

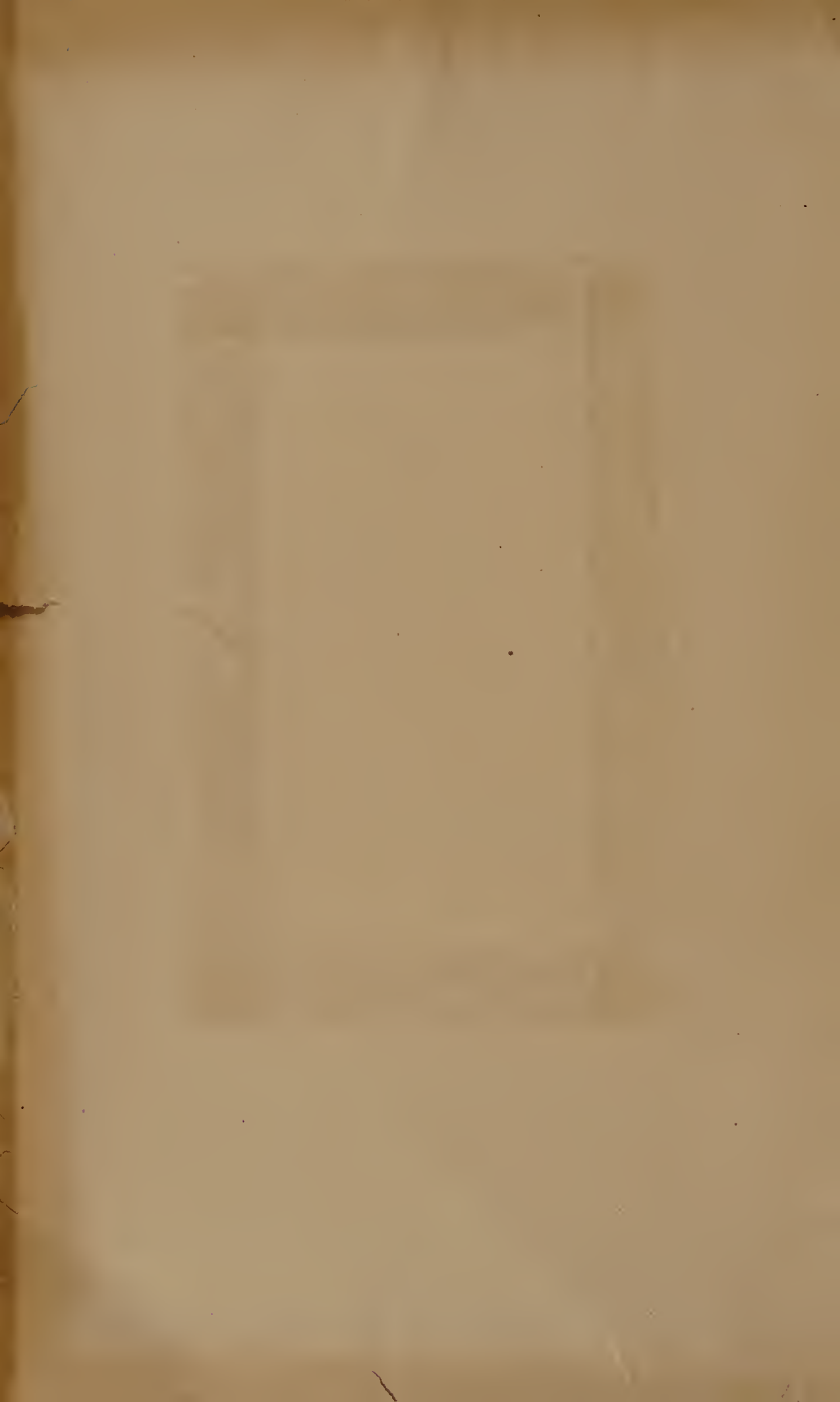
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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

1828-1830,

1, 2, 3, 4 Peters,

BOOK 7,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LL.D.

WITH
"NOTES ON U. S. REPORTS"
BY
WALTER MALINS ROSE.

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PREFACE TO SECOND EDITION.

THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.

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17

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1828.

BY RICHARD PETERS, Junior

Counselor at Law, and Reporter of the Decisions of the Supreme
Court of the United States.

VOLUME I.



P R E F A C E.

The volume of reports now published, contains the cases decided in the Supreme Court of the United States, during the January term, 1828.

In the execution of the trust committed to him, it has been the earnest endeavor of the reporter, to exhibit the facts of each case presented to the court, briefly and accurately; and to state such of the arguments of counsel as, in his opinion, were required for a full and correct understanding of the important points of the case, and the decision of the court. He solicits the indulgence of his brethren of the profession for any deficiencies in this part of the work. It has not been within the scope of his purpose to give, at large, all the reasoning and learning addressed by them to the court.

It is freely admitted, that this volume is issued from the press, under an anxious solicitude for its favorable reception. As it is the first of a series to be published by the reporter, while holding the station assigned to him by the kind consideration of the court, he is most desirous that it shall obtain—what will be deemed by all the highest sanction—the approbation of those whose enlightened and learned labors it is the object of the work to record.

In the statement of the points decided in each case, a plan somewhat novel has been adopted. The syllabus of each case contains an abstract of all the matters ruled and adjudged by the court, and, generally, in the language of the decision, with a reference to the page of the report in which the particular point will be found. As many of the cases occupy a considerable space, this mode of reference will be found convenient, to the practitioner, and to the student.

It is held to be obligatory on the reporter, under the provision of the act of Congress which declares that “the decisions of the court shall be sold to the public at large, at a price not exceeding five dollars per volume.” to stipulate with the publisher that the price, per volume, shall be that sum. This has been done.

RULES AND ORDERS

OF THE SUPREME COURT OF THE UNITED STATES.

The office of the clerk to be kept at the seat of government, and the clerk not to practice. [i]
Admission of attorneys and counselors. [ii]
Counselors not to practice as attorneys, &c. [iii]
Oath or affirmation of counselors and attorneys. [iv-vi]

All process in the court to be issued in the name of the President of the United States. [v]
The practice of the Court of King's Bench and Chancery, of England, the outlines of the practice of the court. [vii]

Evidence required on motions for the discharge of bail. [ix]

Service of a subpoena in equity suits, and proceedings afterwards. [x]

Form of returns to writs of error. [xi]

No records to go out of the clerk's office, or from the court room. [xii, xxxiv]

Affidavits may be taken of the value of the matter in controversy in a suit. [xiii]

Counselors may be admitted as attorneys. [xiv]
Plaintiff may proceed *ex-parte*, when defendant fails to appear. [xv]

Defendant may proceed, when writ of error issues thirty days before the meeting of the court. [xvi]

Rates of damages to be allowed by the court. [xvii, xviii]

Rules as to trials and continuances. [xix, xxxi]

I. *Ordered*, That the clerk of this court do reside and keep his office at the seat of the national government, and that he do not practice, either as an attorney or a counselor, in this court, while he shall continue to be clerk of the same.
February Term, 1790.

vi*] *II. *Ordered*, That (until farther order) it be requisite to the admission of attorneys, or counselors, to practice in this court, that they shall have been such for three years past in the Supreme Courts of the state to which they respectively belong; and that their private and professional characters shall appear to be fair.
February Term, 1790.

III. *Ordered*, That counselors shall not practice as attorneys, nor attorneys as counselors, in this court.
February Term, 1790.

IV. *Ordered*, That they shall respectively take the following oath, viz.: I, , do solemnly swear, that I will demean myself (as an attorney or counselor of the court) uprightly, and according to law, and that I will support the constitution of the United States.
February Term, 1790.

V. *Ordered*, That (unless, and until it shall be otherwise provided by law) all process in this court shall be in the name of the President of the United States.
February Term, 1790.

VI. *Ordered*, That the counselors and attorneys admitted to practice in this court, shall take either an oath, or in proper cases an affirmation, of the tenor prescribed by the rule of

Proceedings where the writ of error is a *superseas*. [xix]

Assignment of errors, and putting cases at issue. [xix]

Security for costs. [xx]

Proceedings to enforce payment of costs. [xxi]

Costs upon reversal. [xxii]

But two counsel shall be allowed to argue for each party. [xxiii]

Proceedings upon order for further proof. [xxiv]

Original papers, when to be sent up with the record. [xxv]

Mode of taking new evidence. [xxvi]

No case shall be heard until a printed brief shall have been furnished to the court by counsel. [viii, xxvii]

Proceedings where either party dies pending a writ of error. [xxviii]

When cases shall be docketed, and the records filed. Proceedings in the failure to do this. [xxix]

No cause shall be heard until a complete record shall be filed. [xxx]

Motion for a *certiorari* for diminution of the record. [xxxii]

Exceptions to evidence, in admiralty and equity cases. [xxxii]

Motions not required by the rules of the court to be put on the docket, when to be made. [xxxiii]

this court on this subject, made at the February term 1790, viz.: I, , do solemnly swear (or affirm, as the case may be), that I will demean myself, as attorney or counselor of this court, uprightly, and according to law, and that I will support the constitution of the United States.
February Term, 1791.

VII. The Chief Justice, in answer to the motion of the Attorney-General, informs him, and the bar, that this court consider the practice of the Court of King's Bench and of Chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.
August Term, 1791.

VIII. The court give notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause.
February Term, 1795.

IX. The court declared, That all evidence on motions for a discharge upon bail, must be by way of deposition, and not *viva voce*.
February Term, 1795.

X. *Ordered*, That process of subpoena, issuing out of this *court, in any suit in equity, [*vii] shall be served on the defendant sixty days before the return day of the said process; and further, and if the defendant, on such service of the subpoena, should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex-parte*.
August Term, 1796.

XI. It is *ordered* by the court, That the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

February Term, 1797.

XII. It is *ordered* by the court, That no record of the court be suffered by the clerk to be taken out of his office, but by the consent of the court; otherwise to be responsible for it.

August Term, 1797.

XIII. *Ordered*, That the plaintiff in error be at liberty to show, to the satisfaction of this court, that the matter in dispute exceeds the sum or value of \$2,000, exclusive of costs; this to be made to appear by affidavit, and days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

August Term, 1800.

XIV. *Ordered*, That counselors may be admitted as attorneys in this court, on taking the usual oath.

August Term, 1801.

XV. It is *ordered*, That in every cause, when the defendant in error fails to appear, the plaintiff may proceed *ex-parte*.

August Term, 1801.

XVI. It is *ordered*, That where the writ of error issues within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued.

February Term, 1803.

XVII. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

February Term, 1803.

XVIII. In such cases, where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages.

February Term, 1803.

viii*] *XIX. All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be a *supersedeas* to a judgment, rendered in any court of the United States (except that for the District of Columbia), at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court, within the first six days of the term; and if he shall fail to do so, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial, in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have

the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the District of Columbia, at any time prior to a session of this court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the rights of the cause.

February Term, 1806.

XX. *Ordered*, That all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

February Term, 1808.

XXI. *Ordered*, That upon the clerk of this court producing satisfactory evidence by affidavits, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

February Term, 1808.

XXII. *Ordered*, That upon the reversal of a judgment or decree of the Circuit Court, [*ix the party in whose favor the reversal is, shall recover his costs in the Circuit Court.

February Term, 1810.

XXIII. *Ordered*, That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

February Term, 1812.

XXIV. It is *ordered* by the court, That in all cases where further proof is ordered by the court, the depositions which shall be taken, shall be by a commission to be issued from this court, or from any Circuit Court of the United States.

February Term, 1816.

XXV. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers, as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

February Term, 1817

XXVI. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission, to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue, but upon interrogatories to be filed by the party applying

for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories, within twenty days from the service of such notice. *Provided*, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

February Term, 1817.

XXVII. After the present term, no cause standing for argument will be heard by the court, until the party shall have furnished the court with a printed brief, or abstract of the cause, containing the substance of all the material pleadings, facts and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.

February Term, 1821.

XXVIII. Whenever, pending a writ of error, x*] or appeal in this *court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that, unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving, shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed if it be erroneous. *Provided*, however, that a copy of every such order shall be printed in some newspaper, at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the Supreme Court, then next ensuing.

February Term, 1821.

XXIX. In all cases where a writ of error, or an appeal shall be brought to this court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof, with the clerk of this court, within the first six days of the term; on failure to do which the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial, in like manner as if the record had been duly filed within the first six days of the term; or, at his option, he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court, wherein the judgment or decree was rendered, stating the cause, and certi-

fying that such writ of error or appeal had been duly sued out and allowed.

February Term, 1821.

XXX. No cause will hereafter be heard until a complete record shall be filed, containing in itself, without references, *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court.

February Term, 1823.

XXXI. No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the *first term of the entry of the cause, otherwise [*xi] the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

January Term, 1824.

XXXII. In all cases of equity and admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

February Term, 1825.

XXXIII. On Saturday of each week, during the sitting of the court, motions in cases not required by the rules of court to be put upon the docket, shall be entitled to preference, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

February Term, 1825.

XXXIV. *Ordered*, That after the present term, no original record shall be taken from the Supreme Court room, or from the office of the clerk of this court.

February Term, 1825.

There having been one associate justice of the Supreme Court appointed since its last session, It is *ordered*, That the following allotment be made of the Chief Justice and the associate justices of the said Supreme Court among the circuits, agreeably to the act of Congress in such cases made and provided:

For the first circuit—The HON. JOSEPH STORY.

For the second circuit—The HON. SMITH THOMPSON.

For the third circuit—The HON. BUSHROD WASHINGTON,

For the fourth circuit—The HON. GABRIEL DUVAL.

For the fifth circuit—The HON. JOHN MARSHALL, *Ch. Justice*.

For the sixth circuit—The HON. WILLIAM JOHNSON.

For the seventh circuit—The HON. ROBERT TRIMBLE.

January Term, 1827.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, *Chief Justice.*
The Hon. BUSHROD WASHINGTON, *Associate Justice.*
The Hon. WILLIAM JOHNSON, *Associate Justice.*
The Hon. GABRIEL DUVAL, *Associate Justice.*
The Hon. JOSEPH STORY, *Associate Justice.*
The Hon. SMITH THOMPSON, *Associate Justice.*
The Hon. ROBERT TRIMBLE, *Associate Justice.*
WILLIAM WIRT, Esq., *Attorney-General of the United States.*
WILLIAM THOMAS CARROLL, Esq., *Clerk of the Supreme Court of*
United States.
TENCH RINGOLD, Esq., *Marshal.*

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1828.

1*] [*CLEMENT S. HUNT, *Appellant*,

v.

CHRISTOPHER RHODES, WILLIAM ENNIS, and RICHARD K. RANDOLPH, Administrators of LEWIS ROUSMANIERE, deceased, *Appellees*.

Mistake in written instrument—equity—ignorance of law—of fact.

It is a principle of equity, that, when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfill, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. [13]

The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties. [13]

So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. [13]

If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented for a court of equity to decree another security to be given, different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. [14]

Courts of equity may compel parties to execute their agreements, but it has no power to make agreements for them. The death of one of the parties, and the consequent inefficiency of the security selected, intended to be valid and complete,

but which was not so, will not give the right of interference. [14]

*A mistake arising from ignorance of law, is [*2 not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar characters. [15]

If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief, against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. [16]

It seems, that there may be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate. [17]

THE appellant filed a bill on the chancery side of the Circuit Court of the United States, for the District of Rhode Island, setting forth, that, in January, 1820, Lewis Rousmaniere obtained from him two loans of money, amounting, together, to \$2,150; and, at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage, of his interest in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January, 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a

NOTE.—Whether equity will relieve against a mistake of law.

“It cannot be denied, that some of the positions of Chief Justice Marshall, when the case (*Hunt v. Rousmaniere*) was first before the court, as reported in *Wheaton* (8 *Wheat.*, 174), are greatly shaken by the learned and elaborate judgment of Mr. Justice Washington (*Supra*), in which all seemed to concur. The case itself cannot be quoted as an authority for relieving against mistakes of law, nor for the existence of a distinction between *ignorance of law*, and *mistake of the law*. (*Millard's Eq. Jur.*, 62.)

The doctrine that parol evidence is inadmissible Peters 1.

to show a mistake in law as a ground for reforming a written instrument founded on such mistake, is the settled law of Connecticut. (*Wheaton v. Wheaton*, 9 *Conn.*, 96.)

Agreements entered into in good faith, but under a mistake of law, are generally held valid in equity, and obligatory upon the parties. (*Pullen v. Ready*, 2 *Atk.*, 591; *Stockley v. Stockley*, 1 *Ves. & B.*, 23, 30; *Frauk v. Frank*, 1 *Ch. Cas.*, 84; *Mildway v. Hungerford*, 2 *Vern.*, 243; *Shotwell v. Murray*, 1 *John. Ch.*, 512; *Lyon v. Richmond*, 2 *John. Ch.*, 51; *Storrs v. Baker*, 6 *John. Ch.*, 109, 170; 1 *Story, Eq. Jur.*, sec. 113, 116 to 138; *Clarke v. Dutcher*, 9 *Conn.*, 674; *Irnham v. Child*, 1 *Bro. Ch. C.*, 92; *Marquis of*

bill of sale, of three-fourths of the *Nereus*, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should become due on a policy by which the vessel and freight were insured. In the power of attorney it was recited, that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March, 1821, an additional sum of \$700 was loaned, for which a note was taken, and similar power of attorney given to sell his interest in the schooner *Industry*; this vessel being also still at sea.

On the 6th of May, 1820, Rousmaniere died intestate and insolvent, having paid \$200 on account of the notes; and the plaintiff gave notice of his claim, to the Commissioners of Insolvency, appointed under the authority of the Insolvent Law of Rhode Island. The plaintiff in his bill alleged that, on the return of the 3^d] *Nereus* and *Industry*, he took *possession of them, and offered the interest of the intestate in them, for sale; and the defendants having forbade the sale, this bill was brought to compel them to join in it.

To this bill the defendants demurred; and their demurrer was sustained in the Circuit Court; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the *Nereus* and *Industry*, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities were, it was alleged, executed with a full belief that they would, and with intention that they should, give to the plaintiff as full and perfect a security, as would be given by a mortgage.

The defendants having also demurred to the amended bill, the Circuit Court decided in favor of the demurrer, and dismissed the bill; and an appeal was entered to this court. At the February session, 1823, this court considered that the appellant might be entitled to the relief prayed for in equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the court below. (8 Wheat., 174.) The answer of the defendants admits the

loans of money, and the delivery of the promissory notes, and that but two hundred dollars were paid before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant; and they alleged their resistance of the attempt to take possession of them.

The answer also asserts ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney; that they had heard and believed that the appellant meant to be concerned, as a partner, in the voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on security; upon which the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also states, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents state they had heard, and believed was intended to be executed on the evening of that day. The answer also alleges the insolvency of Rousmaniere, *and that it existed [*4 a long time before his death; which they assert must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit.

The evidence taken in the case, consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them they would have that effect; and also the deposition of Mr. Merchant, to show that the appellant admitted that the motive by which he was induced to make the loan, was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which might attend the same; and that he had consulted with Mr. Hazard upon the subject, who told him that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect, and which was accordingly done.

The Circuit Court pronounced a decree, declaring that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dis-

Townshend v. Stangroom, 6 Ves., 332; *Lord Putmore v. Morris*, 2 Bro. C. C., 219.

Civilians are divided on the question whether money paid under a mistake of law, is liable to a recovery back. But it is the settled doctrine of the English courts, that a promise to pay, upon a supposed liability, and in ignorance of the law, binds the party, and that money paid with a full knowledge of the facts cannot be recovered back, on the ground that the party was ignorant of the law. (*Stevens v. Lynch*, 12 East., 38; *Goodman v. Sayres*, 2 Jac. & Walk., 263; *Brisbane v. Dacres*, 5 Taunt., 143; *East India Co. v. Tritton*, 3 Barn. & Cr., 280; 1 Story Eq. Jur., Sec. 111, note 2; *Bilbie v. Sumley*, 2 East., 469; *Lowry v. Bouchier*, Douglass, 467, 471; *Willard's Eq. Jur.*, 62.)

In Massachusetts it has been held, that money, paid under a mistake of law, may be recovered back; and, at all events, that a promise to pay, under a mistake of law, cannot be enforced. (*May v. Coffin*, 4 Mass., 342; *Warden v. Tucker*, 7 Mass., 452; *Freeman v. Boynton*, 7 Mass., 488.) See also *Haven v. Foster* (9 Pick., 112), in which there is a very learned argument by counsel on each side on the general doctrine, and opinions of civilians, and common law decisions, cited.

As to relief against mistake, in equity, see note to *M'Iver v. Walker* (9 Cranch, 173); note to *M'Ferrer v. Taylor* (3 Cranch, 270); note to *Hunt v. Rousmanier* (8 Wheat., 174); note to *Smith v. M'Iver* (9 Wheat., 532.)

missing the bill, with costs; from which decree, an appeal was entered to this court.

On the part of the appellants, it was contended, that the decree ought to be reversed, and a decree entered for the appellant.

That the answers to the bill do not respond to the only material facts in the cause; it being fully proved that the powers of attorney were intended to have the effect of a specific lien, the appellant is entitled to the relief he seeks, upon the principles laid down in the former decisions of this court.

The case was argued by Mr. Kimball and Mr. Webster for the appellant, and by Mr. Wirt, Attorney-General, and Mr. Robbins for the appellees.

For the appellant:

The court, in concluding their opinion in the former case between these parties, as reported in 8 Wheat., 174, use this language: "We find no case which we think precisely in point, and are unwilling, where the effect of the instrument, the power of attorney, is acknowledged to have been entirely misunderstood by both parties, to say, that a court of equity will not grant relief." In the opinion of the court, the plaintiff having been, in equity, entitled to the relief he prayed for, the principal question now is one of fact.

5*] *It is insisted, that no essential averment in the bill is contradicted by the answer.

The only real difference between them, relates to the possession of the vessels.

It is not denied that it was the express agreement and deliberate intention of the parties that the plaintiff should have a specific security; the defendants only say they are ignorant of this fact.

The testimony of the plaintiff, then, is sufficient to entitle him to a decree, unless the defendants have introduced other facts that are clearly inconsistent with it.

Admitting the origin of the loan to the intestate to be such as the appellees say they have heard, and believe it to be, this may be reconciled with the alleged intention of the parties, that one should give, and the other receive, a specific security.

If the appellant did assign the reasons which the defendants say they have heard, and believe, he assigned, for not taking a bill of sale, that circumstance does not contradict the testimony of the plaintiff's witness. A refusal to take a specific legal security, surely, does not necessarily exclude an agreement for a specific equitable security. The fact mentioned in the answer, may import simply a reference to a legal right, as those stated by the plaintiff's witness, manifestly do to an equitable right. There is, then, no contradiction apparent. As to the bill of sale, found among Rousmaniere's papers, it obviously discloses a design to commit a fraud.

None of the distinct averments contained in the answer are in opposition to the allegations of the bill; and none of them, with the exception of the bill of sale, are derived from the personal knowledge of the defendants.

The general rule of equity, therefore, that declares the testimony of a single witness against a positive averment of the answer to be insufficient for a decree in favor of the plaintiff, does not comprehend the present case. It does

not apply, where the answer contains no direct denial, nor where the facts stated are not, or cannot, be within the defendants' own knowledge. But if it did embrace this cause, the answer ought not to prevail against this bill.

Where a single witness in support of the bill is corroborated by circumstances, it is sufficient for a decree in favor of the plaintiff; and this is the fact in this case. (9 Cranch, 160; *Clarke's Ex'rs v. Van Reysdyk*, *Cooth v. Jackson*, 6 Ves., 40; *Heffer v. Miller*, 2 Munf., 43; *Walton v. Hobbs*, 2 Atk., 19, case 17; *Hunt v. Ten Eyck*, 2 Johns. Ch. R., 92.)

The power of attorney was a part of plaintiff's security; and a letter of attorney that is part of a security, is irrevocable. This was so declared, in the former case of *Hunt v. *Rousmaniere*, also in *Walsh v. Whitecomb*, [*6 in 2 Esp. N. P. R., 565.

It has been ruled, that the answer containing the denial, may also contain in itself the circumstances, giving greater credit to a single witness, sufficient for a decree against the defendant. In a case cited by Chancellor Kent, in *Hunt v. Ten Eyck* (2 Johns. Chancery Reports, 92), the fact mentioned in the answer, that the plaintiff declined taking a bill of sale, from an unwillingness to have his name appear on the vessel's papers, &c., and took, upon advice of counsel, a letter of attorney in preference, implies of itself, that a specific security was mediated by the parties; and tends to show that the plaintiff took the power of attorney, on the recommendation or assurance of his legal adviser, that it would constitute a security as effectual as a bill of sale; insuring the advantages, without producing the inconveniences of that conveyance. The circumstances of the appellant declining to take the bill of sale, for the reasons assigned, and that the powers of attorney were intended to give a specific lien, come in aid of the appellant's witness, and he has also an auxiliary in Merchant; evidence, and the circumstances altogether, establish the fact, that a specific security was designed and agreed upon. It is an elementary principle of equity, that where parties have, by contract, given a right, but have not provided a sufficient remedy, courts of equity will interfere.

Where the remedy is void in law, a court of equity has decreed not only against simple contract, but against judgment creditors. (*Burgh v. Franeis*, cited in *Finch v. Earl of Winchester*, 1 P. Wms., 279, and *Taylor v. Wheeler*, 2 Vern., 564, case 513.)

But there was no judgment creditors here to be affected by a decree in favor of the plaintiff.

M. Fonblanque, in the first volume of his treatise upon equity, suggests, in a note, page 38, whether, in the case of *Burgh v. Franeis*, the second incumbrance had not notice of the former incumbrance. But nothing can be collected from the case as reported, in favor of this suggestion. The presumption is entirely the other way. The plaintiff agreed and contracted for a lien on the vessels, and the other creditors of Rousmaniere trusted to his general credit, and are entitled only to what property belonged to him, subject to the lien, which a court of equity would have enforced against Rousmaniere himself.

It was the manifest intention of the parties

to create a specific lien. But to accomplish their object, they unhappily adopted an instrument, the legal effect of which, they misunderstood. It was a mutual mistake, and this 7*] court appear already *to have decided that, notwithstanding this mistake in law, the plaintiff is entitled to relief.

The case is one of an agreement between parties, which has not been performed, an agreement for a specific security for a loan of money; this has been proved by the testimony of one witness, corroborated by circumstances, and not denied in the answer. It is not, therefore, within the influence of the principle, which requires something beyond the testimony of one witness, to sustain the allegations of a bill which are denied in the answer. It is a case of mutual errors, as to the law, and not one where parties have run their risks of the law. It is an agreement to lend money, not on a note, but on the vessels; and if the court would enforce the lien against Rousmaniere, they should do it now, as the creditors are not third persons, but have no other right than he would have if alive.

For the appellees:

The whole of the proceedings, and the decisions of the court below, upon the case, will be found in 2 Mason's Rep., 244; 8 Wheat., 174, and 3 Mason's Rep., 294. It is now a question between creditors, and is, whether the court will attach a lien when none existed? It is a case where a party having rejected a security, now avers, and asks the court to give him the security he refused. The allegations in the bill are denied by the answer, and they are proved by one witness only.

This is insufficient, and such evidence is dangerous, *Poole v. Cabanes et al.* (8 T. Rep., 328.) Upon the question, whether the court will relieve against a mistake in law, in 2 Johns. cases in Chancery, 51, 60, this was expressly decided not to be within the power of a court of equity.

Taking the fact to be as stated by him, the appellant is not entitled to relief.

This court have decided, in this case, that the agreement made by the appellant with Rousmaniere created no lien upon the vessels in question, though they intended it should, and thought it would create a lien; that Rousmaniere parted with no title; that the plaintiff acquired none in the vessels. The reason why this decision did not finally dispose of this case, was, that the court entertained a doubt, whether this intention to create a lien which was not, in fact, created, did not constitute a ground of relief in the case. And this case stands now to be argued upon this doubt.

The question is, whether a court of equity can relieve against a mistake made by the parties in making their contract, not in matter of fact, but in matter of law, and relieve, to the prejudice of a title vested by law in third parties. Whether equity can create a title where none does exist, and destroy a title where one does exist. This is beyond the province and power 8*] of equity; beyond the legitimate power of a sovereign legislator, and can only be done by that despotic power which is limited only by its own will. If the parties make their agreement, and make it exactly as they in-

tended, and it creates no title, will the court make the title?

If it should be asked, why a court of equity should relieve against a mistake in matter of fact, and not in matter of law, the reason is obvious. When a mistake of fact is committed by the parties, in making their contract, the mistake is corrected, or supposed to be corrected, and the relief is given according to that corrected statement. Equity, then, does what the law would have done, had there been no such mistake. The court keeps to its office of merely pronouncing the law upon the fact, as it was understood, and meant to be, between the parties. But when a mistake of the law is made by the parties in making their contract, if relief is given, it is given, not upon the fact, as understood and meant by the parties, but upon the conception of the parties as to the legal effect of that fact. No mistake is corrected, or supposed to be corrected, that relief might be given according to law; but the mistake is to stand, and the law is to be bent and accommodated to it. Equity is to consider the law not to be what it is, but what the parties conceived it to be, and to decree relief accordingly.

It is a principle of jurisprudence, that every one in his acts and contracts is presumed to be conversant with the law; or, if ignorant, that he is to be made to abide the consequences. This principle is essential, if not to the existence, at least to the well-being of society.

Cited, the case of *Lepard v. Vernon*, reported 2 Vesey & Beam, 51-2-3.

But suppose that a mistake of the law was a general ground of relief, would it avail the plaintiff, in this case? Here is only equity on his side; but on the other, there is law and equal equity combined. And it is a settled principle, that a naked equity is never to prevail against both law and equity. The appellant never having acquired any title to the vessels, by his agreement, nor by any proceedings under it, has only a naked equity. He parted with his money, trusting to his agreement, as constituting a security therefor, upon the vessels. This is his equity. The title of the vessels being Rousmaniere's, to his death, at his death passed to his legal representatives, who the respondents are. The legal title, then, is in them. His estate being insolvent, is in them as trustees, for his general creditors; and, being greatly insolvent, they are sufferers, as well as the appellant; trusting to his property for their indemnity. In their equity he shares equally with them, and has received it; but by agreement to be without prejudice to this suit. *But from his equity they are excluded. [*9 The court will take notice that, by the laws of Rhode Island, no priorities or preferences take place among creditors, in the distribution of intestate estates; whether solvent or insolvent.

A naked equity is never to prevail against equal equity and title combined.

The respondents are the creditors, for they hold in trust for the creditors. If, then, it were to be admitted, that, if mistake of the law was a principle of relief subject to this limitation, that it does not extend, and cannot be extended, to a stranger to the contract in which the mistake was committed; this case does not

Peters 1.

come within the principle; for it is excluded by this limitation.

Mr. Justice WASHINGTON delivered the opinion of the court:

This case was before this court in the year 1823, and is reported in 8 Wheaton, 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney, given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the *Nereus* and of the *Industry*, to himself, or to any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight, was a naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his life-time, expired on his death.

That this species of security was agreed upon, and given under a misunderstanding, by the parties, of its legal character, was conceded, in the argument of the cause, by the bar and bench; and the second question, for the consideration of the court, was, whether a court of equity could afford relief in such a case, by directing a new security, of a different character, to be given; or by decreeing that to be done which the parties supposed would have been effected by the instrument agreed upon. After an examination of the cases, applicable to the general question, it was stated, by the Chief Justice, who delivered the opinion of the court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake, in law, was beyond the reach of a court of equity. The conclusion to which he came is expressed in the following terms:

"We find no case, which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood, by both parties, to say, that a court of equity is incapable of affording relief."

10*] *The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the Circuit Court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans, mentioned in the bills, by the plaintiff to their intestate, and the notes, given for the same, by the latter, and their non-payment; assert their ignorance of any agreement between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or, the amount of the policies, in case they should be lost; but express their belief, that the powers of attorney were selected by the plaintiff, in preference to the other securities, which were offered by the intestate. The answer further states, that the estate of Rousmaniere is greatly insolvent, and had been so before his death; Peters 1.

that the plaintiff had exhibited and proved his demand, as stated in his bill, before the Commissioners of Insolvency, duly appointed, upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be ready, to pay, according to law.

The principal deposition, taken in the cause, is that of Benjamin Hazard, counselor at law; who deposes, that he drew the powers of attorney, annexed to the original bill. That on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated, that the former had loaned, or agreed to loan, to him, a sum of money, upon security to be given by him, on his interest in the brig *Nereus*, and that he was desirous the security should be as ample and available to Hunt as it could be made. That he wished, and was ready, to give a bill of sale of the property, or a mortgage on it, or any other security, which Mr. Hunt might prefer. Both the parties declared that they had called upon the witness, to request him to draw the writings, and to obtain his opinion as to the kind of instrument which would give the most perfect security to the lender. That the deponent then told the parties, that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security as either of the others; and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an instrument as, in his opinion, would most effectually [*11 and fully secure Mr. Hunt; and that the plaintiff frequently asked him, whilst he was drawing the power, and after he had finished and read it to the parties, if he was quite certain that the power would be as safe and available to him as a bill of sale, or mortgage, and that upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute bill of sale of the property, or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties.

It appears, by the testimony of this witness, that he drew the power of attorney, concerning the *Industry*, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction were essentially the same as those which have been stated, in respect to the first loan.

We find another deposition in the record, which deserves to be noticed, as it consists of declarations made by the plaintiff, after the powers of attorney were executed, and may serve, in some measure, to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes, that, after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence

of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that afterwards, Hunt, reflecting, that if he took that security, he would have to take out papers at the custom-house, in his own name, be subject to give bonds for the vessel, and perhaps be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him that he could, or would, draw an irrevocable power of attorney, to sell which, would do as well, and which was accordingly done.

The cause coming on to be heard, in the court below, and that court being of opinion that the plaintiff had then no lien, or specific security upon these vessels, and no equity to **12*** have such lien or security created against the general creditors of Rousmaniere, dismissed the bill; from which decree, the cause has been brought, by appeal, to this court.

It must be admitted that the case, as it is now presented to the court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion, admitted by the demurrer to be true, are now fully proved by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity, which apply to it, it will be necessary, distinctly, to ascertain what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney. Was it that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on the *Nereus* and the *Industry*, or, was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr. Hazard, and for reasons which, it would seem, were approved of and acted upon by the plaintiff. From the testimony of Mr. Merchant, it would appear that the security proposed by Rousmaniere was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as

a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent from both of them that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff a specific security on the two vessels, in the mode selected and approved of by the parties; to ***13** extent, it was a complete consummation of the agreement. Such was the opinion of this court upon the former discussion of this cause in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

There are certain principles of equity applicable to this question, which, as general principles, we hold it to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious: The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused, altogether, to comply with his engagement; and a Court of Equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortgage, or bill of sale, of the vessels, which the plaintiff, after consideration and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The

avowed object of the plaintiff was, to obtain a valid security, but in such a manner as that the legal interest in the property should remain with Rousmaniere, *so that the plaintiff might be under no necessity to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments, to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a Court of Equity, which the representatives of Rousmaniere could not easily have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and, having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended that the plaintiff was misled by ignorance of any fact connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself, we think it would be unprecedented for a Court of Equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no Court of Equity could have compelled the plaintiff to accept the security so offered. Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a mortgage instead of an irrevocable power of attorney, could that court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute, the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

15*] *If the court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument than the one which had been agreed upon between them, the case is in no respect altered by the death of the latter, and the consequent inefficiency of the particular security which had been select-

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ed; the objection to the relief asked for, being in both cases the same, namely, that the court can only enforce the performance of an agreement according to its terms, and to the intention of the parties; and cannot force upon them a different agreement. That the intention of the parties, to this agreement, was frustrated, by the happening of an event, not thought of, probably, by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may therefore admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of *Landsdown v. Landsdown*, reported in Moseley. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported upon a principle not involved in the question we are examining. The subject which the court had to decide, arose out of a dispute between an heir-at-law and a younger member of the family, who was entitled to an estate descended; and this question, the parties agreed to submit to arbitration. The award being against the heir-at-law, he executed a deed in compliance with it, but was relieved against it on the principle that he was ignorant of his title.

If the decision of the court proceeded upon the ground that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered.

If the mistake was of his legal rights, as heir-at-law, it is not going too far to presume that the opinion of the court *may have been [*16 founded upon the belief that the heir-at-law was imposed upon by some unfair representations of his better informed opponent; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it.

But if this case must be considered as an exception from the general rule which has been mentioned, the circumstances attending it do not entitle it, were it otherwise unobjectionable, to be respected as an authority, but in cases which it closely resembles. There is a

class of cases which it has been supposed forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money, lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of *Worral v. Jacob* (3 Merv., 271), where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revocation, the court refused to relieve against the mistake.

The case of *Lord Ingham v. Child* (1 Bro. C. C., 92) is a very strong one in support of [17*] the general rule, and closely *resembles the present, in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion that it would render the contracts usurious. The court, notwithstanding the omission, manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause. It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would

have been effected, by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case, the party asking relief would be entitled to a specific lien; and the court would consider the debtor as a trustee, for the creditor, of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them.

The decree is to be affirmed, with costs.

Aff'g, 3 Mason, 294; See S. C., 2 Mason, 244, 352; Rev'd by 8 Wheat., 174.

Cited—12 Pet., 55; 9 How., 92, 97-99, 102, 104; 7 Otto, 185; 9 Otto, 46; 1 Wall., Jr., 185; 2 Wall., Jr., 253; 4 Cliff., 196, 580.

*DANIEL CARROLL, of Dudington, [*18
Plaintiff in Error,

v.

JOSHUA PEAKE, *Defendant in Error.*

Evidence—practice—pleading.

When a party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement in his own handwriting, but not signed by him, and from the nature of the instrument, it was to be fairly presumed, the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary. Such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. [22]

Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents. [22]

Surplusage in pleading does not, in any case, vitiate after verdict. [23]

In a declaration upon an agreement, by way of lease, by which the lessor stipulated to let a farm from the 1st of January, 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested on the said 1st of January, the defendant refused, and neglected to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff; this assignment is sufficient. [23]

It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request on the first day of January generally, and not at the last convenient hour of that day; and if an aver-

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ment of a personal demand is made, it need not have been on the land. [24]

The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons. [24]

Declarations containing general averments of readiness and request, have been held sufficient, especially after verdict, unless in very peculiar cases. [24]

IN the Circuit Court of the United States, for the District of Columbia, the defendant in error instituted a suit against the plaintiff in error, to recover damages arising out of alleged breaches of an agreement, in the nature of a lease, dated 18th of December, 1819. The declaration stated the agreement; and the damages claimed, were as an indemnity for expenses incurred by the plaintiff, under the agreement, for losses of profits, and for not turning out the tenant who was in possession of the property when the agreement was made. To support the issue on his part, the plaintiff offered to read in evidence to the jury, the following copy [19*] of a paper (the original of *which was signed by Joshua Peake), and which was admitted to be wholly in the handwriting of the plaintiff in error.

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county, for which I oblige myself to pay, on the 1st day of January, 1821, for one year, from the 1st of January, 1820, six hundred dollars (\$600), and to pay all taxes on the same, independent of the above rent; and also, I oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

Witness my hand, this 18th day of December, 1819.

It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same on the tax bill, receipted, out of the rent. (Signed,) JOSHUA PEAKE.

Witness,
WILLIAM DUDLEY DIGGES."

To the admission of this paper by the court, the counsel for the plaintiff objected, but the court allowed it to be read by the jury, upon which they rendered a bill of exceptions; and by writ of error, the cause was brought before this court, and was argued by *Mr. Key* and *Mr. Cox* for the plaintiff in error, and by *Mr. Jones* for the defendant.

For the plaintiff in error, it was said that the declaration sets forth the agreement of lease, that the possession of the property was to be given, the expenses to which the lessee was exposed; and that the plaintiff in error did not perform any of the acts necessary to turn out the tenant, who was in possession of the land when the lease was to commence.

The declaration should have averred a readiness on the part of the lessee to comply with his contract, as to time and place. (*Savary v. Goe*, 3 Washington's Decisions, 140).

The proper day to deliver possession, was the day on which the lease was to commence; and the declaration should have averred that the lessee was at the place in person, or by attorney, at that time, to receive it. Instead of this, the breach is laid, if anywhere, in the county of

Washington, and the property described in the lease, is in the county of St. Mary's; nor is it averred that, by the lease, the plaintiff in error was bound to turn out the person in possession, although damages are claimed for not doing this.

2. The party who gives a lease, is not bound to turn the prior tenant out of possession. The lessor has, by the lease, parted with the control of the property; and the lessee should proceed, under the law of Maryland, to obtain the possession; but, if it was the duty of the lessor to obtain the possession *for the lessee, the [*20] lessee should have required this of him; and his non-compliance with the demand should have been averred.

3. The paper admitted in evidence was a copy; and the copy of a deed is not evidence, unless the original is destroyed, or lost. It is not said the paper was a true copy; and the original, if in possession of Peake, might have been produced; or, if in the possession of the plaintiff in error, might have been called for.

Mr. Jones, for the defendant in error, contended, that, by the operation of the statute of Jeofails, the verdict of the jury had cured all the defects of the declaration, if any existed; and that the declaration contained every necessary statement and averment for the plaintiff's case. When the condition in an agreement is precedent, special performance must be set out and averred; and, when a tender is pleaded, it is necessary to set forth minutely, everything of time and place. In this case, it was not required to declare specially.

2. The act of Assembly of Maryland, gives to the landlord, only, and not to the lessee, a right to proceed, for possession, against persons "holding over."

3. The "copy" of the paper, which copy was wholly in the handwriting of the plaintiff in error, and who must have kept the original paper, was primary, and not secondary evidence, *quoad*, the matters in controversy. It was evidence against the lessor, and was in the nature of a counterpart of the agreement; and necessary to charge the lessor, who had not signed the lease, and who, it must be presumed, retained the possession of it.

Mr. Justice TRIMBLE delivered the opinion of the court:

This is a writ of error, to a judgment of the Circuit Court for the District of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case, in that court, upon a special agreement against Daniel Carroll, who pleaded the general issue; and, upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant, in the court below; which states, that the plaintiff, to support the issue on his part, offered to read in evidence to the jury, the following copy of a paper (the execution of the original of which was admitted), signed by Joshua Peake, which copy is admitted to be, wholly, in the handwriting of the defendant, to wit: "I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county; for which I oblige myself to pay, on the 1st day of January, 1821, for one year from the 1st day of January, 1820,

21*] six *hundred dollars (\$600), and to pay all taxes on the same, independent of the above rent; and also, oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

Witness my hand this 11th day of December, 1819.

It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax bill, receipted, out of the rent.

JOSHUA PEAKE.

Witness,
WILLIAM DUDLEY DIGGES."

Which paper was so offered in evidence, in connection with three letters from defendant to the plaintiff, as a component part of the sum of evidence relied on, to prove the contract as laid in the declaration; which letters are in these words and figures, following, &c. [The letters were mislaid.]

To the reading of which paper, the defendant, by his counsel, objected, as not being competent and legal evidence, to charge the defendant in this case; but the court permitted the said paper to be read in evidence to the jury, &c., to which opinion of the court, the defendant, by his counsel, excepted, &c. The plaintiff, then, further to support the issue on his part, offered in evidence to the jury, the said letters, from defendant to plaintiff, and admitted to be in the handwriting of the defendant; as component parts, in connection with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters, as part of said agreement, the defendant, by his counsel, objected; but the court overruled said objection, and permitted said letters to be read to the jury, as part of said agreement; to which opinion of the court, the defendant, by his counsel, excepted.

It is insisted by the counsel for the plaintiff in error, that these opinions are erroneous; and that the judgment of the Circuit Court should, for that cause, be reversed.

The bill of exceptions does not put the objection to the paper offered in evidence, distinctly, upon the ground that, being a copy, it could not be used, without timely notice to produce the original. Although some doubt exists, whether the objection ought not to have been placed on that ground, in the court below, in order to make it available here; yet, as the whole argument in this court has proceeded upon the assumption, that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is, that a copy cannot be given in evidence, if the original be in the possession of the adverse **22***] party; unless timely *previous notice has been given him to produce it at the trial. This is certainly true, as a general rule. But in examining the numerous adjudged cases to be found in the books, in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered, had not been made by the party, against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy is admitted to be wholly in

the defendant's handwriting. From the nature of the transaction, he was entitled to, and must be presumed to have, the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think that, under such circumstances, this case forms a just exception to the general rule; and that it is not competent for the defendant below to allege against his own acts and admissions that this paper does not, or may not, contain all the verity and certainty of the original. So far we have considered this paper as if it ought to be regarded in the light of a copy. But, we think that is not its true character, as it was presented to the court and jury. We think that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original.

As relates to Peake's contract to pay rent, &c.; it was a copy; but was it a copy as respects Carroll's agreement to let the farm? If so, it was a copy, without an original—for the original paper was not signed by Carroll, and contained no contract, on his part. The paper was offered in evidence, in connection with the three letters from the defendant to the plaintiff, as a component part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies that the letters referred to are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper, as an original, and not as a mere copy, it must be so regarded. We are bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears.

If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy—and, in their absence, that must be presumed—no doubt can exist of their being competent and legitimate evidence, to prove the contract sued on, so far as they spoke on that subject. It has been already remarked, that the paper called a copy was admitted *to be in the defendant's [**23**] handwriting, and that it must have come to the plaintiff's hands by the defendant's act. Let it be supposed, then, that having copied in his own hand, Peake's agreement to pay rent, &c., he had inclosed that paper in one of those letters, and referring to it. The letter here stated, that he (Carroll) agreed to let and lease the farm to Peake, upon terms expressed in the inclosed paper. It is plain that, in the case supposed, the inclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself. It would be a part of the letter. We do not say, the paper was thus inclosed, and referred to, in the letters, or either of them; but it might have been, for aught that appears, and that is enough.

Upon the principle assumed as correct, that the opinion of the court below must be regard-

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ed as sound, until its incorrectness is made to appear, the plaintiff in error cannot prevail; unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to could be considered in the light of an original document. The case first shows, that such a case might have existed, and have been proved upon the trial. It is by no means a strange supposition, to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside at a distance, or where, for other causes, the mode of contracting by correspondence is resorted to. It is objected that the declaration shows no cause of action; and it is insisted the judgment shall be reversed, for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it, which is impertinent, or, at most, only in aggravation of damages. But surplusage, in pleadings, does not vitiate, in any case, after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action. The declaration in substance, alleges that the defendant below agreed to rent, and to farm-let to the plaintiff, the farm, for one year from the 1st of January, 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occupancy of the farm, from the 1st of January aforesaid, free from the let, hindrance, or disturbance of anyone. The declaration then proceeds to aver, that on the said 1st of January, 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel (the defendant), to take possession of the said land and farm, and to rent and occupy the same, &c., and afterwards assign breaches (*inter alia*), 24*] in this, that although *specially requested so to do, on the said 1st day of January, 1820, the defendant refused and neglected to turn out the tenant, who then was, and had been, in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections, urged in argument, are, that the plaintiff should have averred his readiness, and offered his request; not on the 1st day of January generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to everyone, that an offer and request upon the land, in the absence of the defendant, would be a very idle and useless ceremony, and that an offer and request to him, personally, was much better calculated to enable him to perform his duty, and fulfil his agreement.

We cannot admit that it was necessary the offer and request should be made at the last convenient hour of the day. The strict doctrines contended for, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case.

In declarations, general averments, of readiness and request on the day, have always been held sufficient, especially after verdict.

We are of opinion, there is no error in the Peters 1.

judgment and proceedings of the Circuit Court, and the same is affirmed, with damages and costs.

Cited—13 Pet., 447; 7 How., 882; 9 How., 444; 11 How., 492; 2 Blatchf., 34.

*THE PRESIDENT AND DIRECT- [*25
ORS OF THE BANK OF WASHINGTON,
Plaintiffs in Error,

v.

PHILIP TRIPLETT AND CHRISTOPHER
NEALE, trading under the firm of TRIP-
LETT & NEALE, *Defendants in Error.*

*Bills of exchange—duty of bank in collecting—
presentation for acceptance—demand—usage
as to days of grace—notice—evidence—instruc-
tions of court.*

The deposit of a bill in one bank, to be transmitted to another, for collection, is a common usage, of great public convenience, the effect of which is well understood; and the duty of a bank, receiving such a bill for collection, is precisely the same, whoever may be the owner thereof; and if it was unwilling to undertake the collection, without precise information on the subject, the duty ought to have been declined. [30]

If, in any case, in which testimony was offered by a plaintiff, the court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. [31]

By failing to demand payment of a bill held for collection, the bank would make the bill its own, and would become liable to its real owner for the amount. [31]

The allowance of days of grace for the payment of a bill of exchange or note, is now universally understood to enter into every bill or note of a mercantile character; and so, to form a part of the contract, that the bill does not become due until the last day of grace. [31]

It is the usage of the Bank of Washington, and of other banks in the District of Columbia, to demand payment of a bill on the day after the last day of grace; and this usage has been sanctioned by the decisions of this court. This usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable. [32]

The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed. [34]

The failure of a bank holding a bill payable after date for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability. [35]

A bill of exchange, payable after date, need not be presented for acceptance before the day of payment; but, if presented, and acceptance be refused, it is dishonored, and notice must be given.

NOTE.—Banks, collections by; liability for.

Where a bill is delivered by the payee to a bank to be transmitted for collection, the bank to which it is accordingly transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill. If by the mistake of the latter bank, the first-mentioned bank pays over the value to the payee, while the bill proves to be dishonored, the first-mentioned bank can recover back the money on the payee's indorsement; and any breach of duty on the part of the other bank is no defense. (*Farmers' Bank v. Owen*, 5 Cranch, C. C., 504.)

The fact that a bank, receiving paper for collec-

The absence from his home, of the drawee of a bill payable after date, when the holder of a bill, or his agent, calls with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest. [35]

In a suit instituted by the holder of a bill, against the bank, for negligence, in relation to demand, or notice of non-payment of the bill, the court, although required, are not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might, consequently, so act as to discharge the drawer, without becoming liable to its principal. [36]

TRIPLETT & NEALE, the appellees, instituted a suit in the Circuit Court for the 26*] District of Columbia, against the *president and directors of the Bank of Washington, the appellants; for mal-agency in relation to an inland bill of exchange, dated Alexandria, 19th June, 1817, drawn by W. H. Briscoe, for \$625.-34, at four months after date, in favor of Triplett & Neale, upon Peter A. Carnes, Esq., "Washington City." About the 19th of July, 1817, the plaintiffs, being the holders and the proprietors of the bill, placed it in the hands of the cashier of the Mechanics' Bank of Alexandria, for the purpose of its being transmitted to a bank in Washington for collection, they indorsing it in blank for that purpose. The bill, after being indorsed by the cashier of the bank, to the order of "S. Elliott, Jr., Esq." was sent by mail to the Bank of Washington, of which Mr. Elliott was then cashier; together with other bills and notes, without any statement of interest or ownership in the same, by Triplett & Neale. On the 19th October, 1817, the cashier of the Mechanics' Bank of Alexandria, informed the cashier of the Bank of Washington, that "the holder of the draft desired, that if the draft should not be paid, a notary should send a notice to P. A. Carnes, Baltimore, and to Mr. W. H. Briscoe, at Leesburgh, provided the bill should not be paid in Washington." On the 24th October, 1817, the draft was returned to the Mechanics' Bank of Alexandria, it having been protested, for non-payment, on the 23d of October; the drawer and indorser having been regularly notified of the non-payment by the notary. When the bill

was received in Washington, on the 21st July, 1817, the drawee was not to be found; one of the officers of the bank having sought him, in order to present the bill to him, and who was informed that he was in Baltimore. This inquiry was repeated three or four days afterwards, with the same results, of which the cashier was informed. No notice of the non-acceptance of the bill was given by the Bank of Washington to the drawer or to the indorser. Evidence was given, by the defendants below, of the custom in the banks of the city of Washington, and particularly of the defendants, as to the mode of treating bills, when the drawee could not be found, and as to the practice of protesting or not protesting such bills, for non-acceptance. Evidence was also offered, as to the incompetency of Carnes and Briscoe to discharge the bill, at the time of its non-payment; and that since the said period, Briscoe had inherited an estate.

The appellants, on the trial of the cause, requested the court to instruct the jury:

1st. That on the evidence, if believed by the jury, the plaintiffs could not recover.

2d. That the plaintiffs are not entitled to recover, for any loss of recourse against Briscoe, the drawer of the bill.

*3d. That the failure of the de- [*27] fendants; after having called at the residence of the drawee of said bill, to obtain his acceptance thereof, as stated in the evidence of Reilly, and not finding him or any other person there, to accept the said bill; to notify the drawer of that circumstance, was not such a negligence as discharged the said drawer from his liability on said bill; and entitles the plaintiffs to recover.

4th. That if they believe, from the evidence, that the defendants conformed to their former usage in regard to such bills as the one in question, in calling on the drawee for acceptance, the said drawee being from home, and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly, of its non-acceptance, did not discharge the draw

tion, may reasonably expect that, according to the usual course of business, the proceeds may lay in their hands a longer or shorter time, is a sufficient consideration for its undertaking to collect, and it is liable, therefore, if it neglect to give notice to the indorsers in case of the maker's default, where it is the usage of banks to give such notice. (*Smedes v. Utica Bank*, 20 John., 372; affirmed, 3 Cow., 662; *Bank of Utica v. McKinstor*, 11 Wend., 473; affirming, S. C., 9 Wend., 46; *Curtiss v. Leavitt*, 15 N. Y., 9, 167.)

When a bank receives from the owner a bill for collection, payable at the place where the bank carries on its business, not some distant place, it thereby becomes the agent of the owner for the collection, and in the discharge of its obligations as such, if the bill has not been accepted, it is bound to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes payable; and if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps by protest and notice as are necessary to charge the drawer and indorser, or it will be liable to its principal, the owner, for damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary, express or implied. (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y., 459; *Fabens v. Mercantile Bank*, 23 Pick., 330; *Halls v. Bank of the*

State, 3 Rich., 366; *Caldwell v. Evans*, 5 Bush. Ky., 380; *Balmé v. Wambaugh*, 16 Minn., 120.)

If it be necessary or convenient for the bank to employ some other bank or individual to collect the bill, either at the place of its location, or at a distant place where the bill is payable, and it does so, the latter, on receiving the bill and entering upon the discharge of its trust, becomes the agent of the former bank, and not of the owner, and in the absence of agreement to the contrary, is answerable to the former bank for any neglect in the discharge of its duties as agent, whereby the former bank sustains any loss or damage. (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. (3 Seld), 459, overruling *Bank of New Orleans v. Smith*, 3 Hill, 560; *Commercial Bank v. Union Bank*, 11 N. Y. (1 Kern., 203.)

When a bank, broker, or other dealer, receives, on good consideration, a note or bill for collection in the place where such bank, broker or dealer, carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied. (*Allen v. Merchants' Bk.*, 22 Wend. 215, reversing S. C., 15 Wend., 484; *West Branch Bank v. Ful-*

Peters 1.

er thereof from his liability to the plaintiffs. All of which instructions were refused by the court, and a verdict was given against the Bank of Washington for the whole amount of the claim. The defendants below took a bill of exceptions, to the opinion of the court, upon the propositions stated; and thereupon prosecuted this writ of error.

Mr. Key, for the plaintiffs in error. There was no privity between the plaintiffs below and the Bank of Washington; the bill was sent to the Bank of Washington, by the Mechanics' Bank of Alexandria, and it was not known that Triplett & Neale were in any manner interested in it. Before a contract can be presumed to have been made with them to collect the bill, their interest should have been communicated. (2 Caines, 341.) The plaintiff in error should have had the opportunity to accept or reject the inquiry, as the collection of the draft was only an act of courtesy. The law is with the plaintiffs in error on this point. (6 Taunton, 147; 1 Vesey, Jun., 291; 2 Johnson, 204.) In the last case, a notary public gave notice of the non-payment of a note to one indorser, and failed to notify a prior indorser; the last indorser having paid the note, it was decided that a suit could not lie against the notary public for laches, he being liable only to the holder of the note.

2d. Negligence, and loss in consequence of it, must be shown.

The bill was payable four months after date, and it is not necessary to present such a bill for acceptance. (Chitty on Bills, 205, Philadelphia edition, 1821.) As to responsibility, where prejudice has not arisen, Beawes Lex. Merc. 544, 491, was cited, as to the mode of presentation of such a bill. (Starkcy's Evid., 4, part 456.)

3d. If the Bank of Washington was bound to present the bill, the negligence of the plaintiffs **28*** in error to do this, should *have been stated specially in the declaration; and the loss thereby specially averred. (2 Espin., 16; 2 Wilson, 325.)

4th. The conduct of the bank was according to their established customs, and to the prac-

tices in other banks, and if they acted *bona fide*, they should not be charged with the amount of the bill. The usage is, to protest the bill on the fourth day after the nominal day of payment, and the day after the three days of grace. The rule and practice as to non-accepted bills, is the same in this particular, with those which have been accepted.

Mr. Jones, for defendants in error. The claim of the defendants in error, is founded upon the gross negligence of the bank; and this is fully made out by the testimony.

1. As to the absence of privity between the parties of this suit. The custom to collect notes for individuals, which prevailed among all banks, and the fact that no other interest existed in the bill, but that of Triplett & Neale, are sufficient to establish privity between the parties to the action. A suit upon a contract made by an agent, may be brought in the name of the principal; although his interest in the contract does not appear on its face.

2. Negligence is charged in the declaration throughout; and by the usages of the bank, particularly of the present bank of the United States, if the drawee be absent when the bill is received, and does not call at the bank and accept, after notice left at his residence, the bill is protested, and notice given. In this case, the bill should have been protested on the day it became due, without waiting the days of grace, which are only allowed when the bill has been accepted. *Mr. Jones* cited the case of *M'Gruder v. The Bank of Washington* (9) Wheat., 598.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment of the United States Circuit Court of the District of Columbia, for the county of Alexandria.

On the 19th of June, 1817, William H. Briscoe, of Alexandria, drew a bill on Peter A. Carnes, of Washington, payable four months after date, to the order of Triplett & Neale. The payees of the bill indorsed it in blank, and delivered it to the cashier of the Mechanics' Bank of Alexandria, for the purpose of

mer, 3 Barr, 399; *Ivory v. Bank of State*, 36 Mo., 475; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459, reversing S. C., 8 Barb., 396; *Commercial Bank v. Union Bank*, 11 N. Y. (1 Kern.) 203; *Hoard v. Garner*, 3 Sand., 179; *Georgia Bank v. Henderson*, 46 Ga., 493.)

Such second bank or collecting agent is not the agent of the owner, nor jointly liable with the first bank to the owner, but liable only to the first bank who assumed the duty of collecting. (*Merchants and Man. Bank v. Stafford Nat. Bank*, 44 Conn., 564; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. (3 Seld.) 459; *Reeves v. State Bank*, 8 Ohio, N. S., 465.)

Bank receiving paper for collection is the agent of the owner of the paper, not of the maker who pays it. The latter cannot recover back from the bank the money paid on the ground that it has failed to account for it to the owner. (*Smith v. Essex Co. Bank*, 22 Barb., 627; *Ward v. Smith*, 7 Wall., 447; *Alley v. Rogers*, 19 Grat., 383; *Marine Bank v. Fulton Bank*, 2 Wall., 253; *Ward v. Smith*, 7 Wall., 447.)

If due notice of presentment and nonpayment be not given through negligence of the bank, the bank is responsible for the amount of the bill. (*Allen v. Suydam*, 20 Wend., 321; *Borup v. Niningger*, 5 Minn., 523; *Chicopee Bank v. Philadelphia Bank*, 8 Wall., 611; *Essex Nat. Bk. v. Bank of Montreal*, 15 Am. L. Reg. N. S., 418; *Woolen v. N. Y. Peters* 1.

Bank, 12 Blatch., 359; *Indig v. Nat. City Bank*, 80 N. Y., 100; *Ayrault v. Pacific Bank*, 6 Rob., 337.)

When a bank receives a note for collection, the instruments employed by such bank in the business contemplated are its agents, and not the sub-agents of the owner of the note. (*Hoover v. Wise*, 1 Otto, 308.)

The owner of a note who deposits it with a bank for collection cannot maintain an action for the amount collected against a second bank, to which the bank first employed has transmitted it for collection. His remedy is against the bank employed by him; between him and the second bank there is no privity of contract. (*Hyde v. First Nat. Bank*, 7 Biss., 156.)

As to presentment, protest and notice of dishonor of negotiable paper. See note to *Brown v. Barry* (3 Dall., 365); note to *Wilson v. Lenox* (1 Cranch, 194); note to *Fenwick v. Sears* (1 Dall., 259); as to promise to accept, see note to *Coolidge v. Payson* (2 Wheat., 66); as to when and how notice of non-payment must be given, see note to *Bussard v. Levering* (6 Wheat., 102); that no protest of note, or inland bill, or demand as to maker, is necessary, see note to *Young v. Bryan* (6 Wheat., 146), and note *Bank of U. S. v. Smith* (11 Wheat., 171); as to what is waiver of notice, see note to *Thornton v. Wynn* (12 Wheat., 183); also as to usage, controlling days of grace, see note to *Mills v. Bk. of U. S.* (11 Wheat., 431.)

being transmitted, through the said bank, to a bank in Washington, for collection.

The cashier of the Mechanics' Bank of Alexandria, indorsed the bill, to the order of the cashier of the Bank of Washington, and transmitted it to him, for collection, in a *letter of the 19th of July, 1817. Neither of the banks had any interest in the bill.

The bill was protested, for non-payment; and this suit was brought by Triplett & Neale, against the Bank of Washington, to recover its amount. The declaration charges, that the bank did not use reasonable diligence to collect the money mentioned in the said bill, nor take the necessary measures to charge the drawer; but neglected to present the bill either for acceptance or payment; and to have the same protested; whereby the plaintiffs have lost their recourse against the drawer.

It was proved, on the part of the bank, that either on the day the bill was received, or the succeeding day, one of its officers called with the bill, at the house of the said Peter A. Carnes, for the purpose of presenting it for acceptance, and was told that he was in Baltimore. He called again, three or four days afterwards, for the same purpose, and was again told that he was in Baltimore. These answers were reported to the cashier.

On the 9th of October, 1817, the cashier of the Mechanics' Bank of Alexandria, addressed the following letter to the cashier of the Bank of Washington:

"Dear Sir—The holder of the draft on Peter A. Carnes, for \$625.34, desires me to inform you, that if the draft is not paid, to make the notary send a notice to P. A. Carnes, Baltimore, and likewise to W. H. Briscoe, Leesburg, provided it is not paid at his residence, in Washington." On the 13th of the same month, the cashier of the Bank of Washington, in answer to this letter, stated that the bill had not been accepted, because the drawee could not be found; and that the directions given, in the letter of the 9th, should be observed. On the 24th of October, the fourth day after that expressed on the face of the bill, as the day of payment, it was protested for non-payment, and returned under protest, to the Mechanics' Bank of Alexandria. Notice was given to the drawer, who has refused to pay the same.

On the trial, the counsel for the defendant moved the court to instruct the jury:

1st. That upon this evidence, if believed, the plaintiffs are not entitled to recover.

2d. That the plaintiffs are not entitled to recover for any loss of recourse against Briscoe, the drawer of the said bill.

3d. That the failure of the defendants (after having called at the residence of the drawee of the said bill, to obtain his acceptance, and not finding him, or any person there to accept it) to notify the drawer of that circumstance, was not *such negligence as discharged the said drawer, from his liability, on the said bill, and entitles the plaintiffs to recover.

4th. That if they believed, from the evidence, that the defendants conformed to their former usage, in regard to such bills, as the one in question, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonoured, and

giving notice thereof to the parties, on the said bill, then their failure to treat the said bill as dishonoured, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof, from his liability to the plaintiffs.

The court refused to give either of these instructions; to which refusal, the counsel for the defendants excepted; and a verdict and judgment were rendered for the plaintiffs.

The plaintiffs in error insist that the Circuit Court ought to have given the instructions first asked, because, 1st, no privity existed between the real holder of the bill and the Bank of Washington. That bank was not the agent of Triplett & Neale, but was the agent of the Mechanics' Bank of Alexandria. Some cases have been cited, to show that if an agent employed to transact a particular business, engages another person to do it, that other person is not responsible to the principal. On this point, it is sufficient to say that these cases, however correctly they may have been decided, are inapplicable to the case at bar. The bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington, to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics' Bank was the mere channel through which Triplett & Neale transmitted the bill to the Bank of Washington.

The deposit of a bill in one bank, to be transmitted for collection to another, is a common usage of great public convenience, the effect of which is well understood. This transaction was, unquestionably, of that character; and there is no reason for suspecting that the Bank of Washington did not so understand it. The duty of that bank was precisely the same, whoever might be the owner of the bill; and, if it was unwilling to undertake the collection, without precise information on the subject, that duty ought to have been declined. The custom to indorse a bill put in bank for collection, is universal; and the Bank of Washington had no more reason for supposing that Triplett & Neale had ceased to be the real holders, from their indorsement, than for supposing that the *cashier of [*31] the Bank of Washington had become the real holder, by the indorsement to them. It is the customary proceeding, for collection, in such cases; and is for the advantage of the party interested. At any rate, the letter of the 9th of October disclosed the real party entitled to the money, and the answer to that letter assumes the agency, if it had not been previously assumed. The court is decidedly of opinion, that the Bank of Washington, by receiving the bill, for collection, and, certainly, by its letter of the 13th of October, became the agent of Triplett & Neale, and assumed the responsibility attached to that character.

The first prayer of the defendants, in the Circuit Court, being to instruct the jury, that, upon the whole evidence, the plaintiff ought not to recover; if it might properly have been granted in any case, in which any testimony was offered, certainly ought not to have been

granted, if any possible construction of that testimony would support the action.

The liability of the bank, for the bill placed in its hands for collection, undoubtedly depends on the question, whether reasonable and due diligence has been used, in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett & Neale have alleged the failure to give notice of the non-acceptance of the bill, and the failure to demand payment in proper time. The counsel for the bank have brought the first question more distinctly into view, by a more definite instruction respecting it, which was afterwards asked; and its consideration will be deferred, until that prayer shall be discussed; but the first must be disposed of, under the general prayer.

Unquestionably, by failing to demand payment in time, the bank would make the bill its own, and would become liable to Triplett & Neale for its amount. The inquiry, therefore, is into the fact.

The demand was made, on the fourth day after that mentioned on the face of the bill, as the day of payment.

The defendants in error insist, that, if the bill was never presented for acceptance, payment ought to have been demanded on the day mentioned on its face. If this be not so, then it ought to have been demanded on the third day afterwards, which is the last day of grace.

The allowance of days of grace, is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill, or note, of a mercantile character, and to form so completely a part of the contract, that the bill does not become due, in fact, or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment, previous to that day, will not authorize a protest, or charge the drawer of the bill.

32*] *This is universally admitted, if the bill has been accepted.

If it has been noted, for non-acceptance, but has been held up, it would not be protested for non-payment until the last day of grace. Why, then, should a bill never presented be demandable, at an earlier day than if it had been accepted, or if acceptance had been refused? Whatever might have been the original motive for the indulgence, it is now taken into consideration, both by the drawer and payee of the bill. The amount is, consequently, estimated, on the calculation, that it becomes really due on the last day of grace. Neither party can foresee, when the bill is drawn, whether it will be paid or not; nor, if it be payable, after date, whether it will be presented or not. Their calculation, therefore, as to the day when it becomes really due, and is to be paid, is independent of these considerations. No sufficient reason is perceived for the distinction.

It is, however, a law dependent on usage. The books which treat on the subject, concur in saying that payment must be demanded when the bill falls due, and that it falls due on the last day of grace. The distinction between a bill which has, and which has not been presented, has never been taken; and it is apparent, that a bill is never drawn with a view to this distinction. The fact, that the question has never been made, is a strong argument

against it. The point has never, so far as we can find, been brought directly before a court; and we have seen only one case in which it has been even incidentally mentioned.

In *Anderson v. Beck & Pearson* (16 East, 248), a bill was drawn, payable two months after date, and was not presented for acceptance. It was protested for non-payment, and a suit was brought by the holder against the drawer. He resisted the demand, and the opinion of the court proceeds on the admission that the bill fell due on the last day of grace. This case consists, we believe, with the opinions and practice of commercial towns.

But if a bill, payable after date, and not presented for acceptance, falls due on the same day as if it had been accepted, the defendants in error insist that payment ought to have been demanded on the last day of grace.

It was proved at the trial, that the settled usage of the Bank of Washington, at that time, and of all the other banks in Washington and Georgetown, was, to demand payment on the day succeeding the last day of grace; and this usage, so far as respects notes negotiable in a particular bank, has been sanctioned by the decisions of this court. *Renner v. The Bank of Columbia* (9 Wheat., 582) was a suit brought in a Circuit Court of the District of Columbia, against the indorser of a *promissory [**33** note, which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to have been in conformity with the custom of the bank; and the defendant moved the court to instruct the jury that the demand was not in time, and that the indorser was not liable for the note. This instruction was refused, and the defendant brought the judgment into this court by writ of error. The judgment, on great deliberation, was affirmed.

In this case, the custom of the bank was known to the parties to the note. But the question arose afterwards, in a case in which the custom was not known to the parties. *Mills v. The Bank of The United States* (11 Wheat., 430) was a suit brought by the bank against the plaintiff in error, and others, on a note indorsed by him, and negotiated in the office of discount and deposit of the Bank of the United States, which was protested for non-payment, on the day of the last day of grace.

It was proved at the trial, that this was according to the usage of that bank. The counsel for the defendant moved the court to instruct the jury that this usage could not bind the indorser, unless he had personal knowledge of it, at the time he indorsed the note. The court refused to give the instruction, and the jury found a verdict for the bank, on which judgment was rendered. That judgment was brought before this court, and affirmed. The court said, that "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not."

In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they

have chosen to make the security itself negotiable.

These cases decide that under consideration, unless there be a distinction between a bill and a note made negotiable in a particular bank. In the case of a note negotiable in a particular bank, the parties may very fairly be presumed to be acquainted with the usage of that bank. As the decisions which have been cited depend upon that presumption, it will become necessary to inquire, how far the same presumption may be justified in the case of a bill drawn on a person residing in a place where this usage is established.

If a promissory note were made in the city of Washington, payable to a person residing in the same place, though not purporting to be payable and negotiable in bank, it would very probably be placed in a bank for collection. It **34*** is a common *practice, and the parties would contemplate such an event as probable, when the note was executed.

The same reason seems to exist for applying the usage of the bank to such a note, as to one expressly made payable and negotiable in bank. Such notes are frequently discounted, and certainly the person who discounts them, or places them in bank for collection, stands in precisely the same relation to the bank, as respects its usage, as if the notes purported on their face to be negotiable in bank. The maker of a negotiable paper, in such a case, may fairly be presumed to be acquainted with the customary law which governs that paper, at his place of residence.

In the case at bar, however, the bill was drawn at Alexandria, on a person residing at Washington. Does this circumstance vary the law of the case?

The usage by which questions of this sort are governed, is different in different places. It varies from three to thirty days; and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington. Could this be questioned, still the holder of the bill, who placed it, by his agent, in the Bank of Washington for collection, who has made that bank his agent, without special instructions, submits his bill to their established usage. The cases, then, which have been cited, are not different in principle from this; and payment having been demanded, according to the invariable usage of the bank, was demanded in time. If, then, the objections to the conduct of the bank were confined to the demand of payment, and protest for non-payment, the first instruction asked by the defendants in the Circuit Court ought to have been given. But they are not confined to the demand of payment, and to the protest for non-payment. They extend to the steps taken by the bank, concerning the presentation of the bill.

The second instruction asked for, is in terms which are in some degree equivocal. It may imply, either that the recourse against the drawer of the bill was not lost, or that if lost, that circumstance would not entitle the plaintiff

to recover against the bank; as its decision is not essential to the cause, it will be passed over.

The third is more specific. The court is asked to say, that the failure of the bank to give notice to the drawer, that the drawee was not found at home, when called upon to accept the *bill, is not such negligence as discharged ***35** the drawer from his liability, and entitles the plaintiff to recover.

The question suggested by this prayer, is one on which no decision is found in the books. It depends on analogy, so far as it is to be decided by adjudged cases. Such a bill need not be presented; but if presented, and acceptance be refused, it is dishonored, and notice must be given. Had the bank taken no step whatever to obtain an acceptance, no violation of duty would, according to these decisions, have been committed. Can any unsuccessful attempt to do that which the law does not require, place the agent in the same situation that he would have stood in had the drawee been found, and had positively refused acceptance? Absence from home, with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home when the holder of a bill or his agent offers it for acceptance, is in no respect culpable. Had the drawee received advice of the bill, he could not have not known that it would be presented for acceptance, because the law did not require it, and is consequently not blamable for his absence when the officers of the bank came to present it for acceptance. Had the bill, under such circumstances, been protested for non-acceptance, and returned, the drawer might not have been liable for it.

The bill, then, on general principles, ought not to have been protested; and the absence of the drawee ought not to be considered as equivalent to his refusal to accept. It might have been a prudent precaution to have given information that the bill was not accepted, because the drawer had not been found, but we cannot say that the omission would subject the agent to loss, unless such was the special usage of this bank.

4. The fourth prayer is for an instruction to the jury, that if they believe, from the evidence, that the defendants conformed to their former usage, in regard to such bills, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiff.

The Court has already indicated the opinion that this omission to treat the bill as dishonored, in consequence of not finding the drawee at home, if the usage of the bank was not to notice such a circumstance, did not discharge the drawer; consequently, this instruction ought to have been given, unless it should be supposed foreign to the case in which it was asked. In a suit brought by the holder against the bank, the *Court was not ***36** bound to declare the law as between the holder and the drawer, unless the liability of the bank was determined by the liability of the drawer.

Although, in the general, the one question depends on the other, yet it may not be universally so. The bank was the agent of the holder, not of the drawer, and might consequently so act as to discharge the drawer, without becoming liable to its principal. In this case, however, as the agent received no specific instructions, but was left to act according to the law merchant; a course of proceeding which did not discharge the drawer, could not render the agent liable to the principal. This prayer was, therefore, essentially the same with that which preceded it, with this difference. The third prays an instruction, whatever might be the usage of the bank; the fourth prays essentially the same instruction, provided the conduct of the bank conformed to its usage. This instruction, therefore, ought to have been given, as prayed. Upon a review of the whole case, the court is of opinion, that if the bank acted in conformity with its established usage, in not noting the bill, and giving notice thereof, when the ineffectual attempt was made to present it for acceptance, this action could not be supported. With respect to this usage the testimony is contradictory, and ought to have been submitted to the jury, in conformity with the last prayer made by the counsel for the bank. The court erred in not giving this instruction as prayed. The judgment, therefore, is to be reversed, and the case remanded for a new trial.

This cause came on, &c. On consideration whereof, this court is of opinion that the Circuit Court erred in refusing to instruct the jury, that if they believed that the defendants conformed to their former usage in regard to such bills as the one in question, in calling on the drawer for acceptance (the said drawer being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs. It is therefore considered by the court, that the said judgment be reversed and annulled, and that the cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

Cited—14 Pet., 320; 4 How., 326, 327; 1 Black., 49; 2 Wood. & M., 291; 1 Biss., 331.

37*] *GEORGE R. GAITHER, *Plaintiff*
in *Error*,
v.

THE FARMERS' AND MECHANICS'
BANK OF GEORGETOWN (for the use
of THOMAS CORCORRAN), *Defendants* in
Error.

Usury—parties—laws of Maryland.

C. & Co. discounted their notes with the F. & M. Bank of Georgetown, at thirty days; and, in lieu of money, they stipulated to take the post-notes of

the bank, payable at a future day, without interest, while post-notes were at a discount of one and one-half per cent. in the market, at the time of the transaction. Such a contract is usurious. The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. [43, 44]

When an action is in its origin instituted in the name of A, for the use of B, the *cestui que use* is, by the law of Maryland, regarded as the real party to the suit. [42]

If a note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it. [43]

The act of Assembly of Maryland, declares "all bonds, contracts and assurances whatever, taken on an usurious contract to be utterly void." And the indorsement of a promissory note, for an usurious consideration, is a contract within the statute, and was void. [43]

THIS suit was instituted by the defendants in error, against George R. Gaither, as the drawer of a promissory note, dated Georgetown, 24th July, 1822, for \$1,513.96; payable six months after date, to the order of W. W. Corcorran & Co. Indorsers, W. W. Corcorran & Co., and Thomas Corcorran. Before the swearing of the jury in the case, it was stated by the counsel of both plaintiff and defendant, to one of the judges of the court; who, being a stockholder in the bank, objected to sitting in the case; and the same was also stated to the court, before the jury was sworn; that the bank was not interested in the event of the cause; and, on the trial it was also shown to the court by the clerk, that this suit, standing on the docket in the name of the bank was, by direction of the plaintiff, on the morning of, and just before the cause was called for trial, entered for the use of Thomas Corcorran; and the jury were sworn to try the cause standing on the docket, to the use of Thomas Corcorran.

W. W. Corcorran & Co., merchants of Alexandria, were in the frequent receipt of large discounts from the bank, upon their own notes, indorsed by Thomas Corcorran, for which other notes payable to them, were, from [*38 time to time, deposited in bank, as collateral securities for the notes discounted; which collateral notes were kept in deposit by the bank, and as collected, were passed to the credit of the borrowers; and the collateral notes, a short time before they became due, were so entered in the deposit book of the bank, as that the bank became the collectors upon their own account of their respective amounts, to be appropriated as stated.

The note of the plaintiff in error was treated in this manner; and, before it became due and was protested, it had been entered on the deposit book of the bank, and had remained in possession of the bank until the day of the trial of the cause. The discounts of the bank for W. W. Corcorran & Co. were not generally to

NOTE.—As to usury, see note to *Levy v. Gadsby* (3 Cranch, 180); as to the law of place, on the question of usury, see note to *Slocum v. Pomeroy* (6 Cranch, 221); as to whether taking interest in advance is usury, see note to *Fleckner v. Bank of U. S.* (8 Wheat., 338); as to who can set up usury, see note to *DeWolf v. Johnson* (10 Wheat., 367).

a large extent in cash; but when large discounts were made, it was with an understanding that the proceeds of the same should be received in post-notes having some time to run, without any rebate, for the time being allowed by the bank, but the bank retaining the usual discount of six per cent. per annum on the amount of the discounts; and the post-notes were made payable at various periods, from twenty to ninety days, but most generally payable when the note discounted, or the note received as a collateral security became due. The amount of discounts received by W. W. Corcorran & Co. from the 24th of July, 1822, to the 22d of February, 1823, was \$77,732; and during that time the post-notes issued for their use, by the bank, exceeded \$59,000.

The post-notes, at the time they were received, were at a discount of one per cent. per month in the market; and some of those received by W. W. Corcorran & Co. were sold at that rate. The bank always held the note of the defendant below as a collateral security for the notes discounted for W. W. Corcorran & Co.; and the defendant paid to the bank, on the 1st day of February, 1823, \$500 on account of the note. Within two days of the trial, when the bank having collected as much money as reduced the debt due by W. W. Corcorran & Co. to a small sum, they ordered the suit to be marked for the use of Thomas Corcorran, under authority of an order dated February 17th, 1823, signed by W. W. Corcorran & Co., "to deliver to him what notes of theirs might remain in possession of the bank, after the debt due by them, for which they were left as collateral security, should be paid."

The defendant below also proved that the name of Thomas Corcorran was not upon the note when it was passed to the bank, nor until after the note became due; and he produced, and offered in evidence to set-off the promissory notes of W. W. Corcorran & Co., which had **39*** been transferred to him, *by the payee thereof, after the note upon which this suit was brought had been transferred to the bank, but before this suit was brought, and before they fell due, which was after the 17th of February, 1823.

The plaintiff below offered W. S. Nicholls, admitted to be one of the stockholders of the bank, as a witness, who was objected to as being interested in the event of the suit; but the court overruled the objection, and he was sworn and examined. The defendants prayed the court to instruct the jury that, if they believed the evidence of the transaction between the bank and W. W. Corcorran & Co. were usurious, the plaintiff could not recover; which instruction the court refused to give. The court refused to suffer the defendants to give the evidence of set-off, which they proposed to exhibit. To these decisions of the court a bill of exceptions was tendered, and the case was brought up to this court by writ of error.

Mr. Taylor and *Mr. Key*, for the plaintiff in error.

The admission of W. S. Nicholls as a witness was erroneous on two grounds:

(1) He was interested in the event of the suit.
(2) He was one of the parties, plaintiff, on the record; he being a stockholder in the bank.

1. The suit was originally brought for the

use of the Mechanics' Bank of Alexandria, and the bank is responsible for the costs of suit, to which the witness will, as a stockholder, be obliged to contribute, on the failure of the suit. (2 Camp., 354; Phillips' Evid., 57.) Under the law of Maryland, the party to whose use the suit may be brought is liable for costs; but he is only a security for the costs with the nominal plaintiff. The declaration of the counsel, that the bank had no interest in the cause, was made in order to induce the judge, who was a stockholder, to sit, and whose high character placed him above the influence of interest. It was not intended to authorize the introduction of an interested witness, as to the effect of the declaration of parties or counsel. (1 Stark. Pt., 4, 34.)

2. If this suit can be sustained, it must be upon a legal title of the bank in the note; and as the note was made payable to W. W. Corcorran & Co., they must have indorsed it to the bank, in the course of their transactions with the bank, and for an usurious consideration. The facts make out a case from which the jury might have presumed usury, and there is nothing which will prevent the plaintiff in error from availing himself of this defense. They show that the notes of W. W. Corcorran & Co. were discounted by the bank, and no money paid for them, but the proceeds of the discount were paid in post-notes, generally payable when the notes discounted *by [***40**] the bank became due, and upon which no rebate or reduction was made for the times the notes had to run. In the course of these transactions, and as a part of them, the note of the plaintiff in error was indorsed over to the bank by the borrowers upon these usurious contracts. This was usury. (Chitty on Bills, Philadelphia edition, 1821, 112.) The statute makes the contract upon which usury is taken, void, and no title can be obtained under it. It is not the validity of the note which is questioned, but that of the transfer of the note by the indorsement. The plaintiff in error is liable to pay the note, but not to those who claim under an invalid transfer of it; no one can claim under such an indorsement. (1 Starke's Reports, 385; Chitty, 105, 692.) The bank having held the note under an invalid transfer, and instituted a suit upon it, the case cannot be altered as to the right of the person to whose use it is marked. This change in the suit does not alter the relations of the parties, and give a right to the *cestui que use* which the plaintiffs in the suit did not possess. The whole of the evidence shows that the bank held the note for their own use. That it became theirs through the usurious dealings with W. W. Corcorran & Co., and they could pass no right in it to any person.

3. Upon the evidence, the set-off ought to have been admitted. The law of Virginia authorizes a set-off to be allowed in such a case. A set-off is allowed against the party really claiming in the suit, although another may be nominally the plaintiff. (Chitty, 12; 1 T. Rep., 39; 4 T. Rep., 341; 7 T. Rep., 663; 16 East, 36.)

Jones & Cove, for the defendants in error.

The question as to the interest of the bank in the event of the suit, and therefore of the compelling of W. S. Nicholls as a witness, was

closed by the declarations of the counsel, before the cause came on for trial. The counsel had power to bind the parties by their admission, and the court below was bound to consider anything done to release the interest of the bank that could be done. The real party to the suit was the *cestui que use*, and by a court of law he would be so treated; and he has full power over the cause, in the same manner as if he was the only party on the record. As to the nature of the interest of a witness who is nominal plaintiff. (4 Stark, 751, 770, 775, 776.) When a corporation can be a witness. (4 Stark, 1061, 426.) By the laws of Maryland, 1796, chap. 43, sec. 13, the party for whose use the suit is marked is liable to costs. (1 act of 1794, chap. 54, sec. 10.)

The bank held the note of Gaither, as trustees for W. W. Corcorran & Co., and the stockholders would have no interest in the same.

41*] *2. If there was usury between W. W. Corcorran & Co. and the bank, it cannot affect the claim in this suit. An usurious transaction between the drawer of a note and the indorsee will not discharge the drawer; and the only danger to which he would be exposed might be that of a double recovery. * (1st) By the drawer, who had not legally passed away the note, and (2d) by the usurious indorsee.

The law is settled that the usury must affect the original contract, and will not affect collateral matters growing out of it. When given originally for an usurious consideration, all are affected by it; but the usury must have attached to the instrument itself, and it will not affect one given in lieu of it to a person who was ignorant of the usury at the inception of the first contract. (3 Esp., 22; 8 T. Rep., 390; 1 Camp., 165, in note; Philadelphia edition of Chitty on Bills, of 1817, page 95.)

3. The note was never the property of the bank, it having been deposited as a collateral security for notes drawn by W. W. Corcorran & Co. and indorsed by Thomas Corcorran. The note was not deposited in reference to any particular negotiation, but as a security generally; and the right of the bank to it, if any existed, was not affected by subsequent transactions, although usurious. (Ord. on Usury, 104.)

4. The set-off was not admissible. It was not the subject of notice or plea—and the interest of Thomas Corcorran had attached before any of the claims of the plaintiff in error arose.

Mr. Justice JOHNSON delivered the opinion of the court:

The plaintiff here was defendant in the court below, to an action instituted by the Farmers' and Mechanics' Bank of Georgetown, on a note made by him to W. W. Corcorran & Co., and by them indorsed in blank to the bank.

The record makes out a case for this court, of which the following is a summary: That W. W. Corcorran & Co. discounted their own notes with this bank, at thirty days, the bank expressly stipulating that in lieu of money they should receive what they call a post-note of their own, payable at a future day, without interest. The evidence would make out that the post-notes given for this discounted note, were at thirty-five days after date; that it is two days after the discounted note fell due; so that in fact there was no advance of money,

Peters 1.

although an interest of six per cent. per annum was taken from the Corcorrans, and the post-notes of the bank were proved to be at a discount of one per cent., making one and a half per cent. for thirty days, or eighteen per cent. per annum. The note on which this suit was instituted was passed to the bank as a collateral security for the discounted note, and was altogether unaffected with *usury in its origin. [*42] The ground on which the right of the bank is resisted is, not that Gaither is discharged from his contract with W. W. Corcorran & Co., but that the indorsement to the plaintiff below, having been made to secure a note given on a usurious contract, could vest no interest or cause of action in the indorsee. In order to avoid the pressure of this defense in the court below, the plaintiffs there gave in evidence a writing addressed by W. W. Corcorran & Co. to the bank, bearing date 17th February, 1823, prior to institution of that suit, in these words: "Please deliver to Thomas Corcorran what notes of ours may remain in your possession after the debt due the bank, for which they are left as collateral security, shall have been paid, or hold the same subject to his order." And it was further shown that a few days before the issue was tried below, an adjustment had taken place between the bank and Thomas Corcorran (who was then indorser and assignee of W. W. Corcorran & Co.), upon which Gaither's note had been delivered to Thomas Corcorran; he then indorsed his name on Gaither's note, below that of W. W. Corcorran & Co., and thereupon the bank, before the jury were charged, had the name of Thomas Corcorran entered on the docket as the *cestui que use*, for whom they were prosecuting their suit, and the jury, it appears, were charged with the cause, according to the exhibition of parties, thus made upon the docket; that is, to try an issue between the bank, to the use of Thomas Corcorran, plaintiff, and Gaither, defendant.

This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.

It is now contended that, although substituted at the eleventh hour, Thomas Corcorran is to be regarded in that relation; and under that idea this cause has been argued as though the question of usury had been raised between Gaither and an innocent indorser.

But it is obviously impossible, in the present action, to pay any regard to Thomas Corcorran's interest or claims. The arrangement which introduced his name into the cause was too obviously concocted for the purpose of rescuing the interests of the plaintiffs in the record from the effects of the defense of usury. It therefore can pretend to no merit in the administration of justice. But if the effects of that transaction be examined, without reference to the motive, it is equally clear it can have no bearing upon the present action. The interest in, or power over, Gaither's note was only inchoate and contingent, until all the debts due the bank should be paid, or they otherwise be induced to relinquish it to him; and this did *not take place until long posterior to the [*43] institution of the suit, and even after issue joined.

The bank sue on their own interest, declared on their own right, and acknowledge no participation with Thomas Corcorran in the interest or the action, until the moment when the cause is going to trial. It was surely then too late to permit them to assume a new character, or interpose a new party; however liberally this court might be disposed to sacrifice the forms and rules of law, to the Maryland practice.

We will, therefore, put Thomas Corcorran's interest out of view, and will consider the parties, at the commencement of the action, as the parties at its close.

This puts the question on the right of an innocent indorser, out of the cause, since the indorsee of Gaither's note received the usurious interest, and the indorser paid it. The only questions on the point of usury, then, are,

1st. Whether Gaither, in the relations in which he stood to these parties, could set up the usury in his defense.

2d. And whether that defense could be set up, after payment of the note on which the usury had been received.

The objection in the first point is, that as there was no usury in the concoction of Gaither's contract, he ought not to be permitted to avail himself of the usurious contract between the indorser and indorsee, to avoid a debt which he justly owes.

And this is unquestionably true; for the rule cannot be doubted, that if the note be free from usury in its origin, no subsequent usurious transactions respecting it can effect it with the taint of usury. Nor does Gaither propose by this defense to relieve himself from paying the note; it goes only to his liability to pay it to this individual; and reason, analogy, and adjudged cases, will sustain the defense. Suppose a note given to a woman, who marries, and then indorses it without her husband's authority; such indorsement would be void; (1 East, 432,) and the indorsee could not recover, yet the husband and wife may recover.

In a comment on the case of Jones and Davison, in Holt's Reports (1 Holt, 256), an usurious note is likened to a bill of exchange on a bad stamp. If a stamp were necessary to give validity to an indorsement, it cannot be doubted that none who claim through such an indorsement could maintain an action against the drawer. The indorsement, though actual, was ineffectual for the purpose of transferring an interest in the note. It was a void act.

This case is governed by the laws of Maryland; and the act of Maryland against usury is in the words of the Statute of Ann. It declares "All bonds, contracts, and assurances what-
44*] ever, *taken on an usurious contract," to be utterly void. Now, the indorsement of a negotiable note creates several contracts; and if, in this case, it could give a right of action against Gaither, the drawer, it ought also to sustain an action against W. W. Corcorran & Co., the indorsers; but against them, it is perfectly clear that an action could not be maintained, for they were parties to the usurious loan. It follows, that their indorsement was a void act, and the property, and of consequence, the right of action, never passed to these plaintiffs. There is a very strong case, on this subject, which we believe was not quoted in argument, to be found

in the books to which we usually refer. We mean the case of *Harrison & Hamell*, in Taunton's Reports (5 Taunton, 780), in which the rights of a collateral surety to avail himself of usury in the original transaction, is distinctly recognized, when the contract of the collateral was wholly unaffected by usury. The case was reserved for argument, and the whole court concurred in the legality of the defense. The language of the judges is strong, and applies to the case before us. One of them remarks: "That if a man lends £1,000 on an usurious interest, and gets from a third person a collateral security of £800 only, without usurious interest, I hold that bond is void, not because it is given for securing usurious interest, but because it is given for enforcing a contract for usurious interest." And another says: "That if giving these collateral acceptances would alter the case, it would be a shift or device, by which the statutes of usury would be defeated."

With regard to the second point, it is necessary to see the force of the argument which would deduce from the payment of the discounted note a cure to the taint with which the contract of indorsement was affected. The law declares it absolutely void. By what operation, then, is it to be rendered valid by the payment of the discounted note? It is argued, by the payment and extinguishment of the latter note, the usury is extinct, and as if it had never existed. We cannot perceive how this reasoning can prevail, either in point of fact or inference. In point of fact, the crime was only consummated by the payment of that note, since the bank thereby incurred a liability under the statute, to be sued for three times the sum paid them; and as to the inference, it seems very difficult to conceive how the payment of the usurious note should operate to confirm or give birth to a contract which the law declares never had existence, and was *ab initio*, utterly null and void. There have been cases in which usurious contracts have been cancelled, the usury refunded, and new contracts substituted free from the taint of usury; and the law gives to the offender this *locus penitentiae*. But there is no analogy between such a *transaction and that here presented, in [*45 which the money loaned has been paid by the borrower, and only passed into the vaults of the bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint. But even that would never have given validity to an indorsement, which, in the eye of the law, was, as though it had never existed.

As the decision on this point disposes of the right of action, and leaves no probability that the cause will be again brought up to this court, we deem it unnecessary to notice any other of the points made in the argument.

The judgment was reversed, and the cause remanded to the Circuit Court, with directions to award a venire facias de novo.

46*] *GEORGE MINOR, PHILIP H. MINOR, DANIEL MINOR, WILLIAM MINOR AND SMITH MINOR, *Plaintiffs in Error.*

v.

THE MECHANICS' BANK OF ALEXANDRIA, *Defendants in Error.*

Construction of statutes—capital stock of bank—fraud—authority of executive officers—cashier's bond—principal and surety—pleading—practice.

It is a general rule, in the construction of public statutes, that the word "may" is to be construed "must," in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. And in all cases, the construction should be such as carries into effect the true intent and meaning of the Legislature in the enactment. [64]

The provision in the act of Congress, incorporating "The Mechanics' Bank of Alexandria," which requires that the capital stock of the bank shall consist of 50,000 shares, of \$10 each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. [65.]

Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain that such a fraud, which was private, between the original subscribers to the stock and the commissioners, could beset up to the injury of subsequent purchasers of the stock, who became *bona fide* holders of the same, without participation in, or notice thereof. [66.]

The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. [67]

What defects in pleading are, and are not, cured by verdict. [66]

The condition of an official bond, that the officer who gives it shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully; if they are violated from want of capacity or want of care; they can never be said to have been "well and truly executed." [67]

The officers of a bank are held out to the public, as having authority to act according to the general usage, practice, and course of their business; and their acts, within the scope of such usage, practice, and course of business, would, in general, bind the bank in favor of third persons, possessing no other knowledge. [70]

No act or vote of the Board of Directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the du-

ties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier and of his sureties. [71]

The official bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws. [73]

On a joint and several bond, the plaintiff may sue one or all of the obligors; *but, in strictness [*47 of law, he cannot sue an intermediate number. He must sue all or one. But if such error is not taken advantage of by plea in abatement, it is waived by pleading to the merits. [73]

According to modern decisions, a *nolle prosequi* does not amount to a *retravit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. [74]

In an action on a joint and several bond, some of parties' sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards the principal was called upon to plead, and he did so, judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal. To this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties. The court held, that there is no decision exactly in point to the case; that there is no decision between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the courts of the United States, upon this proceeding, have been on the ground that the question is matter of practice and convenience. [75]

When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant. It is a practice which violates no rules of pleading, and will generally subvert the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. [80]

AN act of Congress was passed on the 16th of May, 1812, entitled, "An act to incorporate a bank in the town of Alexandria, by the name and style of the Mechanics' Bank of Alexandria," which institution soon afterwards went into operation; subscriptions for filling up the capital stock of the corporation and bank, having been opened in the town of Alexandria, on the first Monday in June, 1812, under the direction of fifteen commissioners, appointed for that purpose. On the 3d of September, 1817, Philip H. Minor was elected cashier of the bank; and, on the same day, by a resolution of the board of directors, it was ordered, "that the present officers of the bank, do the whole duties of the bank."

NOTE.—"May" in public statute when construed "must." Statutes, whether permission or imperative.

When the word "may" is imperative, and when not imperative considered. (Mason v. Fearson, 9 How., 248, 259).

Where a public statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as "shall"; thus, 23 Hen. VI. says the sheriff may take bail; this is construed he shall, for he is compellable to do so. (Carthew, 293; Rex v. Barlow, 2 Salk., 609; 9 Bac. Abr., 239; 5 Term R., 636; 2 Wils., 377.)

"May" means *must* in a statute, when a right is given or a duty imposed. (Adrianee v. Supervisors of N. Y., 12 How. Pr., 224, 231; Darby v. Condit, 1 Duer, 599; Newburgh Turnpike Co. v. Miller, 5 John. Ch., 101; City of N. Y. v. Furze, 3 Hill, 612, 614.)

A statute declaring that it shall be the duty of the supervisors to raise a certain sum by tax for county buildings is mandatory, and they are bound to execute it without delay. (Carwell v. Allen, 7 John., 63.)

Peters 1.

Where any public body is clothed with power and furnished with means to do an act required by the public interests, the execution of such power may be insisted on as a duty, though the statute conferring it is only permissive in its terms, and not peremptory. (Hutson v. Mayor of N. Y., 9 N. Y., 163; affirming S. C., 5 Sand., 289; Pacey v. Mayor of Brooklyn, 3 N. Y. Leg. Obs., 104; Wilson v. Mayor of N. Y., 1 Den., 595; Hogan v. Deolin, 2 Daly, 18 N. Y. C. P., 184.)

Where it is obvious that the Legislature intended to impose a positive and absolute duty, even in respect to private transactions, permissive words in a statute have an imperative signification. (Livingston v. Tanner, 14 N. Y., 64; reversing S. C., 12 Barb., 481.)

Where the public has no direct and immediate interest in the question, nor have third persons a vested right, a power given for the benefit of persons, which they may exercise or not at their discretion, is permissive, merely, and not compulsory. (Malcom v. Rogers, 5 Cow., 188.)

The word "shall" may be substituted for "may"

In the office of cashier, Philip H. Minor was the successor of William Patton, Jun., who died in August, 1817; and, before his appointment as cashier, Philip H. Minor (who had several years preceding served as an officer of the bank, for some time as discount clerk, and afterwards as book-keeper), had, in March, 1817, been appointed teller for one year, ending in March, 1818, from the time of his appointment; and had given approved bond and security, conditioned that he would well and truly execute the duties of the office of teller. After the appointment of Philip H. Minor, in September, 1817, to be cashier of the bank; and the order of the board, on the same day, relative to the whole duties of the bank being performed by the then officers of the bank; no re-
48*] newel of the appointment *of teller was made, and he usually performed the duties of cashier and teller.

On the 19th day of March, 1818, Philip H. Minor, and the plaintiffs in error, executed a joint and several bond, in the sum of twenty thousand dollars, which contained the following condition:

"Whereas the above bound Philip H. Minor, hath been duly elected to the office of cashier of the Mechanics' Bank of Alexandria, the conditions of the above obligation are such, that, if the above bound Philip H. Minor shall well and truly execute the duties of cashier of the Mechanics' Bank of Alexandria, then this obligation to be void, but otherwise, shall remain in full force and virtue in law.

| | |
|-------------------|---------|
| "PHILIP H. MINOR, | (L. s.) |
| "GEORGE MINOR, | (L. s.) |
| "D. MINOR, | (L. s.) |
| "WILLIAM MINOR, | (L. s.) |
| "SMITH MINOR." | (L. s.) |

In the Circuit Court of the District of Columbia, for the county of Alexandria, the defendants in error instituted an action of debt upon this bond, against all the obligors; and the declaration filed in the same was for the penalty, without taking notice of the condition.

Oyer of the bond and condition having been prayed, &c., the defendants being the sureties of Philip H. Minor, to wit: George Minor, Daniel Minor, William Minor, and Smith Minor, pleaded joint pleas, separate from Philip H. Minor, the cashier of the bank. The substance of these pleas was as follows:

1. The Mechanics' Bank was not competent

to sue, because the commissioners, who, by the act of incorporation, were authorized to open and take subscriptions to the capital stock of the company, and who took the subscriptions, had colluded with the subscribers to the stock, and that \$180,000 of the stock had been fraudulently subscribed; and that an election for directors of the bank was fraudulently and illegally held, by which the persons named as commissioners were elected the directors of the bank; the votes of the fraudulent holders of the stock, amounting to \$180,000, having been taken at the said election; that afterwards, the sums paid by the fraudulent or collusive holders of the \$180,000 stock, were, by the president and directors, paid back to them; and thereby the capital was diminished to \$320,000; and, by the said proceedings, the capital stock of the bank was reduced below \$500,000, as was collusively held out *to the public; [***49** without this, that the plaintiffs, the obligees in the bond, or any other person whatsoever, at the time and times of making the said bond, and of commencing the suit thereon, or at any time whatsoever used, claimed or exercised, or yet use, claim, or exercise, the name and style, privileges and capacities, of the said supposed corporation, or ever claimed to compose the same, otherwise, or by any other ways or means, or in any other manner or form whatsoever, than in virtue of the said subscription, conducted and concluded as aforesaid; and so the said defendants say, the said supposed writing, obligatory in manner and form aforesaid made, is utterly inoperative and void in law; and this, they are ready to verify, &c.

The second plea states, that the defendants ought not to be charged, &c., &c., because the plaintiffs demand the said debt, and bring this action, as pretending and claiming to be a corporation aggregate, in, and by virtue of the act of Congress, mentioned in the first plea, by the name of the Mechanics' Bank of Alexandria, to be composed of the subscribers to the said Mechanics' Bank of Alexandria, which subscribers were not in being at the time of the passing of the said act, but were to be composed of such persons only as thereafter might subscribe thereto, according to the provisions of the act; whereas the subscriptions were not taken according to the said provisions, so as to entitle the persons pretending to be subscribers to the said bank, and their successors and assigns, to compose the said corporation, where-

in the interpretation of a statute, when the good sense of the entire enactment requires a change. This rule applies when the statute establishes an improvement, and devolves upon any person or persons, or corporation, the performance of such acts as may be requisite to insure its completion. (People v. Common Council of Brooklyn, 22 Barb., 404.)

The word "may" in a statute means "must" whenever third persons or the public have an interest in having the act done which is authorized by the use of such permissive language. (Lucas v. Ensign, 4 N. Y. Leg. Obs., 142.)

The word "may" in a statute means "must," or "shall" only in those cases where the public interest and rights are concerned, and where the public or individual persons have a claim *de jure* that the power shall be exercised. (Newburgh Turnpike Co. v. Miller, 5 John. Ch., 101; Buffalo, &c., Plank Road Co. v. Commissioners of L., 10 How. Pr., 237; N. Y. & E. R. Co. v. Coburn, 6 How. Pr., 223; 1 Vern., 152; 2 Salk., 609; Skinn., 370; 3 Atk., 212; 5 Cow., 188; 3 Hill, 614; Perkins v. Butler, 42 How. Pr., 101.)

In a statute made for the protection of the public interests, the word "may" is equivalent to "must." (Hagadorn v. Raux., 72 N. Y., 583.)

When a power is conferred by statute for the promotion of justice, or a public officer is clothed with power to do an act which concerns the public interests, or the rights of third persons, the language used though permissive in form, is in fact peremptory. (Wood v. Shultis, 4 Hun. 309; People ex rel. Otsego Bank v. Supervisors of Otsego, 51 N. Y., 401.)

Though the words of a statute be permissive only, yet if the power granted be conferred for public purposes, it imposes a duty to exercise the power, whenever the public interests require, which may be compelled by *mandamus*. (People v. Brinkerhoff, 7 Hun., 608; S. C., 68 N. Y., 259; People v. Supervisors of Erie, 1 Sheld., 517; People v. Supervisors of Livingston, 68 N. Y., 114; People v. Supervisors of Otsego Co., 36 How. Pr., 1; S. C., 53 Barb., 564; People v. Supervisors of Herkimer Co., 56 Barb., 452.)

fore there was not any person authorized, or lawfully competent to take the bond, which is the subject of this suit; nor was there any such person, at the commencement of this suit, capable of instituting and prosecuting the same, but that the said persons did, unjustly and illegally arrogate to themselves to compose the said corporation, without the capital stock having been filled by subscription, or the supposed corporation having been composed of actual subscribers to the bank, pursuant to the directions of the said act of Congress, or other lawful warrant whatsoever, contrary to the purview and effect of the said act of Congress; and so the defendants say that the said writing obligatory was, at the time of making the same, and is, utterly void in law, &c.

The third plea alleged that the cashier had well and truly performed the condition of the bond, according to the tenor and effect, and the true intent and meaning of it.

The fourth plea alleged that the cashier had performed the condition of the bond, "to the best of his ability, skill and judgment," without any fraud, deceit, or willful default, or breach of duties, whatever.

The fifth plea alleged that the cashier had **50***) performed his duties, *in obedience to, and in pursuance of, the rules, orders, usages and customs of trade and business, ordained, established, and practiced in the bank, by authority of the president and directors thereof.

The sixth plea asserts, that although the duties of the cashier had not been performed by him, yet the non-performance was by the wrong, connivance and permission of the president and directors of the institution.

The seventh plea states, that the bank had not been damnified by the acts of the cashier.

The eighth plea was, that although the bank was damnified by the acts of the cashier, yet it was by the wrong and connivance of the president and directors, &c.

The ninth plea states, that the business and affairs of the company, and the conduct and duties of the cashier, were performed under the regulation and management of the president and directors, who had been chosen according to the provisions of the act of incorporation; and if, at any time, the corporation has sustained damage, since the making of the writing obligatory, by reason of any matter contained therein, it has been by the wrong, connivance or permission of the said president and directors.

To the first and second pleas, the plaintiffs below put in general demurrers, and on each of the seven remaining pleas, issue was taken by general replications; all precisely in the same terms, as follows:

"And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say they ought not to be precluded, &c., because they say that the said cause of action, in the declaration mentioned, did accrue as in the said declaration and breaches are set forth; without that, that the matters set forth in the said plea are true; and this they pray may be inquired of by the country, and the defendants likewise."

But at the next term, the plaintiffs withdrew these general replications as to the 3d and 4th pleas; and to these two pleas put in special replications, leaving the issues on the remaining

five to stand on the general replications and issues as above. The replications thus put in to the 3d and 4th pleas, and rejoinders of the defendants, taking issue upon the same (being precisely in the same terms, *mutatis mutandis*, to each), were as follows:

"And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say, that they ought not to be precluded from having and maintaining their action aforesaid against the said defendants, George Minor, Daniel Minor, William Minor, and Smith Minor, by anything alleged by the said defendants in their third plea, pleaded as aforesaid: Because they say* that [**51** the board of directors of the said Mechanics' Bank of Alexandria, in pursuance of the authority granted to them by the act of Congress, incorporating the said bank, did duly make and declare sundry by-laws for the government of the said bank, its officers and affairs, and, among other laws so made and declared as aforesaid, they did enact and declare, in substance, as follows, to wit:

Section 2d, article 5th. It shall be the duty of the cashier to countersign, at the bank, all the bills or notes to be signed by the president, by order of the directors; carefully to observe the conduct of the persons employed under him; duly to examine into the settlement of the cash account at the bank; count the money deposited in the vaults every evening; compare the amount thereof with the balance of the cash account of that day, and, in case of disagreement, report the same to the next meeting of the directors; to see that all deeds appertaining are duly recorded; and to do and perform all other duties that may, from time to time, be required of him by the president or board of directors relative to the affairs of the institution.

Article 6th. It shall be the duty of every other officer, clerk, and servant of the bank, to do and perform all other duties, that may, from time to time, be required of them respectively, by the president and cashier; and in no case to divulge the transactions of the bank.

Article 8th. That no officer of the bank, the president excepted, shall leave the bank after it closes, until the cashier's account shall be found to agree, or if it does not agree, until a strict examination be made to discover the error.

Section 3d, article 3d. That no discount shall be made without the consent of a majority of the directors present; nor shall any reason be required by the directors to each other, nor assigned to the public, for refusing discounts.

Which said by-laws, so made, enacted, and declared, as aforesaid, were, at the time of the sealing and delivery of the writing obligatory, in the declaration mentioned, in full force and effect. And the said plaintiffs say that the said Philip H. Minor, in the said writing obligatory mentioned, was duly appointed cashier of the said Mechanics' Bank of Alexandria; and, in virtue of his said appointment, did accept the office of said cashier; and, on the day of the date of the said writing obligatory in the declaration mentioned, did thereupon enter upon the duties of the said cashier; and the said plaintiffs further say that the said Philip H. Minor did not well and truly execute the duties of the said Mechanics' Bank, as cashier of the said bank, according to the true intent and meaning

52*] of the condition of the said writing obligatory, but violated his duty as cashier aforesaid, and broke the condition of the said writing obligatory, in the following instances; that is to say:

1. That, during the period that the said Philip H. Minor acted as cashier of the said Mechanics' Bank, under the writing obligatory, as aforesaid, he, the said Philip, as cashier aforesaid, received into his custody and keeping the moneys of the said bank, amounting to very large sums; that is to say, amounting altogether to five hundred thousand dollars and upwards; which said moneys, so received as aforesaid, the said Philip, although often required, hath failed to account for, or to pay over to the said bank, or to make a correct report of the same, from time to time, to the board of directors of the said bank.

2d. And further, that he, the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, did waste, and suffer to be wasted, of the moneys of the said bank, in his care and custody, as cashier aforesaid, the sum of thirty thousand dollars and upwards, whereby the same became entirely lost to the said bank.

3d. And the said plaintiffs further say, that the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did apply and appropriate, of the proper money of the said bank in his care and custody, as cashier aforesaid, to his own proper use, the sum of five thousand seven hundred and twenty eight dollars, and to the use of Thomas J. Minor and himself, the said Philip } \$3,179.00
H. Minor, the further sum of } 1,898.63

\$5,077.63

so that the said sums were entirely lost to the said bank.

4th. And the plaintiffs further say, that the said P. H. Minor, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did pay away, and did suffer and permit to be paid away, of the proper moneys and funds of the said bank in his care and keeping, as cashier aforesaid, to Jabez B. Rooker, divers sums of money, amounting altogether to the sum of \$4,967.30; and to one Francis Adams, divers other sums, amounting altogether to the sum of \$1,884.18; and to William F. Thornton, divers other sums of money, amounting altogether to the sum of \$7,407.25; and to Benjamin G. Thornton, divers other sums of money, amounting altogether to the sum of **53*]** \$4,810.74; and to Lewis *Hipkins the sum of \$2,375.00; and to Robert Young, divers other sums of money, amounting altogether to the sum of \$9,294.44; so that the said several sums of money were entirely lost to the said bank.

5th. And the said plaintiffs further say, that the said Philip H. Minor, during the period aforesaid, and in his capacity of cashier aforesaid, and without the authority of the said bank, did indorse upon a certain check, drawn by Lewis Hipkins upon the said Mechanics'

Bank, in favor of "note in city or bearer" for \$3,000, that the same was "good;" when in fact and in truth, the said Lewis Hipkins had no money or funds in the said Mechanics' Bank at the time of the said indorsement to pay the said check, nor has he, at any time since, had in the said bank any money or funds to pay the said check, so indorsed as aforesaid, and the said bank have actually paid and taken upon themselves the payment of the same.

7th. And the said plaintiffs further say, that Benjamin G. Thornton, on the 18th day of December, 1818, drew a certain bill or draft upon a certain bank in the State of Ohio, called the Bank of New Lancaster; which bill or draft was in substance as follows:

"ALEXANDRIA, December 18, 1818. Cashier Bank of New Lancaster, Ohio. Pay to the order of W. F. Thornton, ten days after sight, \$4,750, and charge the same as per advice, to yours, &c., "B. G. THORNTON."

And the said plaintiffs say that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did advance and pay, upon the credit of the said draft or bill, to William F. Thornton and Lewis Hipkins, the amount of the said draft; that is to say, the sum of \$4,750; by means of which said advancement, so made as aforesaid, the said sum has been entirely lost to the said bank.

8th. And the said plaintiffs further say that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to his duty as cashier, and with a view to deceive and mislead the board of directors of the said bank, did make sundry false and erroneous entries in the books of the said bank, in his care and custody as cashier aforesaid; and among others, the following, to wit: a charge against the Bank of Alexandria, of the date of the 31st of August, 1818, for the sum of \$1,791; and another against the Bank of Potomac, of the date of the *31st of August, 1818, for the sum of [***54** \$2,581.25; and another against the Bank of Washington, of the date of the 2d of March, 1818, for \$1,000; when in fact and in truth, at the periods aforesaid, there was nothing due from the said last-mentioned banks to the said Mechanics' Bank; by means of which said false entries and charges, the said Mechanics' Bank have lost the said several sums of money. All which said several matters and things the said plaintiffs are ready to verify. Wherefore, &c.

To these pleas, the plaintiffs in error put in the following replication:

"And the said defendants, George Minor, Daniel Minor, William Minor, and Smith Minor, say that the said Mechanics' Bank of Alexandria ought not to have, or maintain, their aforesaid action against the said defendants by reason of anything by the said Mechanics' Bank of Alexandria, in their said replication to the said third plea of the defendants above in replying alleged; because they say that the said Philip H. Minor, in the said plea and replication named, did not violate his duty as cashier aforesaid, and break the said condition of the

said writing obligatory, in the instances by the said Mechanics' Bank of Alexandria, in their said replication above pleaded and alleged, nor in any of them, with or by means of any fraud, or deceit, or willful default whatsoever. And this they pray may be inquired of by the country—and the said Mechanics' Bank of Alexandria in like manner."

At the same term, the demurrer to the first and second pleas, and the issues on the remaining seven, between the plaintiffs and the four sureties, were respectively argued and tried; the first and second pleas were adjudged insufficient, on general demurrer; the issues were found for the plaintiffs, and damages, in gross, upon all the issues and breaches, assessed against the four sureties at \$8,607.30; and, upon the motion of the plaintiffs, a rule was then laid on the principal obligor and co-defendant, Philip H. Minor, to plead to issue on the morrow. In compliance with which rule he did, within the time prescribed, plead five several matters in bar; the same, *mutatis mutandis* as the third, fourth, fifth, seventh and ninth, of the aforesaid pleas, put in by the co-defendants, his sureties. A day was given at the next ensuing term to the plaintiffs to reply; at which term the plaintiffs took a judgment on the judgment against the four defendants, with whom the several issues had been tried as aforesaid; and then entered a *nolle prosequi* as against the co-defendant, Philip H. Minor, who thereupon recovered judgment for costs against the plaintiffs.

On the trial of the cause in the Circuit Court, a bill of exceptions was taken to the opinion of **55*** this court, upon certain *instructions which the court was requested to give to the jury. The court instructed the jury, according to the expressed desire of the plaintiffs below, except as hereafter stated, but refused to charge the jury as requested by the counsel of the defendants.

The instructions given by the court, on the motion of the plaintiffs' counsel, and on the evidence given in the cause, were:

1st. If the jury, from the evidence aforesaid, should be of opinion that the said Philip H. Minor, upon his leaving the Mechanics' Bank of Alexandria, that is to say, on the 9th day of March, 1819, failed to pay over, or to account to the said bank, for any portion of the moneys of the said bank, received by him as cashier of the said bank, while he acted as cashier of the said bank, under the writing obligatory, in the declaration mentioned, then the jury may, and ought to infer, that the said moneys so unaccounted for, were willfully wasted by the said Philip H. Minor, or applied to his own use; and that, under such circumstances, the defendants are liable to the bank for the moneys which he so failed to pay over, or account for, to the said bank.

2d. And the said plaintiffs requested the court further to instruct the jury that if, from the evidence aforesaid, they should be of opinion that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, did willfully pay or apply, or did knowingly and willfully suffer or permit to be paid away or applied to the use of Thomas I. Minor and himself jointly, or to himself individually, any portion of the funds or moneys

of the said bank, without the authority of the board of directors of the said bank, so that the said sums, or any part thereof, were lost to the said bank; that the said defendants are liable for the said moneys or funds so paid away, or applied and lost.

3d. And the said plaintiffs prayed the court further to instruct the jury that if, from the evidence aforesaid, they should be of opinion that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, willfully paid away, or appropriated, or knowingly suffered or permitted to be paid away or appropriated to the use of Jabez B. Rooker, Wm. F. Thornton, Benjamin G. Thornton, Lewis Hipkins and Francis Adams, or to either of them, the moneys and funds of the said bank, without the authority of the board of directors of the said bank, so that the said moneys or funds, or any part thereof, were entirely lost to the said bank; then the said defendants are liable for the said moneys so paid away, or appropriated, and lost.

Upon the first and second issues, being the issues under the *third and fourth pleas; [***56** and upon the third, being the issue joined on the fifth plea, the court gave the instructions as prayed for by the counsel for the bank. Upon the third issue, being the issue joined in the fifth plea, the court gave the first instruction, with the addition of the following words: "Unless such failure to pay over, or account for the money so received, by the said Philip H. Minor, was in obedience to, and in pursuance of the directions, rules, orders, usages, and customs of trade and business, ordained, established, and practiced in the said bank, by the authority of the said president and directors."

Upon the fourth issue, being the issue joined under the sixth plea, the court gave the instructions prayed for, adding, in each instruction, after the words "directors of the said bank," the words, "and without the wrong, connivance, or permission of the said president and directors."

Upon the fifth issue, being the issue joined in the seventh plea, the court gave the first instruction, adding the words, "if the jury should be also satisfied, by the evidence, that moneys, which the said Philip H. Minor so failed to pay over, or account for, were thereby lost to the bank;" and, upon this issue also, the court gave the second and third instructions.

Upon the sixth and seventh issues, the court gave the second and third instructions, adding the words, to make them applicable, to the fourth issue; and upon the sixth issue, the court also gave the second and third instructions, adding, in each instruction, after the words "directors of the said bank," the words, "and without the wrong, connivance, or permission of the said president and directors."

The counsel for the defendants then moved the court to instruct the jury,

1. That if it were the established usage and practice of the said bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the said balances, so appearing against the several persons

above charged on the books of said bank, arose out of the exercise of such discretion, by the said cashier, and in the course of the ordinary transactions of said bank, and pursuant to established usage and course of business there adopted, and personally known to the said president and directors, and practiced and continued, with their knowledge, for a series of years, from the commencement of the bank to the termination of the said Philip H. Minor's cashiership; though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the board of directors, [*57] the jury may infer the approbation, assent, and acquiescence of the said president and directors, as to such usage and course of business.

2. That if the said balances, appearing against the several persons above charged on the books of said bank, arose in the course of the ordinary transactions of said bank, pursuant to the established usage and course of business there adopted, and known to the president and directors, and expressly or tacitly acquiesced in, and approved by them; or if the said president and a majority of the directors, were personally acquainted with such usage and course of business, purposely connived at the same and declined investigation, then the jury may infer that the same were approved and permitted by the said president and directors, though no formal communications of the same were made by the said cashier to the board of directors, at their official meeting; and, upon finding such to be the fact, the jury, as to such balances, should find for the defendants, under the issues joined on the replications to the sixth, eighth, and ninth pleas.

Which instructions the court altogether overruled, and refused to give to the jury.

3. If the jury find, from the evidence, that the several officers of the said bank, annually appointed by the said president and directors, as aforesaid, each gave separate bond and security for the faithful performance of the duties of his office; that the said William Patton, so being cashier, as aforesaid, died on or about the 28th of August, next ensuing his last appointment on the 9th of March, 1817; and that on the 3d day of September following, the said Philip H. Minor, having all along acted as teller, under his said appointment as such, for one year from March, 1817, was duly appointed cashier in place of said Patton, and gave bond and security in the usual form, for the faithful performance of his duties as such cashier; being at the same time under bond and security for the faithful performance of his duties as teller, for the year ending in March, 1818, as above stated; that he continued to be such cashier, under his said appointment, until the 9th of March, 1818, when he was again appointed cashier for one year; and on the 19th of the same month gave the bond now in suit; that on the said third of September, 1817, the said president and directors only passed the said orders of that date, appointing the said Philip H. Minor cashier, as aforesaid, and directing the then officers of the bank to do the whole duties of the bank; and did not then, or any time after the said ninth day of March, 1817, make any new appointment of teller; that the said Philip H. Minor, from the time of his first appointment as cash-

ier, usually performed the duties of [*58] teller; which duties, as well as those of cashier, were occasionally, and frequently, during the continuance of said Minor in the office of cashier, performed by the other officers of the said bank, whilst the said Minor was absent, and otherwise occupied with the business and affairs of said bank; that the separate office of teller was established at the first institution of said bank, by the written laws and ordinances of the president and directors, as above given in evidence; that after the said president and directors ceased to appoint a distinct person as teller, as aforesaid, all the distinct functions and duties of teller, and the forms of keeping the accounts and transacting the business by the cashier, or some other officer of said bank, in the name and capacity of teller, were pursued, the same as when the office of teller was filled by a distinct person; the practice being still continued of placing the money of the bank, intended to answer the current demands of each day, in the hands of the officer as teller, of keeping separate accounts of such moneys, and of all deposits, and of all payments upon checks or otherwise, in the name and capacity of teller; such accounts being distinct and separate, and in distinct and separate books from those kept in the name and capacity of cashier; and that the said board of directors, and the proper committees of the same, in their quarterly and other examinations and reports of the state and condition of said bank, and of the accounts of its officers, still kept up the distinction between the teller's and the cashier's accounts, and the teller's and cashier's money; then, that the defendants are not chargeable in this action for the conduct of said Philip H. Minor, in the execution of the duties distinctly appertaining to the office of teller, whilst he was cashier, as aforesaid.

Which instruction the court refused to give, the plaintiffs having offered in evidence to the jury the following by-law of the said president and directors, to wit:

Article fifth, in section second of the by-laws, above given in evidence; and having also offered in evidence, to prove that after the appointment of the said Philip H. Minor to the office of cashier, on the 9th of March, 1818, he did, in fact generally perform the duties of teller, with the knowledge of the president of the said bank; from which it was competent for the jury to infer that he, the said Philip H. Minor, as cashier, as aforesaid, was required by the president of the said bank, or by the board of directors of the said bank, to perform the duties appertaining to the office of teller.

Mr. Taylor and Mr. Jones, for the plaintiffs in error.

1. The plaintiffs below sue in their corporate capacity, under the act of Congress of May 16, 1812, and no such corporation ever existed; it was to exist only on the happening of [*59] a future event. The law does not incorporate a company already formed, but provides for the erection of the corporation, upon certain conditions and on certain forms being complied with.

The demurrer admits the facts stated in the first and second pleas, and the corrupt evasions of the act prevented the corporation ever com-

ing into existence. The obligors in the bond were not thereupon estopped, as the bond was given to supposed or fictitious persons, and not to an existing corporation; and there was no one *in esse* to take the bond. An estoppel cannot be alleged against an act of Parliament. (1 Chitty's Pleadings, 435; Comyn's Dig. Abatement, 16; 3 Instructor Clericalis, 89; Story's Pleadings, 24.)

Dealing with a pretended corporation does not preclude a party from denying its existence; it must have existed *de jure*. It is no objection to the matter in the first and second pleas, that they are not pleaded in bar; a plea that goes to show that there never was such a person as the plaintiff, is a plea in bar. (1 Bos. & Pull., 44; 1 Chitty, 425.)

The general rule that sealed instruments cannot be opened, has exceptions, and in cases of illegal and fraudulent considerations, and considerations *ex turpe causa*; a fraud which is injurious to the public, cannot be precluded by any shield of law. (2 Wilson's Reports, 347; 2 Term Reports, 171.)

It is not necessary to resort to a *quo warranto* to determine the existence of the corporation. The defendant in an action on a promissory note, may call upon a corporation, if plaintiff, to show its charter, and the same principle will apply in this case. A *quo warranto*, or *mandamus* would be proper, if the corporation had ever existed, but that was not the fact in this case; and it is not an answer to the course of proceedings here, that it would multiply actions, for such would not be the fact.

2. As to the effect of the *nolle prosequi*. The action is upon a joint and several bond, and the obligors are sued jointly. The sureties appeared, and took a separate defense, and a verdict was obtained against them. The principal pleaded, after being ruled; and at the subsequent time a *nolle prosequi* was entered against him, and a judgment was taken against the sureties.

The proceeding was erroneous. Upon a joint and several bond, all the parties must be sued together, or each must be sued separately; and it is error to sue less than all, unless the suit be against one only. (3 Term Reports, 782; 1 Hen. & Mumford, 62; 3 Mumford, 187; 2 Maule & Selwyn, 23; 2 Randolph, 446, 478, 174, 313; 2 Day, 387; 5 Mumford, 556; 1 Williams Saunders, *291, Vol. IV., 207, n. 2-91, note 4; 1 Henry Black, 108; 1 Bos. & Pull., 670; 1 Chitty, 32, 33, 546.)

If a judgment could not be obtained against four obligors, on a bond given by five, in a suit so instituted, it cannot be obtained by the entry of a *nolle prosequi* against one. (1 Saunders, 207; 1 Chitty on Plead., 32, 38, 546; 5 Espinasse's *Nisi Prius* cases, 47; *Jeffray v. Frebain*; *Chandler v. Parks et al.*, 3 Esp., 76.) The cases which impugn the doctrine contended for, are *Noke v. Ingraham* (1 Wilson, 89; 5 Johnson's Reports, 160).

If the parties to a joint and several bond are joined in an action, they never can be separated; and if one is discharged, all are discharged, except in cases of infancy and bankruptcy. (1 Henry Black, 108; 1 Bos. & Pull., 630.) The rationale of the rule is, that the party having made it a joint contract by his suit, cannot af-

terwards make it a several contract. (3 Taunton, 307; 4 Taunton, 468.)

The most important inquiry in this case, is upon the instructions given by the court.

Mr. Swann, and *Mr. Wirt*, Attorney-General, for the defendants.

The instructions first given, sustain the action, and sweep away the defense, taking it entirely from the jury. The words "well and truly" in the condition of the bond, mean only integrity, not capacity. (10 John., 271; and the instruction given considers the words as requiring skill.) The cashier acted according to the instructions of the president and directors, and to the usage of the bank. The instruction given precludes mistake, and denies that it constitutes a defense.

The demurrers to the first and second pleas, were not on the ground of an admission of the facts, but the pleas were considered invalid. It was not obligatory on the bank, that the capital should be \$500,000, as the expression that it "may" consist of \$500,000, authorizes it to be less, if it shall be deemed proper; and even admitting the collusion charged, as to the creation of a false capital, to the amount of \$180,000, the remaining capital of \$320,000 was sufficient, under the charter. The pleas are also insufficient, as, although collusion is set up, there is no certainty in the charge or allegation of the persons concerned in it, or the place of the same. The whole purpose of the law is, to limit the amount of trading by the bank; and it is not a fair construction of the act of incorporation, to interpret the terms "may consist" into "must consist." The company went into existence in 1812, and the cashier was appointed in 1817, after many successive years of business by the bank, which could not be affected by the proceedings of 1812.

2. The plaintiffs in error are estopped by having executed this bond to the bank, [*61 from denying the existence of the corporation. (Wills' Reports, 11, 12; 14 Johnson, 238.)

Where the matter which constitutes the ground of an alleged estoppel is new, it is necessary to state it by plea, but not so when it is contained in the declaration. (1 Chitty's Pleadings, 575.)

The proper mode of contesting the existence of the corporation, would have been by an information, in the nature of a *quo warranto*; and it does not rest with everyone dealing with a corporation, to inquire, when called upon to comply with his contract, whether it exists. It was not necessary to set out breaches, until the defendants, the obligors in the bond, had alleged performance, and then the pleas are insufficient; no breaches need be set out. (1 Chitty, 598; 1 Saunders, 103; Archbold, 262; 2 Chitty, 481.) But if there are any omissions or defects in the pleadings, they are cured by the verdict, according to the laws of Virginia.

The instructions given by the court upon the replication, and on the evidence, were such as the court were bound to give, and were in strict conformity to the facts; and, if the court refused to give the instructions asked for by the plaintiffs in error, they did so upon the authority of the by-laws of the bank, and the orders of the board of directors relative to the duties of the officers of the bank. Because the custom

and practice might have been to overdraw the bank, and for its officers to abuse their trust, was this custom to excuse the conduct of the cashier?

As to the effect of the *nolle prosequi*, all the cases referred to by the plaintiffs in error are cases of joint contract, and where the trial was joint. But in this, the four sureties severed from the principal, and, on their own choice, went to trial alone, upon pleas put in separate from the principal.

The verdict has been given against the plaintiffs in error, on a trial of their own selection; and they suffered judgment to be entered against them, without any objection, before the principal in the bond appeared and pleaded.

The entry of a *nolle prosequi*, does not admit that the plaintiff had no cause of action, it is not a *retraxit* or a release, and does not preclude the commencement of another suit. (1 Williams Saunders, 207; Archbold's Practice, 87; 1 Saunders, 291; 2 Maule & Selwyn, 444; 1 Wilson's Reports, 89; 5 John., 160.)

Although the law is well stated to be, that a suit on a joint and several bond must be brought against all, or against one, and that you cannot sue four, when there are five joint obligors, yet the objection must be taken by plea in abatement; and if there is no such plea, and judgment, the consent of the defendants will be inferred. The following cases were also cited **62***] in the argument: *Walsh v. Bishop* (Cro. Char., 239; *Ibid.*, 243; Carthew, 98.)

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Columbia, sitting at Alexandria. The plaintiffs in error were original defendants in the cause, and the suit is now before this court, upon the judgment of the court below, upon certain pleas of the defendants, to which there was a demurrer; and also, upon the instructions given and refused by the court upon the trial of certain issues of fact, joined by the parties.

The action is debt upon an official bond, given by Philip H. Minor, cashier of the bank, and by four other persons, as his sureties, with condition, that Minor "shall well and truly execute the duties of cashier" of the bank; and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after oyer of the bond and condition (which thereby became part of the declaration), severed themselves from the principal, and pleaded nine several pleas. To the two first of these pleas, demurrers were put in; and the court below, upon consideration, gave judgment upon the demurrers in favor of the bank; and the correctness of this decision constitutes the first subject of inquiry.

Exceptions have been taken both to the matter and the form of these pleas; and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon general demurrer. Both

of them are in effect, though not in form, special pleas of *nul tēil* corporation. The first plea in substance avers, that by the charter granted by the act of Congress, of the 16th of May, 1812, ch. 87, the capital stock of the bank was by the charter fixed and limited to consist of \$500,000, *bona fide*; that the whole capital stock was not *bona fide* filled up and subscribed for; but, on the contrary, by a collusion between the commissioners, under whose direction the subscriptions were taken, and the subscribers, a large portion of the capital stock, to wit, 18,000 shares, amounting to \$180,000, were filled up by false and colorable subscriptions; the ostensible subscribers, after payment of the first installments, were fraudulently permitted to withdraw the same; and future payments by them were dispensed with, while they were still rated and held out as stockholders for the purpose of colorably *filling up the sub- [**63** scription of the whole capital stock, and electing a board of directors; and that in this manner, and by these means, and by no other, the bank was put into operation.

This plea is meant to rest upon two grounds to sustain its legal propriety. First, that the subscription of the whole capital stock of \$500,000 was a condition precedent to the putting of the bank into operation as a corporation. Second, that the collusion between the commissioners and the subscribers for the 18,000 shares, being fraudulent, made their subscriptions a mere nullity.

Various answers have been given at the bar to the legal sufficiency of the matters thus pleaded. In the first place, it is said that the defendants are estopped by the bond to deny the legal existence of the corporation. In the next place, that the charter does not make the subscription of the whole capital stock a condition precedent to the establishment of the bank. In the next place, that the question, whether the bank was regularly and *bona fide* put into operation, is matter not inquirable into in a suit of this nature, but only upon a *quo warranto*, instituted by the government; and, in the last place, that the whole stock being, in fact, subscribed, the fraudulent intention and acts of the parties did not make the subscription of the 18,000 shares a nullity. Let us, then, consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to have been (which in terms it is not) incorporated into the plea, and therefore judicially before us. The first section of the act of the 16th of May, 1812, chap. 87, provides, "that the subscribers to the Mechanics' Bank of Alexandria, their successors and assigns, shall be, and hereby are created and made a body politic, by the name and style of the Mechanics' Bank of Alexandria; and by such name and style shall be, and are hereby made able and capable in law, to have, purchase, &c., lands, &c., &c., and the same to sell, &c., to sue and be sued, &c., &c.; subject to the rules, regulations, restrictions, limitations, and provisions, hereinafter prescribed and declared.

In this section there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and, unless there be some restriction or limita-

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tion elsewhere in the act, it is most manifest that the court cannot intend that any particular amount of subscriptions is indispensable.

The second section provides, "that the capital stock of said corporation may consist of \$500,000, divided into shares of ten dollars each, and shall be paid in the following manner: *that is to say: one dollar on each share, at the time of subscribing, one dollar on each share at sixty days, and one dollar on each share ninety days after the time of subscribing; the remainder to be called for as the president and directors may deem proper; provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share at any one time." The argument of the defendants is that "may" in this section, means "must;" and reliance is placed upon a well-known rule in the construction of public statutes, where the word "may" is often construed as imperative. Without question, such a construction is proper, in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say that there is any leading object in this charter, which will be defeated by construing the word "may" in its common sense, as imparting a power to extend the capital stock to \$500,000, and not an obligation that it shall be that sum and none other. It is by no means clear, from this section, that the Legislature contemplated that there should be a capital of \$500,000 on which the bank was to commence, or carry on its operations. On the contrary, three installments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in only when the president and directors may deem it proper. So that the capital stock, except at the discretion of the board, may never extend beyond the amount of \$150,000, for any practical purposes, either as security to the public, or as the basis of discounts. Now, the plea itself does not attempt to deny that all but 18,000 shares of the stock were, *bona fide*, subscribed for; so that, for aught that appears, the capital stock, on which the bank carried on its operation, may have far exceeded that sum. It has been urged that public policy requires such an imperative construction of the clause, for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed, or can be inferred, from the general terms of the act. When the Legislature intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so, is quite as significant *that the Legislature did not deem such a restriction subservient to any manifest public policy.

The Legislature might well presume, after prescribing the maximum to which the capital

stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. The 13th section of the charter contains provisions for the security of the public against over issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally have found a place. It declares that no stockholder shall be answerable for any losses, deficiencies, or failure of the capital stock, for any larger sum than the amount of the stock belonging to him; excepting that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess; and if the directors shall not have property to pay the amount of the excess, then every stockholder shall be liable for their deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank, exceeding twice the amount of the capital stock; which may fairly be construed to mean the capital stock actually paid in; the stockholders become ultimately liable for the excess; and this liability furnishes, if not an ample, at least a reasonable security against the public evils, which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events we cannot perceive any clear legislative intention to make the subscription of the whole capital stock a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls, and cannot sustain the defense.

If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made, with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were *bona fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The third section of the act manifestly contemplates cases of fraudulent subscription, and provides, "that all the subscriptions and shares obtained in consequence thereof, shall be *deemed and [*66 held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements and engagements, in any wise contravening this provision, shall be void; and the person, &c., subscribing, &c., shall have, enjoy, and receive the share or shares respectively, &c., and all the interest and emoluments thence arising, as freely, fully and absolutely, as if they had severally and respectively paid the consideration therefore; any such bargain, &c., to the contrary notwithstanding."

This section seems to us conclusive upon the point. It avoids all bargains contravening the

provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bona fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bona fide* holders, without any participation or notice of the fraud.

For these reasons, we are of opinion that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

The second plea is disposed of by the construction of the charter already intimated, and is further open to fatal objections, from its deficiency of proper averments, and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for, before the bank is to be put in operation.

It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts or circumstances, alleges, that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the act, so as to entitle the subscribers to bring the action; and that the subscribers did unjustly and unlawfully arrogate to themselves the corporate name, style, and privileges, without the capital stock having been filled up by subscription, or the corporation having been constituted and composed of actual subscribers, pursuant to the directions of the act. In point of substance, as well as form, it is bad, upon the established rules of pleading.

This view of the case renders it wholly unnecessary to consider the point made as to the estoppel, and the necessity of a *quo warranto*; on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance; the third is **67*** so, in fact, and pursues the condition *of the bond. The fourth is argumentative, and assumes a particular legal interpretation of the condition; that is to say, that the condition covers only wilful defaults, and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas special replications were filed, assigning special breaches of duty, upon which the parties were at issue, and upon this, and all the other issues in the cause, the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications.

The fifth plea states a general performance of duty, in obedience to and in pursuance of the "directions, rules, orders, usages and customs of trade and business, ordained, established and practiced in the said bank, by the authority of the said president and directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, &c., established and practiced by the president and directors, whatever they may be, whether within the scope of their power or not, would be a good and true discharge of duty. To this plea, a general replication was put in, "that the said cause of action, in the declaration mentioned, did accrue, as in the said declaration and

breaches are set forth, without this, that the matters set forth in the said plea are true," and this the plaintiff pray may be inquired of by the country; and the defendants joined in the issue; upon which a verdict was found in favor of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is, that the law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. A covenant or condition for general performance is broken by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow, that if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings, is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law, and by the statute of *jeofails*, defects in this particular are cured by a verdict. It is true, that in *a declaration upon a covenant for ***68** general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. (Com. Dig. Plead., p. 14.) But that is not the present case. Here the declaration does assign a good breach, by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon oyer, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defense, and denies the performance of it. The verdict has found that the condition was not performed, and consequently upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived. The replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principles, no reason shown against the plaintiff's right of recovery.

It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet if a general breach be assigned, the defect is cured by a verdict for the plaintiff. (Com. Dig. Plead., 48.) The objection, then, to the replication to the fifth plea, cannot now be sustained.

It is not necessary to notice the remaining pleas, upon which issues were joined, because a verdict has been found in all of them in favor of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special de-

fenses, and the plaintiffs were not bound to do more than traverse them.

The instructions of the Court, given and refused at the trial, constitutes the next subject of inquiry. It is conceded, that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the Court in their applications to the other issues, were perfectly proper.

The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over, or to account to the bank for any portion of the moneys of the bank, received by him as cashier, then the jury may, and ought to infer that the moneys so unaccounted for were willfully wasted by Minor, or applied to his own use; and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a willful waste or misapplication of the funds of the bank by the cashier, was a natural conclusion, from his failure to pay **69** over *or account for the same. It was not put to the jury as a presumption capable of being rebutted by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power than that of the bank, ought to lead the jury to the presumption of the non-existence of any such negligence, or accidental loss.

It has been argued, that this instruction is the more material and injurious to the defendants because it proceeds in the latter part, upon a misconstruction of the true import of the condition of the bond. The condition, that Minor shall "well and truly execute the duties of cashier" of the bank, is said to be merely a stipulation for honesty, in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. "Well and truly to execute the duties of the office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully—if they are violated, from want of capacity or want of care, they can never be said to be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we were to narrow down its import to a guarantee against personal fraud only.

The remarks already made, dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare that the sureties are liable upon the bond, for any willful or permissive misapplication of the moneys of the bank, which the cashier knowingly made, or suffered, without authority, whereby the same moneys have been lost to the bank. There seems no ground upon which to rest any reasonable objection to such a direction to the jury.

We may now proceed to the consideration of the three instructions prayed for, in behalf of the defendants. The first is, in substance, that if it were the established usage and practice of the bank, that the cashier might, in his discre-

tion, permit customers to overdraw, and to have checks and notes charged up without present funds in the bank; and for the cashier to receive and pass, as cash, checks, and drafts upon other banks; and if the balances appearing against such persons charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the president and directors, practiced and continued with their knowledge, for a series of years from the commencement of the bank, to the termination *of Minor's cashiership, though the [*70 existence of such balances, or the particular circumstances attending them, were not formally communicated to the board of directors; the jury may infer the approbation, assent, and acquiescence of the president and directors, as to such usage and course of business.

The refusal of this instruction, is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eighth and ninth pleas, to which, alone, it can be properly applied. Those issues put to the jury the question, whether the acts of the cashier, whatever might be their character or kind, were, or were not, done by the wrong, connivance and permission of the president and directors of the bank. The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors, to whom the charter and by-laws submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favor of third persons possessing no other knowledge. In the case of the *Bank of the United States v. Dandridge* (12 Wheat., 64), the subject was under the consideration of this court; and circumstances far less cogent than the present, to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and prac-

tice alluded to in the instruction were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given.

71*] *The pertinency of such a presumption, to these issues, cannot admit of dispute. But the real difficulty remains to be stated. Assuming that the court, upon these issues, ought to have given the instruction prayed for, the question is, whether, upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given, and thereupon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues, in favor of the defendants; or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial; since, in no event, could the instruction, in point of law, have benefitted the defendants. Upon deliberate consideration, we are of opinion that the pleas on which these issues are founded, are substantially bad. They set up a defense for the cashier, that his omission "well and truly to perform" the duties of cashier, was by the wrong, connivance and permission of the board of directors. The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*.

We are of opinion that it could not. However broad and general the powers of the direction may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud—every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality, and, as such, void, as an authority to protect the cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the cashier.

The instruction prayed for, proceeds upon the same principles as the pleas. It supposes 72*] that the usage and practice of *the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow custom-

ers to overdraw, and to have their checks and notes charged up without present funds in the bank; stripped of all technical disguise, the usage and practice thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but "well and truly executing his duties, as cashier." This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants, which substantially turns upon the like considerations.

The third instruction prayed for, in effect, was, that the court would instruct the jury that the defendants are not chargeable in this action for the conduct of Minor in the duties distinctly appertaining to the office of teller, whilst he was cashier in the bank, although those duties were duly assigned to him; because it constituted a distinct office, and the accounts and proceedings of the teller were at all times kept distinct, and in separate books, from those of the cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the cashier are generally pointed out; and among other things, it is provided, that he shall "do and perform all other duties, that may from time be required of him by the president or board of directors, relative to the affairs of the institution." On the appointment of Minor as cashier, who had previously acted as teller, the directors passed a vote, "that the present officers of the bank, do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible, that the duties of teller were, under this vote, assigned to the cashier. If so, then the performance of these duties constituted thenceforth a part of the duties of the cashier, as such; and as much so as if they had been originally affixed to the office of cashier. There is nothing in the nature of the duties of teller incompatible with those of cashier; on the contrary, as is well known, cashiers often perform the functions of both. The circumstance that the office of teller, and distinct accounts, and books, were still kept up, does *not vary [*73 the legal result. It was a matter of mere convenience and regularity, for the government of the bank in its own business; and probably had no higher, or other origin, than to preserve the same forms and series of accounts which the bank had adopted at its first institution. The office of teller had a nominal, but not a real, existence; and, from the time of the union of the duties in the cashier, as such, there was a legal extinguishment of the separate official character. If the cashier had originally had the duties of book-keeper and accountant assigned to him, and, in consequence thereof, had kept distinct account books in the bank, no one would have imagined, because he kept separate account books, as cashier, for his own conven-

ience, or, according to the ordinary usage of banks, that he would not, under his bond, have been responsible for mal-conduct, in keeping the general account books of the bank to its loss or injury. The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws.

The remaining inquiry is, as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor, after he had pleaded, and after judgment was given against the sureties in favor of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh, and ninth pleas, put in by the sureties; and the question arises, whether under such circumstances (no objection to the judgment appearing to have been made by the sureties), this proceeding is an error, for which that judgment ought to be reversed. It is material to state, that the bond on which the suit is brought, is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors, severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number. He must sue all or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and, therefore, there is no variance in point of law between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Serjeant Williams's note to the case of *Cabell v. Vaughan* (1 Saund. R., 74*) *291, note 2), where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed, by having sued all the parties, and subsequently entered a *nolle prosequi* against one of the obligors? If not in general, then, is there any legal difference, where the party in whose favor the *nolle prosequi* is entered, is not a surety, but a principal in the bond? not, indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition.

These questions must be decided by authority, if any such exist; if none can be found, then they must be decided by analogy and principle. It may be proper, in this view, again to notice the fact, that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues (which undoubtedly ought to have been, by the regular course of practice, deferred until the cause was at issue, as to all the parties, or the steps of the law taken to bring them into default) does not

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appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants, or whether there might have been several trials, and several assessments of damages; and whether, if such several assessments had been made and differed in amount, any, and what judgment, ought to have been entered, are points upon which the court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi* was not well defined, or understood, in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. And this latter doctrine has been constantly adhered to, in modern times, and constitutes the received law. In cases of tort against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi*, as to some of them, and take judgment against the rest. The reason is said to be, that the action is in its nature [*75 joint and several; and, as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after verdict against several, elect to take his damages against either of them. *A fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in tort, as we shall hereafter see, it does not seem to have been denied that cases might exist in which, if the defendants severed in their pleas the plaintiff might, after judgment against one, have entered a *nolle prosequi* as to the others. The doubt was, whether he could do so before judgment, which was finally settled in favor of the right, and in such cases, where several damages were assessed against the different defendants, the difficulty was afterwards cured by entering a *nolle prosequi* as to all but one defendant. And in the same manner, a misjoinder of improper parties is sometimes aided. The authorities on this subject will be found summed up with great accuracy in a note of Mr. Sergeant Williams, to the case of *Salmons v. Smith* (1 Saund. R., 207, note 2.) In the same note, the learned editor adds, "if an action is brought upon any contract against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants against whom the recovery has been had from calling upon the other defendants for a ratable contribution."

So far as this reason goes, it is inapplicable to the present case; for, the defendants are entitled not only to a ratable, but a full contribution over, for the entire sum, against the party in whose favor the *nolle prosequi* has been entered; and, consequently, the *nolle prosequi* does not touch their rights. It is observable, also, that the language is qualified by the words "*who join in their pleas;*" which are printed in italics, and may therefore fairly be presumed to have been inserted by the learned editor, *ex industria*, with a view to point out an implied distinction between cases, where there is a severance, and where there is a joinder in the pleas. If there be any such distinction, it is favorable to the present case; for the plaintiffs severed in their pleas from their principal. The learned editor proceeds to state, that, "if in such actions the defendants sever in their pleas, as where one pleads some plea which goes to his personal discharge, such as bankruptcy, *ne unques executor*, and the like, not to the action of the writ, the plaintiff may enter a *nolle prosequi*, as to him, and proceed against the others; for, with respect to the bankruptcy, the statute of 10th Ann, chap. 5, 76*] makes the other defendant, who is not a bankrupt, liable for the whole debt; and therefore, in that particular instance the case is exactly the same as where an action is joint and several. So, the plea of *ne unques executor* does not deny the cause of action, but only that he is one of the representatives of the testator. When the defendants sever in their pleas, with this limitation as to the extent of the pleas in action upon contracts, it is immaterial what is the form of the action; for, the plaintiff may enter a *nolle prosequi* against any of them, before verdict, and proceed against the rest."

The learned editor is fully borne out, in the general position here stated, by the case of *Noke et al. v. Ingraham* (Wilson R., 89), to which he refers. The only question is, whether there is any such qualification upon it, as that the plea should be one going exclusively in personal discharge, and not to the merits. That is the point of real difficulty. The case in 1 Wilson R., 89, was upon several promises made by the defendants, as partners. One of them pleaded a former judgment; and issue being taken upon the replication of *nul tell* record, judgment was given against him, and a writ of inquiry of damages awarded, and final judgment. The other defendant pleaded his bankruptcy, and upon this, issue was joined; and afterwards the plaintiff entered a *nolle prosequi*, as to him. Upon error brought, the principal objection was, that the *nolle prosequi*, upon a joint contract of two, was a discharge of both. Mr. Chief Justice Lee said, "it is agreed on all hands, that in trespass against several, the plaintiff may enter a *nolle prosequi*, as to one, and that will not discharge the other; and therefore, I cannot see why it may not be done in this case; and I do not see how so proper an advantage can be taken upon the statute of Ann, as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." Wright, Justice, was of the same opinion, and so was Dennison, Justice; and the latter added, that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but

that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration, but that this is not the case here. This case is exactly the same as when an action is joint and several; for, the statute 10th Ann, ch. 15, has made the partner, not a bankrupt, liable for the whole debt. This case is the very same, as to this matter of entering a *nolle prosequi*, as if it had been trespass against several defendants."

It is apparent, from this summary of the reasoning of the court, that the case turned upon the consideration, that the contract, by the operation of the statute of Ann, was several as well as joint; and all the court concurred, that, under such circumstances, the *nolle prosequi* would be good, being governed, *in the analogy, to trespass, where the [*77 cause of action was several as well as joint. What was stated by Dennison, Justice, was not the exclusive ground of his particular opinion, but only a suggestion, that the case might be (not would be) different upon a plea to the merits. Now, the general reasoning comes very close to the case at bar; for here the bond is several, as well as joint, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained, who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy, the practice is, in England, to require all the joint contractors to be sued, as is proved by the case of *Bevil v. Wood* (2 Maule & Selw., 23), which makes it really less strong than a joint and several contract.

The case of *Moravia and another v. Hunter & Glass* (2 Maule and Selw., 444), which has been relied on at the bar, was *assumpsit* against four defendants, two of whom were not served; D, one of the other defendants, pleaded: 1. *Non assumpsit*. 2. A special plea of bankruptcy. 3. A general plea of bankruptcy, as to whom the plaintiff entered a *nolle prosequi*. The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the several matters above pleaded by the said D, freely here in court confess, that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi* so entered, had confessed the *non assumpsit*, as well as the other pleas; and therefore, the other defendant was also discharged, and the distinction of Dennison, Justice, in *Noke v. Ingraham* (1 Wils. R., 89), was relied on. But the court held, that the *nolle prosequi* was, in effect, only a confession; that as far as regards D, he had a defense in the matters pleaded by him. This case does not, in terms, overrule the distinction, but it does establish that the court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the court must have considered, that the confession of the plaintiffs, that they could not deny the several matters above pleaded, ought not to be deemed an

admission of the truth of the pleas, except so far as to waive further proceedings in the suit, against the party who sets them up as a defense. This conforms to the definition given in the book, of a *nolle prosequi*. "It is," as Sergeant Williams states (1 Saund. R., 207, note 2), "a partial forbearance by the plaintiff to **78***] proceed *any further, as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest."

These are the only cases in England which the researches of counsel have brought to our notice, bearing directly on the point before the court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities, as, see 1 Chitty's Plead., 32, 33, 546; Com. Dig. Pleader, X. 2, 3, 5; 2 Tidd's Practice, 630; 2 Arch. Practice, 219, 220; 2 Lilly's Practical Register, 280. In America, the cases have gone a step farther. In *Hartness v. Thompson* (5 John. R., 160), where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants, that was set up at the trial, it was held no ground for a nonsuit; but the plaintiff, upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi*, as to the infant, and take judgment upon the verdict against the others. In *Woodward v. Marshall* (1 Pickering's Reports, 500), in the Supreme Court of Massachusetts, upon a joint contract and suit against two persons, one of whom pleaded infancy, it was held that a *nolle prosequi* might be entered, as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of *Chandler v. Parker* (3 Esp. Rep., 76), and *Jaffray v. Frebain* (5 Esp. Rep., 47), but the court thought the practice adopted by themselves was most convenient, and therefore gave it a judicial sanction. These cases were distinguishable from that in 1 Wilson's R., 89, in the fact that the plea went, not only in personal discharge, but proceeded upon a matter which established an original defect in the joint contract; whereas, the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as matter of principle.

Hitherto the question has been discussed, as if the *nolle prosequi* had been entered before, when in fact it was entered after judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In *Lever v. Salkeld* (2 Salk., 455), in trespass against two defendants, and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other, and entered a *non pros.* after the judgment against the infants, and took out execution upon the judgment; upon error brought, it was objected that **79***] a *non pros.* could not be entered after judgment, for the judgment could not vary from the demand of the writ. It was argued on the other side, that torts were several, and

that a *non pros.* might be entered after, as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said, that he supposed there were interlocutory judgments, wherein it might well be; but a final judgment differed, for that being once wrong a subsequent entry would not set it right. The case was, however, adjourned, and nothing more appears of it. This case is not very accurately reported, and it may have been that the judgment was joint, and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned, shows that the doctrine thrown out by Lord Holt was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of *Parker v. Lawrence*, decided in the Exchequer Chamber, and reported in Hobart's Rep., 70. That was trespass against three; one pleaded not guilty, and the other two a justification to which the plaintiff replied, and there was a demurrer to the replication. Pending the demurrer, the issue was tried, and damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error, that the *nolle prosequi* discharged all three. It was agreed by the court (in conformity with the doctrine then prevailing), that if the *nolle prosequi* had been before judgment, it would have discharged the whole action; and so it would, if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two; for a nonsuit, or release, or other discharge of one, discharges the rest. But here the action was at an end, as to the one, by the judgment against him, and no judgment was had against the others, so that they were divided from him, and are not subject to the damages found against him. It was adjudged that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high court. It is cited as authority, by Chief Baron Comyns, in his digest (Pleader, X. 5), who also cites (Pleader, X. 3) the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favor of the judgment in Hobart, and it stands supported by a much earlier case, in the year books (14 Edw. IV.; Brooks abridg. Trespass, pl. 331). If the plaintiff may, in any case, recover a judgment against one on a joint action against two, who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment, in what stage of the cause the suit has ceased to be prosecuted *against the [**80** other. It is sufficient, that in the event the judgment is consistent with the general principles of the action. If a *nolle prosequi* may be entered after verdict, and before judgment, without discharging the other party, there is no good reason why it may not be done after judgment, when there has been no proceeding which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities, is, that there is no decision exactly in

point, to the present case; that there is no distinction between entry of a *nolle prosequi* before, and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground that the question is matter of practice, to be decided upon consideration of policy and convenience, rather than matter of absolute principle; and that therefore this court is left at full liberty to entertain such a decision as its own notions of general convenience, and legal analogies would lead it to adopt. We are of opinion, that where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

Mr. Justice JOHNSON, dissenting.

The facts appearing upon the records, from the count, pleas, and replications, are these: This action was on a bond given for the faithful discharge of the office of the cashier, by Philip H. Minor. It was joint and several. The defendants craved oyer jointly, and pleaded performance, to which plaintiff replied.

They afterwards had leave to withdraw the joint pleas; and the four securities jointly filed various pleas, to which plaintiff replied; and issue being taken, proceeded to trial, and obtained this verdict.

After the verdict, the principal to the bond was ruled to plead, and he then files a variety of pleas, similar in effect to those pleaded by the securities. The court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi*; and judgment is given for the principal, on the bond. That the plaintiffs take nothing by their bill, but for their false clamor, be in mercy, and that the defendant go thereof, without day, and receive his costs.

It was insisted by the defendants, that, in this state of the pleadings and record, the **81*** plaintiffs ought not to have had *judgment below; that there is error, and the judgment should be reversed. What further order this court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine that, in adjudicating upon questions of practice, a court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice.

To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed, without shaking as well established principles as adjudged cases, and opening a door to inconveniences, which must soon compel this court to retrace its steps.

The judgment, as it stands below, is against four out of five joint and several co-obligors; and the obligor omitted, or rather who has judgment in his favor, is the cashier, for whose good conduct in office the other three became bound. Now, this judgment is either a bar to a future suit against the principal or it is not. If a bar, then the record exhibits the inconsistent

case of four being made liable for one, who was not liable himself. And if it is not a bar, then, by possibility, it may be established by the verdict of a future jury, that the co-obligor, for whose misfeasance, alone, these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice that may lead to such consequences, cannot rest upon public convenience.

Nor is it more easy to reconcile it to principle. No authority need be cited to establish, that wherever judgment ought to have been arrested below, this court is bound to reverse for error. Now, this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff, whether to treat the bond as a joint or several contract. He has elected to treat it as joint, and must, therefore, abide by the law of joint contracts, as to both right and remedy; and, upon these, when under seal, it is an invariable rule, that all must be sued, if all have sealed the instrument, and are in life.

It is true, that, in general, the non-joinder of co-obligors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case in which it was impossible to plead in abatement, and that was precisely this case; since the discharge of the principal from the action was produced by the act of the plaintiff, after judgment, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule, on the subject of pleas in abatement; since, by the plaintiff's own showing, in his declaration *and replication, all the **82** co-obligors named in the instrument, sealed it, and were in life at the commencement and close of the suit.

This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of *Rice v. Shultz* (5 Bur. Reports, 2611) with the case of *Hermer and Moore*, noticed in the report of that case. In the one, it was necessary to plead in abatement, because the facts did not appear on record which were necessary to maintain the defense. In the other, the judgment was arrested, because the facts of the plaintiff's own showing made out that he ought not to have judgment, which were all had sealed the instrument, and all were alive. It cannot be questioned, that in a joint contract by five, where all remain equally bound—all in life, and all within reach of the process; more especially, where they have been all actually arrested—the plaintiff must recover against all, or none. This is that case; and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

It cannot be doubted, that had this *nolle prosequi* been entered before trial, the defendants must have been permitted to plead it, *puis d'erien continuance*, and that the plea must have been sustained. And what reason is there for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said they severed in pleading, and suffered the cause to go to trial without objection. But was it in the power of these defendants to compel their co-obligors to join them in pleading? or if the plaintiff chose to proceed erroneously

to trial, were the defendants under any obligation to arrest him, and set him right? It was his own folly, if he ruled them to trial, or consented to go to trial, or committed any other error, in proceeding to judgment. I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But, if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestable, that this judgment ought to be reversed. And I am yet to learn, that, in a joint action in contract against several, a *nolle prosequi* as to the whole action, against one, is not a bar as to him.

83*] *The cases are very few in the books in which the effects of a *nolle prosequi*, in such a case, has been tried by the only sufficient test—a plea in bar—to a suit upon the same contract. But as far as they have gone, they maintain the bar.

If a bar, in cases in which the suit is against a single defendant, there can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, *Beecher's* case, reported in 8 Coke, 58; Croke James, 211, is direct and positive.

That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action, upon the same contract, this was held to be a bar; and it became necessary to remove the judgments, by a writ of error, for some technical informalities, before this obligee could recover in the original contract.

It is true, that Sergeant Williams has said, in his note to 1 Saunders, (207, a.) "that a *nolle prosequi* is now held to be no bar to a future action, for the same cause, except in those cases where, from the nature of the action, judgment and execution against one, is a satisfaction of all the damages sustained by the plaintiff."

And by reference to the next page of his note, it appears that the exception here introduced is intended to embrace actions for torts; and therefore his rule is intended to apply to actions on contracts.

But the authorities he cites are far from bearing him out in his doctrine. The case of *Cooper v. Tiffin* (3 T. R., 511), upon which he relies, decides nothing but a question of costs; and the position that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum*, in case where the point was not presented.

So, also, of his other case in 1 Will., 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground, that he being dis-

charged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Sergeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained, until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood, in former times, than it is at this day. That if it were now better understood, we should perceive fewer of those inconsistencies which are supposed to exist in [*84 the decisions on this subject. Thus Sergeant Williams has mixed up the cases on torts with those on contracts, in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes *Green v. Charnock* (Croke Eliz., 762), which was trespass *quare clausam fregit*. And for other cases which he says establishes the principle "that a *nolle prosequi* is not of the nature of a *retraxit*, or a release; but an agreement only, not to proceed as to some of the defendants, on a part of the suit." Without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass, or tort.

Yet it cannot be contended that the use of the *nolle prosequi* in cases of tort, in which the defendants may be joined and disjoined at the pleasure of the plaintiff, can afford precedent or authority for the use of it, in cases of joint contract; in which the law, regarding the nature of the contract, and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly.

To me it appears that there is abundant authority to prove that the *nolle prosequi*, though entered by attorney, with the judgment that defendant "*eat sine die*," has the effect of a *retraxit*. Lord Coke certainly places them on the same foot, both in his institutes (1 Inst., 139), and his comment upon *Beecher's* case (8 Rep.), and in both instances he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet in one only is the term *retraxit* introduced into the entry of judgment. (See also 2 Rolls Abridg., *nolle prosequi*).

In *Green v. Charnock* (Cro. Eliz., 762), they are certainly treated as synonymous and equivalent. That was trespass, *quare clausam fregit*, against C. & S. S. made default, and judgment of *nil dicit* was then taken against him. C. pleaded in bar, plaintiff replied, &c., and judgment in demurrers for plaintiff. A *nolle prosequi* was then entered against S., and writ of inquiry and judgment against C. And the case proceeds: "Thereupon they brought error, and the error assigned, was because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both." So, again, in the case of *Dennis v. Payne* (Cro., ch. 551), P. & P. gave their joint and several bond to D., who sued the one severally, and after plea, entered a *retraxit*. He afterwards brought suit upon the bond, against

the other, P., who plead the *retraxit* to the first in bar. There was no question made upon its **85***] being a bar, either direct *or by estoppel; as to the obligor first sued, it is, in terms, admitted. But the benefit of that discharge was claimed by the second P., and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppel, only to be taken advantage of by him in whose favor it was entered; and Croke, who held it to be an estoppel, identifies it with a *nolle prosequi*, by observing that it is "*quasi* an agreement that he will no further prosecute; *non vult, ulterius prosequi*." So that both admit it to be a bar against the one discharged. So in Hobart, 70, and in 3 Keble, 332, p. 31, in the year 1674; *nolle prosequi* and *retraxit* are considered as synonymous. So in Silley's Practical Register, in 1719, a *nolle prosequi* is defined thus: "This is, that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a nonsuit, for a nonsuit is a default for non-appearance, but this is a voluntary acknowledgment that he hath no cause of action." (Title *Nolle Pros.*)

So Sergeant Salkeld, who comes down to the time of Queen Ann, refers to *Beecher's* case for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi* (Title *Retraxit*, 3 Salk). So in 4 Wood, 87, in the year 1691, it is distinctly asserted, that an entry "of a *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*" is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly I can find no adjudged case to support it.

In the case of *Walsh v. Bishop*, in (Cro. Char., 239, 243), referred to by Sergeant Williams, as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and after verdict against both, a *nolle prosequi* was entered against one, and the other moved it in arrest of judgment. In that case, it is admitted, in terms, by the court, that as to the one, the *nolle prosequi* was an absolute bar. And by reference to the same case, in page 239, it will be seen that the argument rested upon the right of the plaintiff to proceed against one of several defendants in trespass.

If this plaintiff ever had a right to proceed against these four defendants, in originating this suit, I should have felt no doubt. That is the case in trespass, that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*. (1 Will., 89; 3 Espin., R., 76). There is a modern book of practice of great respectability (I mean Sellon, title *Nolle Prosequi*) in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take **86***] nothing by their *bill, but for their 'false clamors be in mercy,'" which can at least detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole

cause of action, operates in effect as a *retraxit*. The judgment in this case goes to the whole cause of action, and as between the plaintiff and the cashier, is of the same effect as if there had been no other defendant to the action. In a subsequent part of the article, the same author (Sellon) recognizes the distinction between cases of trespass, or tort, and cases of contract; and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit, that if the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendant, to deprive them of a legal defense, or subject them to increased difficulties or liabilities, it is error.

The case in *Maule & Selwyn*, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumptit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the language of the court in that case be considered as affording the true rationale of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The court say, it amounts to an acknowledgment that the one defendant had a defense. But what defense did this co-obligor set up that the other defendants ought to have the benefit of? His pleas were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty.

It is a question of no importance—one of no influence upon the law of the case, whether a *nolle prosequi* may be entered before, or after judgment, or when it may be entered; other-wise than as it affects the legal relations of the parties, and the rules which govern suits at law.

And here, I think, I may very confidently maintain, that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain; or, unless the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action.

In the first class are comprised all actions of tort, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add, also, the case of bankrupts and infants, both of whom, when joint contractors, may be admitted as defendants, upon declaring against their co-obligors, according to the truth of the *case. They may, also, without prejudice [***87**] to their co-defendants, be discharged by *nolle prosequi*; but even as to them, it seems the precedents imposed a restriction; for, it is not permitted, if they have blended their fate with that of their co-defendants, by joining in their pleas. They have then waived their privilege. If their pleas impart no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded; because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time

when it would place the defendants in a worse situation, or deprive them of any advantage of making their defense.

Surely the precedents for entering the *nolle prosequi* after judgment in actions of trespass, against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here: since it is, in the one case, what the law enjoins; in the other, what it forbids.

Nor are the precedents of cases in which the one defendant never was bound, or is discharged by operation of law, without discharging the other, any better authority. In all these cases, the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them, by the judgment, than what could have been legally claimed of them by the action.

There is one curious result produced by this decision, which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion that it is no bar, is now to be deduced from a string of decisions, in every one of which Sergeant Williams himself admits that no recovery could be had against the defendant who has been discharged by the *nolle prosequi*. It is true he attributes this bar to the nature of the action, but this is at least acknowledging that the material question, in the trespass cases, never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the court—I mean the case of *Green v. Charnock* (1 Croke, 762); in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S.; it was adjudged, that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C., was reversed in error brought, and yet there they did not join in pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it 88*] is clear that, notwithstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment. (1 Saund. 217.) And the distinction between the actions of debt and trespass on this point, has been, until now, considered as known and established (1 Plow., 66, 6; 8 Rep., 120, 133; 2 Lilly Ab., 210, 107).

Upon the whole, I am very clear, that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.

Cited—5 Pet., 666; 11 Pet., 96; 16 Pet., 311; 5 How., 64; 9 How., 259; 17 How., 612; 19 How., 323; 4 Wall., 446; 10 Wall., 672; 14 Wall., 501; 10 Otto, 454; 1 Wood. & M., 321; 2 Wood. & M., 533; 1 Blatchf., 84; 15 Blatchf., 301; 1 McLean, 446; 4 McLean, 11; 1 Curt., 147; 2 Curt., 625, 627; 3 Sumn., 383; 3 Cranch, C. C., 683; Hemp., 223, 431; 1 Wall., Jr., 184; 3 Cliff., 207; 4 Cliff., 526.

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*JOSEPH PEARSON AND ROBERT [*89

Y. BRENT, Executors of ROBERT BRENT,
deceased, *Plaintiffs in Error*,

v.

THE BANK OF THE METROPOLIS,
Defendants in Error.

Promissory note—demand—evidence—pleading.

In an action against the indorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank. No other notice of the non-payment of the note was sent to the indorser but that left for him at the Bank of the Metropolis; and it was proved that there was an agreement, by parol, with the indorser, as to other notes discounted previously by the bank, for his accommodation; that payment, and demand of payment, should be made at the bank; the indorser residing a considerable distance from the bank.

The court held, that parol evidence was admissible to show the agreement relative to the place where payment of the note was to be demanded, although the agreement did not appear on the face of the note. Such an agreement is a circumstance extrinsic to the contract made by the note, and its proof, by parol, is regular. [92]

The indorser of such a note is himself bound by the contract made by the drawer, and by the established and known usage of the bank. [93]

Where it was omitted to allege in the declaration on the note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration could not be true unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and, after a verdict, the judgment will be sustained. [93]

THIS action was instituted in the Circuit Court, for the county of Washington, by the Bank of the Metropolis, on a promissory note, dated May 26th, 1819, drawn by George A. Carroll, and indorsed by W. Carroll and Robert Brent, for \$1,100, payable at sixty days, and negotiable at the Bank of the Metropolis. The declaration set out the note, and averred a demand of payment at the Bank of the Metropolis. In support of the issue, on the part of the plaintiffs in error, evidence was offered, that the accommodation given by the said bank, to George A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank, about three years before the date of the note, on which the suit was brought, and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation; and for the purpose of proving that it was the agreement and understanding of the bank, and W. Carroll, at the time of agreeing to give him this accommodation, that the note to be discounted should

NOTE.—*Promissory note*, parol agreement as to place of demand valid.

Sometimes, all the parties to a note—the maker, the indorsers, and the payee, or other holder—agree by parol, that a note, payable by its terms generally, shall be presented for payment at a particular place; in that case, a presentment at the place agreed on will bind all the parties, and no personal demand need be made upon the maker, to charge the indorser. (*State Bank v. Hurd*, 12 Mass., 172; *Whitwell v. Johnson*, 17 Mass., 449; *Bank of America v. Woodworth*, 18 John., 315; *S. C.*, 19 John., 591; *Story, Prom. Notes*, sec. 232; *Meyer v. Hibsher*, 47 N. Y., 265; 1 Daniels, Neg. Instruments, sec. 639.)

be payable at the Bank of the Metropolis, and the notes severally taken, for the renewal of such notes, and for the continuance of the said accommodation, should be in like manner **90**]* payable, and demanded, at the bank; they offered to prove, by parol evidence, that the said Carroll did not reside in the district, after the winter in which W. Carroll lived in the city of Washington—and that winter was the winter of 1817; and that after such time, said George A. Carroll occasionally visited the city, and resided at Washington, in Maryland, about twenty miles from the city, and at Port Tobacco; and that many of the notes, taken for the continuance of the said accommodation, were expressed to be payable at the bank; and that all notes, previous to the one now sued on, were there demanded, and such demand acquiesced in, as sufficient, and subsequent notes given in renewal of the notes so demanded; that it was the custom of the said bank to require, in all cases where the drawer was a non-resident, that there should be such an agreement to pay such notes at the bank; that the bank never would have agreed to discount the notes, except upon such a condition, and this was the understanding of the bank, and necessarily presumed to be known to W. Carroll, and the indorsers, at the time of making such accommodation, or at the time of his removal from the city of Washington.

The counsel for the defendants objected to the evidence; but the court overruled the objection, and admitted the evidence to be given. And the counsel for the defendants prayed the court to instruct the jury, that, to enable the plaintiffs to sustain their action aforesaid, against the defendants, it was necessary that a personal demand should have been made upon the maker of the note, for the money in the said note mentioned; but the court refused to give the instruction; but instructed the jury, that, if from the evidence given as aforesaid, the jury should be satisfied that it was agreed by all parties whose names appear on the notes, and the plaintiffs, that the payment should be demanded at the bank of the Metropolis; and that it was so demanded, at the bank, then a personal demand of the maker was not necessary. To which several refusals and opinions of the court, the defendants, by their counsel, excepted, and sued out this writ of error.

Mr. Swann, district-attorney, and *Mr. Worthington*, for the plaintiffs in error.

1st. Parol evidence cannot be admitted, to show the agreement alleged to have been made. Cited, 3 Stark. Evid., 4, p. 995, 999, 1002; 3 B. & A., 233; 8 Taunt., 92; 4 Mass. Rep., 414; 8 Johns. Rep., 187; 2 Black. Rep., 1249; 7 Taunt., 278; 1 Cowen, 249; 14 Mass. Rep., 155; 1 Gow., 74; 3 Camp. Rep., 57; 1 Taunt., 347.

2d. As to the custom claimed by the bank, 2 Stark. Evid., 455; 1 Phil. Evid., 429; 3 Stark., 1038-9-40; 9 Wheat. Rep., *Renner v. Bank of Columbia*.

91]* *Mr. Key*, for the defendants in error, cited the following cases: Chitty on Bills, 237; 12 Mass. Rep., 172; *Union Bank v. Hyde*, 10 Wheat., 27; also, 7 Johns. Rep., 99; 1 New. Rep., 172; 1 Call. Rep., 250.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This was a suit brought in the Circuit Court of the United States for the District of Columbia, on a note made by G. A. Carroll, and indorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis.

The declaration set out the note, and averred a demand of the same "at the Bank of the Metropolis," where the said note was payable.

At the trial, the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank, about three years before the date of the note on which this suit was brought; and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation.

For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there demanded, the bank proved by parol testimony that the said G. A. Carroll did not reside in the district after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes taken for the continuance of the accommodation were expressed to be payable at the said bank; and that all the notes previous to that on which this suit was brought were there demanded; which demand was acquiesced in as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes but on this condition.

The counsel for the defendants below objected to this testimony, but the court permitted it to go to the jury. The counsel for the defendants below then prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note. The court refused to give this instruction; but did instruct the jury that if they ***should** be satisfied, from the evidence, [***92**] that it was agreed by all the parties whose names appear on the notes, that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker was not necessary. An exception was taken to these opinions of the court, and their correctness is now to be examined.

The plaintiffs in error contend that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the

maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply.

No demand is necessary to sustain a suit against the maker. His undertaking is unconditional, but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

If the testimony was admissible, there is no error in the instruction given by the court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties, that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary.

This point is, we think, involved in the question respecting the admissibility of parol testimony, to establish the agreement. Had the note purported on its face to be payable at the Bank of the Metropolis, that express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol (and unless it can, the testimony was inadmissible), the effect of the parol contract is the same on this point as if it had been in **93*** writing. The only **inquiry* therefore is, whether the testimony was sufficient to be submitted to the jury for the purpose of proving the agreement. We think it was.

The circumstances, that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as a condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued, after the removal of the maker out of the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis; are facts, from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

A verdict having been rendered for the bank, the defendants in the court below filed errors in arrest of judgment.

The error alleged is that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker.

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The plaintiffs in error contend that the agreement is not alleged in the declaration, and we admit that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment.

After a verdict, it is, we think, sufficient to sustain the judgment.

There is no error, and the judgment is affirmed with costs.

Cited—10 Otto, 713.

***PHILIP HICKIE ET AL.,** Heirs and **[*94**
Legal Representatives of JAMES MATHER,
deceased, *Appellants*,

v.

ALEXANDER B. STARKE ET AL., Heirs
and Legal Representatives of ROBERT STARKE,
deceased, *Appellees*.

Jurisdiction—Georgia act of cession—"actual settlement."

In the construction of the 25th section of the Judicial Act, passed 24th of September, 1789, this court has never required, that the treaty, or act of Congress, under which the party claims, who brings the final judgment of a State court into review before this court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty, or act of Congress, and that the judgment of the court is in violation of that treaty or act. [98]

In order to bring himself within the protection of the act of cession by Georgia to the United States, for the land, the party must show that he was "actually settled" on the land, on the 27th of October, 1795, the period mentioned in the said act of cession. [98]

It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory. [98]

IN the Supreme Court of the county of Adams, in the State of Mississippi, the appellees filed a bill in chancery against the appellants; which, according to the laws of the State, was transferred to the Supreme Court, where judgment was given for the complainants.

The purpose of the bill was to obtain a conveyance of a tract of land, containing 2,000 acres: for which Robert Starke, in 1791, under whom the complainants claimed, obtained an order of survey from the Governor-General of Louisiana, which order was executed by the deputy-surveyor, and of which land he afterwards took possession, and cultivated for years. Subsequently, Robert Starke, being willing to exchange this body of lands for another, pro-

posed the same to the Governor of Louisiana. The bill alleged, that, from some personal hostility towards him, an offer of the land so held by him was made to James Mather, the ancestor of the appellants, the defendants in the bill; and a grant of the land was made in 1794, to James Mather, by the Governor of Louisiana, who thereupon entered, and cultivated part of the tract.

It was admitted, that all the forms required by the established laws and customs of Louisiana, while under the Spanish government, by which a full and complete title to land was acquired, had not been conformed to, by Robert Starke, or his heirs, the appellees; and that the **95***) title of James Mather was, *in all respects, full and complete, as a legal title, under those laws. The appellees, in their bill, claimed to have the land conveyed to them, as the title of the appellants had been acquired by collusion with the Governor of Louisiana; and that Robert Starke had been forcibly, and against his will, dispossessed of the land. Under the authority of the Supreme Court of Mississippi, a feigned issue was tried, to determine "whether the ancestor of the complainants ever made a voluntary abandonment of his right to the premises in question, free from any undue influence on the part of the Spanish government or its officers."

This issue was found, by the verdict of a jury, in favor of the complainants; and the same having been certified to the Supreme Court, a decree was made in favor of the complainants, the appellees. The appellants then filed their petition for a writ of error, to the Supreme Court of the United States; suggesting, that the title of James Mather arose "under the articles of agreement and cession," between the United States and the State of Georgia, and that by the decree of the Supreme Court that title has been overruled. The argument before the court was principally confined to two questions; upon the determination of which, the jurisdiction of the court in the case, depended,

1. Whether the construction and effect of the articles of agreement and cession, between the United States and the State of Georgia, were presented for the consideration of the Supreme Court of Louisiana, in the investigation of this case; so that, by the decree of the court, the title claimed by the appellants, under the articles of agreement, was brought into question.

2. Whether the appellants' title, being a full and complete Spanish grant, was confirmed by "the articles of agreement and cession," and was in itself a valid and indefeasible grant of the land.

The only facts connected with the discussion of the case before this court, were those which related to the actual possession of the land by James Mather, and the period of the same.

They are sufficiently noticed in the decision of the court.

Mr. Livingston, for the appellants.

The question of jurisdiction rests upon the fact, whether the construction of "the articles of agreement and cession" was before the court giving the decree for the appellees.

The articles provide, that all complete grants made by the Spanish or British governments, prior to the acquisition of Louisiana, by the

United States; and all incomplete grants made by the State of Georgia, before "the articles," shall be confirmed by the United States.

*The complainants' bill admits that **[96]** the appellants, the defendants in the Supreme Court of Louisiana, had a complete grant from the Spanish government of Louisiana, and thus the title of the appellants was brought before the court; and this title was made valid by the "articles of agreement and cession." The evidence in the case also fully establishes the Spanish title of the appellants, and this is shown in every part of the record; the omission of the appellants to plead this title, thus acknowledged, or thus proved, ought not to defeat it. (7 Wheat., 164, 201.) The petition for a writ of error to the Judge of the Supreme Court of Louisiana, states, that the title of the appellants is claimed under the "articles of agreement and cession;" and as he signs the allowance of the writ, the fact of the title having been before him, is sufficiently shown. As to the non-compliance, by the appellants, with the provisions of the act of Congress of 3d March, 1810, which provide for the registering of claims, under the Spanish and British governments, it was said:

1. Congress cannot pass a law to affect a title, which has been declared complete by the "articles of agreement and cession."

2. If that law is valid, the fact of forfeiture by non-registration must be ascertained by some proceeding, before the title can be considered as lost.

3. The provisions of the law refer to British grants, which were of a particular nature, and which were required to be exhibited to, and registered with the commissioners; and not to Spanish grants.

Both parties to the case claim under a law of the United States; and, by the 25th section of the judiciary law, the jurisdiction of this court extends to all such cases. As to jurisdiction, there was cited, 4 Crauch, 482; 4 Wheat., 348; 5 Cranch, 348.

Mr. M'Duffie and *Mr. Coxe*, for the appellees.

The court will not entertain jurisdiction of this case, but to a limited extent, if it shall consent to assume any jurisdiction over it; as the whole of the facts, upon which the equitable title of the appellees rested, having been peculiarly within the jurisdiction of the Supreme Court of Louisiana, sitting in chancery, and the decision of that court having affirmed these facts, they will remain unaffected by any proceedings here. (1 Wheat., 352; 2 *Ibid*, 363; 6 *Ibid*, 379, 390; 7 *Ibid*, 206.)

In the Chancery Court of Mississippi, "the articles of agreement and cession" were not noticed; and the decree was exclusively upon the equitable title of the complainants in the bill. This being the fact, it cannot be alleged here that the construction of these articles was brought into question.

*In order to maintain the jurisdiction **[97]** of this court it must be shown that the title under "the articles, &c.," was decided upon by the court.

2. "The articles of agreement and cession" look forward to the performance of certain acts under the laws of the United States. The 5th section of the act of Congress of 1803, requires

that titles claimed under Spanish grants shall be exhibited to a board of commissioners, to be appointed for the purpose of examining and registering the same; and, until it shall be shown that the appellants have a grant under the Spanish government, and that the same was exhibited and registered according to the provisions of the law, they are precluded from claiming title under "the articles of agreement and cession." The articles of agreement were not intended to extend further than to adjust the claims of the United States, and the State of Georgia, to the lands; and not to settle those of individuals. (*Henderson v. Poindexter*, 12 Wheat., 543). Congress had no power to legislate, so as to deprive anyone of an equitable title, and consequently the articles of agreement could not take away the appellees' title, existing before the cession.

3. The appellants are bound to show a good and perfect title, under the agreement with Georgia, and the laws of the United States; and that they were in possession of the property. The grant from Spain must have been legally executed, according to the Spanish laws; and under these laws the prior equitable title of the appellees would have been regarded and enforced. (7 Partidas, 16th, 17th title.) The operation of "the articles" cannot be such as will give validity to a title originating in fraud or violence; nor will this court say that a title originating thus shall be sustained; or that the decision of an inferior court, upon the facts of fraud and violence, was erroneous. (Cited, 7 Wheat., 206; 6 *Ibid*, 379.)

The Supreme Court of Mississippi did not decide that the title held by the appellees was invalid; but that it was a legal title, which could not, in conscience, be held by the appellants; and that they should convey the same to the complainants, the appellees. A court of chancery does not decide on the title to land, directly, but only operates on the same, collaterally.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a decree pronounced in the court of the last resort, in the State of Mississippi, directing the plaintiffs in error to convey to the defendants a certain tract of land in the said proceedings mentioned. The plaintiffs in error allege that their title was secured by the compact entered into between the United States and Georgia, for the cession **98*** of the country in which the land lies; and that this decree is in violation of that compact. The defendants insist, that the compact between the United States and Georgia was not called into question, and that the 25th section of the judicial act does not give this court jurisdiction of the case.

In the construction of that section, the court has never required that the treaty, or act of Congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty Peters 1.

or act. The condition in the cession act, on which the plaintiffs in error rely, is in these words: "That all persons, who, on the 27th day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants, legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain."

The plaintiffs produce a grant, legally and fully executed; but to bring the case under the treaty they must also prove that the ancestor, or person under whom they claim, was an actual settler on the 27th of October, 1795. The answer asserts, that the warrant of survey issued on the 7th day of February, 1793, and the survey made on the 20th July, in the same year, when possession was taken; and that the patent issued on the 3d April, 1794. James Williams deposes, that about the 3d December, 1795, he took possession of the tract of land in dispute, as overseer for James Mather the patentee, and understood from him that he had gone to Natchez some time before, to apply for land in the part of the country where the tract in controversy lies. This is the testimony furnished by the record, to prove that James Mather, the grantee, was an actual settler, according to the requisition of the cession act of Georgia. In *Henderson v. Poindexter* (12 Wheat., 530), the term "actual settler" seems to have been understood as synonymous with the resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the court is disposed to think that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory. Had the settlement proved by Williams been made at the day required by the cession act, it would, we think, have satisfied the requisition of that act, and entitled the plaintiffs in error to the benefit of the condition. But it was not made until the 3d of December, *1795. We think, [**99** then, that the plaintiffs in error have failed to prove that the person under whom they claim was an actual settler on the 27th day of October, 1795, and that the court has no jurisdiction of the cause.

The writ of error dismissed, it not appearing that this court has jurisdiction of the cause.

Cited—10 Pet., 395; 16 How., 512.

*THE UNITED STATES, Appellants, [**100**
v.

THE SALINE BANK OF VIRGINIA,
JOHN WEBSTER, ET AL., Appellees.

Discovery—exposure to penalties.

The plaintiffs, as creditors of an unincorporated bank, filed a bill against the cashier, and a number of persons, stockholders of the bank, for a discovery and relief; who, in reply to the bill, state, that their answers to the bill would subject them to penalties under the laws of Virginia, prohibiting unincorporated banks: Held, that the defendants

were not bound to make any discovery which would expose them to penalties. [104]

THIS case came before the court on an appeal by the United States, from the decree of the District Court of the United States for the western district of Virginia; in which court the District-Attorney of the United States filed a bill against John Webster, cashier, and a number of others, as stockholders of the Virginia Saline Bank, to charge them in their private capacities for certain deposits of money made with them, and also to subject their joint funds, &c.

The bill charges that about the year ——— a company was formed by a number of persons, citizens of Virginia, within that district, to carry on the usual and ordinary business of banking. That they established a banking house—assumed the name and style of the “President, Directors and Company of the Saline Bank of Virginia.” That they issued notes, or bills, purporting to be payable out of the joint funds—to make discounts and exchanges, whereby circulation and currency was given to their notes and bills. That in discharge of public dues, \$10,120 of their notes were paid into the treasury of the United States, before the 21st of October, 1819; and, on that day \$5,831 in said notes were deposited by an agent of the treasury with John Webster, cashier of the said association, who demanded payment therefor, after obtaining a certificate of deposit; which payment was refused by Webster, who said he had no funds.

At the same time, the agent presented a draft drawn by the Treasurer of the United States for \$4,290, being also for their notes received in the treasury, which was the balance of the said sum of \$10,120. This draft was refused also for want of funds. The bill charges that Webster possessed funds of the company in specie and notes of solvent chartered banks, and combined with individuals of the company to refuse payment, by fraudulently secreting these funds. The bill prays an account of the funds of the company, and also to subject the cashier and stockholders to a personal decree.

101*] *There was filed with the bill the following documents mentioned therein:

1. “Virginia Saline Bank, October 21st, 1812, William Wham has deposited in this bank, \$5,831, in notes of the same, for safe-keeping—to be returned to him, or his order.”

J. WEBSTER, Cashier.

2. “Virginia Saline Bank, 21st October, 1819. I certify that William Wham, cashier of the Bank of Columbia, acting as agent for the Treasurer of the United States, this day demanded payment of my receipt of this date, in his favor, for \$5,831. That he presented a draft drawn by the Treasurer of the United States, No. 9079, dated 18th March, 1818, in favor of Jonathan Smith, for \$4,290, and demanded payment for the said deposit and the said draft; whereunto I answered, that I was not prepared with funds, and could not pay the said draft, or deposit, at this time.”

J. WEBSTER, Cashier.

The above-mentioned draft, drawn by the treasurer, is in these words:

No. 9,079, Reg'd March 18th, 1818,
for the Register,

J. DAWSON,

No. 9079, Dr. 4,290.

Treasury of the United States,

WASHINGTON, March 18, 1818.

Sir—At sight, pay to Jonathan Smith, Esq., cashier Bank United States, \$4,290, value received.

T. T. TUCKER,

Trea. U. States.

JOHN WEBSTER, Esq.,

Cashier Virginia Saline Bank.

To the bill of the United States, the defendants filed the following joint and several plea, with the usual affidavit:

These defendants, by protestation, not confessing or acknowledging all, or any of the matters and things in the complainants' said bill of complaint contained, to be true, in such manner and form, as the same are therein alleged, and set forth, for plea thereunto say, that the company which assumed the name and style of the “President, Directors and Company of the Saline Bank of Virginia,” whereof mention is made in the said bill of complaint, had not, at the time of the issuing, or of giving currency or circulation to the notes or bills in the said bill of complaint mentioned, or at any time hitherto, any charter incorporating the said company with authority to deal or trade as a bank, or any charter whatsoever; and these defendants further say, that all the notes and bills issued by the said *company, and [*102 to which circulation and currency was given, as in and by the complainants' bill is supposed, were entitled and offered in payment by the said company, to wit, at the time of the issuing of the said notes and bills, as charged and supposed by the said bill of complaint, to wit, at the western judicial district of Virginia; and these defendants aver, that all the matters and transactions in the said bill of complaint stated, and whereof discovery is sought, relate to the emission of the said bills and notes by the said company, and to the offering the same in payment as aforesaid, all which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court may award; and these defendants are advised, and insist, that they ought not to be compelled to discover, or set forth any matters, whereby they may impeach or accuse themselves of any offense or crime, or be liable by the laws of the Commonwealth of Virginia, to penalties and grievous fines; for which cause, these defendants humbly pray the judgment of this honorable court, whether they shall be compelled to make any other or further answer to said bill of complaint, and humbly pray to be hence dismissed, &c.

J. PINDALL, Defendants' Attorney.

The cause was set for argument, on this plea, by consent. The District Court sustained the plea, and dismissed the bill. From which decree, the United States appealed to this court.

The record contains the articles of association called for by the bill, with a list of the subscribers, the 4th article whereof is in these words, viz.: “No stockholder shall be answerable in his person, or individual property, for any contract or engagement of the said com-

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pany, or for any losses, deficiencies, or defalcations of the capital stock of the said company; but the whole of the said capital stock, together with all the rights and credits, and all the property, both real and personal, belonging to the said company, and nothing more, shall, at all times, be answerable for the legal and equitable demands against the said company."

By the articles of association, it appeared that the subscription of the stock of the company began on the 14th of August, 1814.

The Legislature of Virginia had thrice enacted laws on the subject of unincorporated banking companies, in February and in November, 1816; and in August, 1817. (Tate's Digest, 41, 42.)

The following are the provisions of the laws of Virginia upon this matter:

1. It shall not be lawful for any association, or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed within **103*** the limits of *this Commonwealth, for the purpose of discounting notes, bills, or other securities, for the payment of money or other valuable thing, and issuing notes, drafts or bills, whether payable to order or bearer, or any other securities for the payment of money or other valuable thing, in the name, or on account, or for the benefit of, any such association or company, or otherwise for the purpose of dealing, trading, or carrying on business as a bank; to commence or continue the discounting of any notes, or bills, or other securities, for the payment of money or any other valuable thing, or the issuing of any notes, drafts or bills, or other securities for the payment of money, or other valuable thing, or such dealing, trading, or carrying on business, as a bank; and every member, officer or agent of any such company or association, that may so commence or continue such discounting or issuing of notes, drafts, bills, or other securities, or the dealing, trading, or carrying on business as a bank, shall be held and taken to be guilty of a misdemeanor, and, upon conviction thereof, on indictment, information or presentment, shall be liable to be fined at the discretion of a jury, in a sum not less than \$100, nor exceeding \$500. And, if any such company or association, or any president, manager, cashier, or other officer or agent of such company or association, shall pay out, deliver, put in circulation, or issue any note, draft, bill, or other security, for the payment of money or other valuable thing, purporting to promise, order, request or stipulate the payment of money or other valuable thing, or that money or other valuable thing is payable by, or on behalf of such company or association, or any person or persons as agent or agents thereof; each member, officer and agent thereof, shall be, in like manner, liable to the same penalty.

All contracts that hereafter may be made by individuals for the purpose of forming themselves into any association or company, for discounting and issuing notes and other securities, for the payment of money or other valuable thing, as mentioned in the first section of this act, or dealing, trading, or carrying on business as a bank, shall be, and the same are hereby declared to be utterly null and void.

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2. The capital stock of any association or company, trading, discounting paper, or issuing notes, in violation of this act, and all capital stock subscribed to such association or company, shall be held in trust for the benefit of the Commonwealth, and it shall be the duty of the Attorney-General, whenever he shall be informed of the existence of any such company or association, to institute a suit in the Superior Court of Chancery for the district of Richmond, in behalf of the Commonwealth, for the purpose of recovering the capital *stock [***104** aforesaid. In such suit it shall be lawful to make all or any of the members of such company or association, and any officer, agent or manager thereof, parties defendant, and to call upon and compel them, or either of them, to exhibit all their books and papers, and an account of all such matters and things as may be necessary to enable the court to make a decree in pursuance of the provisions of this act. The members of any such association or company, made defendants in such suit, shall be held severally liable to the Commonwealth for their respective proportions of the capital stock held in such company or association, at the institution of such suit, or the time of the decree, or by any person or persons, for his, her, or their benefit; and the court shall decree against the defendants, respectively and severally, the amounts that they and each of them may respectively and severally hold as aforesaid, in the capital stock of such company or association, or by any person or persons for his, her, or their use or benefit, to be levied of the proper goods and chattels, lands and tenements of such defendants. Provided, however, that no disclosure made by any party defendant to such suit in equity, and no books or papers exhibited by him in answer to the bill, or under the order of the court, shall be used as evidence against him in any motion or prosecution under this law, and that a recovery in such suit shall be a bar to every motion or prosecution against any defendant to such suit for the recovery of any penalty, or the infliction of any punishment prescribed by this act.

(See also 1 Randolph's Rep., 71 to 101 inclusive.)

The case was submitted to the court without argument, by the *Attorney-General* of the United States, and by *Messrs. Webster* and *Dodridge* for the appellees.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

The court below decided in favor of the validity of the plea, and dismissed the bill.

It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it.

The decree of the court below is therefore affirmed.

105*] *DANIEL RHEA ET AL., *Appellants*,
v.

DANIEL RHENNER, *Appellee*.

Liability of wife, deserted by her husband, for debts incurred in trade—marriage—conveyance of real property.

The law seems to be settled that when the wife is left by the husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes or has voluntarily abandoned the wife. [108]

By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years, and shall not have been heard of during that time. [108]

By those laws, a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed to pass real estate, until he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void. [109]

THIS was an appeal from the Circuit Court of the District of Columbia, and county of Washington, where a bill had been filed by Daniel Rhenner, the appellee, against Daniel Rhea and Elizabeth, his wife, and William Erskine, an infant, the son of Elizabeth Rhea, by a former husband, Robert Erskine.

Mr. Cox, for the appellants.

1. This case stood before the Circuit Court, as to Elizabeth Rhea, upon the bill and answer; although there may have been a replication, yet no proof having been taken, the hearing was upon the bill and answer only.

The proceeding is altogether irregular as to William Erskine, the infant; the rule being, that when redress is sought against an infant, all the averments must be made out by proof.

2. Two contracts are set out in the bill, one of which is a parol contract, and which is denied on the answer; no proof was given that such a contract had been made, and yet the decree proceeds upon it, as if it had been proved.

3. The deed executed by Daniel Rhea and wife, to the appellee, states the consideration to be a debt due by Daniel Rhea to the grantee; and the bill alleges the debt to have been one of Elizabeth Rhea. The parties to a deed are not allowed to contradict it. (1 Vez. Rep., 128; 2 Pierre Williams, 204.)

4. Elizabeth Rhea, being at the time the debt arose the wife of Erskine, could make no contract.

A married woman may act as a *feme sole* trader, but it does not follow that she can execute a deed. The deed of a married woman is absolutely void; and to constitute a deed an estoppel, it should be a valid deed.

5. It was not a sufficient consideration for the wife of Daniel Rhea to pass property away from her own son for the payment of a debt which, by this deed of conveyance, is stated to be due by Daniel Rhea to the appellee.

Mr. Key for the appellee.

The court below have not given a decree upon the alleged parol agreement. The decree allows the property to be sold for the payment

of the plaintiffs' claims, the proceeds to be brought into court, where the amount of these claims must be proved. Elizabeth Rhea was left by her former husband, Erskine, in 1814, carried on business as a *feme sole* trader, in Georgetown, and as such acquired the lot of ground conveyed to the appellee; she having contracted the debt to the appellee in the course of her trading. The husband having allowed her to contract debts and to purchase property, thereby consented that the property should be liable for her debts.

This is a proceeding in a court of equity, to sustain a claim, the justice of which cannot be denied; and it is easier to do so in such a proceeding than it would be in a court of law. (2 Vernon, 614, 104; Pree. in Chancery, 328.)

The absence of the husband, Erskine, is equivalent to abjuration of the realm, or banishment; in either of which cases the contracts of a married woman are valid by the law of England. (1 Bos. & Pull., 357; 2 Esp. Rep., 554; 4 Esp. Rep., 27.)

The deed acknowledged by a privy examination is an estoppel. (Cases cited, Cowp., 232; 7 Mass., 14, 19.)

Mr. Justice DUVAL delivered the opinion of the court:

This case is brought up, by appeal, from the Circuit Court for the District of Columbia and county of Washington, sitting in equity.

The appellee, who was complainant in the court below, filed his bill in equity, in the year 1822, in the Circuit Court, against Daniel Rhea and Elizabeth, his wife, and William Erskine, an infant son of said Elizabeth. The bill alleges that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of \$300 for goods sold and delivered; that being pressed for payment, she, with the defendant, Rhea, with whom she then lived, agreed, that if allowed further time, they would secure the debt by conveying to Rhenner a lot of ground, No. 165, in Beatty & Hawkins's addition to Georgetown, which was the property of said Elizabeth, and which had been conveyed to her by the name of Elizabeth Erskine.

That Rhea, together with the said Elizabeth, by their deed, *bearing date May 13th, [*107 1819, conveyed to the complainant the lot of ground before mentioned, for the purpose of securing the debt, with interest; and stipulated, that if the debt was not paid in two years, it should be held in trust, with power to sell the same, and apply the proceeds, &c.

The bill further states, that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, viz., on the tenth of May, 1819, but after the agreement to convey to the complainant, fraudulently conveyed the same premises to the defendant, Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection; that he, the said Rhenner, had, at a considerable expense, at the request, and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendants, by collusion, soon after obtained possession of the same, and still keep it, claiming to hold it under the deed to the infant. The bill concludes with praying, that the deed to William Erskine

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may be declared void, and that the property may be sold to pay his claim, &c.

The defendant, Daniel Rhea, in his answer, admits that his wife, before his intermarriage with her, viz., in May, 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself; that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son; that he had no title or interest in the premises; that the property belonged in May, 1819, to Elizabeth Erskine, who was a married woman; and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers, that she was married to Robert Erskine in January, 1812; that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint; the deed bears date on the 7th of April, 1817; that her husband, Erskine, left her in the year 1814, and she believed he was alive in May, 1819, and that she was not, at that time, the wife of Daniel Rhea; that in July, 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea; having received no support from her former husband since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the court; without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the court decreed a sale of the lot before mentioned, for payment of the claim of the complainant; and appointed a trustee to make the sale, under the terms prescribed in the decree; reserving the claim of the complainant for proof on it, and further order. From this decree, there **108** *] was an appeal, and the cause is now before this court for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory; and to what extent a woman who has been abandoned by her husband may contract debts, for which she is personally liable.

The law seems to be settled, that, when the wife is left without maintenance or support, by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the Court of Common Pleas, in England, is reported in 1 Bos. & Pull., 359. In delivering the opinions of the court, Mr. Justice Buller refers to the case of Lady Belknap, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys was banished by act of Parliament during life; and it was decreed in her case, that she might, in all things, act as a *feme sole*, and as if her husband was dead: and that the necessity of the case required she should have such power. (1 Vernon, 104.) And the same reason applying, where the husband had abjured the realm, the Peters 1.

wife, in that case, was allowed to sue as a widow for her dower. In such case, she has been permitted to alien her land, without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered, that banishment, or abjuration, is a civil death of the husband. In the case of *Deborah Gregory v. Paul, executor of Warburton*, reported in the 15th volume of Mass. Rep., all these cases are reviewed by the Supreme Judicial Court of Massachusetts, and the law recognized. In the case under consideration, there was a voluntary abandonment of the wife, by the husband, without having furnished her with the means of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deeds for the lot aforementioned was executed, her husband had been absent five years only; she continued under a coverture, and was the wife of Robert Erskine, her first husband. There is no evidence that she was at that time married to Daniel Rhea; and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven years, and *shall not have been heard of during **[*109]** that time. But by the laws of Maryland, which must govern in this case, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed.

The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May, 1819, are therefore inoperative and void.

The Circuit Court decreed, in this case, upon the bill annexed and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree.

It does not appear that any evidence was taken on commission, or otherwise, to establish, or disprove, the material allegations in their bill.

The record being thus defective, this court cannot make a final decision. The decree of the Circuit is reversed, and the record remanded for further proceedings.

*SUNDRY AFRICAN SLAVES. [*110

THE GOVERNOR OF GEORGIA, *Claimant,*
Appellant,

v.

JUAN MADRAZO.

THE GOVERNOR OF GEORGIA, *Appellant,*
v.

SUNDRY AFRICAN SLAVES.

JUAN MADRAZO, *Claimant.*

Jurisdiction—in suit against governor of a State, as such, State a party.

In the District Court of the United States, for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the State of Georgia, and were seized by the authority of the Governor of the State, for an alleged illegal importation; process was issued against the slaves, but was not

served. The case was taken by appeal to the Circuit Court, and the Governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the Circuit Court, &c. Held, that such a stipulation could not give jurisdiction in the case to the Circuit Court; as process could not issue legally from the Circuit Court against the Africans, because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess. [121]

"It may be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." [122]

The libel and claim exhibited a demand for money actually in the treasury of the State of Georgia, mixed up with the general funds of the State, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the State to exercise. Held, that the courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendment to the Constitution of the United States. [123]

In a case where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party in the record. [124]

THESE cases were brought before this court, from the Circuit Court of the United States for the district of Georgia, under the following circumstances:

The schooner *Isabelita*, a Spanish vessel, owned by Juan Madrazo, a native Spanish subject, domiciled at Havana, was despatched by him with a cargo, his own property, in the year 1817, on a voyage to the coast of Africa, where she took in a cargo of slaves. On her return voyage she was captured by a cruiser called the *Successor*, under the piratical flag of Commodore Aury, the said cruiser being then commanded by one Moore, an American citizen, and having been fitted out in the port of Baltimore, and manned and armed in the river Severn, within the waters and jurisdiction of the United States. The *Isabelita* and the slaves on board were carried to Fernandina, in Amelia Island, and there condemned by a pretended Court of **111** *Admiralty, exercising jurisdiction under Commodore Aury; and sold, under its authority, by the prize-agent, Louis Segallis, to one William Bowen. The negroes, so purchased by Bowen, were conveyed into the Creek nation, in consequence, as it was alleged, of the disturbed state of East Florida, the insecurity of property there, and with a view to their settlement in West Florida, then a province of the Spanish monarchy. Being found within the limits of the State of Georgia, they were seized by an officer of the customs of the United States, and delivered to an agent appointed by the Governor of Georgia, under the authority of the act of the Legislature of that State, passed in conformity to the provisions of the act of Congress of March, 1807, prohibiting the importation of slaves into the United States, the

negroes having been so brought into the United States, in violation of that act.

Some of the negroes were sold by an order of the Governor, without any process of law, and the proceeds paid over to the treasurer of Georgia. The residue of the negroes are in possession of an agent, appointed by the Governor of Georgia.

The *Isabelita* was fitted out as a cruiser at Fernandina; taken by Moore to Georgetown, South Carolina; seized there by the United States, sent round to Charleston; libeled in the District Court of South Carolina; and by a decree of that court, restored to Madrazo, the claimant.

The Governor of Georgia filed an information in the District Court of the United States for the District of Georgia; praying that a part of these Africans, which remained specifically in his hands, might be declared forfeited, and may be sold.

A claim was given in, in this case, by William Bowen; Juan Madrazo, the libellant in the other case, did not claim.

The decree of the District Court dismissed the claim of William Bowen, and adjudged the negroes to be delivered to the Governor of Georgia, to be disposed of according to law.

William Bowen appealed to the Circuit Court, by which court his claim was dismissed; and from the decree of that court, dismissing his claim, he has not appealed.

Juan Madrazo filed his libel in the District Court of Georgia, alleging, that a Spanish vessel called the *Isabelita*, having on board a cargo of negroes, was piratically captured on the high seas, carried into the port of Fernandina, there condemned by some pretended tribunal, and sold; that the negroes were conveyed, by the purchaser, into the Creek nation, where they were seized by an officer of the United States, and by him delivered to the government of the State of Georgia, pursuant to an act of the General Assembly of the State of Georgia, carrying into effect an act of Congress of the United States; *that a part of the said **112** slaves were sold, as permitted by said act of Congress, and as directed by said act of the general assembly of the said State, and the proceeds thereof deposited in the treasury of the said State; that part of the said slaves remain undisposed of, under the control of the Governor of the said State, or his agents; and prays restitution of said slaves and proceeds. Claims were given in by the Governor of Georgia, and by William Bowen. The District Court dismissed the libel, and the claim of William Bowen. From this appeal, Juan Madrazo appealed to the Circuit Court.

The Circuit Court dismissed the libel and claim of the Governor of Georgia, and directed restitution to the libellant; and from this de-

NOTE.—*Jurisdiction of Circuit Courts by consent.* The jurisdiction of the Circuit Courts is limited to that conferred by act of Congress. They have no jurisdiction, except such as Congress, by constitutional laws, has conferred upon them. (*United States v. Hudson*, 7 Cranch, 32; *McIntire v. Wood*, 7 Cranch, 504; *United States v. Bevans*, 3 Wheat., 336; *Moffat v. Soley*, 2 Paine, 103; *Hubbard v. North. R. R. Co.*, 3 Blatch., 84; *S. C.*, 24 Vt., 715; *Ex-parte Cabrera*, 1 Wash. C. C., 232; *Shute v. Davis*, 1 Pet. C. C., 431; *Livingston v. Jefferson*, 1 Brock. Marsh., 203.)

As to jurisdiction of Circuit Courts generally, see notes to *Emory v. Greenough* (3 Dall., 369); to *Strawbridge v. Curtis* (3 Cranch, 267); *U. S. v. Coolidge* (1 Wheat., 415); *U. S. v. Bevans* (3 Wheat., 336).

As to jurisdiction of District Courts generally, see note to *Glass v. The Betsey* (3 Dall., 16.)

As to jurisdiction of the United States Supreme Court, see notes to *Matthews v. Zane* (4 Cranch, 382); to *Martin v. Hunter* (1 Wheat., 304); to *Houston v. Moore* (3 Wheat., 433); *McCormick v. Sullivan* (10 Wheat., 192.)

cree, appeals have been taken by the State of Georgia, and by William Bowen. A warrant of arrest was issued by the District Court, but was never served. A monition also issued, and was served, on the Governor and Treasurer of the State of Georgia.

In the Circuit Court, the following proceedings took place: "On motion of the proctors of the libelant, Madrazo ordered, that he have leave to renew his warrant, for the property libeled; but it shall be held a sufficient execution of such warrant, if the Governor, who appears as claimant, in behalf of the State, will sign an acknowledgment that he holds the same subject to the jurisdiction of this court."

Whereupon the following instrument was filed, December 24th, 1823:

EXECUTIVE DEPARTMENT,)
MILLEDGEVILLE, May 15th, 1823. {

The executive having been furnished by the deputy-marshal with the copy of an order, passed by the Circuit Court of the United States, in relation to certain Africans, the title to which is a matter of controversy in said Circuit Court, and also in the Superior Court of the county of Baldwin, makes the following statement and acknowledgment, in satisfaction of said order and notice.

Juan Madrazo } Libel in admiralty,
v. } against sundry
Sundry Africans. } African negroes.

The Governor of the State of Georgia acknowledges to hold sundry African negroes, now levied on, by virtue of sundry executions, by the sheriff of Baldwin county, subject to the order of the Circuit Court of the United States, for the District of Georgia; after the claim of said sheriff, or prior thereto, if the claim in the said Circuit Court shall be adjudged to have priority of the proceeding in the State Court. JOHN CLARK, Governor.

113*] *Documentary evidence was introduced in the court below, and witnesses were examined, which proved the interest of Madrazo in the Isabelita; the illegality of the capture and condemnation; and which were intended to prove the identity of the negroes, the subject of the proceedings, with those who had been on board the Isabelita.

On the part of Juan Madrazo, it was contended,

1. That his proprietary interest in the slaves, and the illegality of the capture, and condemnation of the Isabelita and cargo, were fully proved, and that he is entitled to restitution of the property libeled.

2. That the court below had jurisdiction.

3. That the possession of the property libeled, the service of the monition, and the order of the Circuit Court, and agreement of the Governor of Georgia, filed in that court, fix the parties in possession of the property for it; and that the process of the court will operate on them individually, and not on the State of Georgia.

On the part of the State of Georgia, it was contended,

1. That the court below had no jurisdiction.

2. That there is no sufficient proof of proprietary interest, to entitle Juan Madrazo to restitution of the property libeled.

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William Bowen was not represented by counsel, before the court.

As the decision of the court was exclusively on the question of jurisdiction, no other than the arguments of counsel on that question are given.

Mr. Berrien, on the part of the State of Georgia.

1. The Circuit Court of the United States had no jurisdiction in the case, it involving jurisdiction over the State of Georgia.

Jurisdiction cannot be claimed on the ground of consent; it cannot be obtained by the voluntary appearance of the Governor of Georgia to the libel of Madrazo, and he had no right to give jurisdiction. The exemption of a State from the jurisdiction of the courts of the United States, is for the preservation of their sovereignty; it is an attribute of sovereignty, and it is no objection to the exception being taken, that the appearance was voluntary. The Governor of Georgia could not yield up this attribute of the sovereignty of the State; his agency being limited by the constitution. A party may object to the jurisdiction of the court below, to try a cause which he himself instituted. (*Capron v. Van Noorden*, 2 Cranch, 126). This question is therefore to be considered as unaffected by the appearance of the Governor of Georgia.

The 11th article of the amendments to the Constitution of the United States, takes away the jurisdiction of the courts of the Union, in all cases in law and equity in which claims are *preferred against the separate [*114 States; and the amendment was intended to leave to the several States the adjustment of the claims of individuals upon them. (*Cohens v. State of Virginia*, 6 Wheat., 264). The judicial power of the courts of the United States, is, by the amendment, prevented from extending to any suit, commenced or prosecuted, &c., against a State. (6 Wheat., 264, 407, 408.)

The alteration in the constitution was not made by revoking a power which the courts possessed; but the amendment declares, that "the judicial power shall not be construed to extend to suits, &c.:" and it denies that such a power ever existed.

Why is not a suit in the admiralty a suit at law?

It proceeds according to the law of the country, and in the courts of the country. The laws which govern and regulate the decisions of the admiralty courts, are the laws of the Union.

It is agreed, that, according to the doctrine in *Fowler v. Lindsey* (3 Dall., 411), the State must be either nominally or substantially a party to the suit. It is not enough that the suit may, in its result, consequentially affect its interests.

The State of Georgia is a party in the proceedings of Madrazo; a citation is prayed to the State; and the property which the libelant seeks to obtain, by the decree of the District Court is in the possession of the Governor of Georgia, under the authority of a law of the State; another part is in the treasury of Georgia, and has become mingled with the general and public funds of the State. The process of the court was served on the Governor and Treasurer of the State; and they are required to

show cause why restitution shall not be decreed. The law of the United States of 1807 prohibits the importation of slaves, and directs, that if slaves are brought in, they shall be seized, and delivered to the governor of the State in which the seizure is made. The Governor of Georgia appointed an agent to receive them; and the libel states the slaves claimed were delivered to the agent of the State. The right of the State of Georgia, acquired under that act, is spread on the record by the libellant; and it is this right, so acquired, which he seeks to divest. The State of Georgia is, therefore, a party to this suit, because the *res* is in her possession; and the monition issued below, was served upon the Governor and the Treasurer of the State.

The jurisdiction is also denied, because a judgment of the court would operate directly on the State of Georgia. Madrazo should look to the Legislature of Georgia for redress; and the appeal to her justice is not to be made through the courts of the United States.

The terms of the amendment to the constitution, **115***], its spirit, *and the views heretofore taken of it by this court, are all opposed to the construction now claimed, which will except from the operation of the amendment, cases of admiralty jurisdiction. Proceedings in the admiralty, are suits at law. Does the admiralty proceed without law, according to the will of the judge? The forms of its proceedings are according to the civil law; the rights of the parties are decided according to the law of nations, and the law merchant; and both on its prize and instance side, according to the municipal laws of the country where it sits.

The objections made by the States to their liability, before the amendment to the constitution, was not to the mode by which the suit was instituted; but to the fact of their being made answerable to the courts of the Union.

To restrict the amendment to cases of common law and equity, would not, therefore, have afforded an adequate remedy to the alleged grievance. Nor was the restriction established with a reservation as to claims, by foreigners; neither was it intended to leave uninfluenced by it, cases which might arise out of a state of war. Many of the suits which had been brought, and which might have been brought, before the amendments, were instituted by foreigners; or were of a nature to be prosecuted in the admiralty. The construction claimed by the opposite counsel, would exhibit the extraordinary fact, that while the amendment took away the jurisdiction of the Supreme Court in suits against States, it left it in the lowest court under the constitution.

Nor does the exemption of the States from suits in the admiralty, authorize apprehensions of internal difficulties. In cases of capture, at war, on the high seas, by whatever ship of war or armed vessel, acting under the authority of the United States, the capture may be made, no right could be acquired by capture to the property, by a State; the right to the property, is that of the sovereign who makes the war; and, but for the prize act, by which the property captured is condemned and distributed, it would remain the property of the sovereign. Cited, *Osborne v. The Bank of the United States* (9 Wheat., 157-8); likewise

Cohens v. The State of Virginia (6 Wheat., 264).

But if the amendment to the constitution does not extend to cases of admiralty jurisdiction, the jurisdiction of this case would be in the Supreme Court, and, therefore, there is error in these proceedings.

2. The court below never had possession of the *res*, or anything pertaining to it. The warrant of arrest issued in the District Court was never served, the court relying on the service of the monition, which was erroneous.

*The *res* remained in the possession [***116** of the Governor of Georgia, without any agreement for its production.

The proceedings in the District Court, not having been founded upon the *res*, and the service of the monition not having been legal, the Circuit Court could not have jurisdiction on the appeal. As an appellate court, it could by no proceeding get possession of the *res*; and the case should have been remitted by the Circuit to the District Court.

The provisions of the act of Congress of 1807, which apply to this case, were not repealed by the law of 1818.

The repeal applied to importations by sea, and these slaves were brought into Georgia by land.

Mr. Wilde, for Juan Madrazo, made these points:

1. That the court below had jurisdiction.

2. That the proprietary interest of Madrazo in the *Isabelita*, and slaves, and the illegal outfit of the Successor, are sufficiently proved; and he is consequently entitled to restitution.

The original grant of jurisdiction, in such cases, to the courts of the United States, is ample. (2d sect., 3d art. Con. U. S.) The admiralty jurisdiction is, "of all cases of admiralty, a maritime jurisdiction," generally, without restriction; whether they arise under the constitution, laws, and treaties of the United States, or the law of nations.

The grant of common law and equity jurisdiction is confined to cases arising under the constitutional laws and treaties of the Union. Before the amendment to the constitution, the courts of the United States must have taken cognizance of admiralty cases; although a State were directly interested, or even a party on the record.

Even since the amendment, there are cases in which it is presumed these courts may take jurisdiction, although a State be a party. The second clause of the tenth section of the second article of the constitution, prohibits the States from keeping troops, or ships of war, only in time of peace. In time of war, they may. During actual hostilities, there is nothing to prevent a State from fitting out a ship of war, or even a fleet, for defense, or annoyance; and the lawful prizes made by such a fleet, it is presumed, would be the property of the State; a State may exercise this power. Congress have the right to make rules concerning captures. Such rules are the supreme law. But if all captures, made by State cruisers, are to be tried in State tribunals, how long could the rules of Congress concerning captures be enforced, or the belligerent rights of the Union be exerted without the violation of justice to neutral nations?

To the great powers of war and peace, must

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117*] be attached *those of making war efficient, and peace secure. Unjust judgments, unredressed, are among the causes of war. But if the State tribunals are to decide in the last resort, upon captures made by their own vessels, where neutral claimants are concerned; the whole may be involved in war, by the misconduct of a part.

This court will not adopt such a construction of the amendment, unless it is forced upon them by its terms.

The language must be clear, strong and peremptory, which coerces its adoption.

The grant distinguishes between common law and equity jurisdiction, and admiralty jurisdiction. They are given by distinct clauses, and to a different extent; and are treated as separate powers. If they are so considered—if the three are separately granted, distinguishing each from the other, and two only are taken away, does not the third remain?

If the District Court were proceeding without jurisdiction, how has it happened that a prohibition was not moved for? It would lie, in such a case (*United States v. Peters*, 3 Dall., 121); and an appeal might be taken on the decision. (*Cohen v. Virginia*, 6 Wheat., 397.) The counsel referred to Publicus, No. 80, and to the debates of the conventions, on adopting the constitution. But, supposing the amendment extends to, and excludes, admiralty, as well as equity and common law jurisdiction; is this a case where the State is a party defendant on the record, or in which her rights are directly implicated; and the process of this court must go against her? In form, the State is not a party; the information and claim are by John Clark, Governor, in behalf, &c. The proceeding, if State interests are implicated, is not against a State, but by a State; the State, if a party at all, is the actor. In substance, it is a judicial proceeding, at the instance of a State; in which she seeks the aid of the United States Courts, to give effect to a title claimed in her behalf, under the United States laws. In effect, the sentence and process of the court will operate not upon the States, but on individuals. (*Osborne v. The Bank of the United States*, 9 Wheat., 738, and *The United States v. Bright*, 3 Am. Law Journal, 216.)

Has the State of Georgia really any interest in these Africans? The claim set up, is under the act of Congress of 1807, prohibiting the slave trade; which places Africans illegally imported at the disposition of the State into which they are brought; and the act of Georgia of November, 1817, ordering them to be sold, unless taken by the Colonization Society, and all expenses since capture and condemnation paid. Before any decree upon this information—before it was even filed—all that part of the act of 1807 under which Georgia could derive any title, was repealed. (Act of 1818; Ing. Dig.)

118*] *The title to property forfeited, or liable to forfeiture, is not divested, till it is libeled and condemned; and if there be an appeal, not until sentence of condemnation is rendered in the appellate tribunal. (*Yeaton v. The United States*, 5 Cr., 281-3.)

If the statute creating the forfeiture be repealed before final sentence, without reserving the right to punish cases arising under it, condemnation cannot take place. (*Schooner Ra-Peters* 1.

chael v. The United States, 6 Cr., 329; *The Irresistible*, 6 Wheat., 551.)

Until the condemnation, the State has no right to the Africans.

After condemnation, indeed, the importer's title is divested, by relation back to the act of forfeiture. But until condemnation, his title is not divested.

The right of the State depends upon the result of a judicial investigation; which, when a forfeiture is ascertained by final sentence, gives it relation back to the time of the act committed, and from that period divests the importer, and invests the State, with his title. But if pending the proceedings the act is repealed, the judicial proceeding necessary to give effect to the claim of the State can have but one result.

That claim must be rejected.

The proposition, that the Courts of the United States have not jurisdiction in such a case, then, comes to this: an alleged right, in a State, though dependent upon the result of a judicial inquiry, may be set up, to preclude that inquiry, upon the result of which it depends. And that, even though the court could look into the question, must determine that no right, in fact, exists.

Under this act, there was no authority to sell the Africans before condemnation; and the money, if in the treasury, is there by the unauthorized act of an individual, and in violation of the law.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the Island of Cuba, engaged in the slave trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sail, under the flag of one of the governments of Spanish America, and carried into Amelia Island, where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William Bowen, and were conducted into the Creek nation, *within the limits of the [***119** State of Georgia, where they were seized by M'Queen M'Intosh, a revenue officer, at Darien, in Georgia, early in January, 1818, under the act of 1807; which prohibits the importation or bringing into the United States of any negro, mulatto, or person of color. This act annuls the title of the importer, or any person claiming under him, to such negro, mulatto, or person of color, and declares that such persons "shall remain subject to any regulation, not contravening the provisions of this act, which the Legislatures of the several states or territories, at any time hereafter, may make for disposing of such negro, mulatto, or person of color."

In December, 1817, the Legislature of Georgia passed an act, which empowered the Governor to appoint some fit and proper person to proceed to all such ports and places within this State, as have or may have, or may hereafter hold any negroes, mulattoes, or persons of color, as have been, or may hereafter be seized or condemned under the above recited act of Congress, and who may be subject to the con-

trol of this State; and the person so appointed shall have full power and authority to receive all such negroes, mulattoes, or persons of color, and to convey the same to Milledgeville, and place them under the immediate control of the executive of this State.

The second section authorizes the Governor to sell such negroes, mulattoes, or persons of color, in such manner as he may think most advantageous to the State.

The third directs that they may be delivered up to the Colonization Society, on certain conditions therein expressed; provided the application be made before the sale.

Under this act, the Africans brought in by William Bowen were delivered up to the Governor of Georgia, who sold the greater number of them, and paid the proceeds, amounting to \$38,000, into the treasury of the State. The Colonization Society applied for those remaining unsold, amounting to rather more than twenty, and offered to comply with the conditions prescribed in the act of December, 1817.

In May, 1820, the Governor of Georgia filed an information in the District Court of Georgia, stating the violation of the act of Congress, that the Africans were placed under the immediate control of the executive of the State, where they awaited the decree of the court. He states the application made on the part of the Colonization Society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the court.

In November, 1820, William Bowen filed his claim to the said Africans, alleging that they **120*** were his property; that they *had not been brought into the United States in violation of the act of Congress; but were seized while passing through the Creek nation, on their way to West Florida.

In February, 1821, Juan Madrazo filed his libel, alleging that the Africans were his property; that on the return voyage from Africa, they were captured by the privateer Successor, commanded by an American, and fitted out in an American port; that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States, brought into the limits of the District of Georgia, and delivered over to the government of that State, in pursuance of an act of the General Assembly, carrying into effect an act of Congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to \$38,000, or more, paid into the treasury of the State; and that the residue, amounting to twenty-seven or thirty, remain under the control of the Governor.

The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the Governor of Georgia; and that the Governor and all others concerned, should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold, paid over to him.

Upon this libel a monition was issued to the

Governor of Georgia, who appeared and filed a claim on behalf of the State; in which he says, that the slaves were brought into the State in violation of the act of Congress, and that they were taken into the possession of the executive of the State, in pursuance of the act of the State Legislature, enacted to carry the act of Congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the treasury, where they have become a part of the funds of the State, not subject to his control, or to the control of the treasurer. That the residue of the said slaves, who remain unsold, have been demanded under the law, by the Colonization Society.

Process was also issued against the Africans, but was not executed. The two causes came on together, and the District Court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal to the Governor of the State, and that the proceeds of those sold should remain in the treasury.

Both Bowen and Madrazo appealed to the Circuit Court.

At the hearing in the Circuit Court, the sentence, dismissing *the claim of Bowen, [***121**] was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made, that the slaves remaining unsold should be delivered to him, on his giving security to transport them out of the United States; and farther, that the proceeds of those which were sold should be paid to him. From this decree, the Governor of Georgia and William Bowen have appealed to this court.

A question preliminarily to the examination of the title to the Africans, which were the subject of these suits, and to the proceeds of those which were sold, has been made by the counsel for the State of Georgia. He contends, that this is essentially, and in form, a suit against the State of Georgia, and therefore was not cognizable to the District Court of the United States.

The process which issued from the Court of Admiralty not having been executed, the *res* was never in possession of that court. The libel of Madrazo, therefore, was not a proceeding against the thing, but a proceeding against the person for the thing. This appeal carried the cause into the Circuit Court, as it existed in the District Court, when the decree was pronounced. It was a libel, demanding, personally, from the Governor of Georgia, the Africans remaining unsold, and the proceeds of those that were sold; which proceeds had been paid into the treasury.

Pending this appeal, the Governor filed a paper in the nature of a stipulation, consenting to hold the Africans claimed by the libel of Madrazo, subject to the decree of the Circuit Court; if it should be determined that the claim in the Circuit Court had priority to sundry executions, levied on them by the sheriff of Baldwin county. Had this paper been filed in the District Court, it would have been a substitute for the Africans themselves, and would, according to the course of the admiralty, have enabled that court to proceed in like manner as if its process had been served upon them. The libel would then have been *in rem*. Could this

paper, when filed in the Circuit Court, produce the same effect on the cause?

We think it could not.

The paper in nature of a stipulation, is a mere substitute for the process of the court; and cannot, we think, be resorted to where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty; which the Circuit Court does not possess.

This cause therefore remained in its character a libel against the person of the Governor of Georgia, for the Africans in his possession as governor, and for the proceeds, in the treasury, **122***] of *those which had been sold. Could the District Court exercise jurisdiction in such a cause?

Previous to the adoption of the 11th amendment to the constitution, it was determined that the judicial power of the United States extended to a case in which a state was a party defendant. This principle was settled in the case of *Chisholm v. Georgia* (2 Dal., 419). In that case, the State appears to have been nominally a party on the record. In the case of *Hollingsworth v. Virginia*, also, in 3 Dal., 378, the State was nominally a party on the record. In the case of *Georgia v. Brailsford* (2 Dal., 402), the bill was filed by his excellency Edward Telfair, Esq., Governor and Commander-in-Chief, in and over the State of Georgia, in behalf of the said State. No objection was made to the jurisdiction of the court, and the case was considered as one in which the Supreme Court had original jurisdiction, because a State was a party. In the case of *New York v. Connecticut* (4 Dal., 3), both the States were nominally parties on the record. No question was raised in any of the cases respecting the style in which a State should sue or be sued; and the presumption is that the actions were admitted to be properly brought. In the case of *Georgia v. Brailsford*, the action is not in the name of the state, but it is brought by its chief-magistrate in behalf of the State. The bill itself avows, that the State is the actor, by its governor.

There is, however, no case in which a State has been sued without making it nominally a defendant.

Fowler et al. v. Lindsey et al. (3 Dal., 411), was a case in which an attempt was made to restrain proceedings in a cause depending in a Circuit Court, on the allegation that a controversy respecting soil and jurisdiction of two States had occurred in it.

The court determined that a State, not being a party on the record, nor directly interested, the Circuit Court ought to proceed in it. In the *United States v. Peters*, the court laid down the principle, that although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

In the case of *Osborn v. The Bank of the United States* (9 Wheat., 738), this question was brought more directly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the State were defendants, and the title of the State itself to the subject in contest was asserted. In that case, the court said:

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"It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." The court added, "the State not being a party on [***123** the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The information of the Governor of Georgia professes to be filed on behalf of the State, and is in the language of the bill, filed by the Governor of Georgia on behalf of the State, against Brailsford.

If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this.

The libel of Madrazo alleges that the slaves which he claims "were delivered over to the government of the State of Georgia pursuant to an act of the General Assembly of the said State, carrying into effect an act of Congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of Congress, and as directed by an act of the General Assembly of the said State, and the proceeds paid into the treasury of the said State, amounting to \$38,000, or more."

The Governor appears and files a claim on behalf of the State to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the Legislature of Georgia, made to give effect to the act of Congress on the subject of negroes, mulattoes, or people of color, brought illegally into the United States, and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control.

The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the State, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of Congress. The possession has been acquired by means which it was lawful to employ.

The claim upon the Governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant, as the appealed bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the *State itself [***124** may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a pro-

ceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the State, made for the purpose of giving effect to an act of Congress, and has done nothing in violation of any law of the United States.

The decree is not to be considered as made in a case in which the governor was a defendant in his personal character; nor could a decree against him, in that character, be supported.

The decree cannot be sustained as against the State, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit, prosecuted not against the State, but against the thing, because the thing was not in possession of the District Court.

We are therefore of opinion that there is error in so much of the decree of the Circuit Court as directs that the said slaves libeled by Juan Madrazo, and the issue of the females now in the custody of the government of the State of Georgia, or the agent or agents of the said State, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves, who were sold by order of the governor or the said State, be paid to the said Juan Madrazo, and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the Governor of Georgia and the claim of William Bowen.

Mr. Justice JOHNSON, dissentiente:

By the new and unexpected aspect which this cause has assumed in this court, I feel myself called upon to accompany the report of this decision with a brief explanation. Such an explanation appears necessary, not less in vindication of the course pursued by the State of Georgia, than of the judicial course of the Circuit Court, over which I have the honor to preside.

By the state of facts, as now exhibited, it would appear as if the court of the sixth circuit of the District of Georgia had been taking very undue liberties, both with the executive and treasury departments of that State; and that **125*** two of the governors *of that State, acting in behalf of the State, had first come voluntarily into the courts of the United States, and then, only because the decision of that court was against the rights they asserted, repudiated their own act, and denied the jurisdiction of the very court which they had voluntarily called to decide on their rights.

Yet nothing can be further from the truth of the case. The real exposition of the incidents to the cause lies in this: that the actual *promovent contestatio litis*, was the colonizing society; that Georgia, at least, in its inception, had no interest in it; that the Governor only regarded himself as a stakeholder to the three

disputants who claimed the property. The slaves, as well as the proceeds of those which were sold, it is notorious, have, in fact, been delivered up by the State to one of these claimants.

It is true, that in this point, the Legislature of the State has differed in opinion on the question of right, from the court that tried the cause, and surrendered them to Bowen, instead of Madrazo; but this fact proves that she was not contending for herself.

There is no necessity, however, for speaking out of the record on this subject. The information, as well as the claim, filed in Madrazo's libel, both explicitly avow, that as to the slaves remaining unsold, the Governor was acting in behalf of the colonizing society; and had not the decision below been against their claim, and on grounds which cannot be shaken, it is fair to conjecture that the exception here taken to the jurisdiction would never have been suggested; nor had that society possessed a legal existence, so as to prosecute a suit in its own name, is there the least reason to believe that the Governor of Georgia would ever have presented himself in the courts of the United States upon this subject.

What could he do? This property had come legally into the hands of his predecessor; a part had been sold; and the rest transmitted to him, specifically. Two parties presented themselves claiming it in their respective rights; and having been constituted by law the guardian of the rights of one, he presents himself to the only Court that could take cognizance of the cause, in order to have the question of right decided, before he would surrender the slaves in his possession to either claimant. The money raised from the sales he disavows having any control over.

But, in the progress of the cause, incidents occur which produce a total change in the views and interests of parties. A third party arises, and, on the clearest proofs and best established principles, has made out the proprietary interest to be in himself. An appeal is taken to this court, and pending the appeal, *the **[*126]** party who had failed in every court below, and must fail, wherever the rights are subjected to judicial cognizance, succeeds in prevailing on the Legislature to abandon the property to him.

Thus, then, the colonizing society have lost all hopes from a suit at law; Bowen has obtained the property; the Legislature that gave it to him, can, at least, feel no desire to have Madrazo's rights confirmed in this court, and all became interested in overturning their own work, and crushing Madrazo's interest under the ruins.

It is certainly a purpose which cannot be willingly favored in a court of justice; and I meet it with the most thorough conviction that the law is not with the appellants, on the objections to the jurisdiction of the court below, which have now, here, for the first time, been moved and argued.

There are two exceptions taken to the exercise of jurisdiction in the court below:

1. That a State was a party, &c.
2. That the jurisdiction of the District Court never attached, because the *res subjecta* was never actually in possession of that court.

The facts were these: The negroes were cer-

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tainly brought into the United States in contravention of the act of Congress of 1807. That act creates a forfeiture, inasmuch as it divests the owner of all property in the slaves so brought in; and by another provision, it is left to the States to dispose of such persons of color in any manner they may think proper, not contravening the provisions of that act. The State of Georgia, by law, authorized their governor to appoint an agent to receive such persons of color, and deliver them to the executive to be sold, unless applied for by the colonizing society; and if so applied for, then to be delivered into their possession.

These slaves were seized by a revenue officer of the United States, and voluntarily delivered to Governor Rabun, then Governor of Georgia, who had sold all, except about thirty, before the society applied to him, agreeably to the provisions of the act.

The Georgia law contains no express instructions to the Governor how to dispose of the proceeds of the sales. It authorizes him to sell, after sixty days' notice, "in such manner as he may think best calculated for the interest of the State;" but whether for cash or credit, or to remain in or be shipped from the State, be meant by this provision, there are no means of determining. The money was, in this instance, paid into the treasury; or, at least, so **127***] the Governor alleges, in his claim *to the Madrazo libel; and so we are bound to consider the facts.

Here, then, was a case of forfeiture, under a law of Congress; and the Governor of the State legally authorized to sue for and recover the thing forfeited, and "when seized and condemned," as the Georgia law expresses it, to sell it on one state of facts; on another, to deliver it to the colonizing society. Who was to sue for this forfeiture, if not the State, or the Governor as its representative? The society could not, for it had no existence in law.

The Governor accordingly sold the greater part; and his successor filed an information in the District Court of the United States, to have the residue condemned, that he might deliver them to that society. To this libel and information, Bowen filed his claim and answer; and while that suit was pending, Madrazo filed his libel in the District Court, praying process against the Africans remaining in the Governor's hands, and the proceeds of those which were sold. On this libel a warrant of arrest was issued against the slaves, and a monition to the Governor and all concerned, in relation to the whole subject of Madrazo's claim.

The warrant of arrest was not served in the District Court; but Governor Clark, successor of Governor Rabun, appeared to the monition, without protest, and filed a claim to the Africans, in behalf of the society; as to the proceeds of those which had been sold, he simply answers that they had been paid into the treasury, where they remained mixed up with the treasure of the State, and beyond his control.

The pleadings were in this state when the district judge entered upon a plenary hearing of the case, taking into view the information of the Governor with Bowen's claim, and the libel of Madrazo with the Governor's claim and answer; and thereupon sustained the in-

formation, and dismissed Bowen's claim and Madrazo's libel.

Bowen and Madrazo appealed; and, on the hearing in the Circuit Court, where a body of new evidence was introduced, the decree of the District Court was reversed, and the information and Bowen's claim dismissed.

But, having proceeded so far, the Circuit Court found itself thus situated.

As the District Court had sustained the information, it would have been nugatory to enforce its warrant of arrest upon the slaves, since they were already in possession of the State. Madrazo's libel being dismissed in that court, no further steps were taken to render the *res subjecta* into actual possession.

But, when the information was dismissed, and Madrazo's *libel sustained in the [***128** Circuit Court, it followed that it was error in the District Court not to have enforced the service of the warrant of arrest on the slaves, or done some equivalent act. Thus situated, the Circuit Court could not send back the cause; because, by the 24th section of the judiciary act of 1789, the Circuit Court is required to go on and make such a decree as this District Court ought to have made. That court thought that the obligation to perform this duty carried with it all the incidents necessary to perform it, and ordered process accordingly. To this the Governor again, without protest, responded, by voluntarily entering into a stipulation to hold the slaves, subject to the order of that court; and then the court, considering itself legally in possession of the *res*, made the decree in favor of Madrazo, which is here brought up for revision.

On the question of right, upon the evidence before the Circuit Court, there can scarcely be two opinions. The cargo was Madrazo's; it was captured by a privateer, fitted out in Baltimore, run into Fernandina, there sold to Bowen, carried across the country to the Creek agency, within the limits of the United States, and where its jurisdiction attached, notwithstanding the Indian title existed; and, although Bowen, the tortious owner, committed an offense by introducing them into the country, Madrazo was not privy to that offense, and was innocent of any act that could work a forfeiture of his interest.

But the question now to be considered, is exclusively that of jurisdiction; and it is insisted, first, that as the State was a party, and the party defendant in both cases, in the Circuit Court, that court could not maintain jurisdiction of the subject.

That a State is not now suable by an individual, is a question on which the court below could not have paused a moment.

The 11th amendment to the constitution put that question at rest forever. But where is the provision of the constitution which disables a State from suing in the courts of the Union?

The second section of the third article extends the judicial power of the United States to all cases arising under the law of the United States, and to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, between a State and citizens of another State, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

It is true, the next section provides that, in all cases in which a State shall be a party the **129*** Supreme Court shall have *original jurisdiction. But, it is obvious that original does not mean exclusive; and, in the 13th section of the judicial act of 1789, it is so treated; since the Legislature there declares in what instances the jurisdiction of the Supreme Court shall be exclusive, and in what concurrent, when a State is a party. The words of that section are: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State, and citizens of other States, and aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

Now, considering this section in connection with the constitution, it is obvious, that the word exclusive, there used, must be considered as applying solely to the Courts of the United States; since it never could have been imagined that the States were to be restricted from suing in their own courts, or those of their sister States; and thus construed, it must carry the implication that the States may sue in any other courts of the United States, in cases comprised within the jurisdiction vested in those courts, by the judiciary act; provided the cause of action, or the parties be such as bring the suit within the cases to which the judicial power of the United States is extended by the constitution.

In a suit against an alien, then, there can be no question that a State may sue in the Circuit Court; and must prosecute a suit there, if the alien chooses to assert the right of transfer secured to him, under the 12th section of that act.

And so with regard to suits against consuls and vice-consuls, it is perfectly clear, that the suit of a State must, if the defendant insists upon his right, be prosecuted in the District Courts of the United States.

The 9th section of the act being that which prescribes the jurisdiction of the District Courts, is explicit on this point. But that section embraces other cases, in which, without any strained construction, the States may assert the rights of a suitor in the District Court.

The words of the section are: "The District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, and trade of the United States, where seizures are made on waters, &c.; and shall also have exclusive original cognizance of all seizures on land, &c.; and of all suits for penalties, and forfeitures, incurred under the laws of the United States."

Now, it is very clear that wherever the District Court is vested with "exclusive original cognizance," the Supreme Court can possess no original jurisdiction; and such is clearly the **130*** case *with regard to seizures and suits for forfeitures, under the laws of the United States, and suits in the admiralty. And, unless some reason can be shown, why a State should not prosecute a suit for a forfeiture, under the laws of the United States, it follows, with regard to the information, that the jurisdiction was rightfully exercised by the District Court in the present instance. The admiralty

suit shall be separately considered. But why may not a State prosecute a suit for a forfeiture under a law of the United States? Take the cases of a law of Congress passed to aid the States, in the collection of a tonnage duty; or of a penalty under their inspection laws. In the one case, there may be a seizure on the water, and in the other, on the land; in either there may be a suit for a forfeiture; and in all, the penalty might, very rationally, be given to the State or its prosecuting officer. The present, so far as it involves the question on the information, is precisely one of those cases. Here was a forfeiture, incurred under a law of the United States; and the benefit of it was consigned to the States if they chose to accept it. Here the State did accept it, and authorized their executive to assert the rights derived under the law of Congress.

An examination of the exceptions in the thirteenth section of the act, which marks out the jurisdiction of the Supreme Court, will throw light upon this subject.

The language of the section is: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also, between a State and citizens of other States, or aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

Now, it may seem unaccountable at first view, why these exceptions should have been extended to controversies between a State and its own citizens, since controversies between a State and its own citizens not one of the subjects of jurisdiction enumerated in the constitution. And the solution is to be found in this, that the grant of jurisdiction, as to cases arising under the constitution, laws, &c., of the United States, and of admiralty and maritime causes, it is not restricted to, or limited by any relation or description of persons. Controversies, in these branches of jurisdiction, may, therefore, by possibility, arise between a State and its own citizens; certainly between a State and the citizens of other states, or aliens, under the laws of the Union, or in admiralty and maritime cases.

As the law regards this information as a civil suit, *in rem*, on the exchequer side of the admiralty, and it was grounded on a law of Congress, the citizenship of the claimants can have no influence on the question of jurisdiction. I think, *however, that it appears [***131** somewhere in this voluminous record, that Bowen was a citizen of Georgia; but whether of that State, a sister State, or a foreign State, the controversy, if it be regarded as one with individuals, is expressly excepted from the exclusive jurisdiction of the Supreme Court; and, I must think, is within the original jurisdiction of the District Court. And if so, it follows that the State must, upon appeal from a decision there made in its favor, assume the attitude of a defendant in any court into which the cause may be legally carried, by appeal or writ of error.

In England, the King cannot be sued, yet he is daily brought before the Appellate Courts, as a defendant in error. It has long since been decided that this is legal. And thus, too, the United States continually appears upon the docket of this court, as a party defendant; and

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for the same reason, although not suable originally, yet upon a judgment obtained, injunctions have been granted against parties who could not otherwise have been made defendants; as, for example, the United States.

The thing is unavoidable it—is incident to the right of appeal. Justice could not be administered without it. There would be no reciprocity; the law would operate unequally, and to the prejudice of the citizen.

There is no compulsory process used to produce this reversed, I may say, nominal, state of parties. The cause is removed by a citation or other less offensive process, and the party appears in the Superior Court, if he will; if not, the cause is disposed of without an appearance.

So much for the information, and the appeal from the District Court upon it. We will now consider the rights of the State, in the relation in which it stood to Madrazo's libel. I am considering the State, and not the officers of the state, as the real party to the record.

When Madrazo's libel was filed, the governor's information was pending; and as Madrazo's libel sets out the seizure and delivery of the slaves to the executive of Georgia, and the claims advanced to the proprietary interest therein, it was properly considered in the District Court, in connection with the information, and in the double aspect of a claim and libel. In the case of *The Antelope*, the cross libel of the Portuguese was treated, reciprocally, as claim and libel. Considered in the relation of a claim to the information, it is impossible to deny, that if the State rightly preferred the information, it must have been bound by the decisions, both of the District Court, and of the tribunal to which an appeal lay from the decision of the District Court upon that information, as regarded the rights of the claimants.

132*] *And if we consider Madrazo's libel in the aspect of a suit in the admiralty, it appears to me impossible to assign a sufficient reason why the State should not be equally bound.

The property or possession of the State had been acquired under a capture at sea—a maritime *tort*. It was therefore clearly a case of admiralty jurisdiction. Where, then, is the limit to this branch of the jurisdiction of the District Court? No personal relation, description, or character, imposes any such limit. The grant of jurisdiction to the United States, and by the United States to the District Court, is without restriction, and it would be singular if a State should be precluded from the right of appearing to assert its rights before that tribunal. Suppose the case of a capture of a library shipped to state, and a re-capture and libel for salvage; surely, in some form or other, the State must have a hearing. There is nothing compulsory upon the State; the right may be abandoned, if it will; but, after preferring a claim, will it be contended that it may withdraw itself from the contest, under an assertion of State immunities, to the prejudice of individual right? This is not a new question in the admiralty, it is considered by Godolphin, who observes, "that for the same party in the same cause to surmise and move for a prohibition against that jurisdiction, to which himself had formerly submitted, and in

a cause which, by the libel, appears not other than maritime, seems quite beside the rule and practice of the law." Jurisd. of the Adm., p. 116, 117, and the two adjudged cases of *Jennings* and *Audley* (Brow. Rep., p. 2, p. 30), and *Barter* and *Hopes* (*Ibid*), which he cites, do fully establish "that in all cases where the defendant admits the jurisdiction of the Admiralty Court, by pleading, then prohibition shall not be granted, if it do not appear that the act was done out of the jurisdiction."

Now, in this case, the State appeared, and claimed to the monition, without protest. In the admiralty a claimant is an actor; and had the decision of the District Court been affirmed, the State would have had the full benefit of this interposition, as a party. And again, at a subsequent period, the State voluntarily surrendered the *res* to the Circuit Court, and took it out again on stipulation, &c., and had not this exception now been taken, would have had all the benefit of a decree of restoration, if made by this court. But it is insisted that consent cannot give jurisdiction; that this is a sound rule, and as applied to the common law courts, cannot be controverted. But is it so in the admiralty?

It must be recollected that the common law courts have themselves released this rule, in relation to the admiralty. I allude to the controversy on the subject of the stipulation bonds, which was finally abandoned, on the ground of the assent *of the party, stipulating to [***133** submit to the jurisdiction of that court. These decisions seem fully in point to the present case. (2 Br. C. & A., 97, 98.)

But in the proceedings in *rem*, the admiralty wants no consent or concession to enlarge its jurisdiction. All the world are parties to such a suit, and bound by it, by the common consent of the world. The interest of a State, or the United States, in the *res subjecta*, must be affected by such a decision. The question will now be considered, whether the want of an actual reduction of the *res* into possession in the District Court, deprived that court of jurisdiction; or whether, if it did, that circumstance would affect the appellate jurisdiction of the Circuit Court. Also, whether on the reduction of the *res* into possession, there was any assumption of original jurisdiction in the Circuit Court?

On these points I cannot bring myself to feel a doubt, since the very failure in the District Court to grant process for reducing the *res* into possession, would be such a "*damnum irreparabile*" as would sustain an appeal to the Circuit Court. Otherwise, the very ground of appeal, that which gives jurisdiction, would take it away. And what, upon an appeal, would be the course of the Circuit Court, upon such a case? It has no power to remand the cause; for the 24th section requires that "when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment, or pass such decree, as the District Court should have rendered or passed." This section, I must believe, necessarily, substitutes the Circuit for the District Court, upon a reversal; and vests it with power to do whatever that court could have done, or ought to have done, originally. It is very important here to notice, that not reducing the *res* into

possession in the District Court, was the necessary consequence of its first error, in sustaining the information, and dismissing Madrazo's libel. For if Madrazo's pretensions were to be considered as rejected, there could be no reason for pursuing the means of reducing the *res* into possession in the District Court, and while the cause was in the Circuit Court, that necessity did not arise, for the same reason, until the decree was passed for reversing the decree of the District Court, and dismissing the information. Thus circumstanced, the power given, and duty imposed, by the 24th section, could not have been exercised otherwise than it was. The Circuit Court, alone, could proceed to do justice between the parties, and become, *quoad hoc*, vested with original powers.

The question, as it regards the proceeds of the Africans sold, is one of more nicety. For the proprietary interest in the negroes unsold could well be disposed of, after the court **134*** *became actually possessed of them. The court was not at liberty to doubt that the stipulation would have returned the slaves, specifically, upon monition. But the proceeds of those sold, we must suppose had been paid into the treasury; and there is no doubt that the court could not, and would not, have attempted, by compulsory process, to get at it. Yet, was this a sufficient reason for not proceeding to adjudicate upon the question of right? I think not.

It must be noticed here, that the head of the government had omitted no firm or legal means to give authenticity to the submission of the State to the jurisdiction of the court. The letters of procuration, executed by both Governor Clark, and his successor, Governor Troup, in due form, are on the files; expressly authorizing, in the name of the State, all the acts of certain proctors of that court, in the name and behalf of the State.

The Governor's answer, then, was the answer of the State; and when the answer avows, that many of the slaves were sold, and the money paid into the treasury, what is it but acknowledging that the property of Madrazo no longer remains in specific existence, but has been sold, and appropriated by the respondent under such circumstances as convert Madrazo's rights into a pecuniary demand, a debt due by the State? Now, the State could stand in no other relation to Madrazo, in this behalf, than Bowen or the captor would have stood, had the sale been made by them; and can it be supposed that a similar answer, from either Bowen or the captor, would have deprived the court below of its jurisdiction?

It is almost a work of supererogation, to resort to precedents on such a question; but if necessary, there is no want of precedents to prove that the District Court was bound to go on and render justice to the libellant, according to the forms of the admiralty, as far as it could proceed.

The case of *Monro v. Almia*, decided in this court in 1825, was just such a case. (10 Wheat., 473). There it was fully considered whether the court might go on, and how to proceed, and the cause was remanded to the Circuit Court, for further proceedings. The libel charged a seizure and appropriation of a sum of money, on the ocean; and the respondent

appeared, under protest, and, by demurring, admitted as true, what the answer here avows to be true.

And strongly analogous is the case of *M'Kenzie v. Livingston & Welsh*, reported in a note to the 3d Term Rep., 333, in the case of *Stuart v. Wolf*; in which M'Kenzie preferred a libel in the Vice-Admiralty Court, in Jamaica, to obtain condemnation of a sum of money, captured by him, and not paid into the registry of the court. Livingston and Welsh filed a claim, and that court decreed to them "the sum of £1,300* in the possession of the captor." [*135 M'Kenzie appealed to the Lords Commissioners, who affirmed the decree below, and the cause was remitted for further proceedings.

In that case, the *res* was avowedly out of possession of the court; and yet, upon the submission of the party who held it, the court entertained jurisdiction, and decreed upon the cause; as if the claimant had been libellant, and the libellant stood in his place.

When money is the thing in contest, or the thing captured has been converted into money, it becomes essentially a debt; and, of course, a metaphysical thing, not to be arrested specifically.

Upon this view of the subject, the District Court might have exercised jurisdiction over the whole capture; and did entertain jurisdiction, in the very act of dismissing the libel, upon the question of right. Then, when the whole cause was brought, by appeal, before the Circuit Court, I hold that the Circuit Court was bound to go as far as it could go, without intrenching upon the sovereign rights of the State; which, for the purposes of justice, had thus consented to enter into the litigation between these parties; that is, as far as a decree.

Had not the progress of the court been arrested by this appeal, it could certainly have gone no farther than to issue its monition. But, it cannot be doubted that, upon Madrazo's petitioning the Legislature on the subject, their officers would have been instructed to dispose of the property and money, according to the decree of the court. Subsequent events, however, have given a new aspect to things; and Madrazo, with abundant proofs of his rights, is left without remedy.

DECREE.—These causes came on, &c. On consideration whereof, this court is of opinion that there is error in so much of the decree of the said Circuit Court as directs restitution of the slaves libeled by Juan Madrazo, and the issue of the females, in the custody of the government of the State of Georgia, or the agent or agents of the said State, and that the proceeds of those slaves, who were sold by order of the government of the said State, be paid to the said Juan Madrazo; the Circuit Court not having jurisdiction of a cause in which the plaintiff asserts a claim upon the state; and that the same ought to be reversed and annulled; and the libel of the said Juan Madrazo is ordered to be dismissed. And this court is further of opinion that there is no error in the residue of the said decree, and the same is hereby affirmed; and it is further considered and ordered, that the said cause be remanded to the said Circuit Court, with directions for further proceedings to be had there-

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on, according to law and justice, in conformity to this opinion.

Cited—2 How., 23-27; 17 How., 500; 2 Paine, 419.

136*] *JOSEPH MANDEVILLE, one of the firm of RICHARD SLADE & Co., *Plaintiff in Error*,

v.

GEORGE HOLEY AND THOMAS SUCKLEY, Joint Merchants in Trade, Under the Firm of HOLEY & SUCKLEY, *Defendants in Error*.

Under the law of Virginia, a confession of judgment by the defendant is a release of errors.

ERROR to the Circuit Court for the county of Alexandria.

An action was instituted in the Circuit Court for the District of Columbia, by the defendants in error, against Richard Slade, James Anderson, and the plaintiff in error, trading under the firm of Richard Slade & Co.; and the suit having abated, as to Slade, by his death, and by return, as to Anderson, it was prosecuted against Joseph Mandeville only.

The declaration contained the usual money counts, and the damages were laid at \$10,500.

By consent of parties, an order was made by the court, referring the accounts to the auditor of the court, to state and report them to the court; this report to be subject to exceptions; and when the report should be settled, then the same to be substituted for a trial by jury, and a judgment to be entered for the whole sum, which should be finally ascertained by the court to be due.

The auditor reported a balance of £2,403 2 6, of which £1,860 6 7 was principal, to be due to the plaintiff below; which, with the exchange, amounted to \$11,695.20, deducting the interest included in the balance reported by the auditor; the principal of the debt found to be due, was less than the damages laid in the declaration.

No exceptions having been filed, Mandeville, the plaintiff in error, at a term subsequent to the report, came in, and confessed a judgment for the sum reported, with interest, from the 7th of December, 1824.

Mr. Swann, for plaintiff in error.

Mr. Taylor, for defendants in error.

Mr. Swann. The writ issued in a case is no part of the record, unless oyer of it is craved; and the confession of judgment goes to the declaration, in which, the damages claimed are stated to be \$10,500. Upon the confession of judgment for \$11,695.20, the court gave a judgment which was erroneous, as to this sum, beyond the amount claimed in the declaration.

The law of Virginia, which authorizes a jury to give damages, as the principal of the debt, to the amount laid in the declaration, and to allow interest from a preceding period, making **137*]** *the whole amount of the verdict greater than the damages in the declaration, does not apply in this case, as the debt is a sterling debt.

If this judgment is sustained, the plaintiff in Peters 1.

error will be compelled to pay interest upon interest, as both principal and interest are included in the sum allowed by the auditor. The verdict of a jury, giving the principal and interest from a particular day, on the same, would have had a different effect.

Mr. Taylor, for defendants in error.

The court should allow the defendants damages upon the amount of the judgment, as the plaintiff in error was not justified in thus proceeding against his own confession of judgment, and its whole purpose was delay. The form of the confession of judgment is such as is usual; and it is the same form of judgment, as upon the verdict of a jury. The law of Virginia authorizes a jury to give damages, which may, in the whole amount, exceed the damages laid in the declaration. The interest being stated to commence at a period anterior to the day of trial, a party may come in, and agree to enlarge damages. By the act of Assembly, in Virginia, in 1792, a judgment by confession is equivalent to a release of errors.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The court are satisfied in this case, that under the law of Virginia, a confession of judgment by the plaintiff in error, in the original suit, is a release of errors.

Judgment affirmed, with costs and damages, at the rate of six per centum per annum.

*JAMES GREENLEAF, *Appellant*, [*138
v.

NICHOLAS L. QUEEN, AND ELEANOR HIS WIFE, heirs, and RICHARD WALLACK, administrator of WASHINGTON BOYD, deceased, *Appellees*.

Trustee, by deed, for sale of property for benefit of creditors—administrator of trustee—chancery practice.

Where, by the terms of a deed, conveying real estate in trust, to be sold for the benefit of the creditor of the grantor, the trustee is directed to sell the property conveyed by public auction, the trustee was bound to conform to this mode of sale. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interests of those for whom he acted. [145]

When property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale, in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time more was bid for the same than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since whatever may be the liability of the *cestui que trust*, to those interested in the proceeds of the sale, for the amount offered at the auction: it is not an objection, on the part of the purchaser, to release him from his contract. [146]

Where the vendee of real estate had purchased it, subject to the dower of the widow, of which dower he might have been informed, if he had used proper diligence, a Court of Equity will not interfere to release the vendee; but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed. [147]

Where a bill had been filed against a trustee of real estate, and, after his death, administration had been granted to A; who, on the petition of creditors, interested in the trust, was also appointed by the court the substituted trustee; and the court went on to decree, that A, as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding being rather to make the decree against A, in the character of administrator, because he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law, to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. [148]

A decree of a Court of Chancery is erroneous, which, after ordering certain acts to be done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of court, and renders the decree ineffectual; and it is no answer to this objection, that it appears by the record, in the case, that the acts ordered to be done have been performed; since the error is in the decree itself, and not in its execution. [148]

A bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so; but this must be done on demurrer, plea, or answer, pointing out the person or persons whom, the defendant insists, ought to be made parties. [149]

[139*] *When a debtor had conveyed to a trustee real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs-at-law, of the first trustee, shall be parties to the same; as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. [149]

APPPEAL from the Circuit Court of the county of Washington; the appellant having been complainant, in a bill in equity, filed 31st December, 1819, in the court below, against Washington Boyd, trustee of Charles Minifie.

The objects of the bill were to make void a contract made by the appellant, for the purchase of certain lots of ground, in the city of Washington, being the estate held in trust for the creditors of Charles Minifie, that certain collateral securities, delivered by the appellant, with his note for \$3,815, being for the purchase money of the lots of the trustee, should be returned; and that the note should be cancelled and surrendered; that a release should be executed, of the judgment at law obtained by the trustee, on the note, and for a perpetual injunction and general relief, &c.

Upon filing this bill, an injunction was granted, until further order of the court; and, after various proceedings, the following decree was made:

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| Greenleaf v. Washington Boyd and others. | } | In Chancery, April Term, 1824. |
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"It is ordered by the court, in this cause, that the trustee appointed by the order of January 21st, 1823, make and execute a good and sufficient deed to James Greenleaf, for the property sold to him by the former trustee, Washington Boyd, according to the terms of that sale; to be approved by one of the judges of this court, and filed with the clerk, to be delivered to the said Greenleaf, upon the payment of the purchase money; and that he also obtain and file with the clerk, a sufficient deed

of release, from Zachariah Walker, to be approved of by one of the judges of this court, to the said James Greenleaf, releasing all title and claim to any and every part of the lots and property of the said Charles Minifie, sold by Washington Boyd, as trustee, or mentioned in the aforesaid deed of the trustee, Richard Wallack, to James Greenleaf; and that, upon the said deed, and the said deeds of release being executed, signed, approved, and filed, as aforesaid, that then the injunction be dissolved, and the trustee authorized to proceed in levying and collecting the amount of the judgment, *for the purchase money, as men- [*140] tioned in said bill. And the original bill, and bills of revivor, having been set down for hearing, upon the bills, answers, and exhibits, and all the proceedings in the cause, it is, by the court, on this 15th of December, 1824, decreed and ordered, that the said bill be dismissed with costs.

"And it is hereby further ordered and decreed, that, before proceeding in collecting said purchase money, a good and sufficient bond shall be executed, in the penalty of \$500, by any one or more of the creditors, with security, to be approved of by one of the judges of this court, conditioned to indemnify the said Greenleaf, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property mentioned in the deed of the said Wallack, to said Greenleaf, which may have been purchased by the said Jameson, at the sale of the said Boyd, and filed with the clerk of the said court."

By order, WILLIAM BRENT, Clerk.
15th December, 1824.

From this decree, the complainant appealed.

The opinion of the court, delivered by *Mr. Justice WASHINGTON*, fully states all the matter of the case.

The case was argued by *Mr. Jones* for the appellant, and by *Mr. Key* for the appellees.

Mr. Jones, for the appellant.

1. The title of Charles Minifie was never affected by the sale of Boyd to Mr. Greenleaf. The authority to sell was a special one, and the terms not having been complied with, as the sale was private, and not public. Minifie, or his heirs, or his creditors, may proceed against the trustee, no time precluding the same. (The case of *Daniels v. Adams*, Ambler, 191; 1 *Bridge Index*, 41.)

A private sale was set aside, although more was obtained by the sale than by a public sale, it being against the authority of the trustee. The court cannot vary the terms of a trust. (1 *Anstruth*, 80; 4 *Brown's Chancery Cases*, 479.)

2. Mr. Greenleaf had no notice of these objections to the title, until a few days before the filing of the bill; and it was then too late for this proceeding. (16 *Ves.*, 272.)

The title could not be completed without the consent of Minifie and his wife; and no steps were taken to obtain this, nor were the measures adopted, in reference to the titles acquired by Jameson, Prout, and Walker, who purchased some of the lots at the public sale, effective. The purchaser would still be obliged to go into chancery, to complete his title to some of these lots so purchased. Nor has a title been made to him by the heir of Boyd, if Mr. Wallack, the

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141*] substituted trustee, *could convey her title, it could not be by virtue of the decree stated in the case, as Mr. Greenleaf was not a party to the proceeding.

The court will not permit an executory contract for land to be carried into specific execution, until the seller can give a complete title. (4 Ves., 97; 2 Ves., Jr., 100; 2 Coxe, 294; 5 Ves., 147; 16 *Ibid.*, 272.)

As to taking possession of property, being an acceptance of title, Sugden on Vendors, 9.

The sale made to Greenleaf, was a fraud on the public; and no title to the purchase money could be derived under it. A confirmation of the title held by Mr. Greenleaf, by the legal heir of Boyd, and by the creditors of Minifie, was necessary; and it was not the duty of the purchaser to seek out the heir. He had called upon Boyd, who had the trust, to do what was proper.

There was no ground to dismiss the bill, for want of proper parties; this should have been pleaded; this is never done, unless in a case where no decree can be made, without affecting those who are not before the court.

Mr. Key for the appellees.

This is a case, where a purchase was made, when property was high, which has since fallen; and the purchaser, therefore, desires to relieve himself from the bargain. The terms of the trust were complied with, by the trustee; a public sale was made of the property; Greenleaf took possession, knowing all the facts; and, not until after judgment against him for the purchase money, did he ask for a specific performance, and an injunction as to notice. Cited, 2 John. Chanc. Cases, 197.

The purchaser has not done what he ought to have done, to obtain a title. He should have filed his bill against all the persons interested—Minifie and the creditors; but the bill was against Boyd alone; and this authorized the conclusion that the aid of Boyd only was wanting.

The case is one of a *bona fide* and regular sale, by the trustee; possession taken by the purchaser; execution of his contract, with full knowledge of all the circumstances, by the delivery of his promissory note, for the purchase money; and afterwards, by proceedings without proper parties, and altogether irregular, an attempt by the purchaser to defeat the claims of the creditors of the *cestui que trust*.

Mr. Justice WASHINGTON delivered the opinion of the court:

This cause comes from the Circuit Court of the District of Columbia, for the county of **142***] Washington. The appellant filed *his bill in that court, against Washington Boyd; setting forth, that on the 19th of March, 1817, the said Boyd, as trustee under a deed of Charles Minifie to him, entered into a contract with the plaintiff, for the sale of sundry lots in the city of Washington, at the price of \$3,500, payable in 6, 12, and 18 months; for which, including the interest, and amounting in the whole to \$3,815, he then gave his note to Boyd, who acknowledged the receipt thereof by an instrument under his hand; and thereby agreed, that on the payment of the note, he would convey to the plaintiff the said lots, which had been previously sold at public auction, two of them to Elliot, Peters 1.

as agent for the plaintiff, and the others to Francis Jameson, William Prout, and Z. Walker. That, although the title of these lots which had been sold to Jameson, Prout, and Walker, had not been released from their claims, the defendant, Boyd, had nevertheless recovered a judgment against the plaintiff for the amount of his note before mentioned, upon which he threatened to sue out an execution. The prayer of this bill was for an injunction, and a conveyance of the lots with a clear title.

The plaintiff afterwards filed an amended bill setting forth the original negotiations between the plaintiff and Boyd, in March, 1816, for the purchase of the above lots, which resulted in a contract, by which the plaintiff was to be considered as the purchaser of them, at the price of \$3,500, payable with interest, in 6, 12, and 18 months. That the defendant had, nevertheless, thought proper to expose the said lots to sale at public auction, some time in April, 1816, and had caused Elliot, the plaintiff's agent, to be set down as the purchaser of two of the lots only, at the price of \$3,500, although neither Elliot nor the plaintiff was present; and that the remaining seven lots were struck off, three of them to Jameson at \$159, one to Prout at \$45.15, and the remaining three to Walker, at \$264.90, making, in the whole, the sum of \$4,019.05.

That matters remained in this situation until the 19th of March, 1817, when the written contract mentioned in the original bill was entered into.

The bill then sets forth the judgment obtained by Boyd against the plaintiff, upon his note for the purchase money of the lots, and the deposit by the latter with the former of certain securities as collateral security for the debt, in consideration of a suspension of the execution until some time in December, 1819. It further charges, that the plaintiff was ignorant of the title and authority of the defendant to dispose of the above property, until within a few days preceding the filing of this amended bill; when upon examining the land records of the county he found the deed of trust from Charles Minifie and one James Ewell and *Z. Farrell to [***143**] the said Boyd, conveying the above lots to him in trust, to dispose of the same at public sale, on 6, 12, and 18 months credit, and to apply the proceeds to the payment of the debts of the said Minifie, and to hold what might remain after such payments, subject to the decree of the Circuit Court of the said district and county, in the suit brought by the wife of said Minifie for alimony; and the balance, if any, to be paid over to said Minifie. The bill then concludes by charging that the contract made by the plaintiff with the defendant, for the purchase of the said lots, is void, because it was made in contravention of an injunction obtained by Mrs. Minifie, and because the purchase by the plaintiff was made at private, and not at public sale; that the title is likewise defective for the same reasons, and because the property is subject to the claim of Mrs. Minifie for alimony and for dower, and is not released from the claims of Prout, Jameson, and Walker, to the seven lots sold to them. The prayer of this bill is that the contract may be declared void; that the judgment upon the plaintiff's note may be perpetually enjoined; and that the

pledged securities may be restored to the plaintiff.

The injunction asked for was granted till further order. A petition was filed in the same court by William Prout and others, creditors of Charles Minifie, setting forth the death of Washington Boyd, leaving Eleanor, the wife of Nicolas L. Queen, his heir-at-law; and praying that another trustee might be appointed to complete the execution of the trusts of the deed from Minifie to Boyd. To this petition, Queen and his wife appeared and filed an answer, admitting the truth of the allegations in the petition, that the said Eleanor is the heir-at-law of Boyd; and submitting to such decree as the court might think proper to make.

That cause being set for hearing on the petition and answer, the court on the 21st January, 1823, made a decree by which Richard Wallack was appointed trustee in the place of Washington Boyd, deceased, upon his giving bond and security; with authority to complete the trusts left unexecuted by Boyd, according to the provisions of the trust deed, and to recover and collect the purchase money for such of the trust property as had been sold by Boyd; and upon the payment thereof, to convey said property by a good and sufficient deed, in fee, to the purchasers thereof, and to bring the said proceeds of sale into the court, to be distributed as the said court might direct, according to the deed of trust. A bond was accordingly executed by Wallack, approved by one of the judges of the court, and filed amongst the proceedings in that cause; a transcript of which proceedings was made an exhibit in this cause. On the same day the above decree was passed, the court decreed in **144** *this cause, that the plaintiff should on or before a certain day, proceed in the same by making the heirs of Washington Boyd defendants, as also such other persons as might be necessary to enable the court to decree therein; otherwise that the bill of the plaintiff should be dismissed.

In May, 1824, the plaintiff filed a bill of revivor against N. L. Queen and Eleanor, his wife, heir-at-law of Washington Boyd, and Richard Wallack, administrator of the said Boyd; to which bill Queen and wife appeared, and by consent of parties, the answer filed by them to the petition of Prout and others, was received as an answer to the bill of revivor, and the original suit was agreed to stand revived.

The cause was then set for hearing on the bills, answer and exhibits, and all the proceedings in this cause, and also in the petition of Prout and others before mentioned; whereupon the court decreed that Richard Wallack, the trustee appointed by the order of the 21st of January, 1823, should execute a good and sufficient deed to the plaintiff, for the property sold to him by Boyd, the former trustee, according to the terms of that sale, to be approved by one of the judges of the court; to be filed with the clerk; and to be delivered to the plaintiff, upon the payment of the purchase money; that he should also obtain and file with the clerk, a sufficient deed of release by Zachariah Walker, to be approved as aforesaid, to the plaintiff, releasing all title and claim to any and every part of the property of Charles Minifie, sold by Boyd as his trustee; and that upon

the said deeds being executed, approved and filed, as aforesaid, the injunction granted in this cause should be dissolved, and the trustee be authorized to proceed to levy and collect the amount of the judgment for the purchase money, as mentioned in the bill. The decree then proceeds to dismiss the bill, with costs; and that before proceeding to collect the said purchase money, a good and sufficient bond should be executed, in the penalty of \$500, by any one or more of the creditors, with security, to be approved by one of the judges of the court, with condition to indemnify the plaintiff, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property mentioned in the deed of the said Wallack to Greenleaf; which might have been purchased by the said Jameson, at the sale of Washington Boyd, and filed with the clerk of the court. From this decree, the plaintiff appealed to this court. A deed by Richard Wallack to James Greenleaf, bearing date the 2d of August, 1825, a bond of indemnity executed by Jonathan and William Prout, and a deed of release by Z. Walker, as directed by the aforesaid decree, dated the 3d and 7th of February, 1825, were executed, approved, and filed with the clerk of the court, in conformity with the decree, and form [***145** parts of the record brought up by this appeal.

The first objection made by the appellant's counsel to the decree of the court below, is that the contract between the appellant and Washington Boyd, for the sale of the lots mentioned in the bill, was void, for want of authority in the latter to dispose of the property in any other mode than at public auction. Such, it must be acknowledged, is the mode prescribed by the deed of trust; nor can it be questioned, but that the trustee was bound to conform to this, as well as to the other requisitions of the deed, under which he professed to act. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other, although by doing so, he might, in reality, promote the interest of those for whom he acted.

But what are the facts in the present case?

The nine lots, which formed the subject of the correspondence between the appellant and the trustee, in March, 1816, and of the written contract, on the 19th of March, 1817; were actually advertised, as directed by the deed of trust; were set up for sale, as the amended bill alleges, at public auction, in April, 1816, and were sold for the sum of \$4,019.05. Two of them were set down to S. Elliot, the agent of the appellant, at the price of \$3,500; and the other seven were struck off to Jameson, Prout, and Walker, for the remaining sum of \$519.05.

It is not even charged in the bill, much less is there any proof in the cause, to warrant a suspicion that the sale was not fairly conducted; or that any person bid for the two lots set down to Elliot, more than the sum at which they were charged to him.

In making the sale in that mode, no deception was practiced upon the appellant; since he was informed, by Elliot's letter to him, on the 16th of March, 1816, that Mr. Boyd had further postponed the sale of Minifie's property, and would consider him, Greenleaf, as the purchaser for \$3,500. The writer adds: "I have

stipulated, that the whole property shall be included. It is necessary to go through the forms prescribed by the decree;" meaning, no doubt, if the letter be truly transcribed into the record, the trust deed. But, on the 19th of March, 1817, when the contract was finally reduced to writing, the appellant was distinctly apprized, that the whole of the lots had been sold at public sale, at six, twelve, and eighteen months; and he was then satisfied to give his note for the stipulated sum agreed to be paid for the nine lots, upon the engagement of Boyd, to make a deed for the same to Samuel Elliot. Upon what plausible ground, then, can the appellant **146***] insist that the lots were not sold at public auction, and, on that ground, to seek to be relieved against the payment of his note, given for the purchase money, thus agreed to be paid for the property? The argument urged by his counsel, that the contract is void, because the lots were sold to the appellant for a less sum than that at which they were struck off to the purchasers, at the public sale, cannot, for a moment, be maintained; since, whatever might be the liability of the trustee to the *cestui que trust*, to pay the difference between those sums, it is surely not an objection, in the mouth of the appellant, sufficient to release him from his contract.

But, were it to be admitted that Boyd acted in derogation of his trust, in selling the property to the appellant for a less sum than he actually sold it for at public auction, and that on that account the title of the appellant might be impeached, may not the objection be removed by the agreement of the parties, beneficially interested in the property under the deed of trust, to confirm the sale; or, by their acts, tending to produce the same result? Of this we apprehend there cannot exist a doubt. Now, who are the parties for whose benefit this trust was created? They are the creditors of Charles Minifie, in the first instance; and after they are satisfied, Mrs. Minifie, to the extent of the sum which might be decreed to her for alimony; and then Charles Minifie, as to any balance which might remain. But it appears from the exhibits filed in the cause, that the amount of the debt due by Minifie, and for which judgments were obtained against him, exceeded considerably the sum at which these lots sold at public auction, independent of the interest due upon those debts, and the costs of the different suits in which the judgments were entered. The only persons, then, who are beneficially interested in the property conveyed by the deed of trust, are the creditors of Charles Minifie, who have united in a suit against the heir-at-law of Boyd, for the purpose of having a new trustee appointed to carry into execution the sale made of the property by the former trustee, under the deed of trust; and they are, as the bill charges, the active parties in enforcing the payment of the purchase money; after these solemn acts, done in affirmance of the sale made to the plaintiff, the creditors would never be permitted, by a Court of Equity, to impeach it; nor can the alleged breach of trust be urged by the appellant, as a reason for annulling the contract, or excusing him from the payment of the purchase money.

The next objection made by the appellant's counsel to the decree of the court below, is, Peters 1.

that the title of the property, which it directs to be conveyed to the appellant, is defective; being encumbered with the claim of Francis Jameson to three *of the lots, and with **[*147]** the right of dower of Mrs. Minifie in the whole of the property.

It is very manifest that the title of Jameson, if any he has, is merely nominal. The sale to him was made in 1816, upon six, twelve, and eighteen months' credit; and, by the terms of the sale, he was required to give his note for the purchase money, with an approved indorser, negotiable at one of the banks in this district. The bill does not charge, nor is it even alleged at the bar, that a note was given by Jameson for the purchase money, bid for these lots; not one cent of it has been paid by him, or even demanded; or that, from the year 1816, when the sale was made, to the present moment, a claim to the property has been asserted, or intimated, by this person. But, it does appear, by the testimony of a witness examined in the cause, that the plaintiff, Greenleaf, has been in possession of the whole of the property, from the time that he purchased it; and that Jameson had, upon the application of Boyd to relinquish his claim to the property, consented to do so.

Upon this state of facts, this court can feel no hesitation in saying, that Jameson had not such an equitable title to the lots purchased by him as a Court of Equity would enforce against the trustee of Minifie, or against the plaintiff. Whether that court would require a title like this to be released, in a case where a trustee was a party plaintiff, asking for a specific execution of the contract, need not be decided in this case. But we are clearly of opinion, that the want of such a release cannot be urged by the vendee, as a cause for rescinding the contract.

The objection founded on the right of dower of Mrs. Minifie, is quite as untenable as the one that has just been disposed of. The plaintiff, when he made the purchase of this property, was apprised that he was dealing with a trustee; and knew, or might have known, from the land records of the county in which the property was situated, whether Mrs. Minifie was a party to the deed of trust; and had, or had not, relinquished her right of dower. He required of the trustee no stipulation in relation to this right; and it may therefore be fairly presumed that the value of it was taken into consideration, in fixing the amount of the purchase money to be paid for the property. In such a case, as well as in that which we have just disposed of, a court of equity will not interpose to relieve the vendee, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed by these claims.

The court is, upon the whole, of opinion, that the objections to the decree, which have been noticed, are insufficient to warrant a reversal of it. It is, however, exposed to other *objections, which must produce this **[*148]** result, and which now remain to be examined.

The first is, that Richard Wallack, the substituted trustee, who is required by the decree to perform a number of acts, in order to entitle him to levy and to collect the amount of the judgments for the purchase money, and upon the performance of which the injunction is dis-

solved, was no party to the controversy in the court below. The suit, it is true, was revived against him in his character of administrator of Washington Boyd, and also against the heir-at-law of Boyd; to which mode of proceeding no objection could be taken, if the decree had been against him in his character of administrator, because, in that character, he claimed under a title derived from the party, by whose death the abatement of the suit was caused; and was the person designated by law to represent him, in relation to his personal estates.

But this was not the case in respect to Richard Wallack, as the substituted trustee and successor of Boyd. The power with which the latter was clothed, became vested in Wallack, not by operation of law, but by the appointment of the court, subsequent to the institution of the suit. The original suit, which abated by the death of Boyd, became also defective by the termination of his powers, and the appointment of a new trustee, and could only be prosecuted against him by way of a supplemental bill, in nature of a bill of revivor; in which it would be necessary to state, not only the original bill and the proceedings thereon, and the death of the former trustee, but the appointment of Wallack as his successor, and his acceptance of the trust; and to require him to appear and answer the charges contained in the supplemental and original bills. For anything appearing upon the face of this record, Wallack is an entire stranger to the trust with which the decree connects him, and without any power, whatever, to make a valid conveyance. For there being no supplemental bill, or allegation in any bill that Wallack had been appointed to complete the trust which Boyd had left unexecuted, and to collect the purchase money for the property which that trustee had sold, and that he had accepted such appointment; these facts cannot be considered as having been established by the proceedings and decree in the suit of the creditors of Minifie, against the heir-at-law of Boyd. (See Mitf., 33, 63, 70.)

The next objection to the decree is, that after decreeing Wallack to perform a number of acts to entitle him to levy and collect the amount of the judgment against the appellant, as before mentioned, it proceeds to dismiss the bill with costs; thereby putting the cause out of the court, and rendering the other parts of the decree ineffectual. Should Wallack, for example, [*149] ple, *refuse to execute a conveyance of the property to the plaintiff in the court below, pursuant to the decree, the non-existence of the suit on which that decree was made, would prevent any process of contempt from issuing against him, for the purpose of compelling him to execute the decree. It is no answer to this objection, that it appears by the record in this case, that Wallack has in fact executed the decree on his part; since the error complained of is in the decree itself, and not in its execution.

It was insisted by the counsel for the appellants, in anticipation of the above objection, that the court below would have been warranted in dismissing the bill absolutely, without requiring anything to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.

That a bill may be dismissed, where the

plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so, need not be questioned; but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented, and would most unquestionably be erroneous, although the decree should assign this as the ground of dismissal; which is not done in the present case.

The last objection to the decree, which it is thought necessary to notice, is, that the heir-at-law of Washington Boyd, deceased, is not required to release her title to the property in controversy to the appellant; a majority of this court being of opinion that the legal estate in that property did not pass to Richard Wallack, under the decree of the 21st of January, 1823, before referred to, but is yet outstanding in the heir-at-law of Boyd.

The decree of the court below must, for these errors, be reversed, and the cause is to be remanded to that court for further proceedings to be had thereon, in conformity with the principles before stated.

DECREE.—This cause came on, &c. On consideration whereof, it is the opinion of this court, that there is error in the said decree, in requiring any act to be performed by Richard Wallack, before he was made a party to the said suit, by regular proceedings against him, according to the course and practice of a court of chancery, and had either answered the bill making him such a party, or the same had been taken for confessed, against him; and that the said decree is also erroneous in dismissing the bill of the plaintiff in the court below; and also, in not decreeing the said Nicholas L. Queen, and Eleanor Queen, his wife, the defendants in the said suit, to release to the appellant, James *Greenleaf, all their right and title to [*150] the property directed by the said decree to be conveyed to him, by the said Richard Wallack; for which errors, it is now by this court decreed and ordered, that the said decree be reversed and annulled, and that the cause be remanded to the court below, to be there proceeded in, according to law, and in conformity with the principles stated in this decree.

Cited—5 Biss., 75.

*BENJAMIN BUCK AND THOMAS [*151] HEDRICK,

v.

THE CHESAPEAKE INSURANCE COMPANY.

Insurance—concealment—policies for “whom it may concern”—insurable interest—instructions as to insurance.

Insurance. To affirm, that “in policies for whom it may concern,” there can be no undue concealment as to the parties interested in the property to be insured,” is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information contrary to the verity of the case, this obviously gives a conventional signification to the

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Buck & Hedrick applied to the defendant for payment on said policies, and all the papers to prove the distinct interests of Medina and Fitch were shown; but the office declined to pay either, on the ground that said policy covered no one but Fitch, and that the letter of 27th April was a representation that the whole cargo was Captain Fitch's, and therefore affected both policies.

The plaintiff, on the trial, prayed the court to charge the jury,

1st. That as the policies of insurance in this case purport to insure the plaintiff "for whom it might concern," they are not bound to prove, that at the time of effecting said insurance, or any other time, they disclosed to the defendant **154*** ants that Spanish *property was intended to be covered by said insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured.

2d. That if the jury believed the policy of 6th May, 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent as well as neutral property.

3d. That if the jury believed that the policy dated 24th May, 1822, was founded on the letter of 27th April, 1822, and the order written therein, the policy being "for whom it may concern," does cover belligerent as well as neutral property.

4th. That if the said Daniel Fitch, at the date of said policies, was legal and equitable owner of a part of the cargo insured, and the legal, though not equitable owner of the residue, the policies, "for whom it may concern," do cover the entire cargo; and said Daniel Fitch is competent in law to recover the whole in his own name, though the belligerent character of a part of the said cargo was not disclosed at the time of effecting said policies of insurance.

5th. That the court instruct the jury that the letter of 27th April, 1822, with the order written thereon, do not in law amount to a representation that the property to be insured was the sole property of Daniel Fitch, or that the whole, or any part thereof, was not belligerent.

Upon these several prayers, numbered in the record 1, 2, 3, 5, and 6, the judges of the Circuit Court differed in opinion, and certified the same to this court.

The cause was argued by *Mr. Hoffman* and *Mr. Mayer* for the plaintiffs, and by *Mr. Wirt*, Attorney-General, and *Mr. Meredith*, for the defendants.

The plaintiffs' counsel contended, (1st) a policy for whom it may concern covers all possible persons and all possible interests, belligerent as well as neutral. (*Hodgson v. Marine Insurance Company*, 5 Cran., 100.)

The doctrine has been so settled in France, England, New York, Massachusetts, &c. (Phil. on Ins., 57-63, 107; 2 Mag., 211; 2 Emeri., 460; Ordi. Hans T., Tit. 1, s. 4; 1 Emeri., ch. 2, s. 4, ch. 11, s. 4; 2 Dane's Abr., 127; 1 Mar. on Ins., 306, 215, in notes; Norris's Peake, 346-7-8; John. Dig., 274, ss. 41, 43, 280, 108.)

(*Barnwell v. Church*, 1 Caines' Rep., 217, 229, 237, 238, 243; *Murray v. Uni. In. Com.*, 2 John. Cas., 168; *Skidmore v. Desdoity*, 2

John. Cas., 77; *Etting v. Scott*, 2 John. Rep., 157, 163; *Goix v. Knox*, 1 John. Cas., 337; 1 Mar. on Ins., 306, 310; *Lawrence v. Sebor*, 2 Caines' Rep., 203; *Hagedorn v. Oliverson*, 2 Maule and Selw., 485; *Sleinback v. Rhinclander*, 3 John. Cas., 269; *Vanderhevel v. Uni. In. Com.*, 2 New York *Cas. in Error, 217, [***155** 269, and 2 John. Cas., 127, 451; Cranch, 100, 109; *Seamans v. Loring*, 1 Mason, 128, 125, 136.)

Was there a concealment of belligerent interest? Concealment can only have reference to the contract between the parties; non-disclosure is not concealment, and the party charging it must show fraudulent intention. As to the words, "lawful goods and merchandise," the parties refer to municipal sanctions only, and not to foreign circumstances. (1 Johnson's Cases, 77, 120, 487.)

Upon the doctrine of concealment, non-disclosure, or misrepresentation, the following positions were assumed, and claimed to be sustained by the authorities cited:

1. That no disclosure of anything within the essential nature of the policy could be necessary, and consequently that no undue concealment can be predicated, either as to the persons interested or their country.

2. That there has been neither a representation nor a misrepresentation, in regard to the cargo insured.

3. That the first policy stands upon nothing but the order of 6th May, in which order no one feature of a representation of neutrality is to be found, but the very reverse.

4. That the letter, and on which the second policy, viz., for \$2,000, was effected, contains no such representation in regard to the cargo then to be insured, and if it did, it was strictly true, as Daniel Fitch's absolute interest amounted to \$2,275.25.

5. That this letter, if a representation at all as to the neutrality of the cargo covered by this second policy, can in no way affect, by a retroactive energy, the antecedently executed policy.

6. That the office, having neglected to make those inquiries which, under the circumstances of the case, the law imposed on it, cannot now transfer to the insured the effect of an obligation to disclose voluntarily what would have been willingly communicated had the office, at that time, deemed it of consequence to inquire after.

7. That Daniel Fitch, being the consignee and trustee of the whole of Medina's interest, with full authority to insure, and having the custody of the entire cargo laden on board of his vessel, had an insurable interest in the whole, and might, had he seen fit so to do, have truly represented the whole as his own, for the purpose of effecting insurance.

(Phil. on Ins. and Authorities, 64, 94; Phil. on Ins., 86, 89; John. Dig., page 284, ss. 143, 144, 146, 147-153; Wharton's Dig., 319, ss. 23, 30, 32; Phil. on Ins., 87; 7 Cranch, 506; 1 Caines, 75, 492; 2 John. Cas., 487; 1 John. Cas., 1; 2 John. Cas., 77, 120; 1 New York Cases in Error, XXV.; 2 John. Rep., 130; *Anthon's N. P. Cases, 83; Phil., 69, [***156** 90; 4 East, 590; *Dennis v. Ludlow*, 1 Caines, 111, 217; *Long v. Bolton*, 2 Bos. & Pull., 209; *Boyd v. Dubois*, 3 Camp., 133, 312; 13 Rep., 61, 267; 9 East, 283, 292; 1 Camp., 116, 117,

118; 1 Maule and Selw., 35; *Long v. Duff*, 2 Bos. & Pull., 209; Phill., 101; Marshall, 475, note; *Brown v. Shaw*, 1 Caines, 489; *Depeyster v. Gardiner*, 1 Caines, 492; *Fort v. Lee*, 3 Taunt., 381.)

2. It was the duty of the insurers to inquire into the state of things at the time of the contract, and there was no representation of a sole neutral interest.

The insured asks to be insured against "all risks;" and it was therefore the duty of the office to inquire what risks were intended to be covered.

Authorities cited as to the general nature of representation: Mar. on Ins., 450, 451; Phill. on Ins., 80; 6 Cranch, 274-281; 7 Cran., 507, 535, 536, 541; Phill. on Ins., 84; 14 Mass. Rep., 152; 1 Mar. on Ins., 459; Phill. on Ins., 109, 110; *Purson v. Watson*, Cowp., 785, or Mar. on Ins., 459; *Bize v. Fletcher*, Doug., 271, or Mar. on Ins., 459; Phill. on Ins., 106; *Alsop v. Coit*, 12 Mass. Rep., 40, or Phill. on Ins., 110; *Ross v. Bradshaw*, 1 Black. Rep., 312, or Phill. on Ins., 110; Wharton's Digest, p. 380, ss. 28, 30, 31, 32; *Hubbard v. Glover*, 3 Camp., 312; *Clapham v. Colozare*, 3 Camp., 382; *Dawson v. Atty.*, 7 East, 357; *Hodgson v. Marine Insurance Co.*, 5 Cran., 100; *Livingston and Gilchrist v. Marine Insurance Co.*, 6 Cranch, 274; 7 Cran., 507; *Vandankhevel v. Uni. Insurance Co.*, 2 Caines' Cases in Error, 257, 267-282; Dong., 305.

Authorities cited as to the duty of underwriters to make inquiries: 1 Mar. on Ins., 397, 474, 475; Phill. on Ins., 84, 108, 109; 2 Dall., 274; 2 Yates, 178; *Fort v. Lee*, 3 Taunt., 381; Phill. on Ins., 105; 14 East, 479; Wharton's Dig., 319, s. 23; 1 Camp., 383; Phill. on Ins., 63, or *Davis v. Boardman*, 12 Mass. Rep., 80; *Boyd v. Dubois*, 3 Camp., 133; *Duplanty v. Com. Ins. Co.*, Anthon's Rep., 83; *Livingston and Gilchrist v. Mary. Ins. Co.*, 7 Cran., 508, 536, 538, 547.

3d. That even if the letter of 27th April had asserted that Daniel Fitch owned the cargo, it was (as far as the doctrine of representation is concerned) substantially true; he being the legal owner as trustee and consignee of Medina's part, and, as such, competent to sustain any action for that part of the cargo, and also to represent, though perhaps not to warrant, it as his. (Phill. on Ins., 41, 42, 60; *Rind v. Wilkinson*, 2 Taunt., 237; *Joseph v. Knox*, 3 Camp., 320; 3 Wheat., Selw., 774, 775, and note; *M'Andrew v. Bell*, 1 Cas. N. P. C., 373; *Lucena v. Crow*, 2 New. Rep., 323; 3 Bos. & Pull., 75; Phill. on Ins., 58; Mar. on Ins., 104-118; *Routh v. Thompson*, 11 East, 157*] 428; *Ludlow v. Broune*, 1 John. Rep., 15; *Caruthers v. Sheddon*, 6 Taunt., 14, or 1 Serg. and Lowb., 293.)

4th. That even admitting the letter of 27th April to be a gross misrepresentation, it can in no way affect either policy.

Not the first policy, because that policy was founded solely on the order of 6th May, and was executed several weeks before the letter of 27th April was in the country.

Not the second policy, because, as respects that portion of the cargo, covered by the \$2,000 policy, the letter was strictly true, Fitch's interest exceeding that amount. (1 Mar. on Ins., 455, 456; 2 Wheat. Selw., 750, note (41); Peters 1.

Phill. on Ins., 80, 81, 84, 85; *Marsden v. Reid*, 3 East, 572; *Dawson v. Atty.*, 7 East, 367; *Bell v. Carstairs*, 2 Camp., 543; *Forrester v. Pigou*, 1 Maul and Sel., 13; *Brine v. Featherstone*, 4 Taunt., 871; *Etting v. Scott*, 2 John. Rep., 157, 162.)

On the part of the plaintiff, it was also urged, that the policy of the 6th of May is not to be connected with that of the 24th May; no representation was made whatever, when the first policy was entered into.

The insurance on the property on board the Columbia was properly made under the authority and order of Daniel Fitch, who, as master of the brig, and in the relations which existed between him and Mr. Medina, had a right to order the same.

Even gratuitous insurances are not void, but voidable. The tests of such insurances are, was the premium secure, and had the party a right to abandon? The cases cited by the defendants' counsel do not impugn these principles, but sustain them.

Mr. Meredith, and *Mr. Wirt*, Attorney-General, for the defendants.

The letter of the 27th April was a representation of neutral property; and it is insisted, that the terms "for whom it may concern" may be limited by a representation, and the case before the court; the representation was not true.

It is admitted that the stipulations in a policy may be enlarged by a representation, and if enlarged, why not restricted? (*Eaerquart v. Bernard*, 1 Taunt., 450.)

As to a representation and its effect, the following cases were cited: 1 *Seam v. Lowry*, 1 Mason's Rep., 136; 2 Johns. Rep., 157, 163; 2 Caines, 203; 2 Johns. Cas., 451, 173.

The representation having been made by a resident owner, was in effect a warranty of neutrality. (Phill. on Ins., 82; 6 Mass., 220; 2 Johns. Cas., 451, 173.)

A representation must correspond with the facts represented, and must be as favorable to the insurers as if it had been literally true. (Phill. on Ins., 102; 2 Johns. Cas., 168; 6 Mass. Rep., 212.) No case has been cited by the counsel for the plaintiffs, where the cover of property by fraud was protected. Here *the cover was false, and intended to [*158 protect the property of Medina, a belligerent.

Captain Fitch had not an insurable interest in the property of Medina, and as an agent, he was guilty of a misrepresentation. (*Lucena v. Crawford*, 2 New. Rep., 323; 11 East., 434.)

The first policy exhausted the whole of Captain Fitch's interest in the property, and left nothing for the second policy; and the second could not operate, there being a claim against prior insurances in the policy.

False lights were held out to the underwriters by the letter, and while they supposed they undertook a peace risk, they had assumed a war risk.

The insured are bound to show that the property insured was intended to be insured by the policy; and there is no evidence of any authority given by Medina to Fitch, to cause the insurance to be made, or that the same was made for him. (Phill. on Ins., 57, 58, 61; 3 Johns. Cas., 269.)

As to an adoption of a policy, it must be

done by the person for whom the insurance was intended. (2 Maul and Selw., 485; 1 Mason's Rep., 136.)

Mr. Justice JOHNSON delivered the opinion of the court:

This cause comes up from the Circuit Court for the Maryland District, on a difference of opinion.

The suit below was instituted on two policies of insurance, the one for \$6,000, the other for \$2,000, upon the brig *Columbia*, Daniel Fitch, master, at and from the Spanish island of Porto Rico to Baltimore, for whom it may concern. Buck & Hedrick were the agents of Fitch, and the policies were made in their name. The first policy was executed on the 6th of May, 1822, and stands unimpeached by any circumstances occurring at the time of its execution. But, when application was made for the second policy, which was on the 24th of May, the agents laid before the underwriters a letter, dated Ponce, April 27th, 1822, to this effect:

Messrs. BUCK & HEDRICK:

"I wrote you a few days ago by the brig *Ospray*, Captain Perkins, direct for Baltimore, requesting you to have insurance done for me on the brig *Columbia*, and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th of May, with a cargo of sugar. When I wrote you by the *Ospray*, I could not say what amount of cargo to have insured for me. I now think I shall have on board about 130,000 pounds, valued at \$8,000, which amount I wish you to have insured for me," &c.

The rest has no material bearing upon the cause. On the back of this letter was written the following inquiry:

159*] "What will \$2,000 be insured at, agreeable to within letter, on cargo, of which you have \$6,000 insured some time since?"

BUCK & HEDRICK."

The vessel and cargo were totally lost, by the perils of the sea; and the interest proved at the trial, consisted of above \$2,000, the property of Fitch, and above \$6,000, the property of G. Medina, a Spanish subject, of Porto Rico, at that time affected with the character of a belligerent.

The whole cargo was consigned to Daniel Fitch, and documented as his; Medina himself being on board, on the voyage.

The order for insurance, on which the policy of 6th May was effected, was in the following words: "Insurance is wanted against all risks, for account of whom it may concern, \$3,000 on the brig *Columbia*, Daniel Fitch master, and on cargo, \$6,000, as interest may appear, at and from Ponce, Porto Rico, to Baltimore; a letter from Captain Fitch, dated 19th April, says, he expects to sail about 5th to 10th of May; that the brig is in good order, perfectly tight and seaworthy. What premium?"

Both policies, it appears, were done at a premium of 1½, and on neither occasion was the letter of the 19th April called for by the office, nor was any warranty or representation of any kind made or asked for, respecting the cargo; beyond what was voluntarily made, and has been stated.

The first instruction on which the court be-

low divided, was prayed for by the plaintiffs, in these words:

"That as the policies of insurance in this case purport to insure the plaintiffs "for whom it might concern," they are not bound to prove, that at the time of effecting the insurance, or any other time, they disclosed to the defendants that Spanish property was intended to be covered by the insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured.

Dangerous as it always is, in a court of justice, to generalize in the propositions which it decides, it is peculiarly so in questions arising on policies of insurance.

The present proposition is obviously couched in terms too general to admit of an answer in the affirmative, without restriction or modification. And as courts of justice are not bound to modify or fashion the instructions moved for by counsel, so as to bring them within the rules of law, if this cause had come up on a writ of error to the judgment of the court below, for refusing the instruction as prayed, it would be difficult to say, that in the terms in which it is presented, the court was bound to give this instruction.

To affirm, "That in policies of such description, there can be no undue concealment as to the parties interested in the *property [*160 to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes inquiry; the assured may be silent, it is true, if he will, and let the premium be charged accordingly; but if the inquiry then made should be responded to, with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy; which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure "for whom it may concern," under an express assurance, that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest.

This is no more than the application of the general principle, that insurance is a contract of good faith, and is void whenever imposition is practiced.

That a policy "for whom it may concern," will, in ordinary cases, cover belligerent property, has been fully conceded in argument. Nor is it contested, that previous representation will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants, is, that the letter of April 27th, was a representation that the whole cargo was Captain Fitch's, and that it thereby operated as an imposition upon the underwriters, and as such, avoids both policies; or that it affixes a conventional meaning to the phrase, in these policies, which limits its ordinary import.

Is there anything in the case sufficient to except these policies from the ordinary import and effect of the phrase "for whom it may concern?"

We are of opinion there is not.

Whatever turn of expression may be given to

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the question, or in whatever aspect it may be presented, it is obviously, at last, no more than the simple question, have these underwriters been entrapped, or imposed upon, or seduced into a contract, of the force, extent, or incidents of which, a competent understanding cannot be imputed to them?

A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in *Pelly v. The Royal Exchange, &c.* (1 Burr., 341), "the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy. Hence, when a neutral, carrying on a trade from a belligerent to a neutral country, asks for insurance "for whom it may concern," it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property, under neutral names, or of the precautions ordinarily resorted to, that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary than in the correspondence by other vessels so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters, thus intercepted, have often been the ground-work of condemnation in Admiralty Courts; and underwriters, to whom the extension of trade is always beneficial, must and do connive at the practice in silence. They ask no questions, propose their premiums, and the contract is as well understood as the most thorough explanation can make it.

There is nothing in the letter, in evidence, calculated to mislead an insurer of ordinary vigilance, but what was fully explained away by concomitant circumstances. It is true, that in the letter Fitch writes, to have insurance done for him on "the brig Columbia and her cargo;" that he cannot say what amount of cargo to have insured for him. Yet, when the offer was submitted, it was indorsed on the back of this letter, and expressly declared to be upon the same cargo, of "which you have \$6,000 insured, some time since."

The insurance alluded to, was made "for whom it may concern," and this second policy is expressed in the same terms.

Here, then, was a neutral, professing himself to be owner of a cargo, consisting of produce of the hostile island, on a voyage, having for its object to find a market for that produce; most unnecessarily, if himself the real owner, or if there were no owners, but neutrals; most unwisely subjecting himself, or them, to an increase of premium, which could not but result from such an offer.

This was a circumstance calculated to induce inquiry. The defendants had a right to make what inquiries they pleased, as to the real character of the cargo; and if they did not make those inquiries, the law imputes to them the use of the phrase, "for whom it may concern,"

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in its ordinary effect and signification. We are, therefore, of opinion, that this instruction, if so modified as to be confined to the case before the court, ought to have been given.

The second prayer, amounting only to an affirmance of the general proposition, as relates to the policy of the 6th May, we are of opinion, ought to have been given.

The third prayer, having the same bearing upon the policy of the 24th May, we [*162 are of opinion, for the reasons expressed in the first prayer, ought also to have been given.

By the fifth prayer, the plaintiffs ask of the court to instruct the jury, "That if the said Daniel Fitch, at the time of said policies, was legal and equitable owner of part of the cargo insured; and the legal, though not equitable owner of the residue, policies, "for whom it may concern," do cover the entire cargo; and said Fitch is competent, in law, to recover the whole in his own name; though the belligerent character of a part of said cargo was not disclosed at the time of effecting said policies."

The language in which this prayer is couched, obviously imports two propositions: 1st. That a policy, "for whom it may concern," will cover the whole cargo; though the assured had only the legal, without the equitable interest in part, and a legal and equitable interest in the residue; and, 2d. That Daniel Fitch is competent, in law, to recover the whole, in his own name; though the belligerent character of part was not disclosed, when the policies were executed.

It is a very great objection to this prayer that the language used is too general and abstracted; and not adapted to the case, with that studied precision which the law requires; thereby rendering it scarcely possible for the court to meet it with a simple, positive, or affirmative answer.

To the first of the two propositions, it may be further objected, that it is difficult to perceive how it came to be introduced into the cause. Abstracted from the effect of belligerent interest in the cargo, the defense admits that the policy covers all other interests, whether legal or equitable.

And, with regard to the second, it is not easy to perceive why the court should be called upon to charge the jury that Daniel Fitch was competent, in law, to recover the whole in his own name, when the suit is, in fact, prosecuted in the name of the agents; and they count upon the interests of both Medina and Fitch.

But the cause has been argued upon the assumption that this prayer brings up the question of insurable interest, in Fitch, by whose instructions, Buck & Hedrick effected this insurance; and, as it is better to follow out the concessions of counsel than to let the cause come up here again, upon this point, we will consider that question as being raised by this, in connection with the other prayers.

And here, we think, the facts make up a clear case of insurable interest. The only doubt probably arises from one of the most prolific grounds of uncertainty on many subjects, viz., the use of terms, originally unaptly selected, but now rendered legitimate, by use. It is only necessary to inspect a few cases *on [*163 this doctrine, to be satisfied that the term *interest*, as used in application to the right to

insure, does not necessarily imply *property*, in the subject of insurance.

In the case of *Crawford et al. v. Hunter* (8 D. & E., 13), the plaintiffs were commissioners appointed by the crown, under an act of Parliament to superintend the transportation, &c., of Dutch vessels, seized in time of peace, without any present designation for whom; whether to be held in trust, for the original owners, the crown, or the captor. The vessel had been carried into St. Helena; and the policy was effected, with a view to her safe transportation from that island to England; and after much consideration, it was adjudged that this was a good insurable interest, and the plaintiffs recovered.

The same point was afterwards decided, in *Lucena v. Crawford et al.* (3 Bos. & Pull., 75), on a writ of error, to the Exchequer, after three arguments, and great deliberation; yet the seizures were made before declaration of war; and the interest of the plaintiffs amounted to nothing but a power over the subject, with a claim by *quantum meruit*, for their services.

Putting down the present case, therefore, to its lowest grade of insurable interest, it is equal to that of the plaintiffs, in the two cases alluded to; for Daniel Fitch was, at least, the agent or trustee of Medina, to transport his goods from Porto Rico to a market, and to secure them from the chances of capture and loss.

But this case is stronger than the English cases cited; for by the act of Medina himself, Fitch was exhibited to the world, clothed with all the national documents, which evidence an absolute property; and, for many purposes the real owner would have been estopped to deny it.

We will instance the payment of duties; for which, either as owner or consignee, our laws held Fitch absolutely liable. We have, therefore, no doubt of the sufficiency of the insurable interest, in this case.

The last prayer on which the court below divided, is in these terms:

"That the court instruct the jury, that the letter of the 27th April, 1823, with the order written thereon, do not, in law, amount to a representation; that the property to be insured was the sole property of Daniel Fitch; or that the whole, or any part thereof, was not belligerent.

We have already expressed our opinion on the proposition here presented. It is to be regretted that this prayer, also, is so defective in precision. But it was obviously intended, and so argued, to be confined to a representation which would vitiate the policy. With relation to the first policy, we are all of opinion that it was unaffected, by the letter specified; and, **164*** with regard to the second policy, whatever might have been the effect of this letter, had it stood alone; yet, taken in connection with the concomitant circumstances, it was not fatal to the contract.

On this point, a majority of the court would be understood to express the opinion, that this letter connected with the order indorsed upon it, the previous insurance referred to, and, considered in relation to the state of the world, and the nature, character, and ordinary conduct of the voyage insured, was not such a representation as, *per se*, vitiated the policy.

And this opinion will be certified to the court below.

This cause came on, &c. On consideration whereof, this court is of opinion, 1. That as the policies of insurance in this cause purport to insure the plaintiffs "for whom it may concern," they are not bound to prove, that, at the time of effecting the said insurance, or any other time, they disclosed to the defendant that Spanish property was intended to be covered by the said insurance, unless inquiries on the subject were propounded by the insurer, prior to the insurance. 2. That if the jury believe the policy of the 6th of May, 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent, as well as neutral interest. 3. That if the jury believe that the policy dated 24th of May, 1822, was founded on the letter of the 27th of April, 1822, and the order written thereon, the policy being "for whom it may concern," does cover neutral, as well as belligerent property. 4. That if the said Daniel Fitch, at the time of the date of the said policies, was legal and equitable owner of part of the cargo insured, and legal, though not equitable owner of the residue, the policies being "for whom it may concern," do cover the entire cargo; and that the said Fitch had a good insurable interest in the whole cargo; and the plaintiffs, as his agents, are competent to recover the whole sum insured thereon, on proof of such legal and equitable interest in the said Fitch. 5. That the letter of the 27th of April, 1824, whatever might be its effect if taken alone, yet, taken in connection with the indorsement thereon, with the previous policy to which it refers, the actual state of the world, &c., and the nature of such transactions, is not such a representation as vitiates the policy. All which is ordered and adjudged by this court to be certified to the said Circuit Court.

Cited—8 How., 249; 15 Wall., 674; 20 Wall., 163; 8 Otto, 538, 539; 2 Blatchf., 103; 3 Sumn., 140.

*HENRY WRIGHT, WILLIAM [*165
CAROTHERS, ROBERT DENNISTON,
WILLIAM PATTON, THOMAS BUR-
MAN, AND JAMES ROBERTSON, *Plaint-*
iffs in Error,

v.

THE LESSEE OF LEVI HOLLINGS-
WORTH, AND JOHN KAIGHN, *Defend-*
ants in Error.

Ejectment—pleading.

In a trial in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G., citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading; and the jury found for the plaintiff, upon the third, or new count, and a judgment was rendered in his favor.

The allowance and refusal of amendments in the
Peters 1.

pleadings; the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This court has always declined interfering in such cases. [168]

After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he pleases, abide by his plea already pleaded, and waive his right of pleading, *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, in the new, as well as in the old counts. [169]

THIS was an action of ejectment, commenced in the Circuit Court for the District of West Tennessee, in 1813; by the lessee of Levi Hollingsworth, and John Kaighn, citizens of the State of Pennsylvania; against Henry Wright and others, the plaintiffs in error, and citizens of Tennessee. The declaration set forth a demise from Hollingsworth and Kaighn, to John Denn, the defendant in error. A notice was served on the tenants in possession, who, at June term, 1813, appeared, and put in the plea of "not guilty." At June term, 1817, after a jury had been sworn in the cause, the plaintiff suffered a non-suit; which was afterwards set aside; and the plaintiff had leave to add a new count to his declaration, upon condition that all the costs of the term should be paid by him, absolutely; and that he should pay all preceding costs, the same to be refunded, if he should ultimately succeed in [166*] the action. A new *count was then filed, in which is stated a lease from Benjamin Spencer, a citizen of Missouri. To this count no plea was filed; and, at June term, 1825, a trial was had, and a verdict and judgment were rendered for the plaintiff, upon the last count in the declaration.

This writ of error was brought to reverse the judgment.

Mr. White, for the plaintiff in error.

1. No plea was filed to the additional count in the declaration, upon which the trial was had, nor was there any other issue joined at the trial.

2. The amendment, authorizing a new lessor, ought not to have been allowed.

To the new count in the declaration, which introduced a new lessor, Benjamin Spencer, and stated a demise from him; the defendants were not called upon to plead. The case remained from 1817, when the additional count was filed, until June term, 1825, when the trial took place; and the verdict of the jury was upon the new count, and nothing was said upon the former counts in the declaration. The verdict was therefore given, when no issue was joined; and the plea which had been put in originally, could not be applied without consent or notice to the defendants, to the new count. A new party had been introduced, and the defendants should have been allowed an option, whether they would expose themselves to the expenses of a trial, upon the allegations in the additional count. The jury had not the count Peters 1.

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stating the demise from Benjamin Speneer, before them, and yet their verdict was upon it, exclusively. (Adams on ejectment, 200, 205; 1 Caines' N. Y. Term. Rep., 153, 251.)

The terms on which the non-suit was taken off, were, the payment of the costs of the term, absolutely; and of all antecedent costs, which were to be returned if a verdict should be obtained by the plaintiff in the ejectment. These costs were to depend upon the issue between the then parties; but the verdict in favor of the plaintiff, upon the new count, condemned the defendants to pay the whole costs, upon an issue, not formed at the time the court took off the non-suit; and upon the claim of a party, not at that time known to the court.

It does not appear from the record that any ground was laid for the amendment, and the court ought to have been satisfied, before it was allowed; it would have been irregular to allow the amendment without terms.

On the institution of the suit, a *capias ad respondendum*, authorized by the act of Assembly of Tennessee, was issued, against the tenant in possession, and bail given to secure the damages which might be recovered; and the case stood upon the claims of the then actual parties in the cause.

*A new plaintiff could not be introduced, who could claim the benefit of the bail. (1 Scott's Revisal of the Laws of Tennessee.)

Mr. Isaacs, for the defendants in error.

No objections were made to this count, or to the issue at the trial; no allegation of surprise, but the defendants produced and examined their testimony; and the verdict was given without any exception to the pleadings.

1. It is not necessary that the record should show the grounds on which the court set aside the non-suit, and afterwards allowed the amendment; they are stated to have been done after motion, and a rule granted. The law of Tennessee authorizes the court to allow amendments, beyond the statutes of amendments, and *jeofails*, of England, "provided that the nature of the action shall not be changed; and all causes shall be tried, without being entangled in the nice formalities of pleading." (Act of Assembly of Tennessee of 1809, chap. 49.) And the courts of Tennessee have given a most liberal construction to this law.

2. A plea of "not guilty" had been put in, and issue joined upon it. This plea traversed all the facts in the plaintiff's declaration, and made the traverse as broad as possible. The plea put in to the declaration, in its original form, was the proper plea to the new count.

3. It is not claimed, that the bail put in, when the suit was commenced, inured to the benefit of Benjamin Spencer.

Mr. Justice TRIMBLE delivered the opinion of the court:

This action of ejectment was commenced in the Circuit Court, held in East Tennessee, by suing out a writ of *capias ad respondendum*, accompanied with the declaration; and the tenants in possession held to bail, to answer to the action, in a manner provided for by a statute of the State. The original declaration contained two counts; the first, on the demise of Hollingsworth and Kaighn, citizens of Pennsylvania;

the second, on the demise of Joseph Blake and Daniel Green, citizens of Massachusetts.

The tenants appeared and pleaded "not guilty," upon which issue was joined. A trial was had, and a nonsuit suffered by the plaintiff, which was set aside on the payment of costs. After these proceedings, the court, on the motion of the plaintiff, permitted the declaration to be amended, by adding a count, on the demise of Benjamin Spencer, a citizen of Missouri. The parties went to trial without any other pleadings, and a verdict having been found for the plaintiff, upon the third or new count; judgment was thereon rendered in his favor; to reverse which, the defendants have prosecuted this writ of error.

They allege the judgment is erroneous and should be reversed.

168*] *1st. Because, the count on which judgment was rendered against them does not show that Missouri is one of the United States.

2d. Because, the court permitted the declaration to be amended, by adding a new count, on the demise of Benjamin Spencer; and especially as the amendment was permitted with payment of costs.

3d. Because, no plea was filed to the new count, nor any issue made up thereon.

The first objection was very properly not pressed, in argument. The count alleges Benjamin Spencer to be a citizen of the State of Missouri. This count was filed after Missouri was admitted as a State into the Union; and there can be no question but that this, and every other court in the nation, are bound to take notice of the admission of a State, as one of the United States, without any express averment of the fact.

In support of the second objection, it is urged that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced under the state practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third or new count, a proceeding at common law; and, that, according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

This argument would be entitled to great, and perhaps decisive influence, if addressed to a court, having any discretion or power over the subject of amendments.

But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials; and, indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has

always declined interfering in such cases; accordingly it was held by the court in *Wood v. Young* (4 Cranch, 237), that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned. That the refusal of *the [*169 court below to grant a new trial, is not matter for which a writ of error lies (5 Cranch, 11, 187; and 4 Wheat., 220); and that the refusal of the court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of the amendment.

The authorities cited by the learned counsel, do not, we think, support his last position—that the judgment is erroneous, because a plea was not filed to the new count. They prove, unquestionably, that upon the amendment being made to the declaration, by adding a count, the defendants had a right to plead *de novo*; they prove nothing more. They do not show that the defendants, in such cases, must necessarily plead *de novo*; or that judgment may be entered by default, for want of a plea to the new count, if, before the amendment, he has pleaded the general issue. We think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo*. His failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new as well as on the old counts.

This is the general doctrine in other forms of action, such as trespass and *assumpsit*; and we see no reason to distinguish the action of ejectment, or take it out of the general rule.

Judgment affirmed with costs.

Cited—14 Pet., 626; 7 How., 718.

*JAMES J. McLANAHAN, WIL- [*170
HELMUS BOGART, AND JOHN JOSEPH
COIRON, *Plaintiffs in Error*,

v.

THE UNIVERSAL INSURANCE COM-
PANY, *Defendants in error*.

Insurance—province of the court—writ of error
—*seaworthiness—policy "at and from port"*
—*competent crew—concealment.*

Insurance. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible there-

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from, to the free judgment of the jury. But, care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. [182]

An application for a new trial, on motion after verdict, addresses itself to the sound discretion of the court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. The application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exceptions, to the cognizance of the Appellate Court, the directions of the court below must then stand or fall, upon their own intrinsic propriety, as matters of law. [183]

Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. [183]

Seaworthiness in port, or lying in the offing, may be one thing, and seaworthiness for a whole voyage, quite another. [184]

A policy on a ship, "at and from a port," will attach, although the ship be, at the time, undergoing extensive repairs, in port; so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. [184]

What is a competent crew for the voyage—At what time such crew should be on board—What is proper pilot ground—What is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground, for the voyage—are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury. [184]

The contract of insurance, is one of mutual good faith; and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance, is not at the time in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. [185]

If a party, knowing that his agent is about to procure insurance for him, withholds information, for the purposes of misleading the underwriter, it is a fraud, and vitiates the insurance. [185]

Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter. [185]

What constitutes due and reasonable diligence, is a question of fact for the jury. [186]

*The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and, whether fraudulent or not, is matter of fact for the jury. [188]

The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information, and experience, and are in no sense judicially cognizable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. [188]

Little stress ought to be laid upon general expressions falling from judges, in the course of trials. Where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance,

and his leading opinion of the conclusion to which the facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury, but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court. This is so familiarly known, that it needs only to be stated, to be at once admitted. [190]

The question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matter of fact, resolving itself into a mere point of law. [191]

THE action, in the Circuit Court for the District of Maryland, was instituted by the plaintiffs in error, on a policy of insurance, in the usual form; and a verdict was rendered for the defendants, under the opinion of the court, upon the first of nine exceptions, taken by the plaintiffs.

The material facts in the case were: Insurance was effected in Baltimore, in the name of Thomas Tenant, to the amount of \$10,000, on the brig Creole, for a voyage from Havre de Grace to New Orleans, with liberty to touch and trade at Havana. The policy was dated upon the 22d day of December, 1823. The insurance was made for the plaintiffs, the sole owners of the vessel, under the following circumstances:

John Joseph Coiron, one of the plaintiffs, while at Harve de Grace, on the 19th of October, 1823, addressed to Mr. John Stoney, of Charleston, the following letter:

HAVRE, October 19th, 1823.

MR. JOHN STONEY, Charleston:

Dear Sir—Please to have insured, for my account, for the *account and risk of [*172] whom it may concern, ten thousand dollars on the brig Creole, of New Orleans, Captain Jacob Goodrich, for New Orleans, touching at the Havana. The brig and boats in the best order, having a round-house on deck, containing fourteen berths; the crew are seventeen in all. We intend sailing to-morrow. I have with me my family, consisting of two children and two nephews. The wind having shipped round suddenly, I write this in haste; my first will be more satisfactory to you, for particulars. The new Georgia upland cotton, twenty sous; rice, thirty francs. Your devoted serv't and friend,

JOHN JOSEPH COIRON.

NOTE.—*Marine Insurance. Fraud. Suppression of facts.*

The concealment of material circumstances, vitiates all contracts upon the principle of natural law. (Comfoot v. Fowke, 2 Dow., 263; Hodgson v. Richardson, 1 W. Black., 465.)

In a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as to affirm that to be true which he knows to be false. (Per Lord Mansfield in Pawson v. Watson, Cowper, 785; Pasley v. Freeman, 3 Term R., 51.)

The insured is bound to represent to the underwriter all the material circumstances of the ship Peters 1.

and voyage. If he do not, though by accident only, or neglect, the underwriters are not liable; a *fortiori*, if he suppress, or misrepresent, from fraud. (Ratcliffe v. Shoolbred, Park Ins., 413; De Costa v. Scandret, 2 P. Wms., 170; Seaman v. Formereau, 2 Stra., 1183; Webster v. Forster, 1 Esp., 407; Foley v. Maline, 1 Marsh., 117; Fort v. Lee, 3 Taunt., 381; Berthon v. Longman, 2 Stark., 58; Kirby v. Smith, 1 Barn. & A., 672; Westbury v. Aberdeen, 2 Mees. & W., 267; Lynch v. Hamilton, 3 Taunt., 37; Lynch v. Durnsford, 14 East., 494; Hodgson v. Richardson, 1 W. Black., 463; McAndrews v. Bell, 1 Esp., 173; Fillis v. Bruton, Park Ins., 414; Carter v. Boehm, 2 Burr., 1905; Hildyard, Mar. Ins., 575-583.)

And also another letter, as follows:

Duplicate.

HAVRE, October 20th, 1823.

MR. JOHN STONEY, Charleston:

Dear Sir—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, \$10,000, on the brig Creole, of New Orleans, Captain Jacob Goodrich, from this port back to New Orleans, touching at the Havana, the vessel and boats in the best order, having a roof on deck, containing fourteen berths, manned by seventeen hands. You know the vessel. I have only to add, that I have made \$1,000 worth more repairs and improvements on her. She is now a very convenient packet. I will feel gratified to hear from you, at the Havana. I intend but making a very short stay there, having two children and two nephews with me, and being very anxious to meet Mrs. C., I cannot give you any favorable information respecting business in this part of Europe.

With the pleasing expectation of being soon near you, I remain, respectfully, dear sir, your devoted servant and friend,

JOHN JOSEPH COIRON.

This letter was inclosed in another, addressed by Quartier & Drogy, of Havre, to Mr. Stoney, dated 23d of October, 1823, and stamped with the post-mark of Savannah, December 10th; which, with the indorsements thereon, were as follows:

P. Hesperus.

HAVRE, October 23d, 1823.

JOHN STONEY, Esq., Charleston:

Sir—We are indebted to our mutual friend, Mr. J. J. Coiron, from whom we beg leave to hand you the inclosed letter, for an introduction to your respectable firm, and should feel **173*** particularly happy, if it became the means of an active correspondence between us; the produce of your country, and particularly cotton, being always of an easy and frequently advantageous sale in this part of France, on account of the vicinity of the metropolis, and the principal manufacturing towns, which gives Havre a decided preference over the other commercial ports of France. Georgia short staple sells at 27c. 29, and the stock on hand not considerable, few arrivals being expected until the new crop, which can hardly reach our market before the month of December. It would, however, not be prudent to speculate on the present prices, as they will be likely to give way on arrival of the new crop, and occasion considerable losses. Our opinion is that purchases ought to be made at from 11 to 13d, and not to exceed 14d, to offer a benefit here.

Should you feel disposed to enter into a connection of business with us, and honor us with an answer, we could, if you are so inclined, commence with an adventure of a hundred bales of cotton, for mutual account, and successively enlarge the speculation if the result prove satisfactory. As to the re-imbursement for our share, we authorize you to draw on us, at Paris, at sixty or ninety days' sight, if the exchange be advantageous; else we may either make you remittance, or open you a credit at New York. In case it should suit you to speculate for your own account, we beg to offer you

the facility of an anticipation of half the amount of the consignments you may please to intrust to our care, on receipt of the bills of lading and order for insurance. We are also ready to offer the same facilities on shipments which you may sway to us, for account of other houses, and to grant you a share in the commission on the same.

Would oblige us to render us the following service, viz.: to procure acceptance of the inclosed bill of \$420, sixty days' sight, on Barbet & Esnard, of your city; and, when accepted, to hand the same to Mr. Sam Simon, at Augusta. &c.

Believe us, with due regard, sir, your most obedient servants,

A. QUARTIER & DROGY.

JOHN STONEY, Esq., Charleston, S. C.

No. 9, 1823.—QUARTIER & DROGY, Havre, Oct. 23. Received 13th December.

Hesperus.

The letter of the 19th October was dispatched, in a single form, from Havre on the 20th, by a vessel sailing on that day, for Philadelphia, and was received by Mr. Stoney on the 15th of December; a duplicate of the letter of the 20th was dispatched on the 23d of October, by the Hesperus, via Savannah.

*On the 12th of December, 1823, Mr. [***174**] Stoney applied to the Fire and Marine Insurance Company, and to the Union Insurance Company in Charleston, for insurance on the Creole, and both offices refused the risk, upon the ground that they ought to have received account of the arrival of the brig before that time. The offers were withdrawn, and upon the 13th of December he wrote to Thomas Tenant, Esq., at Baltimore, the following letter. The letter was post-marked at Charleston on the day of its date, and was received in Baltimore by Mr. Tenant on Saturday, the 20th December, in due course of mail:

CHARLESTON, 13th December, 1823.

THOMAS TENANT, Esq., Baltimore:

Dear Sir—I received, the day before yesterday, a letter from John Joseph Coiron, via Savannah (extract annexed), in which he requests me to have insurance effected on the Creole, on his account, and others, valued at ten thousand dollars (\$10,000). The two offices here are afraid of their own shadow, and will not underwrite her. I must, therefore, request the favor of your having the insurance done, agreeable to his order annexed, and I will be answerable to you for the premium, &c. Good upland cotton 14 cents, and declining. I have only to confirm my respects of the 3d inst., which I hope you have received before this. If the insurance cannot be done with you, please write to New York to have the same effected.

Expecting the pleasure of hearing from you soon, I am, very respectfully,

Your most obedient servant,

JOHN STONEY.

Duplicate. (Inclosed.)

HAVRE, 20th of October, 1823.

MR. JOHN STONEY, Charleston:

Dear Sir—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, \$10,000 on the brig Creole, of New Orleans, Captain Jacob Good-

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rich, from this port, back to New Orleans, touching at the Havana. The vessel and boats in the best order, having a roof on deck, round-house, containing 14 berths, manned by 17 hands; you know the vessel. I have only to add that I have made \$1,000 worth more of repairs and improvements on her. She is now a very convenient packet.

Extract Thomas Tenant, Esq., of Baltimore, Maryland.

No. 1. John Stoney, Charleston, 13th Dec., 1823, and 20th Dec. (mail), order for insurance.

175*] *On the 22d of December, 1823, Mr. Tenant applied to the defendants, the Universal Insurance Company, for insurance, by the following written order for the same; and, upon the contract thus made, the policy was on the same day filled up and executed. "I want insurance, for account whom it may concern, on the brig Creole, Jacob Goodrich, master, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana, against all risks; and in case of loss, the same to be paid to me. The vessel valued, independent of freight, to this sum—\$10,000.

The Creole was completely rebuilt and copered at Charleston, S. C., in last summer, at great expense, and is now considered a remarkably fine vessel. She was, and I presume still is, owned by M'LANAHAN and Bogart, and J. J. Coiron. The latter gentleman was on board her, and I presume is returning in her to New Orleans. He writes from Havre, under date of 20th October, but does not say when the brig would sail. She sails under a certificate of ownership. What will be the premium on the above risk?

THOMAS TENANT,
By RICHARD G. COX.

Baltimore, 22d Decr., 1823.

8 per cent.

Accepted. T. Tenant."

On the day the insurance was so made, Mr. Tenant had made application, in the same terms, to the Maryland, Chesapeake, and Baltimore Insurance Companies, all of which declined the risk. The Phoenix Insurance Company, upon application, declined, on the ground that the time of sailing was not ascertained; and the Patapsco Company were willing to take \$5,000, at 5 per cent. premium. The insurance effected by Mr. Tenant, was the only one made upon the Creole.

No information relative to the loss of the Creole was received in Charleston, nor was her loss known there, until the 15th of December; on which day the brig Panther arrived at Charleston, and about 2 o'clock, Mr. Stoney was informed thereof.

On the 19th of October, 1823, by entries in the log-book of the Creole, at Havre, it was shown that "the brig was getting ready for sea on the 20th; at 9 A. M. the pilot came on board, and warped out into the basin, made sail, hove to in the offing, for the captain, owner, and passengers and crew." At 10 A. M. they came off, and the pilot left the vessel. Tuesday, the 21st October, 1823, the following entry was made in the log-book:

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*TUESDAY, OCTOBER 21, 1823. [*176

| H. | K. | COURSES. | WINDS. | |
|----|----|----------|--------|---|
| 1 | 7 | | | Commences with fine breezes and pleasant weather. This day contains 12 hours, ending at noon. At the commencement of the civil account, that at midnight, Cape De Here bore per compass S. S. E., distant five leagues. |
| 2 | 7 | | | |
| 3 | 7 | | | |
| 4 | 7 | | | |
| 5 | 7 | | | |
| 6 | 7 | | | |
| 7 | 7 | | | |
| 8 | 7 | | | |
| 9 | 7 | | | |
| 10 | 7 | | | |
| 11 | 7 | | | |
| 12 | 7 | | | |

The detention of captain on shore, being in want of the national certificate of the owners of this brig, having been carried off by the former captain, Leonard Fash, who was dismissed. It was, therefore, necessary for the present captain to go through the requisite formalities, before the American Consul, to prove the want of this important document.

The protest of Captain Goodrich, master of the Creole, stated that the Creole sailed from the port of Havre de Grace on the 21st of October, 1823, bound for Havana in Cuba; that on the 29th of December, the brig was wrecked, and lost on Sugar Key, while on the voyage; and himself, the passengers and crew, were picked up, and some of them carried to New Orleans by the ship Trumbull, which ship arrived on the 17th of December, 1823. The second mate of the Creole, and five passengers, among whom were Mr. Coiron and his family, left the ship Trumbull off the Havana, in the small boat of the Creole, and were landed there upon the same day. It also appeared from the evidence on the part of the defendants, that the schooner Chase, Captain Richard S. Pinckney, master, sailed from Havana for Charleston from the 1st to the 3d of December, 1823, and arrived at Charleston on the 12th of the same month. Captain Pinckney stated that he did not hear in Havana any report of the loss of the Creole. The schooner Eliza and Polly sailed from Havana for Charleston three hours before the Chase, and Captain Pinckney left Havana to go on board the Chase three hours after the sailing of the Eliza and Polly.

The following letter from Lemuel Taylor to Mr. Tenant, was also admitted as evidence:

"HAVRE, June 28th, 1824.

My Dear Sir—Your favor of the 5th instant was received yesterday; and, in reply, I have only to say, that I left Havana on the 3d of December last, in the schooner Chase, Captain *Pinckney, for Charleston; and that, [*177 some days previous to my departure from Havana, I see a person land on the wharf, a crowd seemed to get round him, and I see several taking him by the hand; I asked who he was; his name was mentioned, but I do not now recollect it, and that he was passenger in the brig Creole, from Havre, for Havana, and lost on some of the Keys; and that he was an old trader to Havana, from France, and had a large adventure on board. His name, and time of landing can be ascertained at Havana, if wanted. I never heard the case mentioned on the passage, or in Charleston; and I am sure I never thought or heard of it after leaving

Havana, till one day, while in Baltimore, Mr. Parker, speaking of losses, mentioned the Creole; and I observed I heard of her loss while in Havana; he then observed they should have to refuse to pay the loss, and that it would be one of the most painful disputes he ever had as president, on account of the great respectability of yourself and Mr. Stoney, and mentioned something about dates. From that time until I received your letter yesterday I never heard or thought of the case. And I again repeat that I am sure I did not hear the loss mentioned on the passage or in Charleston, and that I see the passenger land as mentioned; and that his name and date can be furnished from Havana, if wanted.

I am, dear sir, very sincerely, your friend
and servant,

LEMUEL TAYLOR."

It was also proved that the northern mail closed in Charleston at ten o'clock in the morning, and generally arrived in Baltimore in seven days, exclusive of the day the letter was mailed, but never at an earlier day; though sometimes in eight or nine days; that it generally arrived from half-past one to two o'clock, and the letters of Mr. Tenant were never delivered by the penny post to him, until after three o'clock on the day of the arrival of the mail. The hours of business of the insurance companies in Baltimore terminated, daily, at two o'clock.

The fullest testimony was given of the high character of Mr. Stoney and Col. Tenant, to negative the possibility of a presumption of intentional fraud, or concealment on the part of either of those gentlemen, relative to the loss of the Creole.

The plaintiff on the trial tendered nine exceptions to the opinions of the Circuit Court, all of which are stated on the record; but, as in the opinion of this court, no notice is taken of any other than the first exception; and the court justified the refusal of the judges of the Circuit Court to sign the bill of exceptions to any other than the first, it is deemed necessary to insert the first exception only. That exception is as follows: "The defendants, by their counsel, prayed the court to instruct the jury **178*** [that upon the whole evidence in the case the plaintiffs are not entitled to recover, and the verdict of the jury ought to be for the defendants; which instruction and opinion the court accordingly gave; and thereupon the plaintiffs, by their counsel, prayed leave to except, and that the court would sign and seal this, their bill of exceptions, which is accordingly done, this 10th day of January, 1826.

"G. DUVAL, (Seal.)

"ELIAS GLENN." (Seal.)

The cause was brought by writ of error to this court, and was argued by *Mr. Tany*, and *Mr. Jonathan Meredith*, for the plaintiffs in error, and by the *Attorney-General* of the United States, and *Mr. Ogden*, for the defendants.

For the plaintiffs. Two general grounds of defense were taken at the trial below:

1. A concealment of material circumstances in effecting the insurance.

2. Want of proper diligence, in not countermanding the order for insurance, after the loss had occurred.

As to concealment.

Four instances of concealment were charged:

1. The time of the sailing of the brig from Havre.

2. An offer for insurance was made at Charleston, and its rejection.

3. The arrival of the two vessels from Havana at Charleston.

4. The description of the brig in Coiron's letter of 20th October. "she is now a very convenient packet."

As to negligence.

The want of due diligence, in not countermanding the insurance, was charged.

1. By Coiron, in not communicating the loss to Stoney, while off Havana.

2. By Stoney, in not revoking the order to Tenant, on hearing of the loss on the 15th of December.

The general principle as to the doctrine of concealment is, that the assured is bound to make a full disclosure.

The exceptions are: 1. As to facts which the insurer ought to know. 2. What he takes on himself the knowledge of. 3. Which he waives being informed of. 4. Which are not material, as not varying the contract. (*Carter v. Boehme*, 2 Burr. Rep.)

1. As to the charge of concealment of the time of sailing; Coiron could only state his expectation on this subject.

Coiron was not bound to state a mere expectation of the *time of sailing; because, [***179** if he had, it would not have bound him as a representation. (Phill. on Ins., 83, and cases cited.)

There is no general rule on the subject. It depends, like every other species of concealment, on its materiality to the risk, and it was not material here. (*Foley v. Moline*, 5 Taunt., 430; 1 Camp., 116; *Fort v. Lee*, 3 Taunt., 381; 1 Marshall, 483, 484; *Mackay v. Rhinelanders*, 1 John Cas., 408; 1 Sergeant & Lowber, 144.)

The usage in Baltimore, is to calculate the sailing on the day of the last advices in port; which the order in this case stated to be 20th of October. The duty of disclosure is confined to facts, not to the conclusion of other men from the same facts. (Phill., 100; *Bell v. Bell* 2 Camp., 479; 1 Parke (7th edit.), 292; Cited, 2 Dane's Abr., 121.)

The usage in Baltimore corresponds with the legal principle; and that usage may be applied to this case. But if the laws were otherwise, still the question would be, was the alleged concealment material, or was it not, in this case?

2. Concealment, as to arrival of vessels from Havana.

The answers are: 1. There is no proof that Mr. Stoney knew of their arrival. 2. Immaterial, because when they left Havana, the Creole could not be considered missing. (*Littledale v. Dixon*, 1 Newb. Rep., 151.)

3. Concealment, as to the Creole's being a packet.

1st. It is not necessary to describe the particular construction of the vessel offered for insurance. (*Haywood v. Rogers*, 4 East, 590.)

2d. General ground—not countermanding the insurance.

The rule of law is, that if, after an order for

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insurance, a loss happens, it is the duty of the assured to countermand the order, where there is probable ground to believe that, by the exercise of reasonable diligence, it will arrive in time. (See *Fitzherbert v. Mather*, 1 Term Rep., 12; *Watson v. Delafield*, 2 Caines' New York T. Rep., 224.)

Coiron might fairly have presumed that one of the three letters, ordering insurance, might have reached Mr. Stoney long before the loss, particularly the one via Savannah.

The questions in this cause are all unmixed questions of fact, and they were improperly decided by the court below.

The language of the instruction is peremptory, not by way of advice as to the facts, and was considered as binding on the jury. The question of materiality as to concealment, is always a question exclusively for the jury. (1 Park (7th edit.), 289, 301, 314, 317; *Hull v. Cooper*, 14 East, 479; 1 Maule & Selw., 16; *Littlesdale v. Dixon*, 1 Newb. Rep., 151; *Mackay v. Rhineland*, 1 John. Cases, 408; *Williams v. 180** *Delafield*, 2 *Caines, 329; *Fireman Insurance Company v. Walden*, 12 John., 513, and the cases cited in the opinions of Ch. Kent.)

A question of due diligence is also a question of fact. (1 Stark., E. 412, &c.; and see notes in *Moore v. Morgan*, Cowp., 479; *Wake v. Atty*, 4 Taunt., 493; *Bateman v. Joseph*, 2 Camp., 461; *Reese v. Rigby*, 4 Barn & Ald., 202; *Watson v. Delafield*, 2 Caines, 224.)

In reply to the argument of the counsel of the defendants, it was said: The question of seaworthiness is one of fact, and should have been submitted to the jury: As to the casual absence of the captain. (Phill., 118.)

The brief delay occasioned by the want of a paper, was not material; and was not a deviation to avoid the policy. (Phill. on Ins., 191, and cases cited.) The court have the right to decide upon the law of the case, but the facts are exclusively for the jury. Nor is it admitted that the court may advise upon matters of fact, in this case. The court assumed to determine the facts, and took them entirely from the jury.

The practice under the laws of Maryland, is in conformity to the principles claimed by the plaintiffs, and the court are prohibited by law from advising upon the facts. This course of proceeding has not been found inconvenient, nor has it been disapproved of by the people; and it may therefore be considered judicious.

Mr. Wirt and *Mr. Ogden*, for the defendants.

The facts of the case justified the opinion of the court, which is the subject of the first exception; the whole of the case rests upon that exception.

Was the vessel seaworthy, at the time of her departure from Havre? The log-book shows that she got under weigh before the master and crew were on board. At the time of the sailing of the vessel insured, she must be properly manned for the voyage—she must be seaworthy when the voyage commences. (Phill. on Ins., 117; cases cited, 3 Bur., 1419; 7 Term R., 705; 1 T. Rep., 343, 186.)

2d. There was such a deviation as to discharge the underwriters.

Delay for documents a deviation. (1 Phill., 181; 1 Marsh., 499.)

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Upon the first exception, two questions present themselves:

1. Did this court err in giving the instruction?
2. Did the court invade the privileges of the jury?

The time of the sailing of the *Creole* was not communicated by Coiron, nor did he write, as he ought, and could have done, on his arrival at Havana, after the loss of the brig; and his omission to do this, avoided the policy. (Phill., 96; 2 Caines, 224; 1 Johns. Rep., 150; 2 Johns. Rep., 526; 9 Johns. Rep., 33.) Mr. Stoney *should have inquired at Charleston, of [*181 those who arrived from Havana, for information about the *Creole*.

The courts of the United States are not bound by the recent law of Maryland, in reference to the power of courts to advise or instruct the jury upon facts; the law continues unaffected by the statute. What is concealment, is now become a question of law. (Marshall, 467.) In all cases, when a vessel insured is to sail from abroad, the time of sailing is material.

Upon authorities, this was a case in which the court had a right to say the insured could not recover. (Phill. on Ins., 468; 1 Newb. Rep.; 4 Marsh., 470; *M'Andrew v. Bell*, 70; 1 Esp., 371, 407; Phill., 104.)

It is objected, that the court took upon themselves to decide the materiality of the fact; and that this, by the law of insurance, is exclusively for the jury.

This is to say, the court can give no opinion or instruction on the materiality of the facts.

This authority is frequently exercised. (6 Cranch, 274, 339; 13 Johns. Rep., 334; 8 Mass. Rep., 336.) Questions of fact, on which the law was to be settled, have been taken from the jury. What is notice of non-payment of a bill of exchange, is no longer a question of fact. So questions of abandonment. (6 Cranch, 338.) Breaking up of a voyage, has become a question of law, "or it may be considered in the chrysalis state, part grub and part butterfly." (6 Cranch, 71.)

The point now to be settled by this court, is a question of political jurisprudence; and the court is called upon, first, to decide and establish a rule for the proceedings of the courts of the United States; and to say how far these courts can interfere in questions of fact.

Is the inquiry one which cannot be touched, because the barrier is established "that the law is for the court, and the fact is for the jury?"

In England the same principles prevail, and yet the courts have broken down this barrier.

It is expedient that courts should thus interfere, while it is entirely conceded that the preservation of the trial by jury, in criminal cases, is essential; in civil cases, what would be the trial by jury without the interference of courts, and "if the law were left to the shifting sands of jury jurisprudence?" It would be "a world without a sun;" like chaos before the command "Let there be light!"

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Maryland. The original action was brought by the plaintiffs in error against the defendants, upon a policy of insur-

182*] ance underwritten *by the defendants, whereby "they caused Thomas Tenant, for whom it may concern, to be insured, lost or not lost, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana;" ten thousand dollars upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the court, upon the prayer of the defendants' counsel, instructed the jury, "that upon the whole evidence in the case," as stated; the plaintiffs are not entitled to recover, and the verdict of the jury "ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court, upon the ground that the opinion already given disposed of the whole cause upon its merits. If that opinion was correct, this refusal was entirely justifiable; for the court was under no obligation to discuss or decide other points, when the plaintiffs' case was already shown to possess a fatal defect.

The general question, then, before this court, is upon the propriety of the instruction so given to the jury.

A suggestion has been thrown out at the bar, that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts; but merely to offer for their consideration those views which the court had arrived at, and which it might at all times properly suggest to the jury. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. We do not, however, understand that the present instruction was in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed there were no disputable facts or inferences, proper for the consideration of the jury upon the merits; and that, upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view, that it is open for the consideration of this court; and in this view, it will now be discussed, as it was discussed in the argument at the bar.

Four grounds have been presented to justify the opinion of the Circuit Court; which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The **183***] first is *the unseaworthiness of the ship at the time when she broke ground at Havre, and commenced the homeward voyage, by reason of the master and a sufficient crew not being then on board. The second is, the laying off and on, near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board; which, it is said, was an improper detention, and amounted

to a deviation. The third is, the omission of Coiron to communicate to his agent, or other persons in America, the knowledge of the loss, by the way of Havana, so as to countermand the order of insurance; which it contended was a fatal omission of duty. The fourth is, the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th October, ordering the insurance; which, whether fraudulent or not, was a material concealment, and misled the underwriters in the same manner as if there had been a representation that the time of the sailing was uncertain.

It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the Appellate Court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law.

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general to enable the court to draw any legal conclusion from them, either as to seaworthiness or deviation. There is no doubt that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. But how is this court to arrive at the conclusion that the brig Creole was not in that predicament at the commencement of the present voyage? The argument assumes that the ship ought not to have got under weigh or proceeded into the offing, until the master and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was actually *on [**184**] board at the time; nor whether the voyage was absolutely intended to be commenced on that day; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground and standing off and on in the offing, were preparatory steps only for this purpose; nor whether for such purposes the pilot and crew on board were not amply sufficient. But we are far from being satisfied that the law has interposed any such positive rule as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for a whole voyage quite another. A policy on a ship at and from a port will attach, although the ship be at the time undergoing extensive repairs in port, so as, in a general

sense for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage, are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of *Lord Chief Justice Abbott*, in *Weir v. Aberdeen* (2 Barn. & Ald., 320), which goes the length of asserting that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion whenever it comes directly in judgment.

The like answer may be given to the point of deviation. This court cannot intend, that here there was any unnecessary delay in the commencement or course of the voyage. The delay, for the want of papers, may have been entirely justifiable; and, indeed, may have conduced to an earlier inception of the voyage, by putting the ship in a situation to depart at a moment's warning. The usage of trade may be generally, or at least in that particular part, to get the ship under weigh as in this case, and wait in the offing, until the master is ready to come on board; and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds, and seasons. How, then, can this court undertake to decide, as matter of law, apparent upon the record, that any delay, admitting of such explanations, amounts to a deviation?

The next point is the omission of Coiron to **185*** communicate *information of the loss to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, *qui facit per alium, facit per se*. His own knowledge, in such a case, infects the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible Peters 1.

from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by *Watson v. Delafield* (2 1 John. R., 152; 2 Caines' R., 224; 2 John. R., 526), where most of the early cases are collected, and commented upon; and it is well summed up by Mr. Phillips, in his treatise on insurance (p. 96). We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is, whether the rule as to diligence may not, in certain cases, be somewhat more strict, so as to require, what in *Andrew v. Marine Insurance Company* (9 John R., 32) is called "extreme diligence;" or what in *Watson v. Delafield* is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only probably but possibly arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of *each particular case; [*186 and that the expressions thrown out in the cases above mentioned were, not so much intended to point out a stricter rule, as to intimate that there might be cases in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous; or where, from the lapse of time, and the date of the order for insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of *Wake v. Atty* (4 Taunton's R., 494) lays down no new rule, but merely applies the old one to circumstances somewhat nice and peculiar in their presentation.

What constitutes due and reasonable diligence in cases of this nature, is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given, and the inferences deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion, as to time, mode, and place of conveyance, the course of trade and nature of the voyage, and the probable chances

of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances which deserve the most careful consideration of a jury upon the point of due diligence. The loss occurred at no given distance from the port of Havana; and if letters had been sent ashore at that port, there is strong reason to believe that they could have reached Mr. Stoney in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown what were the means and facilities of communication, **187*** in the course of trade and voyages, between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown that the parties contemplated a stoppage off the Havana, so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain or quicker than others which might have been resorted to in the ordinary course of the voyage of the ship Trumbull to New Orleans. We may, indeed, conjecture how these matters were by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts; yet, all these circumstances must or may be material to the point of due diligence. In their very essence, they are matters of fact, and not conclusions of law.

The opinion, therefore, to which the learned counsel wish to conduct us—that the policy is void, because there has been gross negligence in not countermanding the order for insurance—is one to which, upon this record, we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the Circuit Court must, then, be abandoned.

The next point is the omission in the letter of the 20th October of any mention of the time of the vessel's sailing. This is put to the court in a double aspect; first, as the concealment of a material fact; and, second, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage.

Whether this omission in the letter was merely accidental, or with design to mislead the underwriters; and whether, if so designed, it had the effect (which, upon the testimony in the case, would be a matter of serious doubt), it is not now necessary to inquire. If accidental, it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not in fact mislead; and whether fraudulent or not, was matter of fact for the jury.

That there was no virtual representation as to the time of sailing, seems to us conclusively established, by the language of the letter of Colonel Tenant, requesting insurance. He there says, "he (Coiron) writes from Havre, under date of the 20th October; but does not say when the brig would sail." Now, this letter, in direct terms, negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry, or for any presumptions most unfavorable to the assured. The natural result ought to be, that the underwriters should calculate the time of sailing as very near the date of the letter, so as to ***188** ask a premium equal to the widest range of risk, from the intermediate lapse of time. The underwriters had no right to presume that the ship would sail at some future indefinite period, and to bind the assured to that presumption. The letter told them in effect, that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance whenever the ship might sail, be it on that day, or any future day. In this view, the point as to representation vanishes; and the like consideration would, in a great measure, dispose of that of concealment.

But the question, as to this latter point, has been argued at the bar upon much more broad and comprehensive principles; upon which it seems proper for this court to express an opinion, especially as this case may again undergo the consideration of a jury.

It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there cannot at this time be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities), that generally, the materiality of the concealment is a question of fact for the jury. But it is said that there are exceptions from the rule, and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the court. It is necessary to maintain this position in its full extent, to extricate the present case from its pressing difficulties; and if this shall be successfully made out, it will still remain to be decided whether the facts stated in the record are sufficient to enable the court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk, cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation, and touching and staying at port, the objects of the enterprise and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries, are mixed up with nautical skill, information, and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality—that is, whether the risk be increas-

ed so as to enhance the premium—is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance. In this very **189*** case, *the introduction of testimony was indispensable, to show the usual length of the voyage; and it was quite questionable, whether, in a just sense, the vessel could be deemed a missing vessel at the time of the insurance. Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the ship from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same element.

It has been said, that there is no case in which the materiality of the time of sailing has been doubted, where the ship was abroad at the time; whether this be so or not, it is not important to ascertain, unless it could be universally affirmed (which we think it cannot), that the time of sailing abroad must always be material to the risk. If it may not always be material, the question, whether it be so in the particular case, is to be decided upon its own circumstances. Indeed, we cannot perceive how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port may be material to the risk, and if so, the concealment of it will vitiate the policy; but whether material or not, opens the same inquiry into facts as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion, but it is essentially the same process. The case of *Fort v. Lee* (3 Taunt. R., 381), did not proceed upon the ground, that the time of sailing from a home port was never material to be communicated; but, that under the circumstances of that case, the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the court to grant a new trial, where the plaintiff had obtained a verdict, and there was no pretense of any misdirection at the trial. In *Foley v. Moline* (5 Taunt., 145), the court said that there was no pretense for the proposition, as a general rule, that it was necessary to communicate to the underwriters whether the vessels on which an insurance was proposed, had sailed or not. There might be circumstances, that would render that fact highly material; as if the ship were a missing ship, or out of time. So that here, a denial of the proposition now asserted before us, was, in the most explicit terms, avowed and acted on.

Two *nisi prius* cases before Lord Mansfield, have been relied on to establish the supposed exception to the general rule of cases, relative to the time of the sailing of the ship; in which it is argued, that his lordship undertook to decide the point of materiality, as matter of law, **190*** and to give it as a rule to the *jury. It is proper to remark, that little stress ought to be laid upon general expressions of this sort by judges, in the course of trials. Where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to the materiality of the concealment, and his

leading opinion of the conclusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury; but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court. This is so familiarly known, that it needs only to be stated, to be at once admitted. It is with reference to these considerations, that the cases above alluded to should be examined.

The first is *Ratchiff v. Shoobred*, cited from Marshall on Insurance, p. 290. It would certainly seem, at the first view, that Lord Mansfield did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the materiality was in question at the trial, but only the effect of the concealment in avoiding the policy. The same case is reported more fully and more accurately by Mr. Park on Insurance (p. 290), where it is perfectly clear that the point of materiality was left to the jury. "The question is," said his lordship, "whether this be one of those cases which is affected by misrepresentation or concealment." If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable; and the jury found a verdict for the defendant, under this direction. So that the point was left fully open to them.

The next case is *Fillis v. Berton*, cited in Marshall on Insurance, 467, and reported also in Park on Insurance, 292. The insurancee was on a ship from Plymouth to Bristol; and it appeared, that the broker's instructions stated that the ship was ready to sail on the 24th of December, when, in fact, she had sailed on the 23d. Mr. Marshall states, that Lord Mansfield ruled that this was a material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord Mansfield said this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to *them the [***191** general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted that the misrepresentation was material (as from the short duration of such a voyage might naturally be inferred), and that the only point was, whether the ship had sailed or not. The same explanation disposes of the case of *M'Andrews v. Bell* (1 Esp. Rep., 373). Indeed, in any other view, it would be impossible to reconcile these decisions with the judgment pronounced by Lord Mansfield, and other judges, upon more mature deliberation, when causes have been brought before them in bank. Take, for instance, what fell from the court upon the motion for a new trial, in *M'Dowell v. Praza* (Doug. R., 247, 260), *Shirley v. Wilkinson*

(Doug. R., 236), *Hodgson v. Richardson* (1 Bl. Rep., 289), *Littledale v. Dixon* (4 Bos. & Pull., 151), and *Hull v. Cooper* (14 East, R., 79). In the case of the *Maryland Insurance Company v. Ruden's Administrators* (6 Cranch, 338), this court expressed the opinion that "it was well established, that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the Court of Errors of New York, in the case of the *New York Fireman Insurance Company v. Walden* (12 John R., 513), where Mr. Chancellor Kent, in a very elaborate judgment, reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar, cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts, but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

This cause came on, &c. On consideration whereof, it is considered by this court, that there is error in the opinion of the Circuit Court, given to the jury upon the prayer of the **192*** *defendants' counsel; that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant; that opinion having withdrawn from the proper consideration of the jury, matters of fact in controversy between the parties.

It is therefore further considered and adjudged, that the judgment of the said Circuit Court, in this case, be, and the same is hereby reversed; and that the cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—8 How., 248; 13 How., 131; 1 Wall., 598; 5 Otto, 238; 2 Wood. & M., 154, 489, 493; 3 Wood. & M., 189; 6 McLean, 337; Olcott, 115; 1 Sawy., 483.

193* *CORNELIUS COMEGYS AND ANDREW PETTIT, *Plaintiffs in Error*.

v.

AMBROSE VASSE, *Defendant in Error*.

Commissioners under Florida treaty—assignment—abandonment—indemnity.

The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May, 1819,

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was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow that this authority extends to a just all conflicting rights, of different citizens, to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial who is the legal or equitable owner of the claim, provided he is an American citizen. [212]

After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands, and those of others, are left to the ordinary course of judicial proceedings in the established courts of justice. [212]

In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*—possibilities, coupled with an interest and claim, growing out of, and adhering to property—may pass by assignment. [213]

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction. [214]

It is clear, that the right to compensation for damages and injuries, to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation, passed by abandonment to the underwriters upon property which had been seized or captured. [215]

The right to indemnity for an unjust capture, on the sovereign—whether remediable in his own courts or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation—is a right attached to the ownership of the property itself, and passes by cession to the account of the ultimate sufferer; and is afterwards assignable to the person to whom it had been ceded. [215]

It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice. Claims and debts due by a sovereign, are not commonly capable of being so enforced. It does not follow, that because an unjust sentence cannot be reversed, that the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration. [216]

The treaty with Spain recognized an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity. It was demanded by our government as matter of right, and as such was granted by Spain. [217]

The right to compensation from Spain, held under abandonment made to underwriters, *and accepted by them, for damages and in- [*194] juries, and which were to be satisfied under the treaty, by the United States; passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800. [219]

THIS case came before the court, by writ of error to the Circuit Court of Pennsylvania. The defendant in error instituted his suit against the plaintiffs here, who were the surviving assignees, under a commission of bankruptcy, issued against him under the act of Congress of the United States, for establishing

NOTE.—*Mere personal torts not assignable.*

A right of action for a personal tort is not assignable. (Brooks v. Hanford, 15 Abb., 342; Hodgman v. Western R. R. Corporation, 7 How., 492; Purple v. Hudson River R. R. Co., 1 Abb. Pr., 33; S. C., 4 Duer, 74; Butler v. N. Y. & E. R. Co., 22 Barb., 110; Nash v. Fredericks, 12 Abb. Pr., 149; Oliver v.

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a uniform system of bankruptcy throughout the United States, passed April 5, 1800.

In the Circuit Court, a judgment was entered in favor of the defendant in error, the parties having agreed upon a case, which, if required by either, might be turned into a special verdict, subject to the opinion of the Circuit Court.

The case was: that Ambrose Vasse, previously to the year 1802, was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into ports of Spain and her dependencies; and abandonments were made thereof to the said Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802.

The said Ambrose Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of Congress of the United States, for establishing an uniform system of bankruptcy throughout the United States. An assignment was made accordingly, to Jacob Shoemaker, who is since deceased, and the defendants, Cornelius Comegys and Andrew Pettit; who proceeded to take upon themselves the duties of assignees, and have continued to discharge the same. The certificate of discharge of the said Ambrose Vasse, bears date the 28th day of May, 1802.

In the year 1824, the sum of \$8,846.14 was received by the defendants from the treasury of the United States; being the sum awarded by the commissioners sitting at Washington, under the treaty of amity, settlement, and limits, between the United States of America and His Catholic Majesty, the King of Spain, dated the 22d day of February, 1819, on account of the captures and losses aforesaid.

On the 9th day of December, 1823, the said Ambrose Vasse filed a bill in equity in the Circuit Court of the District of Columbia, claiming the sum awarded by the commissioners, and a settlement of the accounts of the assignees. This bill was intended to operate upon the funds which were expected to come into the hands of the agent of the assignees, prosecuting for them the claim before the commissioners; but it was not *proceeded on; the said funds having been received by another person.

The said Ambrose Vasse made a return of his effects to the commissioners of bankruptcy. The claim upon Spain for spoiliations was not in the schedule; but claims upon France and Great Britain were.

The plaintiffs in error made the following points:

1. That the decree of the commissioners under the Florida treaty, awarding the fund to

the assignees of Ambrose Vasse, is conclusive in their favor, and against him.

2. That if the claim on the Spanish government was not legally the subject of assignment, and therefore did not pass under the bankrupt proceedings, to the assignees, it could not pass under the abandonments made to Ambrose Vasse; who claims the fund, not as the original proprietor, but through cessions or assignments of the property made to him as an underwriter.

3. That this claim, as an incident to the property captured and carried into Spanish ports, did pass under the assignment of the bankrupt, and became vested in his assignees.

The case was argued by *Mr. J. R. Ingersoll*, and *Mr. D. B. Ogden*, for the plaintiffs in error, and by *Mr. Lee*, and *Mr. C. J. Ingersoll*, for the defendant.

For the plaintiffs in error, it was contended,

1. That the commissioners, under the Florida treaty, had fixed the relative rights of the parties, by awarding the fund to the assignees, in the face of a claim presented by the bankrupt himself. In deciding thus, they decided, in effect, on the validity and operation of the assignment. The proceeding was not merely *ex-parte*, but afforded to the bankrupt an opportunity to exhibit his pretensions; of which he had not failed to avail himself. His act of interposition was manifested by a bill in equity, filed in the Circuit Court of the District of Columbia, for the county of Washington, in December, 1823; in which Ambrose Vasse, the complainant, states the facts now before this court, and attempts to reach the fund, not (as at present) from the assignees, but against the assignees; and to wrest it, not from the commissioners, but from the treasurer of the United States, who acted under their authority and decrees; and was, accordingly, made a party to the bill. If the commissioners have really decided the point—and, in so doing, they have not exceeded their jurisdiction—no appeal lies to this court. They acted under a treaty, which is the supreme law of the land; and no other tribunal, however exalted, can reverse, or interfere with their decrees. The bill in equity admits that Ambrose Vasse never filed the original claim. Hence, it appears that all the documents in support of it were in *the possession of his assignees; and [*196 they exhibited this evidence of ownership, at least. It is not, however, necessary, that the award of the commissioners should be conclusive, as the case of the plaintiffs in error is sufficiently strong upon the other points, which have been decided in the court below.

2. The argument of the defendant in error is absolute and unqualified—that the claim which has yielded the fund in controversy, was of a description which could not be assigned.

Walsh, 6 Cal., 456; Brooks v. Hanford, 15 Abb. Pr., 342.) A cause of action which will not descend to the representatives of a party cannot be assigned. (Hyslop v. Randall, 11 How., 97; 4 Duer, 660; Jabriskie v. Smith, 13 N. Y., 322; McKee v. Judd, 12 N. Y., 622; Divinny v. Fay, 38 Barb., 18; Fried v. N. Y. R. R. Co., 25 How., 285; People v. Tioga, Com. Pleas, 19 Wend., 73.)

A cause of action for a personal injury, such as assault and battery, is not assignable so as to give the assignee the right to prosecute an action therefor against the wishes of his client, or to prevent the settlement thereof by his client; although it

may be valid between the parties as an agreement entitling the assignee to the results of its prosecution.

(Pulver v. Harris, 62 Barb., 500; Aff'd, S. C., 52 N. Y., 73.)

In general, mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment. (Grant v. Ludlow, 8 Ohio St., 1; Linton v. Hurley, 101 Mass., 353; Norton v. Tuttle, 60 Ill., 130; McGlinchy v. Hall, 58 Me., 152.)

A verdict recovered for a personal tort is assignable. (Zogbaum v. Parker, 66 Barb., 341.)

That the right to receive did not exist in himself; and, therefore, he could not transfer it to others; that he had nothing to assign; that his hopes rested on the will of an unaccountable, because sovereign power, who might, or might not, realize them; that no legal remedy could be pursued; and, without some species of remedy, there can exist no right; that a claim, to be assignable, or even to have existence, means something not ideal, or merely precarious, but substantial, and susceptible of enforcement; not merely to be thought of, but pursued; and, by possibility, to be gained. Admitting, for a moment, both the position and the inference, the shadowy character of the claim, and the impossibility of transferring its ownership—and where does the defendant in error stand? His right to sue and recover, either from the commissioners or his assignees, is derived through exactly the same sort of channel as that of his antagonists. The only difference is, that he claims through a limited and partial assignment; and they through a general and all-comprehensive one. He was not the original owner. He was an underwriter, merely, on the property lost; and, when he paid the losses, he received the assignments without an idea that, at a distant day, this would be the shape in which they would develop themselves. He made his assignment when everything was entirely unchanged. If all the representative interests are to be disregarded, and the political bounty is to enure to the first proprietor, then, we are accountable, not to Ambrose Vasse, the underwriter, but to the original proprietors themselves. If the opposite argument be sound, neither of these parties is entitled to the money; and then, *potior est conditio defendantis*.

Nor does the defendant in error, injudiciously concede anything, in the position which he assumes. He has no standing without it. Whatever he had, in the shape of property, passed by the bankruptcy. His only refuge, is in the suggestion that there was nothing, in the shape of property, to pass; and then, he is unhappily landed here, that being himself a claimant of it, as property, because under an assignment, the same argument applies with equal force to himself; and he is exactly as badly situated as his opponents.

197*] The bankrupt thought the claim passed by the assignment, and intended that it should—for claims of a similar character upon the French and British governments, are stated among his effects, in the schedule laid before the commissioners. This, upon the government of Spain was omitted—probably because it was regarded as desperate, not being then included in any treaty.

3. There was a clear property to be assigned; and it was assigned by the original owners to the underwriter, and by the underwriter to his assignees.

1. Independently of all questions growing out of mere bankruptcy, this was, in its nature, peculiarly the subject of assignment. In matters of insurance there was a time when nearly every transfer consisted of a claim on a foreign government. No neutral vessel could, with safety, navigate the ocean. The attempt led, in instances innumerable, to capture and condemnation. Insurances were resorted to at any rate of premium, however extravagant;

and the little chance of hope of redress, or indemnity to which the underwriters succeeded, was to be gathered from the sense of justice of these ruthless belligerents. Hence, transfers of these claims were of perpetual occurrence. Not only were the transfers made, and deemed worthy of acceptance, but our American courts of justice would permit no recovery from the insurers, until a cession had been actually made. (*Brown v. Phoenix Ins. Co.*, 4 Binn., 45; *Rhineland v. Penn. Ins. Co.*, 4 Cranch, 42.) Not only this; the time when abandonment cannot be made, is after restitution—when the opposite argument supposes the right only begins. (*Adams v. The Del. Ins. Co.*, 3 Binn., 287; *Marshall v. The Del. Ins. Co.*, 4 Cranch, 202.)

The claims on Denmark, France, England, Naples, and Holland, comprise, agreeably to a sober estimate, seventeen millions of dollars, of American capital, locked up in the coffers of foreign potentates; and, long since, for the most part, re-imbursed to the original proprietors, and resting on the insurance offices to an immense extent.

Why is it that a policy always stipulates, that the insured shall sue, labor, &c., after capture, and even after condemnation, if the one party be requiring, and the other undertaking a wild, preposterous, and despairing pursuit? It is the *spes recuperandi*—the incident to the property, or substitute for it, which is transferred in whatever shape it may at a distant day present itself; although the transfer may be in form of the property itself. A thing need not be in possession, to be transferred. It may be on the other side of the globe. It need not even have actual existence, to be the subject of a legal contract of transfer or sale. A ship out of time—the hope or *chance of redemption is sold in [*198 good faith. It appears, afterwards, that she was at the time consumed by fire, or at the bottom of the sea. Yet the contract was good.

2. As a matter of bankruptcy concern, and to be regulated by the principles of bankrupt laws.

The treaty itself says not a word as to the person by whom the restored property, or its substitute is to be received. It merely provides and awards the fund; but whether for the original owner or underwriter or assignee is submitted to the general principles of established law. If it had provided *eo nomine* for the bankrupt, then it might, indeed, have been considered a solace for his general misfortunes, derived from a kind but ill-judged policy; and the political bounty (as it would then really be) would perhaps flow exactly where it was directed. But the argument founded upon the idea of political bounty is defective, when it attempts on that ground to give the fund to the bankrupt; since the treaty leaves that point, viz., the individual object of its kindness, entirely undefined. In the concatenation of inferences, one essential link is wanting, namely, that the particular individual is to be re-imbursed. But why should the underwriter be preferred? He is not the original sufferer, whose feelings are to be assuaged; nor the final loser, whose pecuniary injuries are to be redressed. Had the violation of neutrality, which

is remedied by the treaty, never occurred, the property would have remained with the insured. As it is, the underwriter has paid the loss, but he has done it with the money of his creditors; and hence the deficit manifested in his bankruptcy. The real losers, then, on principle, have the fairest claim to redress.

As to the propriety of adopting bankrupt laws, there may be differences of opinion; but with respect to their object, policy, and true application, when established, there can be none. They are not technical, but substantial. If they give relief from present difficulties, and hope and energy to future exertions, it is in consequence of entire renunciation of all benefit from the past. If ingenuity could discover means by which debtors, notwithstanding their seeming surrender of all, could still retain a lurking interest, which deprives the creditor of his expected consolation; it would not be surprising that bankrupt laws should be forever discountenanced by legislative opposition, and that one general mercantile community should continue under the influence of a multitude of heterogeneous insolvent systems, feeble in their protection of the debtor, and worse than useless to the creditor.

It were extraordinary, indeed, if the effect of bankruptcy were to protect previously acquired property. But for his certificate, execution might be levied, attachment might **199** reach the fund, the wit of man could not elude the scrutiny of the law. Yet, the bankruptcy, which is designed to facilitate the assertion of these rights, if the present effort succeeds, would take them all away.

The moment one becomes a bankrupt, a clear line is drawn between what is his and what is his creditors'. The faculties which God and nature have given him the disposition to labor, and the capacity for exertion of mind and body are his own, inalienably, and nothing can deprive him of them. Even the personal claims to redress for bodily wrongs, which grow out of his person, and not out of his creditors' property, remain. But results arising from the investments of property, whether voluntarily or involuntarily made, however, or whenever to arise, tracing their origin to previous possessions, are to return to those with whom they originated, and who did but advance them. Hence, all the limitations to the transfer by bankruptcy, are reducible to three classes:

1. Such as may never happen, being not merely future in their actual existence, but dependent for any, even a prospective existence, upon events which perhaps never may occur.

Of this description are an heir apparent's pretensions. (*Moth v. Frome*, Ambler, 394.) A pension to a soldier, who may die the moment after bankruptcy. Pay to an officer. Legacy to a bankrupt's wife, on the contingency of her surviving another person. (*Krumbhaar v. Burt*, 2 Wash. C. C. Rep., 406.)

2. The lien of a tradesman, who has done work to a vessel. (*Shoemaker v. Norris*, 3 Yeates, 392.)

3. *Torts* which require an action in a personal form. (*Shoemaker v. Keeley*, 1 Yeates, 245; *Benson v. Flower*, Sir T. Jones, 215.)

This is confined to mere personal wrongs, not growing out of property, for there the assignees Peters 1.

take, even though the injury be accompanied with violence. (Eden's B. L., 235.)

Whatever does not come within one of these three exceptions, passes. Hence, almost every possible variety is to be found in the English cases, which are frequent, because of a continuance of bankrupt laws for a long series of years. (1 Cook B. L., 290, 365; 3 T. R., 88; 2 Vern., 432; 19 Ves., 432.)

It was decided in England, nearly a century ago, that the insurer had the plainest equity in the world, to claim the proceeds of prizes taken under letters of reprisal, after they had paid the original owners. (*Randal v. Cochran*, 1 Ves., Sen., 98.) The bankrupt law of the United States makes express provision for the transfer of equitable as well as legal interests. Chief Justice Kent recognizes our principle in its largest extent, as to the substitute for the property, while he asserts that *there [***200** was no existing hope of recovery as to the property itself. (*Gracie v. N. Y. Ins. Co.*, 8 Johns, 245.)

The bankrupt law of the United States, in principle and policy is the same with the British statutes on the subject. In terms, so far as it applies to the present object, there is no difference. The deficiency is supposed to exist,

1. In the absence of the phrase of the statute (13 Eliz., c. 7) giving to the commissioners power "over all such interest in lands, as the bankrupt may lawfully depart withal."

But this leaves the question exactly where it found it; as we are upon the very inquiry whether this be such a thing as he may lawfully depart withal. And it is more than doubtful, whether the phrase would apply to the kind of interest now in contemplation.

2. In the supposed non-application of the 18th section, which contains the words possibilities of profits. It is supposed that this clause is introduced, not for the purpose of conveying the thing contemplated, but merely to discover anything which may fall in prior to the certificate.

It is apprehended that there could be no object in a discovery, except to transfer; and it matters not whether the transfer is made while the object is remote, or is deferred until beneficial possession can accompany the conveyance. And anything falling in, would become property; and under that name, must then and at all times be disclosed.

3. In the absence of the general expression in the statute, 6 Geo. IV., c. 16, "That this act shall be construed beneficially for creditors."

That provision is not necessary for the present object, which is attained by a construction founded on a mere ordinary and inherent policy of a bankrupt system. The result is reached by Lord Chief Justice Dallas, in an opinion delivered at Hilary term, 59 Geo., III, several years before the statute referred to had any existence. (*Clark v. Calvert*, 8 Taunt., 742.)

Bankrupt laws are supposed to place the assignees in the room of the bankrupt, in the "same situation," without reserve. (*Cassell v. Carroll*, 11 Wheat., 152.)

The interest in question, however, is plainly to be distinguished from a mere possibility; which is "an uncertain thing that may or may not happen." (2 Lill. Abr., 336.)

An heir presumptive or apparent, may have an expectation, but no right; for, the ancestor

may outlive him, or otherwise dispose of the inheritance. Hence, an heir apparent may be a witness, to prove the title to land, but a remainder-man cannot. (*Smith v. Blackhan*, 1 Salk., 283.) A reversion absolute is thus a very different thing. Hence, we speak of the possibility of a reverter which cannot be assigned, just **201***] as we do of *the possibility of a possession which can. (Lord Mansfield, in the argument reported 11 Wheat., 168, on the Maryland charter.) A debt barred by the act of limitations, bankruptcy, or, perhaps, alienage—a debt of a foreign minister, infant, or married woman, are not mere possibilities; although the remedies are at least as defective, and apparently inaccessible as the one in question. The justice of a claim, and its assignable properties, are totally distinct, both from the question of its present or future character, and from the nature and even existence of a remedy. The assignable character of a thing depends on nothing technical, or chuses in action would not pass. But upon the existence of right, abstracted from the consideration of present or future enforcement, or the susceptibility of enforcement at all, from the possible want of a precise remedy. Can there be a plainer proposition than this, that he who unjustly takes my property from me, ought to restore it; in other words, that I ought to have it? And the union of my title to have, with his duty to restore, constitutes a rightful claim. The immediate wrong-doers are the individuals who committed the depredations on American commerce. The sovereign assumed the discharge of these obligations; and it is in pursuance of that assumption that the money is paid.

The right might possibly be deficient, as regarded a specific remedy, and yet be a right still; one susceptible of being owned and transferred, though not advantageously used. But this right is perfect in itself, and is attended with a corresponding remedy. The error which lies at the root of the opposite suggestion, consists in attaching a meaning too narrow and technical to the term remedy. In a judicial court of justice, as our courts are organized, perhaps there is none. The division, however, into executive, judiciary, and legislative departments of government, is not universal. If, as it may be, the sovereign is the interpreter, as well as framer of the law; that is, if instead of three branches, there be but one, or rather instead of their being separate, they are united; why is not an appeal as likely to succeed when made to the supreme authority, as if made to what is usually a subordinate department? At no very distant period of British history, the King himself actually attended in person in the courts of justice. He is still, in contemplation of law, present, *in aula regis*. But if the separation be entire, and judicial remedy be inaccessible, all being referred to the supreme power alone; this merely reduces the difference between us, not to a question of remedy or *no remedy, but the kind or quality of the remedy, whether judicial or executive. If this be the narrow line of separation, and so it is, at the worst, surely you cannot pronounce the one everything, the other nothing—less than nothing; that, a per- **202***] fect, absolute, and *recoverable right; this, a shadowy nonentity—a phantom—something “less even than a hope.”

On the contrary, it is a fundamental rule of presumption, that sovereigns will do justice voluntarily. It is the basis of international law. Hence the broad line between barbarous and civilized states. What sovereign of a civilized community ever ventured to say, “he acknowledged no law but his own will, and set at defiance all remedy but that of force”? There are laws among nations, just as well defined, and about as little liable to be broken, as those of particular municipalities. An American officer is understood to have applied for, and obtained compensation, from the British government. An American citizen very recently made similar application, with similar success, to the sovereign of France.

But it is more than presumption, that governments will do justice. It may be, and often is, enforced. They are compellable by a code which is as effectual in its sanctions as it is clear in its dictates. Municipal law is sometimes interfered with by limitations, tenders, and reliefs; but contracts and rights are not, therefore, extinguished. There are places where there is no law. In China, strangers are altogether without the means of redress. Everyone, with regard to them, is, whether native or sojourner, really irresponsible, and acknowledges not even the law of force. Yet bargains are made, and transfers are executed there, every day, which are respected and even enforced here. If one steal my property, and take refuge in the suburbs of Canton, does it cease to be my property? may I not retain or assign the ownership, notwithstanding the inaccessibility of the thing itself? Principles are established by authority and precedent, which go the whole length of the case. The decision below assumes the broad ground, that there was no right, either in Ambrose Vasse or his assignees, or the original owners; that “it is a mere expectancy, but without hope, because without right, even a contingent one.” Elementary writers on the law of nations, maintain very different principles. (Grotius, b. 3, ch. 2, sec. 5; 2 Ruth., 568–9–570.) Conformably to these principles, a decision was pronounced by the commissioners, under the 7th article of the British Treaty, in the case of *The Betsey*, Furlong, master, (Wheaton's Life of Pinckney, 193, &c.) The newly established Republic of Columbia, has set a noble example of deference for these doctrines, by re-imbursing to the sufferers from depredations by their cruisers, the whole loss and interest, and fifty per cent. damages besides.

The best securities by which the hold on property is maintained, are claims on sovereign powers. Government stock, treasury notes, exchequer bills, are all of this description. Yet, *where is the citizen that does not gladly [**203** exchange all the steadfast earth-bound property he has, and invest it in this more beneficial and productive possession? Trover and trespass may be maintained for it, contracts may be made with regard to it, transfers may take place of it; in short, there is no criterion of property or ownership that may not be applied to what is regarded as having no substantial existence. A bond given by the King of Prussia, declaring himself and his successors bound to the holder, was held to pass as property by delivery; *Gorgier v. Mievile* (3 Bam. & Cres., 45.) Yet

where was the judicial remedy, if the crowned obligor had refused payment? Even criminal jurisprudence gives its sanction and assent to these principles. The forgery of a Prussian treasury note, is within the statute, 43 Geo. III. c. 139, sec 1. (*Rex v. Manasseh Goldstein*, 3 Brod. & B., 201).

The decrees of a foreign government are firm and irreversible, only with regard to the thing. A host of decisions, from *Hughes and Cornelius* (2 Shower, 242), down to *Williams v. Armroyd* (7 Cranch, 423), and even the Apollon, Eden claimant (9 Wheat., 302), confirm this principle, but go no farther. It required a constitutional provision to render adjudications and decrees conclusive throughout—even among sister states. Redress (if the thing itself be passed away) is substituted in some other shape, where wrong has been done by the decree; and it is the more necessary, in proportion to the efficacy and conclusiveness of the sentence by which the specific property has been irrevocably withdrawn. The cases provided for by treaty, were not necessarily, or, in point of fact, generally, of judicial condemnation and decree. They were of mere forcible abduction—and placing the ships and cargoes, tortiously, *infra præsidia*, for which indemnity is provided, not by restoring the thing, but substituting pecuniary compensation.

If the claim were originally nothing, yet when it became substantial, as it did at last, by the interposition of the government of the United States, it has relation back to the former time, and makes the whole available *ab initio*.

For the defendant.

The case states that the money was paid from the treasury, for losses provided for by the Florida treaty; but it does not state, to whom, or for whom, it was paid. The commissioners awarded nothing to Vasse's assignees, but, as is believed, to certain insurers, who claimed the funds. No doubt their award is conclusive on its subject-matter, which is the amount and validity of the claims. By the eleventh section, they were to receive, examine, and decide upon such amount and validity. By the second clause, they were to adjust claims. But they had no judicial function, process, or power. **204*** They were a *board or inquest, to ascertain the sum of claims, and certify it to the treasury for payment. But parties could not litigate claims before the commission, which had no faculties of a judicial character. Neither of the parties to this suit were before that commission, which did not pretend to settle to whom, but only how much should be allowed to any ostensible claimant; leaving it to the ordinary tribunals to determine between disputants. It would be contrary to all principles, to extend, by construction, the powers of such an extraordinary court. In *Campbell v. Mullett* (2 Swanst., 579), the three parties before the board did not each and all claim the same fund, but each his several share of it. There was no conflict of parties before the commissioners; but as the French partner was an alien enemy, his claim to part was rejected on that ground. In *Randal v. Cochran* (1 Ves., Sen., 98), Lord Hardwicke rectified a judgment of commissioners appointed to distribute prize money; and the Vice Chancellor, in the case in *Peters* 1. U. S., Book 7.

2 Swanston, does not ascribe to the commissioners exclusive jurisdiction, except in their unquestionable province. Any person receiving money by award of the commissioners, under the Florida treaty, holds it as money had and received to the use of all and any other persons capable of proving a right to it, or any part of it, by means of suit at law, or in equity.

The main question may be considered, first, by the light of the common law; second, by that of the English bankrupt acts and adjudications; third, by our own.

The commissioners' assignment to the assignees, is of estate and effects, claims and demands. The money in dispute was paid as indemnity for unlawful seizures. (Art. 9 of the treaty; laws of the U. S., Vol. VI., 620.) Vasse's certificate was signed in 1802. Of consequence, there was no indemnity till twenty years afterwards. Whatever it may be, it is certain that it was not specifically assigned, nor is it alluded to in the inventory of his property. If it passed, therefore, it must have been by mere operation of law, without intention of parties; for neither bankrupts, commissioners, nor assignees, appear to have adverted to it at all. Vasse's claims for English and French spoiliations are mentioned, because they operated on his own property as a merchant. But whatever claims, if any he had, as an insurer, by virtue of losses made good by him to other merchants, are nowhere specified in the bankruptcy proceedings. From Vasse or from the commissioners, the assignees acquired no apparent title. Whatever their right is to hold the fund they have got, must be shown independently of their title papers, which are altogether silent on the subject.

First. All the analogies from the common law are against it. By that, even a chose in action cannot be assigned, nor *any [***205** possibility or contingency, unless coupled with an interest, or in equity. (2 Black. Com., 293; 1 Com. Dig., 696-7; assignment, C. 1, 2, 3; Shep. Touch., 239-40, 322; 11 Mod., 152; *Archer v. Bokenham*, 1 P. Wms., 574; *Wind v. Jekyl*, 1 Stra., 132; *Marks v. Marks*.) This, however, was not even a chose in action. It is questionable whether Vasse could assign it himself. Yet the argument is, that the law assigned it by constructive operation. But it is contended, that as it was assigned to him, it might be assigned by or from him. That argument confounds specific cession with the constructive assignment, inferred from operation of law. The merchants whom Vasse indemnified for losses by captures, abandoned and ceded to him specifically the *corpus* and the *spes recuperandi*. Indeed, neither abandonment nor cession is necessary; payment after total loss, acquires the title transferred, without either. (8 Johns., 237, *Gracie v. The New York Insurance Company*.) But the postulate here is, that by construction of the act of bankruptcy, this sovereign boon was transferred by Vasse to the commissioners, and by them to the assignees, without any specific or intended assignment of it, twenty years before it had existence; that such was the intention of the Legislature in forming the bankrupt act. If so, certainly all the familiar doctrines of the common law were overlooked by them.

2d. It may be granted, that by the English

statutes of Elizabeth, James, and George, concerning bankruptcy, and their various adjudications, all property and interest pass by bankrupt assignment. I agree to the language of *Ch. J. Dallas*, as quoted from 8 Taunt., 742—every beneficial interest. But then, it must be what the law recognizes as such, not every popular or vulgar notion of right or claim. In 2 Com. Dig., 112, title bankruptcy, note *m.*, the cases are collected, and the principles of exception will be found as well adjudged as those of general rule. After the extensive provisions of the statutes of Elizabeth and James, in 1732, came the stat. 5 Geo. II., ch. 32, enlarging and consolidating the system; and superadding the phrase “possibility of profits.” The late consolidating act of 1825 (5 Geo. IV., ch. 16), omits that phrase, but retains the legislative injunction, which pervades and characterizes the English system, to construe all the statutes largely and liberally for creditors. Thus enjoined, the courts have gone great lengths in administering the policy of the bankrupt laws. In exchange for personal liberation, they have required the surrender of all convertible property. But they have never taken anything which the bankrupt himself realizes after certificate, nor any mere damage demand, though suable before certificate. Now, the fund in question, was a demand, if anything, for damage. **206***] ages for *torts*, and realized long after certificate. The English system goes no further than estate and effects, whether goods in possession, debts, contracts, or choses in action, says Blackstone, 2d vol., 484. The act of George IV., consolidating all its predecessors, is also limited to estate, goods, chattels, debts, and the like. (Eden., App., 25.) Not a word of it applies to anything but tangible property, for which there is right of action, and right of action is nothing less than right of possession. (6 T. R., 684, *Domett v. Bedford*.) According to the latest and most eminent English authorities, mere possibilities are not devisable, nor do they pass to assignees under a commission of bankruptcy. (Preston on Estates 75–6; Preston on Abstracts of Titles, 93–5, 254.) The whole tenor of the argument of the Master of the Rolls, in the case of *Campbell v. Mullet* (2 Swanst., 551), is to the same effect, in a case remarkably similar. The question there turned on partnership, it is true; but the reason submitted in behalf of Vasse, are precisely those of the Master of the Rolls, whose decision is quoted as authority in Gow on Part., 315–16. What possible construction of the English bankrupt law can be drawn to a different result? The hope in question is not a thing at all, much less a chose in action. No right of action followed it. Possession of it was impracticable. No remedy would reach it. The standard of remedy is the true judicial test of right. To say that this is but a question of the kind of remedy is a mere argument of terms; for who can sue a sovereign? If the claim cannot be made in and through a court of justice, it is no claim. Even the political right, if it exist, to petition or complain to executive government, is not a right that can be classed with legal rights or claims. A mere possibility is an uncertain thing. (2 Lil. Abr., 343.) But the hope of indemnity from a foreign sovereign, is the merest possibility imaginable.

The English exceptions are: 1. Damages for torts or slander. (Sir W. Jones, 215, *Benson v. Flower*.) 2. All unliquidated damages. (Doug., 562, *Goodtitle v. North*; 6 T. R., 489, *Banister v. Scot*; 7 T. R., 612, *Hammond v. Toulmin*.) 3. Any mere course of action. (8 Ves., 335, *ex-parte mare*; 3 Wils., 270, *Goddard v. Vanderheyden*; See also, 1 Barn. & Ald., 491, *Overseers of St. Martin v. Warren*; 3 Bingh., 154, *Davies v. Arnott*.) In *Watson v. The Ins. Co. of N. A.* (1 Binn., 47), it was left to a jury to estimate a *spes recuperandi*. But in *Gracie v. The New York Ins. Co.* (8 Johns., 237), this proceeding is treated as preposterous. A fourth class of cases in England, concerns the pay of public officers, which never passes by bankrupt assignment, on principles of public policy. The doctrine of possibility of interest, is settled to mean a legal or practical possibility. (3 P. Wms., 132, *Higden v. Williamson*.) Not any or every possibility. (Id. 385, *Jacobson v. Williamson*, *Ambl., [**207** 394; *North v. Frome*, 3 Merw., 671; *Carleton v. Leighton*; *Chandler v. Gardner*, cited in 17 Ves., 338–343; *Crutwell v. Lye*.) It is not by the force of the phrase, that possibility of interest becomes so comprehensive a provision in the English bankrupt acts, but by their injunction on the courts to construe them largely. If Vasse, after assignment, and before certificate, had sued for slander, or personal trespass, the assignees would have no right, according to the English law, to whatever he recovered after certificate. Now, the indemnity in question, which could not be sued for, was not awarded till after certificate, and then for the *torts ex delicto*. Not a case from the English codes can be cited, nor a principle, which sanctions the assertion, that any mere possibility would pass under such circumstances. All the cases referred to in the opposite argument, are of possibilities coupled with interest, and in some of them, the exception now contended for is strongly put. (3 T. R., 88, *Jones v. Roe*.) No English authority can be vouched by the assignees, while the case in 2 Swanston, the authority of Mr. Preston, and the analogies of all their established exceptions to the general rule, concur in the conclusion that such a possibility as that in question would not be taken by a commissioners' assignment, under the acts of bankruptcy in England.

3d. But the American law differs materially from the English, on this subject. Bankruptcy, in England, is a long established system, matured and formed by the Legislature, and sustained by the judiciary. In this country, it had but a short-lived existence; has never been a public favorite, and the courts have no impulse from statutes to extend it by construction. The whole question is, what is the true interpretation of the act of Congress of 1800. (3 Vol. Laws of U. S., 320.) The 5th, 6th, 13th, and 14th sections, are all that regulate assignments, and they each and all uniformly contemplate property that may be realized. By the 5th, the commissioners are to take possession of the property, and deliver the effects to the assignees. By the 6th, estate and effects are to be assigned; and the 13th provides for the bankrupt's debts to be recovered. The 14th directs the assignees to recover his property, goods, chattels, and debts. The 13th

does, indeed, mention claims, but it characterizes them as such as are suable, attachable, and recoverable by legal process. The only debatable section is the 18th. All the rest exclude every idea of possibility, contingency, damages, or the like. They uniformly treat of tangible property, and nothing else. The 15th section, copied from the first section of the statute 5 Geo. II., provides for disclosure of every possibility of profit. But that provision is confined to the discovery of the bankrupt's **208*** interests. The same *section, when it comes to provide for their assignment, returns to the word estate. The intent was to eviscerate *ex seipso* an account of everything that may be realized; but not comprehending personal demands for torts and damages.

This is clear from the 50th section, which provides for contingencies falling due before certificate, a superfluous provision if the 18th section had already provided for them. These sections would be in conflict otherwise. But the meaning of this voluminous act is not to be taken from any detailed section. What may be called its code, is to be found in the whole taken together. The 26th section, allowing a premium for the discovery of estate; the 29th section, compelling assignees to exhibit accounts of estate and effects; the 32d section, directing them to keep books of receipts from estate; the 34th section, authorizing them to sell the estate at auction; the 53d section, making an allowance for support out of the estate; and the 54th section, directing a deposit of the money proceeding from the estate; all these sections are to be taken with the 5th, 6th, 13th and 14th sections, already analyzed, and altogether demonstrate, beyond doubt, that property, such as may be possessed, sued for, and recovered, taken into possession, and turned to account, was intended to pass by commissioners' assignment, but never any mere contingencies, with which no interest is coupled. By capture and *deductio infra presidia*, the property insured and paid for by Vasse, was lost entirely. No lawful reclamation for it remained. The sufferer was the original owner, by whose cession both *res* and *spes* were transferred to Vasse, when he paid for the losses. But this transfer conveyed to him no chose in action, because there can be none, without a right of action, for there is no such thing as right, without legal remedy. (3 Black. Com., 123.) No interest existed in Vasse, because he had no right—no claim, because a claim is a demand for a thing out of possession. There was no *jus prosequendi*, or *standi in judicio*; no demand against the Spanish government, or our own; nothing of which any judicature could take cognizance. A right to damages begins when an injury is inflicted. (3 Black. Com., 116.) But that is a suable right of municipal cognizance. So a captor has a defensible and imperfect right, after capture, but only because the prime courts are open to him. Whereas Vasse could have sued or complained nowhere. The wrong he sustained was by a tort. The only redress was sovereign and international. The wrong was belligerent. The claim was by this nation against that. There was no arbiter, and war was the only remedy. The bounty which resulted after twenty years' negotiation, was a sovereign boon, altogether contingent,

gratuitous, unliquidated, and fortuitous. Spain had declined in power. *This country [***209** had improved. Her colonies, our neighbors, revolted, after our example. Florida, her province, happened to be convenient for our requittal, and the very seizure of that province, which preceded its transfer, was not only accidental, but unauthorized. Grotius is quoted for the position, that an individual right exists to make reprisal for wrong suffered. But both Grotius and Rutherford speak of national, not individual redress. Grotius does indeed refer to Homer for the authority of Nestor, who is reported by that authority to have reprisal on the cattle of the Eleans, for their stealing his horses. But this is not modern law, if it be even Grecian, in the times of the Iliad. Individual reprisals are unknown to the modern law of nations, especially to the law of this country, which, by written constitution, requires a law enacted in form to make war lawful. Vasse had no right to claim from Spain, or to act at all. He could do nothing but submit. Mr. Pinkney's argument, as referred to in the case of *The Betsey*, Furlong, does not contradict this position; and if it does, it was overruled by the majority of the commissioners, to whom it was addressed. *Brown v. The Phoenix Ins. Co.* (4 Binn., 445), and *Rhineland v. The Pennsylvania Ins. Co.* (4 Cra., 45), do not affect the question of an assignment, by construction of the act of bankruptcy, and that is the only question. The sovereign grant was appropriated by treaty between the two nations. It was distributable by the United States. Similar claims have been settled with the Republic of Columbia, and are pending against France, Naples, and Denmark. The opposite argument has already transferred them in all cases of bankruptcy, by an unsuspected operation of law, constructively drawn from an expired act of Congress; which argument, in like manner, has disposed of all the pensions or gratuities yet to be granted by our government to the officers of the revolution. They have all changed hands, unconsciously to the owners, who are petitioning, not for themselves, but the assignees of their creditors, in all instances of bankruptcy or insolvency. Can such an operation of law be possible or tolerable? Was such the intention of the framers of the act of Congress, to establish a uniform system of bankruptcy throughout the United States? If so, and by dint of successful hostilities, a century hence, the claims on England, which have been relinquished by treaty, should be revived and acknowledged, their indemnity, if paid, will belong to assignees, not to sufferers. That the parties in this instance never thought of such result, has been shown. If Congress, nevertheless, so enacted it, such enactment, it has also been shown, transcends the English bankrupt statutes, and contravenes all the established and familiar principles of the common law. It may be added, that the *French—it is believed also the Dutch—[***210** and all other bankrupt systems, are the same. By the French, the things assigned are goods, money, furniture, effects, and choses in action. (Code civ. Commerce, Liv. 3, Tit. prem., *De la Faillite*, sec. 2.) Nowhere do possibilities, contingencies, mere rights of action for torts, or demands for unliquidated damages, pass

from bankrupts or insolvents to their assignees. The American adjudications are uniform and strong in their current to that conclusion. (2 Dal., 213, *Shoemaker v. Keeley*; 4 Serg. & Rawl., 28, *Sommer v. Wilt*; 9 Serg. & Rawl., 248-9, *North v. Turner*; 13 Serg. & Rawl., 54, *O'Donnel v. Seybert*; 1 Wash. C. C. Rep., 13, *Dusar v. Murgatroyd*; 3 Day, 272, *Bird v. Clark*; 2 Wash. C. C. Rep., 406, *Krumbhaar v. Burt*.) The last case is in point; is a stronger case than the present; and has been acknowledged by the community as the settled law in Pennsylvania, for the last twenty years. To inquire whether the possibility of Vasse's recovery, would, in case of his death, have passed by will, or in course of administration, is but petitioning the principle in contest. Even conceding the affirmative, does not affect the question which depends on the construction of the act of Congress; but it would be wrong to concede it against the authority of Preston, the case in second Swanston, and the case of *Krumbhaar v. Burt*.

Mr. Justice STORY delivered the opinion of the court:

This was an action of *assumpsit*, brought by Ambrose Vasse, in the Circuit Court, for the District of Pennsylvania, to recover from the plaintiffs in error (who were defendants in the court below), a certain sum of money, received by them under the following circumstances:

Previous to the year 1802, Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured, and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. Vasse became embarrassed in his affairs, and his creditors proceeded against him, as a bankrupt; under the act of Congress of 4th April, 1800, ch. 19. An assignment was made accordingly to Jacob Shoemaker (who is deceased), and the defendants, Comegys and Pettit, who proceeded to take upon themselves the duties of assignees, and have ever since continued to perform the same. Vasse was discharged, under the commission; and his certificate of discharge bears date the 28th of May, 1802. In the year 1824, the sum of \$8,846.14 was received by the defendants from the treasury of the United States; being the sum awarded by the commissioners sitting at Washington, *under the treaty with Spain, which ceded Florida to the United States, dated 22d of February, 1819, on account of the captures and losses aforesaid. On the 9th of December, 1823, Vasse filed a bill in equity in the Circuit Court of the District of Columbia; which is in the case; upon which, it seems, no final proceedings were had on the merits. Under the commission of bankruptcy, Vasse made a return of his effects to the commissioners; which is in the case.

Upon these facts, a general verdict was found for the plaintiff, Vasse, for the sum of \$8,846.14, subject to the opinion of the court, with liberty for either party to turn the same into a special verdict; and the Circuit Court gave judgment upon the facts in favor of the original defendant. The present is a writ of error,

brought for the purpose of ascertaining the correctness of that judgment.

Three questions have been argued at the bar: 1. Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse (which is assumed to be the true state of the fact), is conclusive, upon the rights of Vasse; so as to prevent his recovery in the present action. 2. If not, whether the abandonment of the vessels and cargoes to him, as underwriter, by the owners, and his payment of the losses, entitled him to the compensation awarded, independent of his bankruptcy. 3. If so, then, whether his right and title to the compensation, passed by the assignment of the commissioners of bankruptcy, to the defendants, as his assignees, by the true intent and terms of the bankrupt act of 1800 (ch. 19).

1. As to the first point.

1. The treaty with Spain, of the 22d of February, 1819, was ratified on the 13th of February, 1821, by the government of the United States. In the 9th article it provides, that the high contracting parties "reciprocally renounce all claims for damages or injuries, which they themselves, as well as their respective citizens and subjects may have suffered, until the time of signing this treaty;" and then proceeds to enumerate, in separate clauses, the injuries to which the renunciation extends.

The 11th article provides, that the United States, exonerating Spain from all demands in future, on account of the claims of their citizens, to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, &c., shall be appointed, &c., and within the space of three years from the time of their first meeting, shall "receive, examine, and decide upon the amount and validity of all claims *included within the descriptions above-^[212] mentioned." The remaining part of the article is not material to be mentioned.

It has been justly remarked, in the opinion of the learned judge who decided this cause in the Circuit Court, that it does not appear from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tri-

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bunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of a language of the treaty. But it does not necessarily or naturally follow that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed that it was the intention of either government, to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others, who asserted a title to the fund, be left to the ordinary course **213***] of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. We are, therefore, of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners. The case of *Campbell v. Mullett* (2 Swanston's Rep., 551) is distinguishable. The claim in that case had been laid before the commissioners, and rejected by them, on the ground that the party was alien enemy; and if so, he certainly did not come into the purview of the treaty. It was not pretended that the party had any title to the indemnity, unless it could be deemed partnership property, and, as a partner, he was entitled to share in it. The court considered that it was not partnership property in which he had a title; that his claim to any portion of it had been rejected, upon the ground, that such claim was not within the treaty; and the indemnity had been granted to the other partners, for their shares only, of the joint property, and they took no more than their own shares. The court then proceeded, upon the ground that there neither was an original nor a derivative title, to the indemnity, in the party now seeking to set it up. If an assignment had been shown from them to him, of their own interest in the claim or award, before or after it was made; the case might have admitted of a very different consideration. Whatever, therefore, might be the authority of that case upon general principles—upon which it is unnecessary to pass

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any opinion—it is inapplicable to the present.

2. The next question is not noticed in the opinion of the Circuit Court, and turns upon the nature and effect of an abandonment, for a total loss to the underwriters. Much argument has been employed, and many authorities introduced, to prove what rights and interests, possibilities and expectancies, may or may not pass by assignment; we do not think it necessary to review these authorities, or the principles upon which they depend, upon the present occasion. In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*—possibilities coupled with an interest, and claims growing out of, and adhering to property—may pass by assignment. But the material consideration here is, whether, upon the principles of the law merchant, the right, title, interest or possibility (call it which you may) to the indemnity awarded in this case, did not pass by the abandonment to Vasse.

We do not think that, upon an examination of the doctrines of insurance, there is any difficulty in this part of the case. It *does [**214** not appear on the record whether there was, in this instance, any formal instrument of abandonment or not, nor is it material, for the law gives to the act of abandonment, when accepted, all the effects which the most accurately drawn assignment would accomplish. By the act of abandonment, the insured renounces and yields up to the underwriter all his right, title and claims to what may be saved, and leaves it to him to make the most of it, for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers, and is fully borne out by Mr. Marshall and Mr. Park, in their treatises on insurance. (Mar. on Ins., B. 1, a 14; Park on Ins., ch. 9, pp. 228, 279.) "Where," says Mr. Marshall, "as in case of capture, the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should recover at once, as for a total loss, and leave the *spes recuperandi* to the insurer, who will have the benefit of a recapture, or of any other accident by which the thing may be recovered." Mr. Park uses equally strong language. He says "the insured has a right to call upon the underwriter for a total loss, and, of course, to abandon, as soon as he hears of such a calamity having happened, his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost; because, by the abandonment, that chance devolves upon the underwriters." It is very clear that neither of these learned writers meant to confine these remarks to cases where the specific property itself, or its proceeds, were restored; for the whole current of their reasoning, in the context, goes to show that whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters; and for this purpose they refer to the case of *Randall v. Cochran* (1 Ves., 98), before Lord Hardwicke, where this very point was adjudged. In

that case the King had granted letters of reprisal against the Spaniards, for the benefit of his subjects, in consideration of the losses which they had sustained by unjust captures, and he appointed commissioners to distribute the produce of these reprisals among the sufferers; and the commissioners would not suffer the underwriters, but only the owners, to make claim for the losses, although the owners were already satisfied for their loss by the underwriters. Lord Hardwicke decreed that the owner should account for the same to the underwriter; and said, "the person who originally sustained the loss was the owner, but after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the insured stood as a **215***) trustee for *the insurer, in proportion to what he paid, although the commissioners did right to avoid being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to whom he assigned his interest, as it was in effect after satisfaction made." This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive that the assignment by abandonment is competent not only to pass the property itself, or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord Hardwicke was the stronger, because the indemnity was awarded to the party by his own sovereign, and not by the sovereign of the captors. Mr. Marshall and Mr. Park manifestly contemplate the case as establishing the principle that any indemnity, however arising, is a trust for the underwriters, after they have paid the loss. (Park on Ins., ch. 8, p. 229; Mar. on Ins., B. 1, ch. 14, s. 4.)

The case of *Gracie v. The New York Insurance Company* (8 Johns. R., 237) recognizes the same principle in its full extent. That was a case of abandonment after a capture, and where there had been a final condemnation, not only by the courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was, whether the jury were at liberty to deduct from the total loss the value of the *spes recuperandi*. The court held that they were not. Mr. Chief Justice Kent, in delivering the opinion of the court, said:

"If France should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants, [the underwriters] if they should pay the amount, &c." The case of *Watson v. The Insurance Company of North America* (1 Binn. R., 47) proceeds upon the same principles. It admits that the *spes recuperandi* passes by an abandonment to the underwriter; and the question there was, whether its value, when not abandoned, was to be deducted from the total loss. We consider it, then, clear, upon

authority, that the right to the compensation in this case was in its nature assignable, and passed by abandonment to Vasse; and, upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the *ownership of the property itself, and [***216** passes by cession to the use of the ultimate sufferer. If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

The case of *Campbell v. Mullet* (2 Swanston, 551), already adverted to, has been pressed upon the attention of the court as indicating, certainly not as deciding, a doctrine somewhat different. In that case the compensation had been awarded by the commissioners under the British treaty of 1794, to American citizens, for unjust captures made by British cruisers; and there had been condemnations by the highest appellate courts of prize. One argument was, that the compensation so granted was not to be deemed a mere donation to the parties who received it for their own use, but an indemnity. The Master of the Rolls, in answer to this, said: "It is said that the sums awarded by the commissioners are not matter of bounty or donation. Can they be a matter of right? What is right? That which may be enforced in a court of justice. Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation is not founded in right, but in policy between the nations providing compensation to individuals who have lost property by sentences which are thought unjust. The grounds of relief before the commissioners are, the want of any redress in any municipal courts. Whatever the individual obtains is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of a consideration, yet, for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund belonging to an independent authority, a grant to the sufferer for what he lost." Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory. It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain nor the government of the United States is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law he may be without remedy; but with reference to principles of international law he has a right both to the justice of his own and the foreign sover-

217*] eign. The theory, *too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, s. 7? That where American citizens have sustained losses or damages, "by reason of irregular or illegal captures, or condemnations of their vessels or other property, under color of authority or commissions from His Majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants." The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice. The case of *Randall v. Cochran* (1 Ves., 98) stands upon the true ground. It considers the right of indemnity as traveling with the right of property. In that case it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the crown, out of funds provided by reprisals. So, perhaps, the commissioners thought, but Lord Hardwicke decided otherwise. There cannot be a doubt that, if the party injured had died before or after the treaty was made, and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators. The remarks which have been made upon this case are equally applicable to the provisions for indemnity, under the treaty with Spain. It recognized an existing right to compensation in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain.

We may now come to the point, which, indeed, is the only one of any intrinsic difficulty in the cause—whether the right, so vested in Vasse, to compensation, passed, under the bankruptcy assignment, to his assignees? That this is a question free of doubt, will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the court below. The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of 1800, ch. 19. The act begins by an enumeration of the persons who are **218***] liable to be declared bankrupts, "and among them are "underwriters, or marine insurers." This plainly shows the sense of the Legislature, that such persons might, by the ordinary course of their business, be reduced to insolvency and be justly placed within the beneficial operation of such a law. It tends also to the presumption, that it might have been the intent of the Legislature, that the rights de-

veloped upon them, from the nature of the losses for which they were liable, so far as under any circumstances they might or could be valuable rights, should be available as a fund for the benefit of their creditors, in case of their bankruptcy. As the Legislature meant to exonerate the underwriter from all future liability for his debts, it would seem natural that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees, for the benefit of his creditors. If he possessed claims by abandonment, to the amount of \$100,000, which might, by future events, be rendered more or less productive, and which might be (as they have often been), salable and transferable in the market; such funds, present or expectant, might well be deemed within the legislative policy, and fit to pass to the creditors by assignment. It might otherwise happen, that large recoveries might ultimately vest in the bankrupt, for his own exclusive benefit, upon rights pre-existent, and vested at the time of his bankruptcy. If such a course of legislation would not be unnatural, let us next see what is the precise language of the statute itself. The fifth section declares, that it shall be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c., and also to take into their possession and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen, or appointed."

These words are certainly very general and comprehensive. "All the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the rights devolved upon Vasse, by the abandonment, could, in case of his death, have passed to his personal representative; and when the money was received, be distributable, as assets. Why, then, should it not be assets in the hands of the assignees? *Considering it in the light in which [**219** Lord Hardwicke viewed it, as an equitable trust in the money; it is still an interest, or at all events, a possibility coupled with an interest. Besides, "all deeds, books, accounts, papers, and writings of the bankrupt," are to be taken into possession. Now, the abandonment, and other documents connected with it, fall precisely within these terms; and as we shall immediately see, whatever is taken possession of by the commissioners, is to be passed to the assignees. The sixth section provides "that the commissioners shall assign, transfer, or deliver over, all and singular the said bankrupt's estate and effects aforesaid, with "all muniments and evidences thereof," to the assignees so chosen. And for the most part, the words "estate and effects" are used throughout the act, as descriptive of the property passing under the assignment. The 11th, 12th, and 13th sec-

tions of the act, respect more particularly the transfer of the real estate, of the mortgages, and of the debts of the bankrupt. It is only necessary to say that they contain no language abridging the proper inferences deducible from the language of the fifth section.

The 18th section contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall "fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, moneys, or other effects and estate; and of all books, papers, and writings, relating thereunto, of which he or she was possessed; or in which he or she was in any ways interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission; or whereby such bankrupt, or his or her family, then hath or may have, or expect any profit, possibility of profit, benefit, or advantage whatsoever, &c." It then goes on further to provide, that the bankrupt shall, upon such examination, execute in due form of law, such conveyance, assurance, and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners to vest the same in the "assignees;" and also requires the bankrupt to deliver up "all books, papers, and writings relating thereunto," which are in his possession, custody, or power, at the time of the examination. Upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language **220*** of *the fifth section, we think it is cleared up, and illustrated by that of the present. Here, the words "profit, possibility of profit, benefit, or advantage whatsoever," are used, and show that mere interests *in presenti*, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, "whereby the bankrupt then hath, or may have or expect any profit." It has been supposed that this clause looks solely to property, which was not capable of assignment, at the time of the bankruptcy, because not then vested; inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it. If this were so, it would not affect the present case, because we are of opinion that the claim under consideration was completely vested in right and interest in Vasse, at the time of his bankruptcy. We think, however, that this clause does not justify so narrow an interpretation. The disclosure is required of estate and effects, in which the bankrupt was interested, as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, "whatsoever

and wheresoever." The object of the provision was to make such conveyances auxiliary to, and confirmatory of the assignments made by the commissioners; and we believe that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act, has been supposed to demonstrate the correctness of the construction of the statute contended for by the counsel for the original plaintiff. It declares "that if any estate, real or personal, shall descend, revert to, or become vested in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, &c. This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy. The cases put, are of property descending, reverting to, or becoming vested in the bankrupt. In respect to a descent cast, after the bankruptcy, it is manifest that nothing could pass by any antecedent assignment of the commissioners.

The heir, during the life-time of his ancestor, has no right, claim, title or interest, in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor, at all times; and in no just sense, a possibility of interest, a right in the thing itself. The other words, "reverting *to, or become vested" ***221** "ed" in the bankrupt, require a like interpretation. They allude to cases where the party had nothing vested in him, as a subsisting interest, either absolute or contingent, *in esse*, or *in futuro*, until after the bankruptcy: and when any such interest falls in before the certificate of discharge; the commissioners, and not the bankrupt, are to assign it; a circumstance which demonstrates that no stress ought to be laid upon that part of the 18th section, already alluded to, respecting a conveyance by the bankrupt himself; except as a confirmation, and not as a principal assurance. It seems to us, then, that the 50th section aids, rather than shakes the interpretation of the statute, which has been already announced. It applies to no possibility of profit, benefit, or advantage, vested at the time of the bankruptcy (as the present case is); but to interests accruing to the party for the first time, *de jure* as well as *de facto*, after the bankruptcy. This view of the matter renders it unnecessary to consider whether there is any substantial difference between the English statutes of bankruptcy and our own, on this subject; and, of course, in the authorities applicable to it. Our opinion proceeds upon the purview and objects, and on the terms of our own statute; and we are accordingly of opinion, that the judgment of the Circuit Court ought to be reversed, and a judgment entered in favor of the original defendants. It is to be understood, that upon the last point, this is the opinion of the majority of the court.

The cause must be remanded, with directions to enter a judgment accordingly, for the original defendants.

This cause came on, &c. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause, be, and the same is

herely reversed and annulled; and that a judgment be entered in the suit, in favor of the plaintiffs in error, Cornelius Comegys and Andrew Pettit; and the case remanded to said Circuit Court, with directions to enter judgment for the plaintiffs in error in this court, Cornelius Comegys and Andrew Pettit, accordingly.

Rev'g 4 Wash., 570.
Cited—13 Pet., 413; 14 Pet., 97; 16 Pet., 227; 11 How., 551; 17 How., 614; 20 How., 8; 24 How., 322; 2 Black., 559; 7 Otto, 396; 9 Otto, 303, 308; 5 Cranch, C. C., 32, 358, 360; Woolw., 286; 13 Bank. Reg., 321; 3 Bond., 270; 5 Biss., 385; 5 Mason, 64.

222*]*CHARLES W. KARTHAUS, *Plaintiff in Error*,
v.

FRANCISCO YLLAS Y FERRER ET AL.,
Defendants in Error.

Arbitrament—partnership—presumption in favor of award—pleading.

There is a class of cases, upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod*. But the rule is to be understood, with this qualification, that in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. [227]

One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he might bind himself, so as to submit his own interests to such decision. [228]

It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it. [228]

If a submission be of all actions, real and personal, and the award be only of actions personal, the award is good; for, it shall be presumed, no actions real were depending between the parties. [228]

When, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money, in an action on the bond, to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. [231]

ON the 16th of January, 1823, the plaintiff in error gave an arbitration bond, in the usual form, with sureties, to the defendants in error, in which it was set forth, that, "whereas certain disputes, differences, and controversies have arisen, and are still depending, between the above bounded Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and himself, and the above-named Francisco Yllas y Ferrer, and Josef Antonio Yllas, for the ending and determining the disputes, differences, and controversies, aforesaid, and all actions, suits, claims, and demands whatsoever, concerning the same, the said parties have agreed to refer the same to the award,

judgment, and determination of Lewis Brantz and Henry Child, both of Baltimore, merchants; arbitrators indifferently chosen, and named by and on behalf of the said parties, to award, order, arbitrate, judge, and determine, concerning the same. And if the said arbitrators cannot determine the same, that then the same shall be fully ended and determined by a third person, to be by them chosen as an umpire, in such *manner as hereinafter is, in that be- [*223 half, mentioned and expressed.

Now, the condition of this obligation is such, that if the above bound Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil, and keep the award, arbitrament, order, determination, final end, and judgment, which shall be by them, the aforesaid arbitrators, made, of and concerning the premises, and of all disputes, differences, actions, suits, claims, and demands whatsoever, touching and concerning the same, so as such award, arbitrament, determination, final end, and judgment of the said arbitrators, of and in the premises, be by them made and given up in writing under both their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days from the day of the date hereof.

"And if they, the said arbitrators, of and in the said premises, cannot agree, end, and determine the same, in fifty days from the day of the date hereof, that then if the said Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil, and keep the award, arbitrament, and umpirage, of the above-named arbitrators, and such third person and umpire as they, the said arbitrators, shall indifferently name, elect and choose, for the ending and determining the same premises, or a majority of them, so as such award, umpirage, and judgment of the said arbitrators and umpire, or a majority of them, of and concerning the same, be by them so made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in sixty days from the day of the date hereof. This obligation to be void and of no effect, otherwise the same shall remain in full force and virtue."

Upon this reference, the following award was made, under the hands and seals of the arbitrators and the umpire:

"We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael M'Blair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award, and adjudge, that the late firm of Charles W. Karthaus & Co., pay, or cause to be paid, unto Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of fourteen hundred and seventy-five dollars, for a balance of the general account current between the parties; and also the sum of thirteen hundred and ninety-eight dollars, for a balance arising out of the moneys recovered for the brig Arogante Barcelonese and cargo, in which award, a parcel of cutlasses, or their proceeds, *are considered as becoming the property of said Yllas y Ferrer." [*224

NOTE.—As to awards and arbitration, see note to Carnochan v. Christie (11 Wheat., 446).
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"Given under our hands and seals, in Baltimore, this 8th of March, 1828."

To an action on the bond, against the plaintiff in error, he pleaded the condition, and that no award had been made. The defendants in error replied, and answered, and set it out as stated; and there was a demurrer to the replication, which the court overruled, and a judgment was entered for the plaintiff below. In this judgment error was alleged; and before this court, the plaintiff in error sought to maintain,

1. That the award is not agreeable to the submission.

2. It is not certain, final and mutual.

3. It directs an act to be done by strangers.

4. It is defective in other respects.

The case was argued by *Mr. Hoffman*, and *Mr. Mayer*, for the plaintiff in error, and by *Mr. Wirt*, Attorney-General, for the defendants.

For the plaintiff in error.

The object of the submission was to have all the matters in controversy adjusted by the arbitrators, and the words "certain disputes," so meant and intended. (2 Caines' Rep., 320; 15 John. Rep., 197; Com. Dig. Arbitration, 4 D.)

1. This was a submission between all the parties, the plaintiff in error, and the firm of which he was a member, there being partnership and individual disputes; and the award does not apply to all, but only to the plaintiff in error. It should profess to decide everything in the premises.

The submission being conditional, *ita quod*, the referees were bound to pursue, strictly, the submission in all its terms, and to award on all matters submitted to them. (2 Gallison's Rep., 778; Cokes' Rep., *Bascoe's case*, 193; 1 Salk., 70; Kyd on Awards, 176.)

2. An award must be so certain that it may be pleaded in bar, to an action against the parties to it; which is not the fact in this case.

1. It does not comprehend all the parties, nor decide upon all the subjects in dispute; it is uncertain and contradictory, and there are no averments in the replication which will supply these deficiencies; there should have been an averment as to the members of the firm—as to the accounts, and the transactions out of which the accounts grew. By no form of pleading could the plaintiff in error show he had, in this case, satisfied the claims of the defendant in error. The award should have designated the claims on the plaintiff, individually, and on the firm; nor does it appear by it that Charles W. Karthaus, and C. W. Karthaus & Co., were **225** the same persons. *(Cited, 1 Bacon's Abr. Arbit. and Award, pl. E., 1, 216; 1 Com. Dig., 666; Tit. Awd. pl. E., 4; 7 East, 81; 5 Wheat., 394.)

In an action on an award, the plaintiff is not bound to set out the particulars; but if he proceed on the bond, he must set out the breaches with particularity. The defendant may do it, but it is the duty of the plaintiff. (Kyd on Awards, 195.) That part of the award, by which "a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer," is altogether uncertain. It does not state what cutlasses, or what the amount of the proceeds, considered as the property of Yllas y Ferrer, were included, or referred to.

Mr. Wirt, for the defendants in error.

The court are always disposed to maintain awards. (Caldwell on Arbitrations, 123.)

The pleadings do not exhibit anything from which error can be imputed. The defendant should have rejoined, and shown that there were other parties, and other matters, than those stated in the award; having failed to do this, there is nothing before the court but the submission and the award; and there is nothing to show that there were other persons interested, and other matter to be acted on, but those stated in the award. This form of pleading is only waived when the submission sets out every matter at large. (Cited, Kyd on Awards, 171; 7 East, 81.)

The firm is not a party to the submission; and the partner who submitted to the arbitration, will alone be bound by it, and to pay the amount awarded (Kyd, 40). As to the set-off, in such a case of individual and partnership accounts. (Cited, 5 T. Rep., 493; 6 T. Rep., 582-3.)

Certainty, to a common interest only, is required in awards. This award is sufficiently certain. (Kyd, 132; 1 Caines' Rep., 314, 315; 14 John., 108, 109.)

¶ If the award be certain in part, it may be executed for so much as is certain, although another part is uncertain; unless the part which is uncertain is the consideration for that which the uncertain part was given. (5 Wheat., 409.) The award here is entirely for the defendants in error, and if any part of it is uncertain, which is denied, the plaintiff in error cannot complain. (11 Wheat., 448.) The cutlasses and the proceeds are sufficiently designated, and if they were not, it was for the plaintiff below only to complain.

Mr. Justice TRIMBLE delivered the opinion of the court:

This was an action of debt, brought by Francisco Yllas, and Josef Antonio Yllas, against Charles W. Karthaus, on an arbitration bond, in the Circuit Court of the District of Maryland.

The defendant, after oyer of the condition of the bond, pleaded, no award made, &c. The plaintiff replied, setting forth the [*226 award *in hæc verba*, and assigning a breach; the defendants demurred generally, and the plaintiff joined in demurrer. The Circuit Court having given judgment, upon the demurrer, in favor of the plaintiffs, the defendant has brought the case up, by writ of error, for the consideration of this court.

The first and principal ground relied on by the plaintiff in error, for the reversal of the judgment, is, that the award is not agreeable to the submission, in this: that two several distinct controversies, the first between the plaintiffs and the late house of Charles W. Karthaus & Co., and the second between the plaintiffs and Charles W. Karthaus, individually, were submitted to the referees, and that they left the latter undetermined. The condition of the bond, after reciting that certain disputes, differences, and controversies have arisen, and are still depending between the above-bound Charles W. Karthaus, acting for his late house of Charles W. Karthaus & Co., and for himself and the above-named Francisco Yllas y Ferrer, and Josef Antonio

Yllas, &c., "refers the same to the referees named, and their umpire, and binds the said Charles W. Karthaus, &c., to abide by and perform their award;" so as such award, &c., "of the arbitrators, of and in the premises, be by them made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days."

The arbitrators, and their umpire, within the time limited by the submission, made and delivered their award in writing, under their hands and seals, in the following words, to wit: "We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael M'Blair, as umpire, acting in virtue of the annexed bond, or instrument of writing, do hereby award and adjudge, that the late firm of C. W. Karthaus & Co. pay to Francisco Yllas y Ferrer, and Josef Antonio Yllas, or their representatives, the sum of fourteen hundred and seventy-five dollars, for the balance of the general account current between the parties, and also the sum of thirteen hundred and ninety-eight dollars, for a balance arising out of moneys received for the brig Arogante Barcelonese, and cargo; in which award, a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer."

It is plainly seen from the face of the award, that the arbitrators have not contradistinguished between Charles W. Karthaus, as a member of the late house of Charles W. Karthaus & Co., and Charles W. Karthaus, as an individual, unconnected with his late house. The argument is, that this omission of the referees vitiates the award. It is said that this, being a conditional submission, *ita quod*, the arbitrators were bound to pursue the submission **227** strictly, and to award, of and *concerning every matter referred to them. In support of this argument, the counsel referred to *Randall v. Randall* (7 East, 80), and several other cases less apposite.

That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall v. Randall* is a leading case of that class. Lord Ellenborough, *Ch. J.*, in delivering the opinion of the court, says: "The arbitrators had three things submitted to them; one was to determine all actions, &c., between the parties; another was to settle what was to be paid by the defendant for hops, poles, and potatoes, in certain lands; the third was to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for."

This case was adjudged according to the rule laid down in the books—that if the submission be conditional, so as the arbitrator can decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. (Kyd, 177.)

But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters in controversy having been decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. (Caldwell, 105; Kyd, 177; Cro. Car., 216; *Baspole's case*, 8 Co., 98; *Ingraham v. Milnes*, 8 East's Rep., 445.)

That Lord Ellenborough understood and intended to apply the rule, as thus qualified, in *Randall v. Randall*, is manifest. For Mr. Espinasse, in commenting upon *Baspole's case*, having observed, that it is said in that case, that though there be many matters in controversy, yet if only one be signified to the arbitrators, he may make an award for that, for he is to determine according to the *allegata et probata*—and it is in every day's practice, that an award may be good in part, and bad in part. Lord Ellenborough, in answer to that argument, replies: "That is, where it does not appear there is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him, than those which are mentioned to him at the time of the reference. But here it does expressly appear, that there was another matter referred, on which there is no arbitrament."

*In this case, it is not pretended that [**228** any notice was given to the arbitrators of any other matter, unless that notice was given on the face of the submission.

The question, then, is, does it distinctly appear, from the face of the submission, that any other point of difference between parties was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine.

If, as the argument supposes, there was any point in difference, which concerned Charles W. Karthaus, individually, as contradistinguished from the points in difference which concerned him as Charles W. Karthaus, of the late firm of Charles W. Karthaus & Co., what was that point of difference?

No satisfactory answer has been given, and it is believed none can be given, to this inquiry. How, then, can it be maintained that a distinct point of difference between the parties was referred, and by the reference itself notified to the referees, which they have neglected to determine? The case of *Ingraham v. Milnes* is a strong authority to show, that although the submission be conditional, *ita quod*, there must be a distinct specification, as in *Randall v. Randall*, to sustain the objection, that part has been omitted by the arbitrators. Here the submission is in very general, and, we think, in very vague and ambiguous terms. It speaks of disputes, differences, and controversies, between Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and for himself and the plaintiffs. But how, or in what he acted, for the one or the other, is not specified. The terms "late house," imply the former existence, but present non-existence, of the late house of Charles W. Karthaus & Co. He may be the only surviving partner, the firm having ceased by the death of the other members. But if the firm was continuing, Charles W. Kar-

thaus, while he must be admitted to be perfectly competent to submit to reference his own interests in the firm, could not, by his submission, bind his partners. He might bind himself to perform whatever the award directed the firm of which he was a member to do; so that, either way, it was a submission of his own interest only. In order to overturn the award, it is not enough that he may have had different and distinct interests in his individual and in his partnership character. It is a settled rule, in the construction of awards, that no intendment shall be indulged, to overturn an award, but every reasonable intendment shall be allowed to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good—for it shall be presumed no actions real were depending between the parties. (*Kyd*, 72, and *Baspole's* case, before cited.)

229*] *So in this case, although the submission speaks, in general terms, of disputes, differences, and controversies, with Charles W. Karthaus, acting for his late house of C. W. Karthaus & Co., and for himself, it shall not be intended there were any controversies with C. W. Karthaus, individually, other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *alimunde*, they were brought before the referees.

There is no analogy between this case and *Lyle v. Rogers*, (5 Wheat., 394), cited at the argument. In that case, it was decided, that where claims against a party, both in her own right, and in her character of administratrix, were submitted to arbitrators, it was a valid objection to the award, that it awarded a gross sum to be paid by her, without distinguishing between what was to be paid by her in her own right, and what in her representative character. The Chief Justice, in delivering the opinion of the court, explains the reason and ground of the decision, by observing: "If this award was made against Mrs. Dennison, as administratrix, she would not only be deprived, by its form, of the right to plead a full administration (a defense which might have been made before the arbitrators, and on which their award does not show, certainly, that they have decided), but also of the right to use it in the settlement of her accounts, as conclusive evidence that the money was paid in her representative character. If this objection to the award is to be overruled, it must be on the supposition that it is made against her personally; yet the statement of facts shows the claim against her to be in her representative character." This reasoning cannot apply to the case before the court. It is of no sort of consequence to C. W. Karthaus, whether he is directed to pay as Charles W. Karthaus, individually, or as Charles W. Karthaus, of his late house of C. W. Karthaus & Co. In each case he is bound, personally, to pay, having bound himself so to do by the submission; and the award, if in any case it would be evidence for him against the firm, would not be conclusive, as he had no power to bind his partners, if any existed by his submission. It is objected that the award is not certain, final, and mutual. It was said, in argument, that as

the first sum awarded is expressed to be for a "balance of the general account current, between the parties, the general account current must be understood to include all accounts between them; and hence, that the second sum awarded, for a balance arising out of moneys received for the brig *Arogante Barcelonese*, is included in the first, and the party thus twice charged; or at least, that it does not certainly appear otherwise." *We think there is [*230 no foundation for this argument. To indulge such a supposition, would impute either manifest injustice, or gross negligence, to the referees. Great stress was laid, in the argument, on the uncertainty of the closing clause of the award, in these words, "in which award, a parcel of cutlasses arc considered as becoming the property of said *Yllas y Ferrer*." There is considerable doubt and uncertainty as to the meaning of the arbitrators, in the use of these terms. And had this uncertainty appeared in any part of the award, intended for the benefit of the defendant, it would, perhaps, be fatal to the whole award. Had that been the case, it would be hard and unjust to compel him to perform that part of the award which is onerous to him, when he could not have, on account of its uncertainty, that which would be beneficial to him. But, however doubtful the precise intent and meaning of this part of the award may be, it is certain it was intended as a benefit in some way to *Yllas y Ferrer*, over and above the two sums of money directed to be paid to the plaintiffs. The defendant can have no reason to complain that the plaintiffs, or either of them, may not, on account of this uncertainty, be able to obtain all the benefits intended by the award; nor can it furnish any reason for withholding from them that to which they are certainly entitled.

It is deemed a sufficient answer, to the objection of want of mutuality in the award, to remark, that great stress was laid, in the early cases, upon the mutuality of an award; but at present, it is by no means considered necessary that each party should be directed to do, or not to do, any particular thing. (*Cald.*, 113.) Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The court held it a good award, (*Harris v. Knight*, 1 Levz., 58).

In *Palmer's* case (12 Mod., 234), one party was directed to pay money to the other, without any directions being given to the latter in any way; and again, it was awarded that A should pay B 40 shillings for a trespass. (*Freeman*, 204.) The respective awards were considered unimpeachable. These cases fully establish the principle above laid down. An award is regarded as final when it is an absolute conclusive adjudication of the matters in dispute; and there is no reason to doubt the conclusiveness of the adjudication in this case, as to the two sums of money directed to be paid; and that the award will operate as a bar to any future litigation, upon the accounts for which they are given. Again. It is objected that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus & Co. pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard it.

Peters 1.

231*] So far as *appears upon the record, the late firm or house of C. W. Karthaus & Co. and C. W. Karthaus, are one and the same person; or more properly speaking, it does not appear that there is any other person, *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person, *in esse*, of the late house of C. W. Karthaus & Co., it cannot be truly affirmed that he and the house of which he was a partner are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognizant of the fact, and might have shown it, if true, but has not. The direction that the late firm of C. W. Karthaus & Co. shall pay, unquestionably includes C. W. Karthaus; and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment; namely, that the replication is insufficient, because, in assigning a breach it only alleges C. W. Karthaus had not paid. As no other was, or could be bound by the submission and award, to pay, and he was bound; it was a sufficient assignment of a breach of the condition of his bond, to allege that he had not paid the money awarded in favor of the plaintiffs.

Upon the whole, it is the opinion of this court, that there is no error in the judgment of the Circuit Court, and the same is affirmed with costs and damages.

Cited—1 Otto, 170.

232*] *JUNIOUS K. HORSBURG, Devisee
of JAMES HENDERSON, *Appellant*,

v.

MARTIN BAKER AND HANNAH, HIS
WIFE, FRANCIS CLARK, ROBERT
BOYCE, AND PETER MASON, for
himself, and as guardian to SUSANNAH R.
HAMLETT.

*Chancery jurisdiction—forfeiture—revival of
bill for discovery.*

A Court of Chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. [236]

After an answer and discovery, the rule is, that a suit brought, merely for discovery, cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it. [236]

A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for was a forfeiture, which might be enforced at law. Under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture but the dismissal should have been without prejudice to the legal rights of the parties, as an absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. [236]

ON an appeal from the Circuit Court for the District of Kentucky. The facts and the pleadings in the case are fully stated in the opinion of the court.

The cause was argued by *Mr. Wickliffe*, on Peters 1.

the part of the appellants, no counsel appearing for the appellees. The following points were stated in the argument, by *Mr. Wickliffe*:

1. The loan made in 1784, and as further evidenced, by the deed of confirmation of 1787, was valid, as between the parties to it; and as Baker and wife are proved, in 1813, to be in possession of the negroes, and of a copy, or the original deed of 1781, is admitted, they are estopped from asserting any title to said slaves, which they may have had prior to that deed.

2. The deed of 1787 having been duly recorded in the proper office, on the 4th of July, 1787, was notice to all the world; and the subsequent removal of the slaves out of the State of Virginia, without the knowledge and consent of Horsburg, did not destroy the legal effect of that deed, or convert the loan into an absolute title, in Baker and wife.

3. Baker and wife cannot rely upon the lapse of time, or the length of possession to defeat the right of Horsburg, and those claiming under them.

4. The court, in this cause, had jurisdiction upon two grounds; the one arising from the nature of the contract and its subject-matter; the other, from the peculiar circumstances of the case, the difficulty of proving and identifying the slave Charlotte and her increase, without the aid of a discovery on oath; and the repeated attempts by the defendants, and the just *fears of the complainant, that the [*233 negroes would be secreted and removed out of the jurisdiction of the court.

When courts of chancery take jurisdiction upon the ground of discovery, or upon any other ground, they will retain the cause for the purpose of granting full relief.

By the act of Assembly of Virginia, of 1758, a parol gift of slaves was void. (1 Wash. Rep., 339, 331.)

The parties to a trust of real or personal property, may resort to a Court of Equity to avail themselves of its benefits. (1 Mad. Chancery, 446.)

Between the *cestui que trust* and his trustee, the statutes of limitation or lapse of time are no bar. (1 Mad., 453; 2 Ves., 680.)

Baker and wife were trustees of the slave and her issue, for the persons entitled to the reversion of them, under the deed of Alexander Horsburg; and they were not authorized to dispose of them; and the sale made by them, while the suit was pending, was void as to the *cestui que trust*. (2 Johns. Chan. Cas., 441; 4 *Ibid.*, 136.)

As to jurisdiction in this cause, and it being a case for relief in chancery. (3 Ves., Jun., 71.)

Slaves, the property of the wife, vest in the husband without being redeemed into possession. (1 Mar. Rep., 517.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

In the year 1813, James Henderson and his wife filed their bill in the Court of the United States, for the seventh circuit, and District of Kentucky, stating that Alexander Horsburg, the former husband of the plaintiff, did, by deed, bearing date the 25th day of April, in the year 1787, confirm to Martin Baker, and Hannah, his wife, for their lives, and the

life of the survivor, then residing in the county of Halifax, in Virginia, a negro girl named Charlotte, previously loaned to them (which deed was recorded); reserving to himself and his heirs, the reversion of the said slave, and her increase; and prohibiting any alienation of them, under the penalty of forfeiting the loan.

This deed was recorded on the 4th day of July, 1787, in the Court of Hustings, for the town of Petersburg; the town in which the said Horsburg resided. The bill further states that the said Alexander Horsburg departed this life in the year 1798, having first made his last will in writing, whereby he bequeathed the residue of his estate to his wife, who afterwards intermarried with the plaintiff, James Henderson.

The bill proceeds to state, that Martin Baker and wife have removed to Kentucky with the slave Charlotte, and her increase; whom they profess to hold as their absolute property; and that the plaintiffs fear that they will be secret-**234***] ed, or conveyed *out of the State to places unknown. The plaintiffs further allege, that they are unable to prove the identity of the said slaves, and pray that the said Baker and wife may be compelled to discover their number and names; and may be decreed to give security for their forthcoming; when the life estate should determine.

The court awarded an injunction, to restrain the defendants from removing Charlotte, and her issue, out of the State.

In May, 1814, the plaintiff, James Henderson, filed an amended and supplemental bill, stating the death of his wife, and praying that the suit might be continued in his name. The bill also states, that Baker and wife had sold Charlotte and her increase to Francis Clarke and Robert Boyce; who intend removing them out of the State, and concealing them. It prays that the slaves may be rendered to the plaintiff, and that Clarke and Boyce may be restrained from removing them. The court extended the injunction to the other defendants. The defendants, Baker and wife, file their answer denying the loan; and insisting that certain friends of the defendant, Hannah, subscribed the sum of forty-three pounds, which was placed in the hands of Alexander Horsburg, to purchase the slave Charlotte for her. They insist on their title, but give a full description of all the descendants of Charlotte.

The defendants, Clarke and Boyce, also deny the right of the complainant.

In 1817 the plaintiff again amended his bill, and charged that Baker and wife had brought the deed from Horsburg with them into Kentucky, as their title to Charlotte.

In November, 1819, Junius K. Horsburg appeared, by his attorney, and leave was given him to file a bill of revival. The bill is filed by the said Horsburg, as the administrator and devisee of James Henderson, and as the heir and only child of Mrs. Henderson, the wife of the said James, and the former wife and devisee of Alexander Horsburg.

The bill recites the previous proceedings in the cause; exhibits the will of James Henderson, and his letters of administration, and charges the sale to Boyce and Clarke, since the institution of this suit, who purchased at a low

price, with the intention of removing the slaves beyond the jurisdiction of the court.

In answer to this bill, Baker and wife say, that, in the year 1773, Thomas Simmons, and others, named in the answer, contributed forty-three pounds, for the purpose of purchasing a negro girl, for the said Hannah, which sum was placed in the hands of Alexander Horsburg, as their agent, with instructions to convey the said negro to the defendants for their lives, and to their children, after the death of the survivor. They believe *this plan [***235** was adopted for the purpose of protecting the property thus given by her friends from the creditors of her husband. Under these instructions, Charlotte was purchased and delivered to them. In the year 1787, after the defendants had been in peaceable possession of Charlotte, about fourteen years, the said Horsburg, without any previous communication of any sort, sent to them, then residing in Halifax, about 120 miles from Petersburg, the deed; a copy whereof is annexed to their answer. They also say that on the same day the said Horsburg executed another writing, obliging himself to convey Charlotte and her increase, after the death of the defendants, to their children, to which they refer, as being filed in the office of the Circuit Court for the county of Garrard. They also refer to a letter, written by the said Horsburg, which they say was given up to be filed in the cause.

In May, 1824, leave was given to file an amended bill, and the cause was sent to the rules for further proceedings.

The amended bill charges that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof; that they purchased the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risk of the title.

The deposition of John T. Mason states that the deponent, as counsel for the original plaintiff, called on the defendants, Baker and wife; who, after some time, admitted that they claim Charlotte and her offspring, under a deed from Alexander Horsburg, which they showed him.

It is a copy, or the original of the deed filed in the cause. They also showed the witness several other papers and letters in relation to the subject, and particularly two letters from Alexander Horsburg, which he believes to be the same, or to the same purport, with those filed in the cause.

The copy of the deed of 1787, recorded in the court for the town of Petersburg, is filed, together with the will of Alexander Horsburg, and of James Henderson; but neither the subsequent deed, stated in the answer of Baker and wife to have been executed by Alexander Horsburg, for the purpose of securing Charlotte and her offspring, to the children of Baker and wife, nor the letters from Horsburg, are found on the record.

The last amended bill was taken for confessed, and the cause set down for hearing. The court directed the bill to be dismissed.

Baker and wife being alive, the plaintiff could have no pretense to recover the slaves claimed by the amended bill, except under the clause of forfeiture for alienation, which the deed contains.

236*] *As a Court of Chancery is not the proper tribunal for enforcing forfeitures, no decree for the purpose of effecting that object ought to have been made. But the plaintiff had a right to apply to the Court of Chancery for a discovery, in order to enable him to proceed at law, either immediately, or on the death of Martin Baker and his wife; and also, for an injunction, to restrain the tenants for life from removing the slaves out of the country. The decree dismissing the bill, entirely defeats both these objects.

The bill, therefore, ought not to have been dismissed, unless the plaintiff had failed to show any title which might be litigated in a court of law. The court will not, in this case, decide upon the title; but is of the opinion, that it authorizes the plaintiff to come into a Court of Chancery to pray for a discovery; and, as there was reason to fear that the property would be removed, to obtain security for its forthcoming, if the title should be determined in his favor. This bill was, in its origin, merely a bill of discovery, and *quia timet*. Before the answer was filed, the original defendants are alleged to have sold the slaves, and, by that act, to have forfeited their life estate. The amended bill, therefore, prays a decree for the slaves themselves. After this bill was filed, the defendants, Baker and wife, answer; and make the discovery with respect to the descendants of Charlotte.

In this state of the cause the plaintiff dies, and his administrator and devisee files a bill in the nature of a bill of revivor.

After answer and discovery, the rule is that a suit brought merely for discovery cannot be revived. (1 Mad., 217; 1 Dick., 133; 10 Ves., 31.) Its object is obtained, and the plaintiff has no motive for reviving it. But such a bill ought not to be dismissed. (1 Mad., 217; 1 Atk., 286.)

The court might properly order that no further proceedings be had in the case. Had this bill, then, been merely a bill of discovery, at the death of the original plaintiff, it ought not to have been sustained in the name of his devisee; because the discovery was made. But it had then become a bill for relief. The relief, however, prayed, is for a forfeiture, which might have been enforced at law. The present plaintiff was in possession of all the evidence which was necessary to support his action at law, and was not driven into a Court of Chancery for the purpose of obtaining its aid. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed, without prejudice to the legal rights of the plaintiff; an absolute dismissal may be considered as a decree against the title.

The decree, therefore, is to be reversed, and **237***] the cause remanded, *with directions to dismiss the bill, so far as it asks relief; without prejudice.

The injunction may be continued in the discretion of the court, till the plaintiff has time to institute a suit at law.

This cause came on, &c. On consideration whereof, this court is of opinion, that, after the discovery sought by the original bill was obtained, the suit ought not to have been revived, nor ought the bill, in the nature of a Peters 1.

bill of revivor, to have been entertained; because the relief sought by that bill was solely to enforce a forfeiture, to which the plaintiff's title, if he has any, is complete at law. It was therefore proper to refuse the relief for which that bill prayed; but as a general decree for a dismissal on the merits, may be considered as a decree against the title, on which the court ought not to have decided, the bill ought to have been dismissed, without prejudice. It is, therefore, the opinion of this court, that there is error in so much of the decree of the Circuit Court as dismissed the bill of the plaintiff generally; and that the said decree ought to be reversed, and the cause remanded to the Circuit Court, with directions to dismiss so much of the plaintiff's bill as prays relief on the ground of forfeiture, and to continue the injunction at the discretion of the court.

Cited—2 Wood. & M., 29.

*CHRISTIAN BREITHAAPT AND [*238
HENRY SHULTZ, *Defendants below*,

v.

THE BANK OF THE STATE OF GEORGIA
ET AL.

Jurisdiction—parties.

The complainants are stated, in the bill, to be citizens of the State of South Carolina. The defendant, the Bank of Georgia, is a body corporate, existing under an act of the Legislature; but the citizenship of the individual corporators is not stated. The averment, in the original bill is, that William B. Bullock and Samuel Hale are citizens of Georgia, and residents therein; William B. Bullock is afterwards designated in the bill, as "president of the Mother Bank, and Samuel Hale, as the president of the branch bank at Augusta, in the State of Georgia." The courts of the United States have no jurisdiction of the case. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank were citizens of that State.

THIS was a bill, filed in the Circuit Court for the District of Georgia, and the case came up on a certificate of a division of opinion, which the judges ordered to be entered upon these points:

First, whether the complainants are entitled to relief?

Second, what relief should be decreed to them?

The only question presented for the decision of this court, was, whether the Circuit Court had jurisdiction of the cause. It was alleged, there is no sufficient averment on the record of the citizenship of the parties.

The complainants, Henry Shultz and Christian Breithaupt, are stated to be citizens of the State of South Carolina. The defendant, The Bank of the State of Georgia, is a body corporate; but the citizenship of the individual corporators is not stated. The averment, in the original bill, is, that "William B. Bullock and Samuel Hale, are citizens of Georgia, resi-

NOTE.—Jurisdiction of the United States Courts, depending on the residence of the parties, including corporations, see note to *Enory v. Greenough* (3 Dall., 369); and note to *Strawbridge v. Curtis* (3 Cranch, 267); and note to *Hope Insurance Co. v. Boardman* (5 Cranch, 57).

dents therein." William B. Bullock is subsequently designated as "president of the Mother Bank, and Samuel Hale as president of the branch bank at Augusta, in the State of Georgia." There are three amendments to the bill, but there is in none of them any further averments. The answer denies the jurisdiction.

The defendant's counsel insisted that the citizenship of the individual corporators should have been alleged, and that the want of jurisdiction is apparent upon the face of the record.

Mr. McDuffie, in support of the jurisdiction of the court, contended, that the objection to the jurisdiction was founded on a misapprehension of the decisions of this court. None of those decisions go further than to say, that if, **239*** on the face of the record, it appears that there are parties, who are not citizens of another State, the courts of the United States will not accept jurisdiction.

In the bill, the complainants are said to be citizens of South Carolina; and William B. Bullock, the president of the Mother Bank, and Samuel Hale, the president of the branch bank, are citizens of the State of Georgia; and there is no ground for the allegation that other persons, not citizens of the State, are interested. The party who claims the jurisdiction, is not bound to prove that no other persons, but citizens of Georgia, are interested.

The bank exists under an act of incorporation, passed by the State of Georgia, and this court will look at the act; which, having a general operation, may be considered as a public act. (1 Black. Com., 85.) If this is done by the court, they cannot say others than citizens of Georgia are members of the corporation. Cases cited, in which the question of jurisdiction has been examined: 3 Dal., 382; *Cabot v. Bingham*, 5 Cranch, 57; 3 Cranch, 267; 3 Wheat., 591.

The policy of the constitution, in relation to jurisdiction, is to include suits against corporations, although all who are interested are not citizens of the same State.

The influence of such corporations, in the State where they exist, makes this appeal to other than State tribunals expedient. When an action is instituted against trustees by citizens of another State, would the jurisdiction of the courts of the United States be taken away, by showing that some of those who had a fiduciary interest were not citizens of the same State with the trustees? The question must be settled by adverting to the local usages of Georgia; and there suits are brought against the individuals who represent the bank.

Mr. Berrien and Mr. Wilde, for the defendant.

The pleadings show that there is no allegation of citizenship in the stockholders of the bank, the owners of its funds; and the point is fully settled, that all the parties who are sued, shall be averred to be citizens of another State, from that of the plaintiff or complainant in the suit.

A body corporate, as such, is incapable of citizenship, according to the true meaning of the law giving jurisdiction.

This court has decided, that they will go behind the act of incorporation, and ascertain the character of the individual corporators, and if they find them citizens of another State, the suit may be maintained; but there must be an

avermert of such citizenship, as to every stockholder. (5 Cranch, 57; 6 Wheat., 146.)

The possession of the fund cannot give the court jurisdiction, as that was the possession of a corporation. No jurisdiction can ***240** be obtained, because of the difficulties in suits against the corporation of one State, by citizens of another; and it is denied that any such difficulties exist in Georgia.

BY THE COURT.—This is not a case within the jurisdiction of the courts of the United States. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations or averments that the same was the fact, as to the stockholders in the bank.

This cause came on, &c. On consideration whereof, this court is of opinion, that as the bill does not aver that the corporators of the Bank of the State of Georgia, which bank is defendant in the suit, are citizens of the State of Georgia, the Circuit Court has no jurisdiction of the cause, and can grant no relief. It is, therefore, ordered to be certified to the Circuit Court, as the opinion of this court, that, in the present state of the pleadings, it not appearing that the defendants are citizens of the State of Georgia, the complainants are not entitled to relief in that court.

Cited—16 How., 350; 18 Wall., 575; 1 Sumn., 584; 3 Sumn., 473; Hemp., 424; 4 Biss., 126.

*JAMES FINDLAY, WILLIAM ***241**
LYTLE, CHARLES VATTIER, ROBERT
RITCHIE ET AL., Citizens of Ohio, *Appel-*
lants,

v.

THOMAS S. HINDE AND BELINDA, HIS
WIFE, Citizens of Kentucky, *Appellees.*

Chancery practice—lost deed.

If, in a case where the loss of a deed or other instrument is made the ground for coming into a Court of Equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him; it seems, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. [244]

If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchases, without notice; parties who claim under such deed, have a right to come into a Court of Equity, for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. [245]

Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase money, binding the party to convey the estate; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding, although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. [246.]

The decree of the Circuit Court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants. All the defendants ap-

Peters 1.

pealed together, to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantees and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs, yet, the reversal of the decree of the Circuit Court was made general, as to all of the appellants, and the whole case opened. [247]

THE appellees filed their bill in the Circuit Court of the United States for the District of Ohio, praying a discovery; and that the defendants may convey to the complainants such a title as they have acquired, to a lot of ground in the town of Cincinnati, and deliver up the possession acquired by them; and also that they account for the profits; and for general relief.

The title set up by the complainants, was alleged to be derived from a receipt given by Abraham Garrison, in whom the title to the lot was then vested, which receipt was in the following terms:

“Received, Cincinnati, 10th September, 242*] 1799, of Wm. and *Michael Jones, fifty pounds thirteen shillings and three pence, in part of a lot opposite Mr. Conn’s, in Cincinnati, for \$250, which I will make them a warrantee deed for the same, on or before the twentieth day this instant.

Test., Jacob Awl.

Signed, ABRAHAM GARRISON.”

And from a deed executed on the following day, by which Abraham Garrison, for the consideration of \$250, conveyed the lot to William and Michael Jones, which deed was said to have been lost by time and accident. The lot was by subsequent conveyances claimed to be vested in the complainants. No affidavit is attached to the bill, showing that the deed was not in the complainants’ possession, or setting forth that it had been so lost or destroyed.

To this bill the defendants, James Findlay, Charles Vattier, William Lytle, and Robert Ritchie, answered separately; and a decree was entered against the other defendants for costs, the bill having been taken *pro confesso* against them, they not having answered.

After hearing, this court gave a decree against the defendants who had answered; and all the defendants appealed to this court.

The bill, answer, exhibits, and depositions, showed a case containing many controverted facts and allegations; and the questions of law arising upon the same were elaborately argued by *Mr. Webster* and *Mr. Caswell* for the appellants, and by *Mr. Doddridge* and *Mr. Jones* for the appellees.

The decision of this court by, which the decree of the Circuit Court of Ohio was reversed, and the cause remanded for further proceedings, was upon two questions of chancery practice; which were raised by the counsel for the appellants.

1. The court have decreed relief to the complainants on the bare suggestion that the deeds once existed which are lost, when no affidavit is attached to the bill, showing that the deeds were not in complainant’s possession; and without such an affidavit a court of chancery has no jurisdiction of the cause. The appellants cited the following cases to show the error of this proceeding. (Mitford’s Pl., 52, Peters 1. U. S., Book 7.

112; 2 Péré Williams, 540, 541; 3 Atk., 17, 132; 4 John. Ch. Rep., 297.)

2. The complainants not having shown a deed from Garrison to the Jones’s, must rely upon the receipt from Garrison to the Jones’s as an equitable title; and if they claim that equitable right they of course must make Garrison the elder and the Jones’s parties to the suit. Upon this point the counsel for the appellants cited *Simms v. Guthrie et al.* (9 Cranch, 25.)

No opinion having been expressed by the court upon the merits of the cause, or upon the general questions presented by *the [*243 counsel, it is not deemed proper to state the arguments of counsel in this report.

Mr. Justice TRIMBLE delivered the opinion of the court:

This is a contest for lot No. 86, in the city of Cincinnati. The appellees, who were complainants in the court below, claim the lot in right of the complainant, Belinda, as half-sister and heir-at-law of Thomas Doyle, Jun., only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seized in fee of the lot in controversy.

The bill charges that on the 10th of September, 1799, Abraham Garrison, being so seized, sold the lot to William and Michael Jones, brothers, and partners in trade, for the price of \$250; part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey; which receipt is annexed and made part of the bill: That a few days after the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones’s, for the lot; which deed has been lost by time and accident. That on the 26th of March, 1800, William Jones, in behalf of the firm of William & Michael Jones, conveyed the lot to Thomas Doyle, Jun.; and that although the intention of that conveyance was to pass the title of both partners, and is in equity good for that purpose, yet, as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants, made a deed of confirmation to the complainant, Thomas S. Hinde.

Various other matters are stated in the bill as strengthening and confirming the equitable right of the complainants in right of the said Belinda, as heir-at-law of Thomas Doyle, Jun.

The bill charges that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, Jun., and of the complainants, subsequently, obtained conveyances of the legal title from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier, and Robert Ritchie, answered; and the bill was taken as confessed against the other defendants for want of answer.

The answer put in issue, generally, the allegations of the bill, and the title of the complainants; but it is not at present necessary to say whether they do or do not sufficiently deny notice.

It appears from the answers and title deeds filed in the cause that all the defendants, as well those who have not answered, as those

who have, are interested in defending the title **244***] of the lot; they standing in relation to each other as vendors, warrantees, and vendees.

At the hearing of the cause in the Circuit Court the defendants, Vattier and Ritchie, were decreed to convey to the complainants, and costs were decreed against all the defendants; and all of the defendants have joined in the appeal to this court.

The appellants contend that the decree is erroneous upon several grounds, which have been very elaborately argued at the bar. Among these two preliminary objections have been raised to the regularity of the proceedings and decree; and if either of them be sustained it will be unnecessary to consider the more important objections made to the decree upon the merits of the conflicting claims of the parties.

The first preliminary objection is, that no affidavit of the loss of the deed from Garrison to the Joneses "by time and accident," as charged in the bill, was made and annexed to the bill.

In support of this objection the counsel for the appellants have cited numerous authorities to prove that when the loss of a deed or other instrument is made the ground for coming into a Court of Equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill; and, that the absence of such affidavit is good cause of demurrer to the bill. But no case has been cited, and none is recollected, in which it has been decided, that although the party charged failed to demur for that cause, but answered over to the bill, or permitted it to be taken, for confessed, by default against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree.

If such a decided case were shown, we should exceedingly doubt its reason and authority.

The objection appears to us to be of that character which ought to be made at the earliest practicable stage of the cause; and if not then made, should be considered as waived. Upon the face of the bill there is an apparent jurisdiction, and the use of the affidavit is only to show, *prima facie*, the truth of the matter.

It is not like the cases in which there is an apparent want of equity on the face of the bills, admitting all the facts stated to be true; nor like the case in which it is apparent, on the face of the bill, that a Court of Equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will be to the bill, yet none is necessary; inasmuch as there is either an absolute want of equity, or of jurisdiction.

We think the supposed former existence and loss of the deed from Garrison to the Joneses was not the only ground for appealing to a **245***] Court of Equity for relief. If the deed, as stated in the bill, were produced, or acknowledged and recorded, would be insufficient as a legal title against subsequent purchasers without notice. The complainants had a right to a discovery upon the ground of notice, against the defendants; and if notice should be brought home to them, the complainants had a right to relief by a decree quieting the title, &c.

Again. If the complainants should fail, as we think they have failed, to prove, by competent and satisfactory evidence, the former existence, execution, and contents of a formal deed of conveyance, sufficient to pass the legal title; we perceive no reason why they might not rely upon the executory contract contained in the receipt; and in this latter view of the case, the jurisdiction of the Court of Equity is unquestionable; and a general demurrer to the whole bill, for want of an affidavit, would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed, could have been maintained for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree, is the want of proper parties.

It has been argued, for the appellants, that Abraham Garrison was a necessary party; and, that as the complainants claim through him by an executory contract, he ought to have been before the court before any decree could be made against the defendants; who also claim through and under him, by a subsequent conveyance of the legal title.

The counsel for the appellees endeavored to overcome this objection, by arguing, that the deed from Garrison to the Joneses, conveyed the title from him to them; that the contract was, therefore, not executory, but executed between Garrison and the Joneses; and further, if it were not so, that there was no necessity for bringing Garrison before the court, he having conveyed away the legal title to the appellants; and that therefore no decree could be made against him.

We have already said, the evidence in the cause does not establish a formally executed conveyance from Garrison to the Joneses, sufficient to convey the legal title; and that the complainants are therefore driven to rest their case upon the executory contract, contained in the receipt.

Under this aspect of the case, was it necessary to make Garrison a party, to enable the court to pronounce a decree between the parties, really before the court?

In the case of *Symmes v. Guthrie* (9 Cranch, 25), this court declared the general rule to be, that, "regularly, the claimants who have an equitable title, ought to make those whose title they assert, as well as the person for whom they claim a conveyance, *parties to the **246** suit." "And that for omitting to do so, an original bill may be dismissed."

In the case of *Mallon et al. v. Hinde* (12 Wheat., 193, 196), the complainants claimed a survey in the military district, in Ohio, by virtue of certain executory contracts, with Elias Langham, and the heirs of Sarah Beard; and sought, by their bill against Hinde, to obtain a conveyance from him of the legal title; which, it was alleged, he had fraudulently obtained, with notice of the complainants' prior equity. Langham, and the heirs of Sarah Beard, were not made defendants; and for that cause, the decree was reversed. There is no distinction, in principle, between that case and this. In that case, this court, in delivering its opinion, hold the following language: "For the appellees, it is insisted the proper parties are not before the court, so as to enable the court to decree upon

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the merits of conflicting claims. And we are all of that opinion." "The complainants can derive no claim in equity to the survey, under or through Langham's executory contract with the Beards, unless these contracts be such as ought to be decreed against them, specifically, by a Court of Equity." "How can a Court of Equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to the rules which govern Courts of Equity, and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant Belinda's equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Joneses. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants, without first deciding that the contract of Garrison ought to be specifically decreed. He might insist the purchase money had not been paid, or make various other defenses. It is not true, that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him the invalidity of his obligation to convey, and overrule such defense as he might make; and if the purchase money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the legal title. We are all of opinion, that upon this second preliminary objection, the decree of the Circuit Court must be reversed.

A question of some difficulty presents itself, as to the extent of the reversal. The decree of the Circuit Court directs the defendants, Ritchie and Vattier, to convey certain portions of the **247***] lot of ground; and awards costs, generally, against all the defendants. There is no doubt, the defendants, against whom there is only a decree for costs, could not appeal alone, from the decree of costs. But the defendants below have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title; standing as they do, in the relation of vendors and warrantees, and vendees. Under these circumstances, we think the reversal should be general, as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course, because, so numerous, and so great, have been the irregularities in conducting the cause in the court below, from its commencement to its termination, by decree, that it seems impracticable that justice be done between the parties, without sending the cause back, as to all the parties; with directions, that the complainants have leave, if asked by them, to amend their bill, and make the proper parties; and to proceed *de novo* in the cause, from filing such amended bill.

This cause came on, &c. On consideration whereof, it is the opinion of this court, that there is error in the proceedings and decree of said Circuit Court, in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon it is adjudged, Peters 1.

decreed, and ordered, that the decree of said Circuit Court, for the District of Ohio, in this cause, be, and the same is hereby wholly reversed, annulled, and set aside. And it is further ordered, that the cause be remanded to the court from whence it came, with instructions to permit the complainants, upon application for that purpose, to amend their bill, and to make proper parties, and to proceed *de novo* in the cause, from the filing of such amended bill, as law and equity may require.

Cited—2 Curt., 299; 1 McLean, 31, 150; 2 McLean, 381.

*OLD GRANT, on the demise of [***248**

SAMUEL MEREDITH, Plaintiff in Error,

v.

JOHN M'KEE, for the use of THE BANK OF THE COMMONWEALTH OF KENTUCKY.

Jurisdiction—amount in controversy.

The court will not take jurisdiction of a case where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars: the title to a lot of ground, part of the whole tract, which was of less value than five hundred dollars, was only involved in the case before the court.

MR. WICKLIFFE moved to dismiss this cause, which was brought by a writ of error from the Circuit Court of the District of Kentucky, on the ground that the property in controversy was not of the value of two thousand dollars; although the whole property owned by the lessor of the plaintiff in error was under a patent, and which was recovered in the ejectment, is one thousand acres; yet, the title to a lot in the town of Falmouth, of less value than five hundred dollars, held under the patent, is only involved in this case, and can only be affected by the decision of this court.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment of the Court of the United States, for the Seventh Circuit, and the District of Kentucky, awarding restitution of lot No. 108, in the town of Falmouth, to the defendants in error; who had been turned out of possession, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment, in favor of the plaintiff in error.

Previous to the institution of the suit, the town of Falmouth had been laid out, in pursuance of an act of Assembly, and lot No. 108 had been sold and conveyed to George Hendricks. The law establishing the town of Falmouth, directed that the lots should be sold, subject to the condition of making certain improvements thereon, within seven years; on failure to do which, the trustees are empowered to enter on any lot not improved and sell it again. These improvements were not made on lot No. 108.

The defendant in error moves to quash the writ of error, because the matter in controversy is not of the value of \$2,000. The motion is resisted, because the whole property which was recovered in the ejectment may be considered

as involved in this motion; since each tenant may move separately for an award of restitution on the supposition that the regularity of the proceedings under the law by which the **249*** town was established, and the lots sold, may be examined; on this motion the plaintiff in error has brought that subject into view, and has discussed it fully. But the court is of opinion that the question of title cannot be considered on this writ of error. The town of Falmouth was separated from the tract out of which it was taken, and this lot was sold before the suit was instituted; neither the trustees of the town nor the proprietors of the lot were parties to that ejectment. The motion to award restitution, therefore, involved nothing further than the lot to which the party prayed to be restored, and as that is not of the value of \$2,000, the court has no jurisdiction. The writ of error is to be dismissed.

Writ of error dismissed for want of jurisdiction, it not appearing that the value of the premises in this suit is \$2,000.

250* *WILLIAM KONIG, who is an alien,*
Plaintiff below,
v.

WILLIAM BAYARD, WM. BAYARD, JR.,
ROBERT BAYARD, AND JACOB LE
ROY, Citizens of the State of New York.

Payment of bill of exchange supra protest.

A stranger to the drawer and indorser of a non-accepted bill of exchange, may intervene *supra protest*, to pay the same for the honor of an indorser or drawer. [262]

It is no objection to this intervention, that it has been done at the request and under the guarantee of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payer of the dishonored bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill, for whose honor it has been paid. [262]

If A, at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra protest*, for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defense which he could have had, if the bill had been paid *supra protest*, for the honor of the indorser by the drawee, and suit brought for the same. [262]

NOTE.—*Acceptance of bills for honor.*

When the original drawee refuses to accept the bill, a stranger may accept it for the honor of some one of the parties thereto, which acceptance will ensure to the benefit of all the parties subsequent to him for whose honor it was accepted. (Bayley on Bills, 177; Story on Bills, secs. 255, 256; Daniels' Neg. Instr., sec. 521; *Ex-parte* Wackerbath, 5 Ves., 574; Hussey v. Jacob, 1 Ld. Raym., 88; May v. Kelly, 27 Ala., 497; Hoare v. Cazenove, 16 East., 391; Wood v. Pugh, 7 Ohio, 156.)

Payment for honor.

When the bill has been protested for non-payment, and not before, a stranger may pay it for the honor of the drawer, or acceptor, if it has been accepted, or of any indorser, or he may pay it for the honor of all the parties—for honor generally, as such payment is termed. And such payment does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying limits and narrows them. (Smith v. Sawyer, 55 Me., 141; Vandewall v. Tyrrell, 1 Wood. & M., 87.)

If the payment is made for the honor of a particular indorser, the party paying may sue such in-

THIS was an action of *assumpsit*, instituted in the Circuit Court of the United States for the Southern Circuit of New York, by William Konig, a merchant of Amsterdam, carrying on business under the firm of William Konig & Co., against the defendants, merchants in New York, trading under the firm of Le Roy, Bayard & Co.

The action was upon a foreign bill of exchange, and the declaration charges that the same was drawn at Baltimore on the 2d day of September, 1822, by John C. Delprat, on N. & J. & R. Van Staphorst, of Amsterdam, in Holland, at sixty days' sight, for 21,500 florins, in favor of the defendants, and made payable to them, or order. That the defendants on the 4th of September, in the same year, indorsed the same to L. H. Huder, who indorsed it to Rougemont & Behrends, and that they, on the 25th of November, 1822, presented the bill (the same being unaccepted and unpaid), to the drawees for acceptance, by whom acceptance was refused, and the bill protested for non-acceptance, and that the plaintiff on the same day, at Amsterdam, to prevent the bill from being sent back to the defendants, did, under that protest, and for the honor and account of the defendants, accept the bill, in writing, and gave notice thereof to the defendants.

That the bill was afterwards, and before payment, indorsed by Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils; and the last indorsees, when the bill became due* and payable, viz., on the **[*251** 25th of January, 1823, at Amsterdam, presented it to the drawees for payment; that payment was refused, and the holders being the last indorsees aforesaid, caused the bill to be protested for non-payment, and the plaintiff, thereupon, upon the protest, and for the honor and account of the defendants, the first indorsers, paid the bill to B. J. De Jongh & Fils, together with two thousand guilders for the cost of the protest and other charges, and gave due notice thereof to the defendants.

The declaration also contained the usual money counts; upon which the general issue was pleaded, and upon the trial of the cause a verdict was taken for the plaintiff for \$9,852.78, subject to the opinion of the court on the following case, with liberty to either party to turn

indorser, and all parties prior to him whom he could have resorted to, but not subsequent indorsers, for it stands like a payment made at the request of the indorser for whose honor it is made, and the payer *supra protest* narrows and limits his rights to recover against them only. (Mertens v. Washington, 1 Esp., 112.)

But if he pays for honor of the bill generally, it is the same as payment for honor of the last indorsee, and he may recover against all parties to the bill. (Fairly v. Roeh., Lutw., 891; Chitty on Bills, 576, 577; Byles on Bills (Sharswood's Ed., [*261], 408; Edwards, 441; 2 Daniel on Neg. Instr., sec. 1254; *Ex-parte* Lambert, 13 Ves., 179.)

The person who desires to pay a bill for the honor of another, must be ready and offer to do so at the time and place of payment, otherwise he will have no right to insist on that privilege. (Denston v. Denston, 13 John., 322; Bayley on Bills, 2d Am. ed., 329; 2 Daniels' Neg. Instr., sec. 1257.)

The privilege of payment *supra protest* is not extended by the law merchant to promissory notes, and as to them the party making such payment acts at his peril. (Byles on Bills, Sharswood's ed. [*262]; Story on Promissory Notes, sec. 453; 2 Daniels' Neg. Instr. sec. 1258.)

the same into a special verdict or bill of exceptions.

It was admitted that the bill was drawn by John C. Delprat in favor of defendants; and that on the 18th day of October, 1822, the defendants indorsed it, and transmitted it to Messrs. Rougemont & Behrends, at London, and that afterwards the bill was indorsed by Messrs. Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils, as charged in the declaration. And in order to prove that the bill was duly protested for non-acceptance and non-payment, and that after the same was so protested for non-acceptance the same was accepted, *supra protest*, by the plaintiff for the honor and account of the defendants, the indorsers; and that after the said bill was protested for non-payment, the same was paid, *supra protest*, by the plaintiff, for the honor and account of the defendants, the indorsers; the plaintiff read in evidence the protest for non-acceptance and non-payment, which were admitted by the counsel of the defendant to be read in evidence for that purpose.

The indorsements on the bill were:

Pay Mr. L. Heder, or order, value received. New York, 4th Sept., 1822. Signed, LE ROY, BAYARD & Co. Pay to the order of Messrs. Rougemont & Behrends, of London, value in account. New York, 1st October, 1822. Signed, L. H. HEDER. Dec. 28, No. 279, presented for stamp at Amsterdam, 22d Nov., 1822. Received with the augmentation, fl. 13 75. Signed, ELVESTER.

The protest for non-acceptance stated that on the application of the notary to the drawees, N. & J. & R. Van Staphorst, Amsterdam, they refused to accept the bill, stating "that whereas the drawer has quite wrongfully drawn his bill, we, therefore, cannot accept the same, and moreover regret that in order to preserve our just rights against him (meaning the drawer). **252***"] *we cannot even interfere in behalf of those to whom this bill was passed."

The protest also stated the following "act of intervention:"

And forthwith appeared and came forward those same gentlemen, Messrs. Wm. Konig & Co., who declared that they were actually ready, on account, and for the honor of the firm of Messrs. Le Roy, Bayard & Co., as indorsers upon this same bill of exchange, to accept the said bill, and for the purpose of paying the amount thereof on the day of its maturity, and accordingly the same gentlemen, Messrs. Wm. Konig & Co., in fact did, and have signed the same.

The protest for non-payment stated the same answer to have been given by the drawees, when payment of the bill was demanded, as made when acceptance was applied for, and also that, after the protest for non-payment.

Subsequently, the gentlemen, Messrs. Konig & Co., commission merchants, residing in this city, at the Cloveniers Burgwal, duly patented for the past year, as appears by their certificate, dated 24th June, No. 1333, to us the notaries exhibited, who, after having previously examined and read the aforecopied bill of exchange, as likewise this present protest, declared, that they in consequence of their acceptance, under protest, should honor and pay Peters 1.

this bill of exchange, and which in fact they have done, for the honor and on account of Messrs. Le Roy, Bayard & Co., as the first indorsers thereon, reserving at the same time, their right against them, and all the others thereby interested.

The following letters were offered in evidence on the part of the defendants, and objected to on the part of the plaintiff; but the objection being overruled by the court, they were read in evidence as follows:

MESSRS. ROUGEMONT & BEHREND, London.

NEW YORK, 18th October, 1822.

Gentlemen—We have now simply to request you to obtain acceptance of the inclosed draft; we do not wish it negotiated until it should be first accepted, either for the honor of the drawer, or for ours and indorsers; we only wish that it may appear as having been sent to you for negotiation by the last indorser. It is drawn by the agent of the Amsterdam house, and as we inclose it as such, we wish it to be returned with the regular formality of law, should it not, contrary to our expectations, be accepted.

With respect, we are, &c.,

LE ROY, BAYARD & Co.

*It was admitted that the above letter was not transmitted, nor the contents thereof communicated by Messrs. Rougemont & Behrends, to the plaintiff.

ROUGEMONT & BEHREND to Messrs. WILLIAM KONIG & Co., Amsterdam.

LONDON, 19th November, 1822.

We beg you to have the inclosed accepted 1st of fl. 21,500, 60 days on N. & J. & R. Van Staphorst, and hold the same to the disposal of the 2d, 3d and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested. If accepted, please let us know the amount of stamp duties, &c.

The defendants also read in evidence the following extracts of letters from the plaintiff to Rougemont & Behrends:

AMSTERDAM, 22d November, 1822.

MESSRS. ROUGEMONT & BEHREND, London.

We had this pleasure 19th instant, and are to-day in possession of your favor. The enclosed fl. 21,500 on N. & J. & R. Van Staphorst, will be presented for acceptance, and kept to the disposal of duplicate; for stamp duty we debit you in postage account, which is fl. 14 5s. Messrs. Van Staphorst have deferred the answer whether they will accept said bill till to-morrow. We cannot inform you of the result until Tuesday, and in case of refusal will forward you the protest.

AMSTERDAM, 26th November, 1822.

MESSRS. ROUGEMONT & BEHREND, London.

We refer to our respects of the 22d instant. Messrs. N. & J. & R. Van Staphorst, after having deferred the acceptance of the bill of fl. 21,500, 60 days, till yesterday, now refuse to accept; we had also the bill presented for non-acceptance, at the same time honoring it for account of Le Roy, Bayard & Co., in New York. The bill has also been accepted on the 25th of November, and will be due on the 24th of January next. We will keep it at the dis-

position of the 1st, 3d, or 4th, or any copy authenticated by your indorsement.

They also read in evidence the following letters from the plaintiff to the defendants:

AMSTERDAM, 26th of November, 1822.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen—Having been charged by Messrs. Rougemont & Behrends, of London, to procure the acceptance of a second of exchange of bill of fl.21,500, Mr. John C. Delprat at Baltimore, of 2d September, to your order, on Messrs. N. & J. & R. Van Staphorst. These gentlemen have refused to accept it, expressing their regret at being unable on this occasion even to protect your signature, and save you heavy damages. **254**]*We have determined to offer it, on the assurance that this intervention would be agreeable to you, and we remit you annexed, in consequence, the protest for non-acceptance, and the act of intervention for the fl. 21,500, becoming due 24th January—accepted 25th November for your account. At maturity we will send you all the papers in order, and as it appears certain that Messrs. Van Staphorst will not pay the draft of Mr. Delprat, you can at present admit that you will leave it to re-imburse us this intervention, with commission, expenscs, and interest. We renew, gentlemen, on this occasion, the offer of our services, desirous that it may be agreeable to you to require them.

AMSTERDAM, 28th January, 1823.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen—We have the honor to confirm our letter of 26th November, of which a triplicate is annexed, and to inform you that Messrs. N. & J. & R. Van Staphorst, having persisted in their refusal to pay the bill of exchange of fl.21,500, of Mr. John C. Delprat to your order upon them, we have paid it under protest, and act of intervention, for your honor.

Accompanying this you receive the papers consisting of first draft in first and second. 2. Protest of act of intervention. 3. Amount relative thereto. Will you, gentlemen, please to acknowledge the accuracy of this amount, on 24th January, fl.21,647, and credit us the amount.

AMSTERDAM, 2d September, 1823.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen—On the 26th of November, past year, we informed you of our having intervened with acceptance, for your honor and account, as indorsers, a draft of fl.21,500, John C. Delprat's draft 60 ds. sight, Baltimore, 2d September, in your favor, protested for non-acceptance against the said drawer, while on the 28th January we had the honor to inform you that we had paid the above bill, by intervention, for your account; handing you, at the same time, the original bill duly discharged, together with necessary protest and act of intervention. Since that time we have only received your lines of the 31st January last, by which you thank us for the intervention made by us, but observe, that Messrs. N. & J. & R. Van Staphorst had, at the same time, informed you, that they had guaranteed to us the re-imbursement of that draft, for which reason you refer us to these gentlemen.

To our letter returning to you duly discharged, and paid by us for your account, the afore-

mentioned bill, you did not give us any reply. Messrs. N. & J. & R. Van Staphorst have only guaranteed us in case we should not be able to recover our re-imbursement *from you, [***255** for whose account we intervened; and they are thus entitled to ask from us, that we enforce that payment from you, to which measure that guarantee obliges us, and the effect of which we cannot but maintain, so that, in order to obtain that payment which you owe us, we have now valued this day on you at sixty days; \$3,600, \$3,400, \$1,932.80, order Gulian Ludlow, Esq., at the exchange of 50 stg.—fl.22,332, being the exact amount of our intervention, together with interest and charges to this day, as per note annexed, which we recommend to your protection, and request you to honor in payment of the amount expended by us for your account. If you, against our expectation, refuse to pay this bill, we must inform you that we have given our most strict and precise order immediately to enforce payment by force of law, to which purpose we must then demand from you the original bill paid, with protest, &c., which we request and authorize you, by the present, to deliver to Gulian Ludlow, Esq., of your city, whom we have empowered to give receipt for these documents; which are our property till you have paid us for them. We are obliged to do this act of devoir, in order to obtain final re-imbursement; while we hope and trust you cannot take this measure, necessary to us, in any evil light,

We remain, very sincerely, gentlemen,

Your most obedient servants,

WILLIAM KONIG & Co.

The following letter from N. & J. & R. Van Staphorst to the defendants, was also offered in evidence, and objected to on the part of the plaintiff, but the objection being overruled by the court, was read as follows:

AMSTERDAM, 25th November, 1822.

Messrs. LE ROY, BAYARD & Co., New York.

Gentlemen—We confirm our last respects of 12th inst., and have since received your esteemed letters of the 4th and 5th ult., first of which accuses receipt of our sundry letters up to the 23d of July, inclusive.

The draft advised in your esteemed favor of 5th ult., 60 days' sight—No. 368—fl.7,000—favor John Telfair, meets due honor at presentation to the debit of your account. We have yesterday received letters from Mr. Delprat, dated 10th, 11th, and 15th of October, of which we cannot fail to communicate in a few words the purport. It is such as we might expect; instead of attempting to clear up any of the distressing items alluded to in our letters to him, or to refute any of the arguments which founded our conduct, Mr. D. merely falls on our circulars, as he calls them (written at the time to only four of those who were owing us moneys at Baltimore, and of which *we [***256** annex copy in our defense), as having injured his credit; and further declaims against an answer, which he had been erroneously informed that we had given in the protest of one of his bills; further, Mr. Delprat chiefly writes, that he is very desirous to have his accounts closed, and sent up to him; so that, all items being properly brought therein, it may be approved

by him, and our intercourse finally closed. We, of course, shall not be backward in complying with that wish; and, on correctness and justice, you will easily believe that Mr. Delprat can safely calculate. When we wrote to you our last letters, and therein stated the amount drawn by Mr. Delprat, so much above anything that prudence or correctness warranted, we were indeed far from prepared for the appearance of a fresh draft of Mr. D., valued (as the French term it) *de but en blanc*, without any light being spread by the letter of advice attached to it.

Fl.21,500—Baltimore, 2d September, at 60 ds. sight in your favor. This draft, confirmed in no letter of Mr. Delprat, and dated at such an ominous time, was calculated to yield much matter to think on. If Mr. Delprat knew of the protests of his former drafts, to what ought this new flourish to serve; if not, what was his intention by drawing such a large sum again over and above all his former dispositions; a valuation which, placing all possible folly and imprudence on our side, it could not yet possibly be thought that we should honor without attempting to explain the matter. We have merely to express our regret at observing again your indorsement on the bill, and notwithstanding your silence in your last favor of 4th and 5th instant, with regard to former interventions, in fact rather disagreeable to us, and whatever might be the intentions of Mr. D. at drawing the bill, we were too much your friends, my dear sirs, not immediately to come forward on account of your signature; but consulting our legal adviser on this so strange and surprising incident, we were sorry to find that it was his positive opinion, that in this peculiar case we ought not to value at all this draft, nor in the least manner to allow that such a draft might properly have been issued by the drawer, and thus that we ought not to consider it at all, nor to meddle with it in the least. So firm was our counsel in that idea, that he was completely against our intervening on behalf of any indorser, as being prejudicial to the system we ought to follow with regard to this bill; but he thought that it was proper to note in the protest our reason for non-acceptance and non-intervention. We were thus put in a disagreeable position; as on the one side we did not wish to act contrary to his advice, and to depart from a system which he thought necessary to us; and, on the other, we were fully determined*] mined, at all events, not to suffer*your signature to go back without being honored. In this predicament, we applied to our friends Messrs. Wm. Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of above bill; which favor these gentlemen have not refused to us, so that, without our prejudice, and completely without yours, we have duly protected your interest. We are well persuaded you would not wish us to have done any act which we might think detrimental to us, and we thus are confident that you will duly appreciate our conduct in this truly awkward affair.

The defendants also read in evidence the following letter from them to the plaintiff:

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NEW YORK, January 31st, 1823.

MESSRS. WM. KONIG & Co., in Amsterdam.

Gentlemen—We are favored with your letters of the 26th November, apprising us that Messrs. Rougemont & Behrends, of London, had sent you for acceptance, a draft for fl.21,500, drawn at Baltimore, by Mr John C. Delprat, in our favor, at 60 days' sight, upon Messrs. N. & J. & R. Van Staphorst, that these gentlemen had refused the acceptance, and that you had intervened for our honor as indorsers; that you had no reason to believe that it would at maturity be paid by the drawers, and that you would thus be called upon to discharge it. Messrs. N. & J. & R. Van Staphorst inform us, under the date of the 25th of November, that they had informed you of the whole case (in relation to this draft), and had requested you, under their guarantee, to intervene. It remains, therefore, but for us to thank you for the honor which you purposed doing us, and to refer you to Messrs. N. & J. & R. Van Staphorst for a release from the responsibility assumed under their guarantee, and for them.

We have the honor to be, gentlemen,

Your humble servants,

LE ROY, BAYARD & Co.

It was admitted, that the said bill, for fl.21,500, was drawn several days after the date of it. That the same was drawn by the said John C. Delprat, on his own account generally, and not on any shipment; and that the said bill was drawn after the said J. C. Delprat heard from the defendants, that his bills on Messrs. N. & J. & R. Van Staphorst had been protested. That the said J. C. Delprat sent to the defendants, an order on Messrs. N. & J. & R. Van Staphorst, dated 4th September, 1822 (a copy of which order is hereunto annexed); and that the said bill was sent therewith to the defendants; that there *were other dealings [*258 between the defendants and the said John C. Delprat, besides those growing out of the agency of the said John C. Delprat for the Messrs. N. & J. & R. Van Staphorst; that the defendants, in the course of those dealings, during the summer of 1822, loaned to the said John C. Delprat a large sum of money on his own account, which loans were carried by them into their general account with the said John C. Delprat; and that the said bill was given to the defendants, by the said John C. Delprat, to repay them for the said advances to him, as far as the same would go.

BALTIMORE, Sept. 4th, 1822.

MESSRS. N. & J. & R. VAN STAPHORST, Amsterdam.

Gentlemen—You will please hold all balances due to me by you; all the proceeds of goods sold or unsold, shipped in my name, per Virgin and other vessels, to the order and for the use of Messrs. Le Roy, Bayard & Co., and for which this letter will be your sufficient authority.

I remain, with esteem,

Your obedient servant,

JOHN C. DELPRAT.

The judges of the Circuit Court divided in opinion upon the following points, which were certified to this court:

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.

2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill, upon which the suit was brought, for the honor of the defendants; and is entitled to receive the amount thereof, with charges and interest.

The first point was waived by the counsel for the plaintiff; and the whole argument was directed to the second point.

The cause was argued by *Mr. Webster* and *Mr. Ogden Hoffman* for the plaintiff, and by *Mr. D. B. Ogden* and *Mr. Oakley* for the defendants.

For the plaintiff.

The contents of the letter of instructions from Van Staphorst to J. C. Delprat, not having been communicated to the plaintiff, ought not to affect him in any manner. Any stranger has a right to intervene in case of the non-acceptance or non-payment of a bill of exchange. This is an established usage in commercial operations, and contributes essentially to their safety and certainty. To the drawer and indorsers it saves the damages on the bill, which would be payable on its return, and prevents other heavy expenses.

The guarantee of the drawees, in favor of the plaintiff, was an arrangement exclusively between the parties; and the defendants have no right to look to it in the transaction.

259*] *On the part of the Van Staphorsts, there was no obligation to give the guarantee, and it was an act for the eventual protection of the plaintiff, in case of the inability of the defendants to repay the amount of the bill; and was not given under any supposition of the liability of the drawees to accept or pay the bill.

If either the plaintiff or the Van Staphorsts could pay the bill separately, both might pay jointly. The person who pays for the honor of another, may look to all the parties to the bill, as well as to the person for whose honor he pays it.

The payment of a protested bill for the honor of another is only a mode of becoming the holder, and although against the will of the parties to it, they thus become debtors to the payer.

The common law, and the law merchant, as part of the common law, presumes a general standing request to be made by the drawer and indorsers of an unpaid bill, to every friend, to prevent the dishonor of the bill, and the burthen of heavy damages in consequence of this. If acceptor, *supra protest*, for the honor of an indorser, pays the bill, he may sue the indorser, as he is to be considered as an indorser paying full value for the bill. (1 Esp. Rep., 112; Chitty on Bills, 441.)

For the defendants.

This mode of proceeding, by the intervention of a third person, prevents and disables the defendants from proving that the Van Staphorsts were bound to accept, and ought to have paid the bill. This action is not upon the bill strictly, but it is for money paid for the use of the defendants by one who was an entire stranger to them, and had not right to intervene. A suit cannot be brought upon the bill, because by its payment it is extinct.

The plaintiff interfered, not for the honor of the drawer or indorser, but for that of the drawees. Laying aside his agency, he under-

takes to pay the bill, at the request of the drawees, and they are liable to him, and have stipulated for his protection.

The general rule of law is, that no man can constitute himself the creditor of another without his consent, express or implied. (6 Term Rep., 310; 1 Beawe's Lex Merc., 63-4.) The only exception to this rule is the case of acceptance of a bill, *supra protest*.

The reasons for this rule are: 1. The law implies consent of the party for whose honor acceptance is made, from the nature of the favor conferred; being gratuitous, and incurring hazard, for the purpose of rendering a service, an acceptor, *supra protest*, may demand recompense for the credit given, for whose benefit acceptance is made. And in case he redraws *on such person, his [*260 bill ought to be promptly complied with, besides a grateful acknowledgment of the favor. (Beawe's Lex Merc., pl. 44, 63, 64.)

Thus it appears that the motive of the acceptor must be such as to entitle him to gratitude.

2. The consideration in the implied contract, in this case, cannot be solely the benefit conferred on the indorser, as voluntary services may be rendered in all other cases, and no contract will be implied.

Can there be an acceptance for the honor of an indorser, under the guarantee of a third person? 1. It confers no honor. 2. Gives no credit. 3. It is not gratuitous or voluntary. 4. It is not founded on a consideration, which can alone lay the foundation of such a contract.

Can there be an acceptance for the honor of the payee or indorser, under a guarantee of the drawee of the bill?

1. The drawee cannot do indirectly what he cannot do directly. The law is settled that, if the drawee has accepted, *supra protest*, for want of advice of effects, and before the bill is payable he receives effects, he is bound to discharge the indorser, and advise him that he will pay the bill. (1 Beawe's Lex Merc., 109.) Thus, if the Van Staphorsts had accepted, *supra protest*, for the honor of the defendants, and had afterwards received remittances from Delprat, they could not have paid the bill, *supra protest*, for the honor of the defendants; and by the acceptance, under guarantee, is intended to deprive the defendants of the benefit of those principles of law.

An acceptor for the honor of the drawer must do it before he accepts generally, "or any ways engages or obliges himself thereto." (Marius Ex., 30, 31; Malyn Lex Merc., Vol. I.)

By parity of reasoning, a person under any obligation to pay cannot pay a bill, *supra protest*, for the honor of another. (1 Lord Raym., 88.)

The consequence of such proceedings might be that, under a secret guarantee, the drawee might avoid the fulfillment of his obligation to pay the bill. Another objection is, that the indorser has imposed upon him a contract, without his knowledge or consent, and this the law will not permit under circumstances exposing him to injury.

The party affected by this intervention cannot have the same defense, or the means of the same defense, against a stranger as against the drawee, as the guarantee may be, and is, generally secret.

The evidence in this case shows that the defendants did not desire to have the bill paid by anyone but the drawees. Rougemont & Behrends, of London, were the agents of the defendants, and they write to the Van Staphorst **261*** that the holders of the *bill desire that it may be protested if not paid. The plaintiff, therefore, knew that it was not the desire of the defendants to save the bill from dishonor. The plaintiff was the agent of the defendants to have the bill accepted, if not dishonored. This is shown by the letter of 19th November, 1822. He could not, therefore, interfere to pay the bill. It was against the nature of his agency.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was brought in the Court of the United States for the Second Circuit and District of New York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. & J. & R. Van Staphorst, of Amsterdam, in favor of Le Roy, Bayard & Co., of New York, and indorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case stated by the parties. The judges of the Circuit Court were divided in opinion on the following points:

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.

2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest.

The first question is understood to be waived. It is a question which was decided by the court at the trial, and could not arise after verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard & Co. to Messrs. Rougemont & Behrends, of London, to have it presented for acceptance, who inclosed it to the plaintiff in a letter, from which the following is an extract: "We beg you to have the inclosed accepted; 1st, of fl.21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of the 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested."

The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants.

Messrs. N. & J. & R. Van Staphorst addressed a letter to the defendants, dated the 26th of November, 1822, giving notice that the bill was dishonored; the drawer having no right to **262*** draw, and that they were advised by counsel not to interpose, in their own names, for the honor of the defendants. The letter adds: "In this predicament, we applied to our friends, William Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our
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guaranty, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favor these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest."

The defendants also gave in evidence a letter from the plaintiff, stating that he had intervened, at the request of N. & J. & R. Van Staphorst, and under their guaranty; but that they required him to proceed against the defendants, as preliminary to the performance of that guaranty.

It was admitted that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants for advances previously made to him; and that he had given to the defendants an order on N. & J. & R. Van Staphorst, for all balances due from them to him.

It is not alleged that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. & J. & R. Van Staphorst, and as having paid the bill at their instance. All parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors to the defendants. It is impossible to doubt that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been made, unless those persons were exposed to some inconvenience to which they would not have been exposed had the interposition been direct. This is not the case in the present instance, since it cannot be doubted that the defendants might have availed themselves of every defense in this action, of which they could have availed themselves, had N. & J. & R. Van Staphorst been plaintiffs. The case shows plainly that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned, why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

*This cause came on to be heard on a [***263** certificate of division of opinion of the judges of the Circuit Court of the United States for the Southern District of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof, this court is of opinion that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest; which is ordered to be certified to the said Circuit Court.

264*] *GERRIT SCHIMMELPENNICH
AND JAN ADRIAN TOE LEAR, who are
Aliens,

v.

WILLIAM BAYARD, WILLIAM BAYARD,
JUN., ROBERT BAYARD, AND JACOB
LE ROY, Citizens of the State of New York.

*Bill of exchange—acceptance—right of consignee
to draw on consignee—obligation of drawee—
principal and agent.*

In this case, the court confirm the principle established in the case of *Coolidge v. Payson* (2 Wheat., 75), that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it; is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise. [283]

If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right, as the holders of the bill paid *supra protest*, if they were bound to honor it, in the character of drawees. [285]

A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the shipper; held, that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipment being received by them. [286]

A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment; and the consignee must pay the bills, if the shipment places funds in his hands. [288]

It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal, when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the principal has, by his declarations or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. [290]

THIS action was instituted in the Circuit Court of the United States for the Southern District of New York, upon nine several bills of exchange, drawn at Baltimore, at sixty days' sight, by John C. Delprat, on the plaintiffs, carrying on business under the firm of N. & J. & R. Van Staphorst, merchants in Amsterdam, and indorsed by the defendants.

The cause was tried in April, 1825, and a verdict taken for the plaintiffs for \$32,275.95, being for the whole amount of their claim; subject to the opinion of the court, upon a case agreed.

The judges of the court below, having divided in opinion *on the following points, the same were certified to this court, and the cause was argued upon the case agreed, and the points upon which there was a division of opinion, by the judges of the Circuit Court:

1. Whether the authority of J. C. Delprat to draw upon the plaintiffs did or did not amount to an acceptance of the bills.

2. Whether the bills paid by the plaintiffs, *supra protest*, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs, to John C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment, on the verdict of the jury.

All the facts, with the correspondence between the parties, which were considered by the court as necessarily connected with a full development of the case, are stated in the opinion of the court.

The cause was argued by *Mr. Ogden* and *Mr. Oakley* for the plaintiffs, and by *Mr. Webster* and *Mr. Ogden Hoffman* for the defendants.

For the plaintiffs.

This action is upon bills of exchange, drawn by Delprat, and accepted, *supra protest*, and paid by the plaintiffs, as they allege, for the honor of the defendants, who were the indorsers on the bills. It is admitted that the plaintiffs, being drawees of the bills, could accept and pay in this form; but it is claimed that the bills were drawn under the arrangement between them and Delprat, and they were bound to accept them; that arrangement being a promise so to do.

This is the same question as if the defendants in this suit had brought an action against the plaintiffs, on those bills, as accepted bills.

Does the authority to draw create a promise to accept? It is admitted that the law of France is that acceptance shall be on the face of the bill. The law of France is the law of Holland. We deny that the contract between the plaintiffs is such a promise to accept, as that, even if all its provisions and conditions had been complied with, any third party could have taken advantage of it.

*As it related to the parties themselves, it was a good promise, when Delprat conformed to the provisions of the arrangement: but strangers had no right to avail themselves of this. The promise in the contract was made to Delprat, and was not assignable in its very nature.

It is only when the promise points to some bill drawn, or to be drawn, with such minuteness and certainty as to sums, time, and parties, as that it may be considered a complete transaction, and a finished agreement, that the promise can avail to the use of third parties; and then it does not so avail as a promise to accept, but as an actual acceptance.

There is no case of a parol promise to accept, being considered as an acceptance; and the doctrine has been already carried too far, so as to become the subject of regret. But there is

NOTE.—That a written promise to accept is equivalent to acceptance of bill, see note to *Coolidge v. Payson* (2 Wheat., 66).

no case which goes as far, as the plaintiff claims in this.

Cases cited, 3 Bur., 1663; 1 East, 98; 4 East, 57; *Wynne v. Raikes*, 5 East, 54; *Cooledge v. Payson*, 2 Wheat., 66; *Starkey*, 411.

All those cases rest on the express promise to accept. (*Goodrich v. Gordon*, 15 John., 6.) Why, if the authority to draw was a promise to accept, say, there was also a promise to accept?

The case of *Cooledge v. Payson*, (12 Wheat., 66), before this court, settled all the principles relative to an obligation to accept; and this case does not come within the rules of law there established. The principles decided by the court in that case, were in the language of the court:

"Upon a review of the case, this court is of opinion, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

The decision of the Supreme Court of New York recognizes the same principles. That case was:

Gordon was sending a sloop from New York to Savannah, during war. Hogan wrote a letter of instructions, viz.: "Should he be captured, ransom the vessel, as low as possible, not to exceed \$2,000, and your draft on me will be duly honored." He was captured, and drew the bill for ransom within the sum, and gave the letter, with the bill.

Chief Justice Marshall says, "the testimony is full evidence that this letter, at all times, accompanied the bill; that the bill was drawn on the faith of it; and that it was on the faith of this letter that the plaintiff, who was an indorser took the bill from the first indorser; and it would be a gross want of faith, now, to disclaim the captain's authority."

The arrangements between the plaintiffs and **267*** Mr. Delprat, *were personal to him, and could have no effect upon the transactions of others. They were to operate on the general business to be carried on between them, and their main object was, consignments to the plaintiffs. Mr. Delprat might purchase parts of cargoes, and they were willing to "facilitate" all such commercial operations of his, as "they could without prejudice to themselves."

Under this arrangement, Mr. Delprat purchased and shipped goods, drew for them, and the proceeds of the shipments were carried to his account, and the bills paid, and charged to him. The defendants were not parties in those transactions, and they stood as mere purchasers of the bills in the market.

These transactions are similar to many others in the United States, and have never been considered as involving an obligation to accept the bills, of which a purchaser can take advantage. Such a responsibility, on the part of the drawees of a bill, would give to it a greater effect, when in the hands of an assignee, than it had before the transfer.

There is no usage making the authority to draw an acceptance. There is no case in which it has been ever so held; and it is inconsistent with the negotiable nature of bills.

The question, therefore, which has been **Peters 1.**

raised, is met in its most imposing form, with an answer in the affirmative; when acting under such an arrangement as that between the plaintiffs and Mr. Delprat, could the plaintiffs take the goods shipped to them, and refuse to pay to a third person the bills drawn upon those goods? It is considered they could; such is the mercantile law, and it cannot be otherwise.

Bills of exchange are purchased on the faith of the names upon them, and not under an expectation that there is a collateral obligation to pay them, on the part of the drawee. There is always an expectation that the bills will be paid; but this expectation does not constitute a legal right against a drawee. In reference to the present bills, it appears from the testimony, that the defendants actually charged Mr. Delprat a commission for indorsing them, without which, they could not have been advantageously negotiated.

It is said, that the shipments were made in trust to pay these bills, and that the plaintiffs could not take the property free from the trust. Let this be so; but who can enforce the trust? Certainly not the assignees, as the trust is not assignable. To the drawer only, would the parties under such circumstances be answerable. The agreement made by the plaintiffs and Delprat, was never performed by him, in any case; and thus the danger is manifested, of giving to a stranger rights which Delprat would not have had himself. No lien existed on the goods, by which the payment of the bills could have been enforced; *no **[*268]** such lien has ever been supposed to exist; all liens require possession in the party or his agent. The goods in this case went to Holland; the bills were sent to England; where is the possession to maintain the lien?

If the bills had been drawn upon particular shipments, and the invoices and bills of lading of the goods had been delivered with the bills, the plaintiffs being so advised by Delprat, then they must have opened a particular account with the party holding the bills, and have paid them out of the shipments.

As to the suggestion of an equitable lien on the goods, for the payment of those bills, it cannot be contended that the holder of the bills could follow the goods and enforce it. The law of Russia gives the party a right to follow goods until he is paid, but this is not the law here. The policy of the English law, and that of all commercial countries, is that the paper is disconnected with the property.

It is well-settled law, that where goods are carried, under a permission to draw, the bills of lading being remitted fixes the property in the consignee, against the creditors of the consignor, although they get the goods. (1 Bos. & Pull., 563; 3 Chitty, 550.) If A sends goods to B, and directs him to pay the proceeds to C, this creates no lien in favor of C. (1 *Starkey*, 123, 143; 14 East, 558; Chitty, 550.)

Mr. Delprat was not the agent of the plaintiffs, under the contract, to draw the bills. He stood in no other relation to them than that of a corresponding merchant, with like powers. He did not draw the bills as agent; they were said to be on his own account, nor did he pretend to bind the plaintiffs, by his acts, as his (principles. (*Bayley on Bills*, 156, 64; 3 Term

Rep., 757; Chitty on Bills, 31.) Agency may be inferred from analogous acts, but they must be of that character. There is no proof that similar bills were ever paid by the plaintiffs.

The plaintiffs sent to the defendants their contract with Mr. Delprat, to show that they had granted him the credit. In their letter to the defendants, they do not say anything about the authority to draw; in reference to the credit, they desired the defendants to supervise the transactions of Delprat; in reference to any bills he might draw, they would take care of themselves, by refusing to accept them.

There is an answer to all the allegations, as to lien, and to an alleged liability to accept. The bills, it is manifest, were not taken on the credit of the drawees.

Mr. Oakley, for the defendants.

The mercantile house of the plaintiffs, at Amsterdam, were desirous to extend their business in the United States; and they employed Mr. Delprat, giving him authority to draw upon them, according to particular directions, **269*** and with a credit of *\$40,000, with the defendants. He acted under this arrangement for four years, and then failed; and the question is, who shall sustain the loss arising in the course of his transactions, out of bills drawn by him, upon the plaintiffs. The business between Mr. Delprat and the plaintiffs was not confined to the contract, nor were his acts in conformity to it; and yet the plaintiffs went on, without communicating to the defendants—who were deeply connected with them in mercantile business, and who had been particularly invited to an agency in their arrangements with Mr. Delprat—that their confidence in Mr. Delprat, their agent, had diminished, or they proposed to withdraw the agency from him.

They suddenly break off the relations between them and Mr. Delprat, and refuse to pay bills, drawn on property which had been shipped to them, and which were to provide for the payment of the bills; taking the funds, the proceeds of the goods, to the credit of their general balance, arising out of their several transactions; and they then pay the bills, *supra protest*, for the honor of the defendants, who were indorsers on the bills. Can this be done? Can they take the goods, and not pay the bills?

Had the plaintiffs a right to accept the bills *supra protest*, for the honor of the defendants?

He who gives an acceptance for the honor of a party, must do it before he accepts generally, "or any ways engages or obliges himself thereto." (1 Lex. Merc. [Malyn] Marius advice concerning bills of exchange, 30, 31). In 1 Lord Raymond, 88, Lord Holt says: "An acceptor for honor of drawer, is when a stranger, having no effects of drawer, accepts out of respect to the drawer." The principle there is, that there can be no acceptance *supra protest*, for the honor of any party, when the acceptor is under any obligation, legal or equitable, as it respects that party to accept generally. This results from the nature of acceptance *supra protest*.

The rules of law are:

1. An acceptor, *supra protest*, may demand a recompense, for the credit given him, for whose honor he accepts (Beawes's Lex. Merc., f. 44); and if he redraws, his bill ought to be legally complied with, besides a grateful acknowledgment of the favor.

2. Where a bill is paid *supra protest*, the payee may redraw, with addition of commission, and it ought, in gratitude, to be punctually complied with. (*Ibid.*, pl. 63, 64).

Such acceptance must therefore be gratuitous, with a just motive; and without connection with, or reference to, the interests of the acceptor.

To examine this case, according to these principles:

1. As between the plaintiffs and the defendants, were those bills such as should be [***270** considered as accepted bills; or bills which the plaintiffs were "in any ways obliged to accept?"

They were; because they were drawn by Mr. Delprat:

1. In pursuance of his written authority.

2. If not in pursuance of a general authority, this authority was to be inferred from the general course of business. An authority to draw a bill is virtually an acceptance of the bill, drawn in conformity to it. (9 Mass., 11; 2 Wheat., 72; 2 Gallison, 238.)

2. A promise to accept a bill, is an acceptance, if the holder has taken the bill on the faith of the promise; although the bill is for a pre-existent debt, or whether the promise be before or after the bill is drawn. This is also the law, although the promise be obtained from the drawee fraudulently.

3. A general authority to draw bills, is equivalent to an acceptance of all bills drawn; or to a promise to accept all.

The facts in this case were:

By the agreement of January 11, 1818, between the plaintiffs and Mr. Delprat, he was their agent: 1. To form commercial connections. 2. To promote consignments. 3. To act as directed in the agreement. As the plaintiffs' agent, Mr. Delprat was bound: 1. To act for no other persons in procuring consignments, either from himself or from others. 2. To use his utmost efforts, for the benefit of the plaintiffs.

The plaintiffs were bound: 1. To facilitate Mr. Delprat's commercial operations, without prejudice to themselves.

The objects of this agreement were, to procure consignments, and that Mr. Delprat should act as the commercial agent of the plaintiffs, generally; and the means of accomplishing them, were to draw bills, to make advances on cargoes, and for which he was also to use the credit opened with the defendants. To the consignments, there was no limit; and, of course, they could go beyond the credit.

From a view of all the letters between the parties, and the evidence, it is manifest that Mr. Delprat acted as the general agent of the plaintiffs; to draw bills for advances on consignments, independent of the credit of \$40,000, and after it was revoked. 2. That the plaintiffs paid such bills without regard to the balance of accounts with him, down to July, 1822; and, 3. That the plaintiffs never set up the objection, that the bills were drawn without authority, until October, 1822.

It is contended, that the agency of Mr. Delprat for the plaintiffs, appears: 1. By the written agreement of the parties. 2. By the relative situation of himself and the plaintiffs, he being a commercial agent to procure consignments,

by making advances by drafts on the plaintiffs. 3. In the course of the business, and the **271*** long habit of the plaintiffs in paying the drafts drawn by him.

The authority of an agent may be shown: 1. By his written power; or in the absence of that, by himself. 2. From the relative situation of the parties. 3. From the habits and course of dealing between the parties. 4. From the recognition of the acts of the agent, by the principal, or by similar acts. The evidence establishes the agency of Mr. Delprat, for the plaintiffs, upon all these principles. As to the bill for £1,000, of July 31, 1822: 1. It was paid before it was due; it was drawn at 60 days; presented on the 14th September, and paid on the 1st October following. 2. There can be no payment *supra protest*, until a demand and refusal of payment regularly made. This refusal cannot be until the bill falls due. (Chitty on Bills, 318.)

Had the plaintiffs a right to pay those bills *supra protest*?

1. In case of acceptance *supra protest* for honor of the indorser, the bill must be presented for payment, and duly protested. (Chitty, 313).

2. If the drawee has accepted *supra protest*, for want of funds or effects, and afterwards receives effects, he is bound to discharge the indorser, and to advise him that he will pay. (Beawes's Lex. Merc., 109.) Thus, there may be an obligation to pay, when there was none to accept. As to the bills of July 31, 1822, for £1,000 pounds, and 5,000 guilders, they were drawn on shipments by the Virginia. The plaintiffs were so addressed, the consignment of the property was received by the plaintiffs, after protest for non-acceptance, and before the bills were paid. They were, therefore, bound to pay those bills out of the proceeds of those shipments.

The plaintiffs cannot take this property, and apply it to their general account with Mr. Delprat, refusing to pay the bills drawn on advances on the very property. The shipments, when they were advised of the facts, were received by them, subject to an equitable lien, in favor of the holders of their bills; and they have a right to their application to the payment of the bills.

As to the bills paid before the arrival of the ships. 1. Payment, *supra protest*, is evidence of money paid to the use of the defendants. It is an equitable action, and admits of any equitable defense. Can it be sustained, after effects to pay the bills have come into the hands of the plaintiffs? Does not the receipt of the proceeds of the property, re-imburse the plaintiffs in the payment?

Equity will frequently give a party relief, in effect amounting to a lien, though not in possession of the goods, to have his demand satisfied out of the proceeds of the goods, in preference **272*** to any other party. (Chitty's Commercial and Maritime Law, 550-51.)

The defendants ask the application of this principle to the bills upon which this suit has been instituted.

Mr. Ogden, same side.

This action is to oblige the defendants to pay the amount of bills paid for their honor, and which they say should have been paid by the Peters 1.

drawees. The plaintiffs received the property, against which the bills were drawn; and the question is, whether property could be received, and the bills drawn upon it be left unprotected. The consignee of property is nothing more than a trustee, to receive the property, and appropriate the proceeds to the use of the consignee, and he must conform to the directions of the consignor. In this case, the bills of exchange drawn by Mr. Delprat were the direction as to the appropriation of those funds.

It is no answer to this, to say that the consignor is a debtor to the consignee; and that upon the principle that a consignee can pay his general balance out of goods, which come into his hands, the plaintiffs would make use of the funds, for their own purposes. They could not get possession of the property, but by a wrongful act; as they had not a right to receive it on any other terms, but those prescribed by the shipper. Those bills, or the letters of advice, state that they were drawn for advances on goods shipped.

1. May not the drawees of the bills be considered as assignees of this property, bound to appropriate the proceeds to the payment of the bills? This would be the case in equity.

In New York, the point has been decided. If the consignee takes goods, he takes them subject to the lien on them.

The evidence shows that Mr. Delprat was the agent of the plaintiffs, engaged in making shipments to them, against which he drew bills, similar to those in which this suit is brought; and that between January and July, 1822, he shipped goods to the plaintiff to a very large amount; upon which bills were drawn, and which were accepted by the plaintiffs, and were paid. Mr. Delprat was the general agent of the plaintiffs. (Payley an agency, 2; 1 Washington's Rep., 19; 11 Mass., Rep., 55.)

It is said an authority to draw is not an agreement to accept. What else is it, but an implied promise to accept? In *Coolidge v. Payson* (7 Wheat.), this court has decided the point as to a particular bill; these are bills of a particular class. It is not necessary that the bill shall express to be drawn as agent, to bind the principal; the contrary practice is universal, and it was the practice not to draw the bills of those parties in that form. If it shall be said that Mr. Delprat had authority ***to draw** ***273** bills under particular agreement, and that those bills were not drawn in conformity with that agreement, the answer is, that the letter of the plaintiffs, announcing their refusal to accept the bills, does not state the refusal to have been on that ground.

It has been decided that if underwriters refuse an abandonment, for reasons assigned, they cannot afterwards, on the trial, allege other reasons for not paying the loss. The objections made by the plaintiffs to the bills, were that accounts were not kept and settled by Mr. Delprat; and that a balance was due to them for their shipments; not because of mal-agency. The facts of the case show that those bills were drawn in conformity with instructions.

But even if they had not, still the principals were bound. The law is so settled, even if the agent violates instructions. (2 Kent's Commentaries, 484.) Another point in this case, which

is in favor of the defendants, rests on the particular situation of the two houses of trade, formed by the parties to this cause. Whatever may be the law as between strangers, the attempt made by the plaintiffs to throw those bills on the defendants, is a violation of the good faith which had always existed between them.

Between them, the highest confidence existed. The defendants were agents for a large amount of the stocks of the United States, held by persons in Holland, and which were under the care of the plaintiffs; and they had large transactions for mutual benefit.

In 1818, Mr. Delprat was appointed, by the plaintiffs, their commercial agent, and was recommended to the particular care of the defendants, who were asked to "facilitate his operations." The agreement with Mr. Delprat was inclosed to the defendants, for the purpose of showing to them the nature of his agency, and informing them of his powers, and of the credit they had given to him. The defendants were to render such services as would enable Mr. Delprat to execute the purposes of the contract. Thus were the defendants brought into a close connection with Mr. Delprat, for the purpose of promoting the designs and interests of the plaintiffs; and those bills, believed by them to be drawn in the regular course of the transactions, authorized by the relations between Mr. Delprat and the plaintiffs, were indorsed to "facilitate the operations" of Mr. Delprat, supposed to be beneficial to all parties.

It is said that the plaintiffs were, by the contract entered into by them with Mr. Delprat, to have nothing to do with the drawing of bills. They did not so construe the agreement, nor did the plaintiffs so consider it. The construction of commercial agreements is best made by the understanding of the parties to **274***] them, and the *use made of the same. The evidence shows that the construction which was assumed as proper, by the defendants, and upon which they acted, in indorsing those bills, had been frequently affirmed in the course of former transactions by the plaintiffs.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows:

| | | | |
|------------|---------------|-----------|-----------------------|
| Baltimore, | May 23, 1822, | £500 | favor of J. P. Kraft. |
| " | " 27, " | 200 | favor of defend'ts. |
| " | " " " | 300 | " |
| " | " " " | 500 | " |
| " | June 12, " | 1,000 | " |
| " | " 18, " | 300 | " |
| " | July 31, " | 1,000 | " |
| " | " " " | fr.10,000 | " |
| " | " " " | 5,000 | " |

These bills were regularly protested for non-acceptance and non-payment; but were accepted and paid, *supra protest*, by the drawees, for the honor of the defendants, the indorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case stated. The judges were divided in opinion on the following points, which have been certified to this court:

1. Whether the authority to John C. Delprat to draw on the plaintiffs, did or did not amount to an acceptance of the bills.

2. Whether the bills paid by the plaintiffs, *supra protest*, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills and the drawees.

On the 11th January, 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy:

The undersigned N. & J. & R. Van Staphorst, merchants in this city, and John C. Delprat, of Philadelphia, present the *last, [***275** choosing for the present act his *domicilium citandi et exequendi*, at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations:

ARTICLE I. The second undersigned (viz., J. C. Delprat) shall, to the benefit of the first undersigned (N. & J. & R. V. S.) manage in the United States of America, the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections, and procuring of consignments; and shall further perform everything the first undersigned will appoint him to do as their agent.

ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom, any consignments or commissions from himself or any other, except to the first undersigned; but on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned without their prejudice.

ART. III. The first undersigned allows to the second undersigned the faculty to value on them direct, or payable in London, at no shorter date than sixty days' sight, for such moneys as the second undersigned shall employ to make advances on whole or part of cargoes of current articles, viz., to the amount of two-thirds of the invoice price of articles laden in chartered vessels, and of three-fourths in vessels owning to the shippers, and likewise consigned to the first undersigned; it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods; and it being understood that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall inclose and forward, or cause to be inclosed and forwarded, to the first undersigned, the bill of lading and invoice of the goods on which the above-mentioned advances might have been made; and shall cause the above goods to be duly insured in America,

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to that effect that the policy of said insurance be delivered up, duly indorsed, to the second undersigned, and rests with him until the end of the expedition. It being further a fixed rule, that the first undersigned must never come in the predicament of having made any advances on cargoes, or part of cargoes, which are not duly insured in America.

The first undersigned further oblige themselves to open a credit of \$40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard & Co., New York, to be made use of by the second undersigned in case any advances are required on consignments to be made to the said first undersigned, that credit to be renewed **276** ed every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them.

If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned to stop for awhile further consignments, then the said first undersigned retain the faculty to prescribe to the second undersigned such limits and orders as they shall find proper according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

ART. IV. As sometimes an opportunity might offer to procure a good consignment to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned to make use likewise of the above-mentioned credit of \$40,000, to interest the first undersigned; in such expeditions for a proportion not larger than one-fourth, with this restriction, that said proportion must never exceed the amount of \$10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account, being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, viz., after that termination shall have been duly advised to the second undersigned by the first undersigned.

ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned one-third of the amount of the two per cent. commission, to be earned by the first undersigned on the consignments to be procured, and further one per cent. from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article 4; it is to be understood that then no benefit arises from the third of the two per cent. commission of those goods; and finally that the second undersigned is promised an allowance for traveling, and other expenses, the sum of \$2,000, say two thousand dollars, per annum, to commence with the first of February, 1818.

ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January, 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid) this contract will be continued from year to year, but that in case one of the parties should desire the annulment of the present contract, said party shall be obliged to signify

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his intention to the other party four months before the expiration thereof.

ART. VII. Ultimately it has been stipulated that in the unhoped-for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfillment of any of the articles above mentioned, [**277** those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the city of Amsterdam, one by each party, who, in case of difference of opinion between them, shall have the faculty of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences; both parties renouncing to all law measure and impediments, and especially to the faculty of laying any arrests, or hindrance, on moneys, goods, or possessions, belonging to any one of the parties undersigned; all such aforesaid measures to be considered now and then as null, void, and of no effect whatsoever, the consequences thereof to be suffered by the party which might have made use of the aforesaid measures.

Of the present act have been made two copies, &c.

Amsterdam, 11th January, 1818.

(Signed) N. & J. & R. VAN STAPHORST.
JOHN C. DELPRAT.

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows:

AMSTERDAM, 21st Jan., 1818.

MESSRS. LE ROY, BAYARD & Co., New York, (confidential.)

Gentlemen—Thinking it useful for the extension of our commercial relations in the line of consignments (one of the branches of our establishment), to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts, in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence which must actuate a person employed during such a long period by your worthy house. We judged it necessary for the obtaining of said purpose, to leave at the disposal of Mr. Delprat, sufficient means to facilitate his exertions, viz., by opening with you in his favor a credit to be made use of by him, in the manner pointed out in the inclosed abstract of our contract with said gentleman. We therefore request and authorize you to furnish Mr. Delprat to the extent of \$40,000, say forty thousand dollars, (to be made advances with by him on such cargoes, or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our house in part of cargoes to the aforementioned purpose). The credit to run for the space of two years, unless countermanded by us, in such a manner that when Mr. Delprat has availed himself of the whole or part of said credit of \$40,000, that credit or part of the same must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat.

278*] *You will observe the sole object of the mission of Mr. Delprat, is to obtain solid consignments from good houses throughout the U. S., and the disposal of the credit opened in his behalf with your house, is exclusively intended to facilitate said business. In this important matter, it will be a point of great security, and as such, eminently satisfactory to us, that our said agent may be able to have recourse in every circumstance, to wise and friendly counsel, and we, therefore, request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, particularly with respect to these transactions for which, by virtue of the credit aforementioned we may have recourse to your cash, it being, as you will observe, a material point that we are secured, that the moneys he may dispose of will have no other than the destination just mentioned. To this effect, we authorize you, gentlemen, in case of moral certainty, that the moneys Mr. Delprat should demand from you by virtue of the above-mentioned credit, would not be employed in the aforementioned manner, and earnestly request you not to pay and to refuse him any moneys whatsoever, on account of the above credit.

In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat; and if, unexpectedly, that conduct could appear in the least exceptionable—we mean either imprudent or equivocal—then, gentlemen, do give us, with all the frankness of long experienced friendship, your ideas respecting that subject, and be perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, and to solicit your friendly co-operation towards the attaining the object of his mission, which we are fully persuaded can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you, for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,

Gentlemen, your most obedient servants,

N. & J. & R. VAN STAPHORST.

(Indorsed.) Confidential. Amsterdam, 21st of January, 1818. N. & J. & R. Van Staphorst. Received, March 29th. Answered, 24th do.

279*] *This letter was answered by Le Roy, Bayard & Co., in the following terms:

PRIVATE.

NEW YORK, 24th of March, 1818.

Messrs. N. & J. & R. VAN STAPHORST, Amsterdam.

Gentlemen—We have the honor of replying to your esteemed favor of 21st of January, ac-

quainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of \$40,000, subject to renewal, as fully expressed in your letter. We doubt not from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part to reap the utmost benefit from the mission intrusted to him.

Believe us, with honor and esteem, gentlemen,

Your obedient servants,

LE ROY, BAYARD & Co.

It is proper to observe, that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard & Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of \$40,000, therefore, which was raised for Delprat, with Le Roy, Bayard & Co., was merely the application of so much of their funds in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions in consequence of this credit; which manifest, unequivocally, the desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th June, 1819, they renew the credit of \$40,000; and add, "at the same time, we conform our former orders not to exceed said amount, for our account. In case you have funds in hand for any of our institutions, and you think proper to remit us for same, Mr. Delprat's bills on us—the nature of which you are well acquainted with—you allow him then, the same credit *which you do to all [*280 persons from whom you take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued.

In answer to this letter, the defendants say, on the 24th of September, 1819: "You also accord us the permission to remit this gentleman's (Delprat's) drafts, for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character, must, with us, act in lieu of vouchers, to exhibit the reality of transactions, which may give origin to such drafts; the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May, 1820, when N. & J. & R. Van Staphorst addressed a letter to Messrs. Le Roy,

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Bayard & Co., of which the following is an extract:

"There being frequent opportunities of drawing here, now, on New York, we will probably have, for some time to come, occasion to dispose of the dividends which 'you will receive for our account, in October next,' and so on; and we have therefore directed Mr. Delprat not to make use of his credit of \$40,000, lately opened in his favor. We thus also request you, by the present, to consider the same as annulled, until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy, Bayard & Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers than is contained in a letter of the 6th Feb., 1821, which contains the following clause: "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us in your hands, or by drawing and indorsing the shipper's draft, must not exceed, henceforth, one-half of the 'true invoice.' As a compensation for this reduction of the advance to be made in the United States, J. & N. & R. Van Staphorst, engaged on the arrival of the shipments, to remit to the consignors, the estimated value of the cargoes, in bills on their own house in the United States.

Delprat acknowledged the receipt of this letter on the 17th of April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May, 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record, until the 9th of July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connection with Mr. Delprat; whose conduct, they said, has been so imprudent as to oblige them, **281***] at the same time, to protest several *of his drafts. Their knowledge, they say, of the former intercourse between Le Roy, Bayard & Co. and Mr. Delprat, and of the great regard felt for him by those gentlemen, induce them to state the chief reasons which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December, 1820, although the balance then due from him was fully \$7,837.54, being "for the proceeds of gin consigned by us to him: for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," &c.

They then proceed to state that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of \$6,000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances; which we till now have not received; though the goods were with him for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances; and dwells on the high opinion they had entertained of him; "his integrity,"

they say, they "even now will not question." Thus, the latter proceeds, "were matters situated, when last Friday, contrary to anything we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat for £200, £300, and £500; issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped;" and on the other hand, 2d, £500, fl. 1250, and 1750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive, that taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state in substance, that they could choose only between the alternatives of allowing the debt due from Mr. Delprat to be swelled to a still larger amount, and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find, that among the drafts to be protested for non-acceptance, and perhaps afterwards for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants on the 1st day of September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs, to hold at their disposal all the proceeds of the goods shipped in his name, by the Virgin, and other vessels, and all balances due to him. This order was inclosed to the *plaintiffs in a letter of the 7th Septem- ***282**ber, 1822, in which they say: "We can of course only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account; and if any should accrue, we will thank you to take such legal steps, which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes, that the several bills of exchange, on which this suit was instituted, were drawn in his capacity as agent, on account of, and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft for £500, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments, precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. & J. & R. Van Staphorst, who never found fault with him for doing so; but to encourage him to make such shipments, gave him credit for one-half the commission, upon the sales of the shipments, so made upon his own account. On his cross-examination, the witness stated that the bill for £500 in favor of Krafft, was drawn for shipments, by the Edward, Jason, and May Flower. He cannot say when the Edward sailed. The Jason had arrived, and the May Flower had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft, but was returned to witness, who sent it to the defendants. The bills of lading and the invoices were not sent with it. The three

bills of the 27th of May, for £1,000, were drawn on account of shipments, in his own name, by the Virgin. She sailed about the 30th July. They were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for £1,000, and for £300, were drawn on tobacco, shipped by the Henry, belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of the 31st of July, were drawn on the shipments by the Virgin, generally. They were not accompanied by bills of lading or invoices. The defendants received a commission for indorsing his bills on the plaintiffs.

In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged; and then drew on the defendants, as the money was required, either on his own shipments or the shipments of others; which bills were credited to the defendants. He understood*] derstands *that all his transactions with the defendants were carried by them into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them.

He was concerned in shipments with Mr. Krafft, and did a great deal of business with him, but did not consider himself as a general partner.

The connection between the plaintiffs and J. C. Delprat, was formed by the agreement of the 11th January, 1818. He was constituted their agent for purposes therein described; and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections, and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct, or payable in London, at no shorter date than sixty days' sight, for such moneys as he should "employ, to make advances on the whole or part of cargoes of current articles," viz., to the amount of two-thirds of the invoice price, &c. It being understood that his letters of advice should be accompanied by the bills of lading and invoices of the goods, on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever; but was an agent appointed for particular purposes, with limited powers, calculated to subserve those purposes. To procure consignments, it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose, and to a limited extent. Out of the limits assigned to him, he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw, must have performed some act in relation to the particular bills, which imposes on them, in law, the character of acceptors.

This point was considered by this court, in the case of *Coolidge et al. v. Payson et al.*

Coolidge & Co. held the proceeds of a cargo claimed by Cornthwaite & Cary, whose claim depended on the decision of this court, of a

case depending therein. Cornthwaite & Cary were desirous of drawing these funds out of the hands of Coolidge & Co., and offered a bond, with sureties, as an indemnity, in the event of an unfavorable decision. Coolidge & Co., in a letter to Cornthwaite & Cary, state some formal objections to the bond, and add: "We shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams *feels satisfied on this point, [*284 he will inform you; and in that case, your draft for \$2,000 will be honored."

In answer to the letter addressed by Coolidge & Co. to Williams, on this subject, he declared his satisfaction with the bond, as to form; declared his confidence that the last signer was able to meet the whole amount himself, but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the same day, Cornthwaite & Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson & Co. also called on him, and received the same information. Two days afterwards, Cornthwaite & Cary drew on Coolidge & Co. for \$2,000, and paid the bill to Payson & Co., who presented it to Coolidge & Co., by whom it was protested. Payson & Co. sued them as acceptors.

The court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter; and that the plaintiffs, on the faith and credit of the said declaration, and also of the letter to Cornthwaite and Cary, did receive and take the bill in the declaration, they were entitled to recover in the action.

The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this court.

In this case, the drawee had written a letter to the drawer, promising to honor his bill for \$2,000; if Mr. Williams should be satisfied with a bond of indemnity, which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case, the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise.

The court, in its opinion, reviews several decisions in England, on this point; in all of which, the promise to accept was express; and in some of which, the court declared the opinion, that the promise ought to be accompanied by circumstances, which may induce a third person to take the bill. After reviewing these cases, this court laid down the rule, "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

285*] *It cannot be alleged that these bills are brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

But, although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the court must be satisfied that the payment is, in fact, what it professes to be—a payment really for the honor of the indorsees. If the drawees, thus refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound in good faith to accept or pay as drawees, they will not be permitted to change the relation in which they stand to the parties on the bills, by a wrongful act. They can acquire no rights as the holders of bills, paid, *supra protest*; if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions, is, whether the drawees were bound to accept or to pay these bills. And first, were they so bound, because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence than was required when considering the first question.

It is apparent, from the contract of the 11th of January, 1818, that Mr. Delprat came to the United States, as the agent of N. & J. & R. Van Staphorst, to manage their mercantile interest; “consisting chiefly in forming new solid connections, and procuring of consignments;” and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs for such moneys as he should employ in making advances on enrrtent articles, consigned to his principals, to the amount of two-thirds of the invoice price of articles laden in chartered vessels. He was still further restricted, in his advances, by orders received long before the bills in question were drawn, to one-half of the true invoice. Mr. Delprat’s authority, then, to make advances, was limited at the date of this transaction to one-half the invoice price. One, and perhaps the most usual mode of conducting business of this description, is to draw in favor of the consignor, or to indorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor, which was raised by the bill. In either case, however, drafts beyond one-half the invoice price of the consignments actually made would exceed the authority given. Circumstances may exist which would impose on the principal the obligation to pay such drafts; but the question we are now considering relates only to the authority under which the bills were drawn. **286*]** That authority restricted *the agent in the amount of his drafts to one-half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited?

The first bill on the list is for £500, drawn in favor of J. P. Krafft on the 23d of May, 1822, and indorsed by him to the defend-

ants. The letter of advice states this bill to be drawn on account of shipments by the Edward, Jason, and May Flower, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record.

The shipment by the Jason had arrived, and the May Flower had sailed before the bill was drawn. Mr. Krafft was at the time indebted to N. & J. & R. Van Staphorst. The bill was returned by Krafft to Delprat, and then indorsed by the defendants.

It does not appear, certainly, who remitted this bill, although the probability is that as it was indorsed by the defendants, not as purchasers, but for a commission, it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat’s testimony, or by some person to whom Delprat sold it. It is true that he further states that after the bill was so returned he sent it to the defendants; but this was, no doubt, done for the purpose of having it indorsed by the defendants, in order to give it credit. Neither does it appear from the evidence in the cause that Krafft accompanied the shipments on account of which this bill was drawn by any letter of advice, or otherwise, directing the proceeds thereof to be applied to the discharge of this bill; but, on the contrary, the letter of advice addressed to the plaintiffs by Delprat directed the bill to be charged to the account of Krafft, generally. Under these circumstances, taken in connection with the additional one, that Delprat was concerned, generally, with Krafft in the shipments made to the plaintiffs, the court is of opinion that there is no material difference between this bill and those drawn on account of shipments made by and in the name of Delprat, which are now to be considered.

It has already been stated that Mr. Delprat was a merchant trading on his own account at the same time that he was the agent of N. & J. & R. Van Staphorst. His transactions in his two characters were as distinct from each other as if they had been the transactions of distinct persons. As an agent he was bound to act “in conformity to the authority and instructions” of his principals. As a merchant he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar *and un- **[287]** usual provisions to place Mr. Delprat under the authority of the house in Amsterdam whilst carrying on trade in the United States on his own account. Upon reference to the contract we find a stipulation between the parties in the following words: “The second undersigned (Delprat) binds himself to procure to no person or persons in this kingdom any consignments, or commissions from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned; they being willing, on their side, to facilitate all such commercial operations as might benefit the second undersigned without their prejudice.”

This article contains the only limitation on the entire independence of Mr. Delprat as a merchant. It is, perhaps, a necessary limitation; which was, in part, the price of his

agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house does not impress on his consignments to the Van Staphorst, or on his bills drawn on those consignments, a character different from that which would have belonged to them had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands.

If any doubt could arise from this article it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the kingdom of the Netherlands any consignments or commissions from himself or any other, except to the Van Staphorst. The singular application of the word procure to consignments made by Mr. Delprat himself, may be connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article the Van Staphorsts allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to make advances on the whole, or part of cargoes of current articles consigned to them to the amount of two-thirds of the invoice price.

It may be said that, as in the preceding article, consignments made by Delprat, on his own account, were considered as procured by him, and were placed on the same footing with consignments made by others; so in this, the express authority to draw bills might embrace transactions of both descriptions. But we do not think that the inaccurate use of words in one article will justify a departure from the correct construction of a succeeding article; unless the same words are used, or the bearing **288*** of the one on the other is such as to require that departure.

The same motives existed for restraining the agent from making, as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence; and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant, and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the consignees must pay the bills, if the shipment places funds in his hands to pay them. But as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement, in order to determine whether it provides for the future connection between the parties, farther than as regards their characters as principal and agent.

The faculty given to Mr. Delprat, by the third article, to value on the Van Staphorsts, is, "for such moneys as he should employ to make advances" on articles consigned to them.

Money laid out in the purchase of articles on his own account, cannot, with any propriety of language, be denominated money employed in making advances on articles consigned to him. The distinction between money advanced on articles consigned, and money employed in purchases—although the articles may be purchased for the purpose of being consigned—is obvious. Money advanced, is always to another, never to the individual making the advance. This language shows, we think, incontrovertibly, that the article was drawn with a sole view to bills drawn by Mr. Delprat, as agent; not on his own account as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him, in making advances to others; but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy, Bayard & Co., inclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable that they *would **[*289]** have given him an express authority to draw on his own account, on invoices to be priced by himself.

But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says, that during the whole period of his agency he was in the habit of making shipments on his own account, to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. & J. & R. Van Staphorst, who never found fault with him for doing so; but, in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments, so made on his own account.

The Van Staphorsts were commission merchants, desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove that the power given him, as their agent, to make advances to others, was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law; and the contract between the parties does not show that either was dissatisfied with those principles, or wished to vary them.

This question refers, we presume, to the authority given by the contract of the 11th of January, 1818. The first article describes the objects which were committed to Mr. Delprat by the Van Staphorsts. These were the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connections, and procuring of consignments."

The second article restrains the right Mr. Delprat might otherwise have exercised, of

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consigning to other houses in the Netherlands.

The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe.

This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account, as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and indorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this authority, appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered, in answering the preceding questions. It asks, whether the plaintiffs were bound to **290*** accept and pay the bills in question; and whether the same having been paid by the plaintiffs, *supra protest*, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

The opinion has been already expressed, that the bill drawn on the 23d of May, 1822, for £500 sterling, in favor of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat, to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments, and in drawing these bills, Mr. Delprat acted for himself, as an independent merchant. The relation between him and the plaintiffs was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills, depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th of July and 10th September, 1822, which were given in evidence by the defendants, they state him to be then their debtor; and it is not shown that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. But the defendants in this cause cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it, requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters written during the continuance of Mr. Delprat's credit with the latter, which shows the Peters 1.

determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are well acquainted with, that they (the *defendants) allow him [***291** the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add: "This is not the effect of any want of confidence in our agent, but merely profiting from our invariable rule, to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th of May, 1819, announcing that he had filled his credit, they say: "In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about £3,000 sterling, or that we should take his drafts on Amsterdam, for a similar value. The personal regard which we bear for Mr. Delprat, would have induced us promptly to accede to his request, had not the restriction laid upon us, of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations or purchase of his drafts, was neither wished nor contemplated by you." And in their letter of the 7th of September, 1822, inclosing the order of Mr. Delprat on the plaintiffs, for any balances belonging to him in their hands; so far from complaining of the protest of the bills, they say: "We can, of course, only consider this order as applying to the balance that may possibly accrue to him, upon the settlement of your account."

Messrs. Le Roy, Bayard & Co., then, were not deceived by the plaintiffs. Unfortunately for themselves they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do, in the letter of the 24th June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The 4th and 5th questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the court after verdict, but on a motion for a new trial which was not made.

The 6th question, whether a judgment can be rendered on the verdict of the jury, has been answered so far as this court can answer it. We do not understand it as referring to the amount of the verdict, for on that the Circuit Court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action, as the *holders of bills, accepted and paid, [***292** *supra protest*, for the honor of the drawers, it is already answered.

The decision of a majority of this court, on the points on which the judges of the Circuit Court were divided, will be certified in conformity with the foregoing opinion.

This cause came on to be heard on a certificate of division of opinion of the judges of the Circuit Court of the United States for the Southern District of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof, this court is of opinion,

1st. That the authority of John C. Delprat to draw on the plaintiffs did not amount to an acceptance of the bills.

2d and 3d. That the bills mentioned in the declaration were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account, and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands.

4th and 5th. These questions are understood to be waived, and do not appear to arise in the case.

6th. The 6th question is decided by the answer to the 2d and 3d, so far as respects the right of the plaintiffs to maintain their action. On the quantum of damages this court can give no opinion.

All which is ordered to be certified to the Court of the United States for the Second Circuit and District of New York.

Cited—4 Pct., 121; 8 How., 468; 1 Story, 27; 2 Story, 237.

293*] *DANIEL PARKER, *Plaintiff in Error*,
v.

THE UNITED STATES.

Army of the United States—to whom double rations allowed—"separate post"—"military department."

The adjutant and inspector-general of the army of the United States was not entitled to double rations, from the 30th of September, 1818, to the 31st of May, 1821.

The President of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts as he may think just, having respect to the special circumstances of each post. The law granting this authority is not imperative, and in the exercise of his discretion the President may allow, or refuse to allow, additional rations as in his opinion he may deem proper. [296]

The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power and make the allowance to officers having a separate command. [297]

No officer is entitled to the additional allowance unless he be a commandant at a separate post, and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station. [297]

In the discharge of his ordinary duties the adjutant and inspector-general has no distinct command; his duties consist in details of service, and not in active military command. [297]

An officer may be said to command at a separate post when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command, in the neighborhood. He must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. [297]

The general order of the war department, of 16th March, 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding each department; it does not relate to the law

of the 3d of March, 1813, "for the better organization of the general staff of the army." [297]

WRIT of error to the Circuit Court for the county of Washington, in the District of Columbia.

This case was submitted to the court, without argument, by *Mr. Jones* for the plaintiff in error, and by *Mr. Wirt*, Attorney-General, for the United States.

All the material facts of the case are stated in the opinion of the court, which was delivered by *Mr. Justice DUVAL*:

An action was commenced in the Circuit Court by the United States against the plaintiff in error, to recover the sum of \$2,337.60, which he had received from Mr. Leslic, the paymaster, then stationed at the seat of government, on a claim for double rations, due him in his capacity of adjutant and inspector-general of the army of the United States, from the 30th of September, 1818, to the [*294 31st of May, 1821. On the settlement of the account of the paymaster this item was disallowed by the second auditor, who considered it as wrongfully paid, and the amount was afterwards directed to be charged to the personal account of General Parker.

The office of adjutant and inspector-general of the army, with the rank, pay and emoluments of a brigadier-general, was created by the act of March 3, 1813. The plaintiff in error was appointed to that office, and his commission bears date on the 1st May, 1816, with the rank of brigadier-general from 22d November, 1814.

The pay and emoluments of the officers of the army are fixed by the act of 16th March, 1802, and the act of 12th April, 1808. By the fifth section of the first-mentioned act it is provided that the commanding officers of each separate post shall be entitled to such additional number of rations as the President of the United States shall, from time to time, direct, having respect to the special circumstances of each post. Under this authority, the President has, at various times, designated military posts and stations, and allowed double rations to the commanding officers; and in the case of General Wilkinson, when stationed at New Orleans and commanding there in quality of a commanding officer at a separate post, he allowed that officer treble rations. It appears by the record and documents referred to in this case that on the 25th August, 1812, the President ordered that generals commanding separate armies should receive double rations.

In February, 1814, an order was issued by the war department on the subject of double rations, of which the following is an extract: "It is ordered that general or other officers commanding districts shall, while so doing, receive double rations, which will supersede all other grants of double rations at posts within the district."

On the 6th March, 1816, a general order was issued in the words following: "Generals commanding divisions; officers commanding military departments, and all officers while in the command of permanent posts and garrisons, separate from the stations of commandants of departments, which subject them to the addi-

Peters 1.

tional expense of independent commands, are allowed double rations. No more than one officer can be entitled to double rations at the same station."

The adjutant and inspector-general performed the duties of his office from November, 1814, and charged the compensation as allowed by law until the year 1816, when a difficulty arose on the subject of his fuel and quarters from the circumstance of there being no disbursing office in the quartermaster's department at the seat of government, and from the **295***] regulations of the war department, then in force, prohibiting an allowance in money to be made to officers in lieu of these emoluments. The Secretary of War then issued the following order: "A commutation of double rations is allowed to the adjutant and inspector-general in lieu of fuel and quarters."

Under this authority he claimed and was allowed double rations from November, 1814; refunding to the government the allowance he had received for fuel and quarters from the time of his acceptance until the date of the above order. He continued to receive double rations, making no charge for fuel and quarters, until an order was issued by the Secretary of War, on the 10th of August, 1818, to the following effect: "The reason for the allowance to the chief of the engineers, and to the adjutant and inspector-general, in lieu of fuel and quarters, no longer existing, since the establishment of the quartermaster's department, at the termination of the present quarter such allowance will cease; and the quartermaster-general will, on requisition, furnish them with fuel and quarters, agreeably to their respective ranks." The commutation of double rations ceased accordingly; and the adjutant and inspector-general continued to charge and receive single rations only, from the first of October, 1818, to the 31st May, 1821, when the office was abolished.

The defendant in the court below, now plaintiff in error, in support of his claim produced a certificate from Richard Cutts, second comptroller of the treasury, "that the senior officer of the engineer department, stationed at Washington, has charged and been allowed double rations since the first of January, 1818. The senior officers of the quartermaster's, subsistence and ordnance departments, have charged and been allowed double rations since the 27th July, 1821; and Major-General Brown has charged and been allowed double rations since the 1st of June, 1821, when he was stationed in this city." And also the following regulations: The regulation and general order of the 27th July, 1821, issued by the war department, allowing to the quartermaster-general, commissary-general of subsistence, the colonel of engineers, and the chief of the ordnance department (while stationed at the seat of government), double rations from the date of the said order.

The regulations or general order, duly issued from the war department, dated the 31st of May, 1821, addressed to the defendant, as adjutant and inspector-general, directing him, among other things, to hand over the records and files of his office to Major-General Brown on the next day, being the first of June, 1821; the said major-general having from the time

he had assumed command, and had relieved the said adjutant and inspector-general, at the seat of government, pursuant to the **last**-[***296** mentioned order, been allowed and paid double rations, as certified by the second comptroller; which regulation or general order is in the following words: "The adjutant-general, under the law of the 2d of March last, being attached to the major general commanding the army, and now absent, you will, to-morrow, pass over the records and files of your office to Major-General Brown, and will assume the duties of paymaster-general. Major-General Brown has been advised of this order, and Colonel Towson will be instructed to hand over the papers and records of the pay department to you." That the brigadiers-general of the army of the United States have all been regularly allowed double rations since the said general order and regulation of the 6th of March, 1816. That the defendant continued at the head of the department of adjutant and inspector-general, and stationed at the seat of government, from the time of his appointment and commission as such until the 31st of May, 1821, and until he was relieved by Major-General Brown, as before mentioned.

The defendant then proved, by Thomas S. Jessup, quartermaster-general, that in his opinion, and according to the general usage of the army, the department of adjutant and inspector-general was a military department, and that the defendant, whilst exercising that office, was commandant of a military department, and, as such, was subject to the additional expense of an independent command.

The declaration in this cause is founded on a transcript from the treasury, certified in the usual form, and contained a count for money had and received, and other counts not necessary to be mentioned; issue was joined on the plea of *non assumpsit*; and by agreement of counsel, a verdict for the United States was taken for the sum claimed, subject to the opinion of the court upon the laws of the United States relative to the pay and emoluments of the officers of the army, and the regulations and orders of the executive department, issued in pursuance of those laws. The court, on consideration, gave judgment in favor of the United States; and the cause is now before this court, by writ of error, for their decision.

The claim of the plaintiff in error to double rations, as charged, rests altogether upon a correct construction of the 5th section of the act of the 16th of March, 1802, and of the regulations and orders of the executive department, issued in pursuance of that section. The President of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts as he may think just, having respect to the special circumstances of each post. The law granting this authority is not imperative, and in the exercise of his discretion the President may allow, or **refuse* to allow, addi-[***297** tional rations, as in his opinion he may deem just.

The reason of the authority to grant the allowance is obvious. By an independent command, at a separate post, the officer is subject to additional expense and an increase of duty. An officer may be said to command at a sepa-

rate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood. He must then issue the necessary orders to the troops under his command, it being impracticable to receive them from a superior officer. His authority is the source from which they must flow.

There can be no controversy about additional rations, if the President makes the allowance. He may issue the order himself, or it may be done by the Secretary of War, with his approbation. The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power and make the allowance to officers having a separate command. The language of the law is plain and unambiguous. No officer is entitled to the additional allowance unless he be a commandant at a separate post, and then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station. *

It is not contended, in the case under consideration, that the grant was made by the President; but the plaintiff in error claims it under the orders which have been recited, and which are spread upon the record, and because officers of equal rank, and in his opinion similarly circumstanced, have received the additional allowance. Double rations form no part of the regular and legal emoluments of a brigadier-general, and can only be claimed under circumstances before enumerated. The plaintiff in error seems to rely, with more confidence, on the order of the 6th of March, 1816, taken in connection with the opinion of General Jessup. That order directs the additional allowance to be made to generals commanding divisions, and to officers commanding military departments, &c.; and General Jessup was of opinion that, according to the general usage of the army, the department of adjutant and inspector-general was a military department; and that whilst exercising that office he was commandant of a military department, and, as such, subject to the expense of an independent command.

The record contains no evidence that the adjutant and inspector-general was ever ordered to an independent or separate command. In the discharge of his ordinary duties he has no distinct command; his duties consist in details of service and not in active military command. **298*** The order of the 16th of March, 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command, given to the officer commanding each department; and that it does not relate to the law of the 3d of March, 1813, for the better organization of the general staff of the army. This appears to have been the construction given to the order by the war department, as none of the staff officers created by that act, with the exception of the plaintiff in error, ever made a claim for double rations; and the claim under consideration was disallowed by the accounting officers of the war department.

During the time the adjutant and inspector-general was stationed at the seat of government, comprehending the space for which double rations are claimed, it does not appear that there was any recognized commanding officer. The staff officers then stationed at the seat of government were subject to the authority of the Secretary of War, and under his direct and exclusive control.

It is the opinion of the court that the claim of the plaintiff in error is not sanctioned by the act of the 16th of March, 1802, nor by the regulations and orders of the executive department, issued in pursuance of that law.

The judgment of the Circuit Court is affirmed with costs.

Cited.—1 Wood. & M., 50, 51.

***THE MECHANICS BANK OF ALEXANDRIA, Appellants,**

v.

LOUISA AND ANNA MARIA SETON, Appellees, by their Guardian, &c.

Chancery practice—specific performance of contracts relating to personalty—parties—evidence—cestui que trust—trustees—presumptive knowledge—interest acquired pendente lite.

Although it seems to be a general rule that a Court of Chancery will not decree a specific performance of contracts, except for the purchase of lands, or things which relate to the realty, and are of a permanent nature; and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description, than such as relate to lands. [305]

Although an objection, for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting. [306]

All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interests of others. [306]

The cross examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of his deposition. [307]

By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found in the record, as evidence; unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent." [307]

It is not a correct construction of the 3d and 21st sections of the act of Congress, incorporating the Mechanics' Bank of Alexandria, that the stock of

NOTE.—As to when specific performance of contracts relating to personalty will be decreed, see note to *Hepburn v. Dunlop*, 1 Wheat., 179. That all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, see note to *Wormley v. Wormley*, 8 Wheat., 421.

the bank shall be deemed to belong to the persons in whose name it stands upon the books of the bank, and that the bank is not bound to recognize the interests of any *cestui que trust*, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. [308]

Full notice of a trust, draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. [309]

It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound with respect to that special property to the execution of the trust. [309]

A subsequent board of directors of a bank is to be considered as knowing all the circumstances communicated, or known to a previous board. [309]

It is a well-settled rule that a court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute. [310]

300*] * APPEAL from the Circuit Court for the county of Alexandria.

This suit was instituted on the chancery side of the Circuit Court by the appellees, complainants in that court, against the Mechanics' Bank of Alexandria, to compel them to permit a transfer to be made of three thousand dollars of the capital stock of the bank, standing in the name of Adam Lynn, and held by him as trustee of the complainants.

The bill charges that the complainants' grandfather, John Wise, to make provision for the support of his children and grandchildren, had made sale, in 1815, of an establishment called the City Tavern, at the price of \$14,000; of which \$10,000 were paid by the transfer of that amount of United States six per cent. stock, made by the purchasers to the said Adam Lynn, the nephew and agent of the said John Wise, for his use. That the residue, \$4,000, was paid to the said Adam in money, to be by him invested in stocks, for the use and subject to the control of the said John Wise. That out of this sum the said Adam purchased from one James Sanderson \$3,000 of the capital stock of the bank, which was in like manner transferred to him; and that although no trust was in terms declared in the transfer of either of the said stocks, they were both avowedly purchased and held by the said Adam in his character of agent and trustee for Wise. That on the 29th of April, 1815, the said John executed a deed to the said Adam by which he conveyed to him the said stocks described as standing in the said Adam's name, in trust for the use of the said John during his life, as to the dividends, and after his death, then, as to the bank stock, to the use of the complainants; and that he has since died. That when the purchase of the bank stock was made, and when it was transferred to the said Adam, it was well known to the president and directors of the bank that the purchase was made and the transfer received by him in his fiduciary character.

That the bank stock was purchased on the 11th of February, 1815, from one James Sanderson, at a small advance; and on that day a payment of \$720 was made in part of the purchase money, and as Sanderson had obtained a discount from the bank on the pledge of all the stock he held in it, it became necessary to know on what terms the board of directors would permit a transfer.

That this application was accordingly made by the said Adam, who distinctly stated that Peters 1.

the purchase was to be made for the benefit of the said John Wise, was to be paid for in his funds, and was to be transferred to the said Adam for his use. He further proposed to the board, as an accommodation to himself, that he should be allowed to discharge a part of the purchase money to Sanderson, by assuming on himself a part of *Sanderson's debt to [*301 the bank, and continuing to that extent the lien the bank then held on the stock to be transferred. That this proposal was rejected distinctly, on the ground that the board must consider the said John Wise as the owner of the stock.

That the said Adam then paid \$2,400 to the bank in discharge of the said Sanderson's stock debt; which being done, the transfer was permitted, and on the 15th of March, 1815, was made to the said Adam, as trustee, though the trust was not declared in the transfer. That it was, however, officially made known, previously to the transfer, and was afterwards frequently a subject of conversation amongst the directors at the board.

That the complainants having expressed to the said Adam their desire that he would transfer their stock to their guardian, he offered himself ready to do so; but, that on application at the bank, permission was refused; on the allegation that he was a debtor to the bank, and that it held a lien for that debt on all its stock which stood in his name.

That the said Adam was proprietor of other stock in the bank in his own right, to the amount of \$18,014, and had a discount on it to the amount of \$15,360, which was little more than the sum permitted to be loaned on stock security by a by-law of the bank—that is to say 4-5 of the amount of such stock.

The bill further charges that when the said Lynn's debt to the bank was contracted he was one of the directors, and that by the 9th article of the charter of incorporation the president and directors were prohibited from receiving discounts or loans on accommodation beyond \$5,000. That all the loans to him were of that description; and that so far as they exceed \$5,000, being in violation of the charter, can create no lien under it. The bill, after propounding special interrogatories, corresponding with the previous allegations, prays that the bank may be compelled to open its transfer book, and to permit Lynn to transfer the stock, and for general relief.

The answer denies that the board of directors had notice of the fiduciary character in which Lynn held the stock claimed by the complainants. It avers, that at the time the answer was put in there was no stock standing in his name on the books, the whole of the stock which stood in his name having been applied to the payment of his debts to the bank, under articles of agreement between him and the cashier.

It admits that Lynn had received accommodation loans on stock, to an amount exceeding \$5,000, but asserts that loans of that description did not fall within the prohibition of *the charter; but if they did, it cannot [*302 affect the bank's right, claiming as purchasers under the contract before mentioned.

The purchase of the stock by Lynn in his fiduciary character, and the knowledge of that

fact by the board of directors, officially and individually, is claimed to be fully proved by the testimony of the said Adam Lynn, a director of the bank, and by that of Robert Young, president, and of Daniel M'Leod and John Gird, directors.

The special agreement under which the respondents claim the stock, appears to have been entered into on the 30th day of May, 1821, nearly a year after the bill had been filed. By this contract, Lynn agreed at once to transfer all his stock, except that claimed by the complainants; for the transfer of this, he gave a power of attorney, which, by agreement, was not to be executed by a transfer, until the decision of the court on the respondent's claim of lien in this suit.

The Circuit Court, on hearing, decreed a transfer; from which decree this appeal was entered.

Mr. Swann and Mr. Wirt, for the appellants.

The Mechanics' Bank of Alexandria did not know of the trust; this stock stood in the name of Adam Lynn, and they had no notice of any other ownership in it; no trust was declared upon the books of the bank; and by the provisions of the charter, the persons who appear as stockholders upon the books, are the only stockholders. By the charter, no one who is a debtor to the bank, can transfer stock owned by him, the bank having a prior lien on the same for their debt.

The claim of the plaintiffs below is resisted on the following grounds:

1. Adam Lynn made a special agreement to transfer this stock to the bank.

2. Adam Lynn was a debtor to the bank, and this stock standing in his name on the books of the bank, without a declaration of the trust, was properly retained as a security for the debt due by him.

3. The subject in controversy in this case, is not proper for the decision of a Court of Chancery. There cannot be a specific performance decreed by this court, as the stock cannot be designated, or specially described. (1 *Mad. Chan.*, 403; 1 *P. Williams*, 570).

4. By the charter of the bank, the only evidence of ownership of stock, is the books of the bank. In the case of a corporation existing under a law, the forms prescribed by the law must be complied with. (17 *Mass. Rep.*, 1; 2 *Black. Com.*, 127.)

5. In this case, it was considered by the complainants, that *Adam Lynn should be a party to the bill, and a rule was taken on him to appear; but the court went to a hearing and decision of the suit without his having been made a party. The court will, therefore, having this fact upon the proceedings, *ex officio*, turn the parties out of court. (*Duguid v. Patterson*, 1 *Hen. & Mun.*, 445.)

Mr. Jones and Mr. Taylor, for the appellees.

1. As to the specific lien claimed by the appellants, under a power of attorney, given by Adam Lynn. It was granted after the bill of the complainants was filed, and is therefore of no value. The transfer, by the power of attorney, was also a violation of the agreement under which it was given.

But, if this is not an answer to the claim of specific lien, the transfer of the stock, by power

of attorney, was made, with notice of the right of the complainants.

2. It does not appear that the debt due by Adam Lynn to the bank arose after the purchase of this stock, and, therefore, no new credit was given upon this stock. The trust was known to the board of directors, when the stock was transferred by Sanderson to Lynn; and from that time they dealt with the trustee subject to the trust. A corporation, by the decisions of this court, is like an individual, in transactions of this kind; and the succeeding board of directors were bound by the circumstances which occurred when the trust commenced.

3. The bank were the trustees of the complainants, either by an original contract, or as trustees, resulting from the payment of the purchase money for the stock out of their funds. (2 *Ves. & Beam.*, 388; 5 *Vesey*, 43; 1 *P. Williams*, 112; 1 *Vesey*, 275; 10 *Vesey*, 360; 1 *Vesey*, Jun., 32, 42.) As to constructive notice, were cited, 8 *Comyn's Dig. N. Ed.*, 363, 15th division; 2d division, 10, 20, 21, 15, 358.

4. This is the case of trust, which is the *peculium* of a Court of Chancery; and the number of shares which are claimed, is a sufficient designation of the property. The original shares bought of Sanderson, remained in the name of Adam Lynn, when the bill was filed.

5. The provisions of the charter, relative to evidence of ownership of stock, can only apply when parties are the holders of stock, in their own right. The practice of the bank to hold stock as mortgagees, shows a different construction of the charter by the bank itself, from that which is claimed in this case.

6. The rules of the Court of Chancery are, that all persons who were parties to the transactions, and all who must be before the court, for the purposes of complete justice in the case, must be made parties. It was not deemed necessary to make Adam Lynn a party, as he was willing to do all that the *court [*304 would have required from him; and it was the bank only, who, having the control of the stock, could make the transfer sought by the complainants.

Mr. Justice THOMPSON delivered the opinion of the court:

The appellees, who were the complainants in the court below, filed their bill against the Mechanics' Bank of Alexandria, setting out their right to three thousand dollars of the capital stock of that bank, which was standing in the name of Adam Lynn, but which was avowedly purchased and held by him, as trustee for John Wise, the grandfather of the complainants, and from whom they derived their right and title to the stock in question. That they were desirous of having their stock transferred to their guardian, which the trustee, Adam Lynn, was willing to do, and offered to transfer the same; but that on application to the bank, permission was refused, on the allegation that Adam Lynn was a debtor to the bank, and that it held a lien for that debt, on all the stock of the bank, which stood in his name. The bill alleges, that when the stock was purchased by Adam Lynn, for John Wise, and transferred to him upon the books of the bank, it was well known to the president and directors that the purchase was

made by, and transferred to Lynn, in his character of trustee for John Wise, although the trust was not expressed in the transfer.

The bill prays that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the three thousand dollars, in stock, to the said Louisa and Anna Maria Seton, or to their guardian, Nathaniel S. Wise.

The bank, by its answer, denies that the board of directors knew, or had any notice, that Adam Lynn held the stock as trustee; but alleges that all the stock standing upon the books of the bank, in the name of Adam Lynn, was considered by the board of directors as his own stock; and avers that at the time the answer was put in, there was no stock standing in his name on the books, but that the whole of it had been applied by the bank to the payment of his debts to it; according to articles of agreement between him and the cashier of the bank.

The bank also sets up the right, under its charter, to hold the stock for the payment of Lynn's debt; but had, under the agreement made with the cashier, as before mentioned, become the purchaser of the stock for a full and fair consideration; without any knowledge that the complainants had any interest in the same.

The court below, upon the bill, answer, and exhibits, and proofs, taken in the cause, decreed that the bank should cause its transfer book to be opened, and to permit Adam Lynn to transfer **305***] the stock to Nathaniel S. Wise, guardian of the complainants, to be by him held in trust, for their use. From this decree there is an appeal to this court, and the following points have been made, upon which a reversal of that decree is claimed.

1. That the subject-matter of the bill is not properly cognizable in a Court of Chancery; but that the remedy is at law, and the party to be compensated in damages.

2. That there is a want of proper parties.

3. That upon the merits, the bank has a right to hold and apply the stock, in payment of Adam Lynn's debt to it.

With respect to the first objection, it has been said that a Court of Chancery will not decree a specific performance of contracts; except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and that where the contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods and contracts for lands, is to be found laid down in the books, as a general rule; yet there are many cases to be found where specific performance of contracts, relating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, contracts of this description, than such as relate to lands.

But the application of this distinction to the present case is not perceived. If this had been a bill filed against the bank, to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged that compensation for a breach of the contract might be made in damages; and that the remedy was properly to be sought in a court of law. But the bill does not set up any contract between the complainants and the

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bank; nor does it seek a specific performance of any express contract whatever, entered into with the bank. It only asks that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank, such transfer could only be made upon the books of the bank; and it was by their consent alone that this could be done.

Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law, for refusing to open its books, and permit the transfer. Nor have the appellants shown such a claim to the stock as to authorize the court to turn the appellees round to their remedy at law against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect; and it is not a case for compensation in damages, but for specific performance; which can only be enforced in a Court of Chancery.

*2d. The second objection, that **[306** Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill and the specific relief sought by it.

It ought to be observed here, preliminarily, as matter of practice, that although an objection for want of proper parties may be taken at the hearing; yet the objection ought not to prevail upon the final hearing on appeal; except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting.

The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit, ought to be made parties, either as plaintiffs or defendants in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But, this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court; and ought to be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted, will always be so modified as not to affect the interest of others. (2 Mad. Chancery, 180; 1 Johns. Chancery Cases, 350.)

Where was the necessity, or even propriety, of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill upon which a decree could be made against Lynn; and it is a well-settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. (2 Mad. Ch., 184; 3 P. Will., 310, Note 1.)

The contest, with respect to the right to the stock, is between the complainants and the bank; and it cannot be necessary to bring Lynn into the suit, in order to determine that question. He claims no right to the stock; and if the bank has established its right to hold it for the payment of Lynn's debt, the complainants have no pretense for requiring the books of the

bank to be opened, and to permit the transfer to be made as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the court as a defendant; for the purpose of litigating questions between themselves, with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties.

The remaining inquiry is, whether the bank is entitled to hold this stock, as security, or ap-
307 ply it in payment of Lynn's *debt; either by virtue of its charter, or under the agreement between him and the cashier.

An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.

Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity.

But, at all events, the objection cannot be listened to here, according to the express rule of this court (February term, 1824), which declares "that in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record as evidence; unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is deemed unnecessary to enter into an examination of the proofs in the cause, to show that in point of fact the stock in question was held by Lynn, in trust for the complainants; and that this fact was known to the board of directors, when it was transferred to him by James Sanderson. The evidence establishes these points beyond any reasonable ground of doubt; and the real question is, whether the bank, with full knowledge of the board of directors, that this stock was not the property of Lynn, but held by him in trust for the appellees, can assert a lien upon it for the private debt of Lynn, either under the charter or the agreement made with Chapin, and the transfer made by him to the bank.

The equity of the case must strike everyone very forcibly, as being decidedly with the appellees. And unless the claims of the bank can be sustained by the clear and positive provisions of its charter, the decree of the court below ought to be affirmed.

This claim is asserted, under the provisions of the 3d and 21st sections of the act of Congress, incorporating the bank.

The third section, after providing for the opening the subscription for the stock, and pointing out the manner in which the excess shall be reduced, in case the subscription shall exceed the number of shares allowed to be subscribed, has this proviso: "Provided always, that it is hereby expressly understood, that all the subscriptions and shares obtained in consequence thereof, shall be deemed and held to be for the sole and exclusive use and benefit of

the persons, copartnerships, *or bodies [**308** politic, subscribing, or in whose behalf the subscriptions, respectively, shall be declared to be made, at the time of making the same; and all bargains, contracts, promises agreements and engagements, in any wise contravening this provision, shall be void." The 21st section declares "that the shares of the capital stock shall be transferable at any time, according to such rules as may be established by the president and directors; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied; except the president and directors shall otherwise order it."

These sections, when taken together, have been supposed to require a construction, that the stock shall be deemed to belong to the person, in whose name it stands upon the books of the bank; and that the bank is not bound to recognize the interest of any *cestui que trust*; and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank.

This construction, however, in the opinion of the court, cannot be sustained. The third section must clearly be understood as applying to the first subscription for the stock; and was intended to prevent one person subscribing for stock in the name of another, for his own benefit.

The construction of the 21st section will depend upon the interpretation to be given to the word *holder*, as there used. This term is not, necessarily, restricted to the nominal holder. It will admit of a broader and more enlarged meaning; and may well be applied to the party really and beneficially interested in the stock. And there can be no good reasons why it should not be so applied, when the bank is fully apprised of all circumstances in relation to the stock, and knows who is the real holder thereof.

This provision was intended to put into the hands of the bank, additional security for debts due from stockholders. But, when it is known that the person in whose name the stock stands has no interest in it, he will acquire no credit upon the strength of such stock; and that such was the understanding of the bank, in this case, is clearly shown by the evidence. For, when the transfer was made to Lynn, he asked to have the discount continued to him, which Sanderson, from whom he purchased, had upon the stock. But this was refused, on the ground that the stock did not belong to Lynn, but to Wise. There is no evidence in the cause to show that Lynn's debt was contracted with the bank after the stock was transferred to him; or that he has, in any manner, obtained credit with the bank on account thereof; but the contrary is fairly to be understood from the proofs. Nor does the bank allege the insolvency *of Lynn; or that it has not a full and [**309** complete remedy against him, without having recourse to this stock.

To permit the bank, under such circumstances, to avail itself of this stock to satisfy a debt contracted without any reference to it as security, and with full knowledge that Lynn held it in trust for the complainants, would be repugnant to the most obvious principles of justice and equity. Suppose the trust had been

expressly declared upon the transfer book of the bank; would there be the least color for sustaining the claim now set up? And yet Lynn would be the legal holder of the stock, in such case, as much as in the one now before the court. Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice.

It is a well-settled rule in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound, with respect to that special property, to the execution of the trust. (2 Mad. Ch., 125; 1 Sch. & Lef., 262.)

Notice to an agent is notice to his principal. If it were held otherwise, it would cause great inconvenience; and notice would be avoided in every case, by employing agents. (2 Mad. Ch., 326.) Notice to the board of directors, when this stock was transferred to Lynn, that he held it as trustee only, was notice to the bank; and no subsequent change of directors, could require a new notice of this fact. So that if the bank had sustained any injury, by reason of a subsequent board not knowing that Lynn held the stock in trust, it would result from the negligence of its own agents, and could not be visited upon the complainants. But no such injury is pretended. From anything that appears to the contrary, Lynn is fully able to pay his debt to the bank.

The case of *The Union Bank of Georgetown v. Laird* (2 Wheat., 390), has been supposed to have a strong bearing upon the one now before the court. But the circumstances of the two cases are very dissimilar. In the former, Patton was the real, as well as the nominal holder of the stock, when he contracted his debt with the bank, and when his acceptance fell due, and the lien of the bank, no doubt, attached upon the stock, and this was previous to the assignment of it to Laird; and the question there was, whether the bank had done anything which ought to be considered a waiver of the lien. But, in the present case, Lynn never was the real owner of the stock, and the bank well understood that he held it as trustee, and no lien for Lynn's debt ever attached upon it.

The appellants cannot, therefore, under any provisions in their charter, apply this stock to **310*** their own use, for the debt of *Lynn, to the prejudice of the rights of the known *cestuis que trust*.

Nor is there any ground upon which the claim of the bank can be sustained, under the agreement made between Lynn and Chapin, the cashier, and the transfer thereof, made by the latter to the bank. If the bank, as has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and if necessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock under the transfer made by Chapin. This was done without any legal authority, being several months after Lynn had revoked the power of attorney, under which the transfer was pretended to be made; and with full knowledge that Lynn was not the owner of the stock. But another and complete answer to the whole of this arrangement, Peters 1.

between Chapin and Lynn, is, that it was made long after the bill in this case was filed; and it is a well-settled rule that the court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute.

The decree of the court below must accordingly be affirmed, with costs.

Cited—19 How., 115; 2 Black., 389; 18 Wall., 474; 1 Story, 66; 1 Cliff., 382; 2 Paine., 542; Hemp., 246.

*ROBERT BARRY, *Plaintiff in Error*, [**311**
v.

THOMAS FOYLES.

*Attachment—variance—agency—partnership—
pleading—evidence.*

The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error. Robert Barry appeared, gave special bail, and discharged the attachment. The plaintiff below then filed a declaration of "*indebitatus assumpsit*," "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue. The parties went to trial, and a verdict and judgment were rendered for the defendant in error.

The court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail, and the appearance of the defendant. The defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment. [315]

Where the general agent of parties carrying on business in a tannery, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day, and may be read in evidence to charge the parties, whose agent the person giving the certificates was. [316]

The principle is that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it at the time of trial. [317]

The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction. The proceeding is always, as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. [317]

Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given to support such a declaration; and the want of notice, has never been considered as justifying an exception to such evidence at the trial. [317]

ERROR to the Circuit Court for the county of Washington.

In the Circuit Court for the county of Washington, the defendant in error issued an attachment against Robert Barry, the plaintiff in error; and according to the established practice, the plaintiff in the attachment, filed, at the time it was issued, an account or statement of his claim; by which he alleged that Robert

Barry, the defendant below, was indebted to **312*** him in the *sum of \$3,410.25, for debts due from the firm of James D. Barry & Co., assumed by him to pay to the plaintiff in the attachment. This account, or statement, was accompanied by an affidavit that "it was just and true, as it stands stated." The plaintiff in error appeared and gave special bail; and a declaration was then filed, in *indebitatus assumpsit*, &c., and the plea of the general issue entered.

On the trial of the cause, the plaintiff offered in evidence to sustain his case, three paper writings, signed by E. Rice, which are stated, in *in extenso*, in the opinion of the court.

In order to prove the defendant chargeable with the amount delivered by the plaintiff below, Thomas Rice was produced and sworn as a witness; who testified, as set forth in the opinion of the court.

The counsel for the defendant below objected to the evidence, and the objection being overruled, the case was brought by writ of error to this court.

Messrs. Cox and Worthington, for the plaintiffs in error, contended:

1st. That the evidence is not competent and sufficient to charge the plaintiff in error, upon his alleged *assumpsit*.

2d. That under the declaration of *indebitatus assumpsit*, the evidence is also incompetent and insufficient.

By the statement filed upon oath, the claim of the plaintiff is averred to be a debt due by James D. Barry & Co., which the defendant below assumed to pay.

The evidence on the part of the plaintiff below did not show such a firm as James D. Barry & Co.; nor did the same prove an implied, much less an express *assumpsit* by Robert Barry.

The plaintiff below complied with the law of Maryland, by stating his cause of action when the attachment was issued; and the defendant appeared and entered a plea thereto. Subsequently, he filed a declaration of *indebitatus assumpsit*, which was irregular. This cannot be done, and therefore the evidence applied only to the first declaration; which stated an assumption of the debt of James D. Barry & Co., and no proof was offered of such assumption. The evidence does not show any connection between Rice and the defendant, nor any authority from Robert Barry, by which his acts or acknowledgments could become binding on him; the plaintiffs did not therefore make out the case spread upon the record by the first declaration.

The papers signed by Rice were improperly admitted. No. 1 is given in the name of James D. Barry. The other two refer to transactions in which the defendant is not named.

2. Upon a general declaration in *assumpsit*, the issue is not maintained by proof of a partnership debt.

The general rule that the defendant, who **313*** is charged separately *for a joint debt, should plead this in abatement, does not apply, when the plaintiff has by his pleadings given no notice of the nature of his demand, until the time of trial, *Jordan v. Wilkins* (3 Wash. Decis., 112). In the case of *Rice v. Shout* (5 Burr., 2611), Lord Mansfield adverts strongly

to the circumstance that the defendant was the person with whom the business was transacted. (Also cited, *Abbott v. Smith*, 2 Black., 947.)

3. The agency of Rice was a special agency, and his acknowledgments were not evidence. He might have made entries in the books to charge his principal, but no more. (Esp. Rep., 375; 2 Stark. Evid., 60.) Nor does his testimony prove the interest or partnership of Robert Barry, in the dealings to which the papers have reference. (3 Stark. Evid., p. 4, 1067.)

Mr. Jones for the defendant.

The objections to the proceedings, as they apply to the first and second declarations, have no force. The account filed, when the writ issued against Robert Barry alone, states his assumption of the partnership debt; and if this was objectionable, it should have been pleaded in abatement.

It was at one time supposed, that in all cases of attachment a second declaration should be filed; but this was afterwards considered as not essential; but the party has at all times a right to vary his pleadings, and even at "the rules" to file a new declaration. To the pleadings in this case, no exception was taken, nor was any objection made at the trial.

The objection to the evidence, as applicable to the account filed, ought not to prevail. If Robert Barry was a partner in the transactions to which the papers refer, the law raises an assumption. The plaintiff is not tied down to prove an express *assumpsit*, when proof is given that he was a partner; and an action will lie against one partner alone, on his express *assumpsit*.

2. The evidence of debts due by J. D. Barry & Co., was properly applied to charge Robert Barry, the plaintiff in error. There must always be a plea in abatement, where the parties are not joined. As to joinder of parties, Mr. Foot cited, with other cases, *Minor v. The Mechanics' Bank of Alexandria*, decided *ante* page 46, this term; and also 5 Burr., 2611.

If the evidence could in any way charge the defendant below, it was admissible. Partnership may be proved by circumstances; and the court did not decide upon the effect of the testimony, but only that it should go, generally, to the jury. This is a case in which the principal is charged with the acts of the agent, within the scope of his authority; the business of the concern being intrusted to the management of Rice by the parties.

Mr. Chief Justice MARSHALL* delivered [*314** the opinion of the court:

This a writ of error to a judgment of the Circuit Court of the United States for the District of Columbia, sitting in the county of Washington. The defendant in error had sued out an attachment against Robert Barry, and had filed an account against James D. Barry & Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration of *indebitatus assumpsit*, for money had and received, and for goods, &c., delivered; to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the Circuit Court offered in evidence three paper writings

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signed by Edmund Rice; and also produced Thomas Rice, a witness, who swore that at the time the said paper writings bear date, and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tan-yard in Washington; kept the books, bought and sold leather, and managed the whole concern for the proprietors; that the said papers are in his handwriting; that the said Foyles, for about seven years (including the dates of said writings), being a butcher, was in the habit of delivering, from time to time, great numbers of hides to the said Rice, at the said yard, and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after awhile it was carried on in the name of Robert Barry. The witness was not present at the settlement, and does not know its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry (who resided in Baltimore) came about twice a year to the yard in Washington; where he spent considerable time in examining and posting the books, with the said E. Rice. Upon one of these occasions, he directed a parcel of leather, which E. Rice had prepared to send on to him to Baltimore, to be kept in the yard till he should return to Baltimore, or ascertain the price of leather there, and give further directions concerning it. During all the time the business was conducted at Washington in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant, and there disposed of by him.

The following are the paper writings offered in evidence, to which the testimony of Thomas Rice refers:

315*] *No. 1. Balance due by James D. Barry to Thomas Foyles on settlement, say sixteen hundred and forty dollars seventy-five cents, up to this date, say April 5th, 1817:

\$1,640.75.

EDMOND RICE.

No. 2. Amount of hides and skins received of Mr. Thomas Foyles from the 1st of April, 1817, to this date, say December 27th, 1818:

| | |
|---------------------------------|------------|
| 755 hides at \$3.75 per hide, | \$2,831 25 |
| 10 sheepskins at 50 cents each, | 5 00 |
| 7 calfskins do., at \$1 each, | 7 00 |

\$2,843 25

January 13th, 1819.

EDMOND RICE.

No. 3. Amount of hides and skins received of Mr. Thomas Foyles from the 2d of February, 1819, to 2d of December, 1819:

346 hides, at \$3.75 each, \$1,297 50

EDMOND RICE.

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion.

A verdict was found for the plaintiff below, Peters 1.

the judgment on which has been brought into this court by writ of error.

In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account he is charged on his *assumpsit* for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a transaction with himself. The court attaches no importance to this variance, because when the attachment was discharged, by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in court as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment.

Considering the case as it is made out in the pleadings, the defendant in the Circuit Court is charged, on his original liability, for a transaction of his own. Edmond Rice having been manager of the whole concern for the proprietors of the tan-yard in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides received by him in the course of business. The papers Nos. 2 and 3 purport, on their face, to be an account of transactions of this description. The only objection made to them is, that instead of the journal of hides delivered *on each day, the manager [*316 has given, at considerable intervals, the total amount of hides received from the last preceding settlement up to that time. We are not aware of any principle which can make such a general certificate less binding than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment; and we perceive no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors.

The paper No. 1 is more questionable. It does not purport to be given for hides received at the tan-yard, nor does it express the items which constitute the charge; but it is said to be the balance due from James D. Barry (in whose name the business was conducted) "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tan-yard; and it does not appear that he had authority to give it on any other account. It is an additional circumstance, of no inconsiderable weight, that the account closes on the 5th of April, 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances combined were, we think, sufficient to justify the submission of this paper, also, to the jury.

The next objection to the admission of these papers is, that the plaintiff in the Circuit Court has failed to prove that Robert Barry was one of the proprietors of the tan-yard while the business was conducted in the name of James D. Barry.

The evidence on this point was given by Thomas Rice, and has been already fully stated. We think the testimony of a partnership was

very strong. It could not, with propriety, have been withheld from the jury.

The question on which the plaintiff in error most relies remains to be considered.

This suit is brought on a partnership transaction against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration?

Although it has been held from the 36 H. VI., ch. 38, that a suit against one of several joint obligors might be sustained, unless the matter was pleaded in abatement, yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted, upon the ground of a supposed variance between the contract laid and that which was proved. This distinction was overruled by Lord Mansfield, in the case of *Rice v. Shute* (5 Burn, 2611). The **317*** same point was afterwards *adjudged, in *Abbott v. Smith* (2 W. Black., 695), and has been ever since invariably maintained. The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial.

The course of decisions, since the case of *Rice v. Shute*, has been so uniform that the principle would have been considered as too well settled for controversy, had it not lately been questioned by a judge, from whose opinions we ought not lightly to depart.

That judge supposed that if the defendant had no notice in the previous stage of the proceedings which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defense at the trial.

But the declaration never gives this notice where the suit is brought against one, only, of the partners. He is always proceeded against as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The cases cited by Mr. Sergeant Williams, in note 4, on the case of *Caleb v. Vaughan* (1 Saund., 191, n. 4), shows conclusively that the want of notice has never been considered, since *Rice and Shute*, as justifying this exception to the evidence at the trial.

We think there is no error, and the judgment is affirmed.

Cited—12 Pet., 331; 13 Pet., 311; Abb. Adm., 381.

318*] *PETER DOX, GERRIT LA GRANGE, AND ISAIAH TOWNSEND, Impleaded with GERRIT L. DOX, *Plaintiffs in Error*, v.

THE POSTMASTER-GENERAL OF THE UNITED STATES, *Defendant in Error*.

Official bond of postmaster—laches and responsibility of Postmaster-General.

The act of Congress, for regulating the postoffice department, does not, in terms, discharge the ob-

ligors, in the official bond of a deputy-postmaster, from the direct claim of the United States upon them, on the failure of the Postmaster-General to commence a suit against the defaulting postmaster, within the time prescribed by law. Their liability, therefore, continues. They remain the debtors of the United States. The responsibility of the Postmaster-General is superadded to, not substituted for, that of the obligors. [323]

The claim of the United States upon an official bond, and upon all parties thereto, is not released by the laches of the officer, to whom the assertion of this claim is intrusted by law. Such laches have no effect whatsoever on the rights of the United States, as well against the sureties as the principal in the bond. [325]

THIS case was brought up from the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, upon a certificate of the judges of that court, that they disagreed on certain points, set forth in the certificate.

The cause was commenced in the District Court of the United States, for the Northern District of New York, and removed by writ of error to the Circuit Court.

The following were the points of disagreement:

1st. Whether the District Court had jurisdiction of the cause.

2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond set forth in the record.

3d. Whether the said bond, from the facts so found or admitted by the pleadings, or appearing on the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged.

The original suit was commenced in the District Court, in August, 1823, and the plaintiff declared in debt, on a bond, in the penal sum of \$6,000, executed on the 1st of January, 1816, by Gerrit L. Dox, Peter Dox, Gerrit La Grange, and Isaiah Townsend; conditioned for the faithful performance of the duties of postmaster, at Albany, by Gerrit L. Dox.

The declaration alleged two breaches of the condition of the bond:

1. That said Gerrit L. Dox did not, at any time between the *first day of January, [*319 1816, and the first day of January, 1817 (he being, during the whole of that time, postmaster as aforesaid), render any accounts of his receipts and expenditures, according to the condition of said bond; but utterly neglected so to do.

2. That after the date of said bond, and more than three months previous to the commencement of the suit, there came to the hands of said Gerrit L. Dox, as such postmaster as aforesaid, the sum of \$6,000 for postages, over and above commissions, &c., which he had not paid over to the Postmaster-General; but had refused so to do, although often requested, &c.

Gerrit L. Dox, the principal obligor, pleaded separately three pleas:

1. *Non est factum*, and tendered an issue.
2. To the first breach, that he did render true

NOTE.—As to bonds of postmasters and official bonds, see note to *Postmaster-General v. Early*, 12 Wheat. 136. As to liability of sureties on official bonds, &c., see note to *United States v. Giles*, 9 Cranch, 212.

accounts of his receipts and expenditures as such postmaster, &c., and tendered an issue.

3. To the second breach, that he had paid to the Postmaster-General all the moneys he had received, over and above his commissions, &c., and tendered an issue.

Issues were joined on these pleas as tendered.

The defendants, Peter Dox, Gerrit La Grange and Isaiah Townsend, the sureties of said Gerrit L. Dox, pleaded six pleas:

1. *Non est factum*, and tendered an issue.

2. To the first breach, that Gerrit L. Dox did render true accounts of his receipts and expenditures, &c., and tendered an issue.

3. To the second breach, that the said Gerrit L. Dox had paid to the Postmaster-General all the moneys he had received over and above his commissions, &c., and tendered an issue.

4. To the second breach, that they executed the bond as sureties; that Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the Postmaster-General, knowing there were sureties, did not open an account against Gerrit L. Dox, and make any claim and demand on him for the moneys received by him as postmaster, until the first day of July, A. D. 1821; at which time, the Postmaster-General did open an account against, and claim and demand of said Gerrit L. Dox, the sum of \$3,041.35; that Gerrit L. Dox, at the time of his removal from office, was solvent, and able to pay his debts, and continued so for three years, and until the first day of July, 1819; and that after the first day of July, 1819, and before the first day of July, 1821, to wit, on the first day of January, A. D. 1820, he became insolvent and still continues to be insolvent. This plea concluded with a verification.

320*] 5. To the second breach, that they executed said bond as sureties for said Gerrit L. Dox; that said Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the Postmaster-General, well knowing that they were sureties for Gerrit L. Dox, and that Gerrit L. Dox had neglected and refused to pay over to the Postmaster-General the balance due from him at the end of every quarter while he was such postmaster, did not commence a suit against said Gerrit L. Dox for his neglect and refusal to pay, until August, in the year 1831, at which time a suit was commenced against him and his sureties, on the bond in question; that Gerrit L. Dox was solvent at the time of his removal from office, viz., on the first day of July, 1816, and continued so for three years, and until the first day of July, A. D. 1819; and that after the first day of July, 1819, and before the first day of July, 1821, viz., on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea also concluded with a verification.

The plaintiff took issues on the first, second, and third pleas of the sureties, as they were tendered; and to the fourth, fifth, and sixth pleas, respectively, he replied that said Gerrit L. Dox was not solvent at the time of his removal from office, nor did he continue to be solvent for the space of three years thereafter, or any part of said time; nor did he, on the first day of January, 1820, or at any other time after the first day of July, 1819, become insolvent; and thereupon issues were joined.

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The issues were tried at the May session of the court, in the year 1824. All the issues were found for the plaintiff, except those joined on the fourth, fifth, and sixth pleas of the sureties, which were found in favor of said sureties; the breaches assigned, having been found to be true, as above stated, the damages on them were assessed at \$6,000.

After the verdict, and at the same session of the court, a motion was made on behalf of the said Postmaster-General, for judgment in his favor, notwithstanding the verdict against him, on said fourth, fifth, and sixth issues with the sureties, and judgment given for the said plaintiff.

The case was argued, on the part of the plaintiffs in error, by *Mr. Samuel A. Foot*, of New York, and by *Mr. Wirt*, Attorney-General of the United States, for the Postmaster-General.

Mr. Foot.

This suit was instituted to recover a balance due to the United States by Gerrit L. Dox, as postmaster at Albany, in New York. Gerrit L. Dox was appointed postmaster in January, 1816, and was removed from office in July, 1816. The breaches assigned were: 1. Not rendering accounts as postmaster.

*2. Not paying over moneys he ought [*321 to have paid.

The issues upon all the pleas put in by Dox alone, and by him and his sureties together, were found for the plaintiff below; the only questions in the case, arise on the fourth, fifth, and sixth pleas, put in by the sureties only. The District Court held these pleas to be immaterial, and gave judgment for the Postmaster-General.

It is admitted, that since this suit was commenced, cases have been decided in this court which bear upon the question whether the neglect of the officers of the government to proceed against a debtor to the public will discharge the sureties. (9 *Wheat.*, 720; *The United States v. Kirkpatrick*, 9 *Ibid.*, 720; *The United States v. Vanzandt*, 11 *Ibid.*, 184.) But the principles settled in these cases, are not entirely applicable to this. The law of the United States relative to the postoffice establishment, makes it the duty of the Postmaster-General to file, every six months, in the treasury department, a transcript of the balances due from the postmasters, and to sue for the same; and if he omits so to do, the balances are to be charged to the Postmaster-General, and to be collected from him. Thus the Postmaster-General becomes himself a debtor to the government, for the amount of the delinquency of every postmaster; unless he has taken measures to collect the same; and he may use the name of the government for the purpose. This suit is, therefore, for the use of the Postmaster-General, as he had neglected to proceed against Gerrit L. Dox, for six years; and the sureties are entitled, against him, to the benefit of his laches. This case is different from those referred to; and the plaintiff, who had a verdict in his favor on the fourth, fifth, and sixth counts, is entitled to the presumptions, that the Postmaster-General was charged with the balances due by Gerrit L. Dox, and that he has paid the same to the United States. In the case of the *Postmaster-*

General v. Early (12 Wheat., 136), the court is understood to have said that if this suit had been brought for the Postmaster-General only, the jurisdiction could not have been sustained. Here, the Postmaster-General is the only person beneficially interested. If the United States were the parties really interested, a special averment should have been made; and the general formal averment in the declaration is not sufficient. The Postmaster-General is the guarantee of the debt to the United States; he could not be a witness in the case, and the suit should have been stated to be for his use; and then the jurisdiction would have been at an end.

2. Are the issues found for the plaintiff in error material? If they are, the district judge erred in giving judgment; if they are not, there should be a repleader. When the finding upon the issue does not determine the right, the **322*** court ought to award a repleader; unless it appears from the whole record, that by no manner of pleading, the matter in issue could have availed. (1 Burr., 381.) The fourth, fifth, and sixth pleas, aver the solvency of the principal of the bond, for a considerable time, during which suit was not brought; and by these laches the sureties have become involved. It is not necessary to show that the sureties applied to know what was the balance due to the United States. At common law, the question is, whether the case is such that the creditor might have been injured or have lost by it. The case of *Laro v. The East India Company* has some application to the principles claimed in this case. (4 Ves., Jun., 824.)

The issues in the fourth, fifth, and sixth pleas, were material, as the solvency of Gerrit L. Dox was of the highest importance to the sureties.

Mr. Wirt, Attorney-General, having, upon the authority of a private statement of the facts, made to him by the counsel of the plaintiffs in error, explained why the suit for a delinquency in 1816 was not instituted until 1823, thus vindicating the Postmaster-General from the imputation of laches, proceeded:

The case is a plain one in favor of the Postmaster-General. All the material issues are found for him.

1. That it was the bond of the obligees.
2. That the principal in the bond did not render an account.
3. That he did not pay over moneys received by him.

The District Court considered the fourth, fifth, and sixth pleas, immaterial, and gave judgment for the plaintiffs, *non obstante veredicto*. If these pleas were really immaterial, the judgment so given was correct. (2 Archibold's Practice, 239; 1 Chitty's Pleadings, 634.)

If the Postmaster-General did not open an account with Gerrit L. Dox, the postmaster at Albany, or bring a suit according to law, would the sureties be absolved? This question has been already settled in this court. The provisions of the law are directory to the Postmaster-General; but they create no contract with the deputy-postmaster, or his securities, that he shall open an account, and institute a suit, in case of delinquency. The case of *The United States v. Vanzandt* (11 Wheat., 184) was one of great hardship; but the securities were held answerable upon the principles stated.

The finding of the jury on the second plea, establishes that no account was rendered by the postmaster; and, therefore, the plaintiff below had no materials to make out an account. The provisions relative to opening of accounts, had been held to be for the use of the United States, and for the direction of their officers, and with which others have nothing to do. Whether these provisions will be ***323** enforced, depends, and properly, on the discretion of the executive.

The question of jurisdiction should have been brought forward in the form of a plea. There is no averment that the Postmaster-General was asserting this claim for himself.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was instituted against Gerrit L. Dox, a deputy-master, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the Court for the Northern District of New York, and was removed, by writ of error, into the Circuit Court, sitting in the Southern District of New York, composed of the associate justice of this court, and the judge of the Southern District. On the hearing, the judges were divided in opinion upon three questions; which have been certified to this court:

1st. Whether the District Court had jurisdiction of the cause.

2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond so given by them, as set forth in the record.

3d. Whether the said bond, from the facts found, or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged.

1st. The question first to be considered, respects the jurisdiction of the court. The difficulties which were believed to attend it, when this cause was adjourned, have been removed by the opinion of this court, in the case of the *Postmaster-General v. Early* (12 Wheat., 136).

In that case, the question was fully considered, and deliberately decided. The time which intervened between the default of the officer, and the institution of the suit, exceeds the time prescribed by the act of Congress in that case as well as this. Consequently, the circumstances of the two cases are, in this respect, precisely the same. But the counsel for the deputy-postmaster says, that this point was not brought into the view of the court, and has not been considered. The opinion of the court, undoubtedly, did not take a view of the question, whether the Postmaster-General possessed such an interest in the cause, that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation. The act of Congress for regulating the postoffice establishment, does not, in terms, discharge the obligors from the direct claim of the United States on them, on the failure of the Postmaster-General to commence a suit against the *defaulter, within the time it prescribes. ***324** Their liability, therefore, continues. They re-

main the debtors of the United States. The responsibility of the Postmaster-General himself, is superadded to, not substituted for, that of the obligors. The object of the act is to stimulate the Postmaster-General to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the act been to favor the sureties, its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the superadded responsibility of the Postmaster-General cannot affect the reasoning on which the jurisdiction of the court was sustained, in the case of the *Postmaster-General v. Early*.

The second question proposed for the consideration of the court, is whether, on the facts appearing in the record, the sureties are discharged from their obligations.

The breaches assigned, are:

1st. That Gerrit L. Dox failed to render accounts of his receipts and expenditures, as deputy-postmaster.

2d. That he had failed to pay over the moneys he had received, over and above his commissions, &c.

The defendant pleaded, 1st. *Non est factum*. 2d. That Gerrit L. Dox did render true accounts, &c.; and 3d. That he did pay over the moneys he received. The issues joined on these pleas were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants; and which state, in substance, that Gerrit L. Dox was removed from his office on the 1st day of July, 1816. That the Postmaster-General did not open an account against him, and make any claim and demand on him for the moneys received by him, as postmaster, until the 1st day of July, 1821. That at the time of his removal from office, he was solvent and able to pay his debts, and continued so until the 1st day of July, 1819, after which he became insolvent, and continues to be so. These pleas also state, that the Postmaster-General, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him, as postmaster, at the end of every quarter, &c., did not commence a suit until August, 1821.

These facts, placed on the record without explanation, must be admitted to show a gross neglect of duty on the part of the Postmaster-General. Does this neglect discharge the sureties from their obligations?

The condition of the bond is broken, and the obligation has become absolute.

Is the claim of the United States upon them **325** released by the laches of the officer, to whom the assertion of that claim was intrusted?

This question, also, has been settled in this court.

The case of *The United States v. Kirkpatrick et al.* (9 Wheat., 720), was a suit instituted on a bond, given by a collector of direct taxes and internal duties, under the act of 22d July, 1813, ch. 16. The act required each collector to transmit his accounts to the treasury monthly; to pay over the moneys collected quarterly; Peters 1.

and to complete his collection, pay over the moneys collected to the treasury, and render his final accounts within six months from the day on which he shall have received the collection list from the principal assessor. In case of failure, the act authorizes and requires the Comptroller of the Treasury, immediately, to issue his warrant of distress against such delinquent collector, and his sureties. The comptroller did not issue his warrant of distress according to the mandate of the law; and this suit was instituted four years after such warrant ought to have been issued.

The court left it to the jury to decide whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants; the judgment on which was brought before this court by writ of error.

The counsel for the defendant urged that laches might be imputed to the government, through the negligence of its officers; but this court reversed the judgment, declaring the opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained in law. "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities." It was further said, that the provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection; and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle "that the mere laches of the public officers, constitutes no grounds of discharge in the present case." The same question came on to be again considered in the case of *The United States v. Vanzandt*, (11 Wheat., 184.)

This was an action of debt brought up on a paymaster's official bond, against one of the sureties. The act for organizing the general staff, and making further provision for the army of the United States, "makes it the duty of the paymaster to render his vouchers to the Paymaster-General, for the settlement of his accounts;" and if he fail to do so, for more than six months after he shall have **326** received funds, the act imperatively enjoins "that he shall be recalled, and another appointed in his place." The paymaster had failed to comply with the requisites of the law; after which the Paymaster-General, instead of obeying its mandate, by removing him, placed further funds in his hands. The Circuit Court instructed the jury, that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds, so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict was also brought before the court by a writ of error, and was reversed.

The counsel for the defendant contended: that this case differed from *The United States v. Kirkpatrick et al.*; but the court said:

"The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster, was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle, that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates; as firmly as the decisions of this court can fix it. We think they decide the question now under consideration.

The third question is, whether the bond can, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January, 1816, the postmaster was removed from office on the 1st day of July, in the same year; and this suit was instituted in August, 1821. But little more than five years intervened between the time when the sum due from the principal in the bond was ascertained and the institution of the suit. The presumption of payment has never been supposed to arise from length of time in such a case, even between individuals; much less, in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time, is evidence to be laid before the jury on the plea of payment. The pleas on which this presumption is supposed to arise, not only do not allege payment, but presuppose that payment has not been made, which failure [327*] they ascribe to the laches of the Postmaster-General. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the court to decide, whether the bond had been "otherwise discharged," is understood to be a repetition of the second question, and to be answered in the answer given to that question.

This court is of opinion that it be certified to the Circuit Court of the United States for the Southern District of New York:

1. That the District Court had jurisdiction of this cause.
2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record.
3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

The cause came on, &c. On consideration whereof, this court is of opinion: 1. That the District Court of the Northern District of New York had jurisdiction of the said cause. 2. That the sureties to the bond on which the said suit was instituted are not exonerated or discharged from their liability on the said bond, by the facts appearing on the record, and ad-

mitted by the pleadings, or found by the jury. 3. That the said bond cannot, from the facts found or admitted by the pleadings, or appearing by the record, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. All which is directed to be certified to the Circuit Court of the United States for the Southern District of New York, in the second Circuit.

Cited—8 How., 106; 8 Wall., 274, 275; 18 Wall., 663; 2 Curt., 625.

*JAMES ELLIOTT, THE YOUNGER, [*328
BENJAMIN ELLIOTT, ANDERSON
TAYLOR, REUBEN PATER, PATSEY
ELLIOTT, AND WILFORD LEPELL,

v.

THE LESSEE OF WILLIAM PEIRSOL,
LYDIA PEIRSOL, ANN NORTH, JANE
NORTH, SOPHIA NORTH, ELIZABETH
F. P. NORTH, AND WILLIAM NORTH,
Defendants in Error.

*Evidence—practice—decisions of state courts—
jurisdiction—deed of feme covert—recording of
deeds—alteration of record.*

A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore in her deposition that the facts stated in the letter had been frequently mentioned by her husband, in his life-time, is legal evidence; as is also the deposition of the witness in a question of pedigree. [337]

The rule of evidence, that in questions of pedigree the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted. [337]

In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written, stating the pedigree of the claimants, was not considered as excluded by the rule of law which declares that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. [337]

Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. [338]

The privy examination and acknowledgment of a

NOTE.—Hearsay evidence as to pedigree, or facts of family history.

In inquiries into events which happened a long time ago, and beyond the memory of living witnesses, hearsay is admitted; as, in questions of pedigree, the declarations of deceased members of the family, entries in family Bibles or other books, recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in family mansions, or preserved in family, and the will of an ancestor, though found cancelled, and not known to have been proved or acted upon, if it appear to have been treated as a paper relating to the family. (3 Bac. Abr., 630; Tit. Evidence, (K.); Higham v. Ridgway, 10 East., 120; 4 Camp., 401;

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deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. [338]

In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these States, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued. [338]

By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky, at her separation from Virginia, and is understood never to have been repealed. [339]

The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. [339]

It is the construction of the act of 1810, that the 329*] clerks of the County *Court of Kentucky have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. [339]

What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial, whether there be an acknowledgment or privy examination in form or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. [340]

A deed from *Baron and feme*, of lands in the State of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife; was indorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows:

"Attest, J. M'Kenney, Jun., clerk."

"Woodford county, ss.

"SEPTEMBER 11th, 1813.

"This deed from James Elliott, and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

"JOHN M'KENNEY, JUN., C.C.C."

Held, that subsequent proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect or give validity to the deed. [340]

If the court of a State had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition that the jurisdiction of a State Court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States. [340]

Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. [340]

The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings. [340]

The jurisdiction and authority of the courts of Kentucky are derived wholly from the statute law of the State. [341]

The clerk of Woodford County Court has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. [341]

WRIT of error to the Circuit Court of Kentucky.

William Peirsol, and Lydia Peirsol, his wife, Ann North, Jane North, Sophia North, Elizabeth F. P. North, and William *North, [*330 citizens of Pennsylvania, heirs of Sarah G. Elliott, commenced their action of ejectment against James Elliott, the younger, et al., the plaintiffs in error, in the Circuit Court for the District of Kentucky, to recover the possession of 1,200 acres of land, part of 2,000 acres patented to Griffin Peart.

The plaintiffs proved, that, upon the division of the whole body among the heirs of Griffin Peart, the 1,200 acres in contest was allotted to Sarah G. Peart, one of the heirs, and that she was seized thereof in severalty. Sarah G. Elliott, formerly Peart, she having intermarried with James Elliott, died about 1822, without issue; Francis Peart, and Le Roy Peart, brothers of Sarah Elliott, died shortly before her, also without issue. The boundaries of the 1,200 acres, and the possession by the defendants, was not controverted.

The plaintiffs below claimed the premises, as the heirs of Sarah G. Elliott, formerly Sarah G. Peart; and they sought to establish their heirship by the deposition of Mrs. Braugh, widow of Robert Braugh, who swears that the letter annexed to her deposition, addressed to William Peirsol, Philadelphia, is in the handwriting of her deceased husband. She also

Bull. N. P., 233; Goodright v. Moss, Cowp., 594; Vowles v. Young, 13 Ves., 143; Douglass v. Sanderson, 2 Dall., 116; 1 Yeates, 15; Winder v. Little, 1 Yeates, 152; Lessee of Lilly v. Kintzmill, 1 Yeates, 28; Raborg's Adm'x v. Hammond's Adm'r, 2 Harr. & G., 42; Lewis v. Marshall, 5 Pet., 470, 476; Collins v. Grantham, 12 Md., 440; Clara v. Ewell, 2 Cranch, C. C., 208; North Brookfield v. Warren, 16 Gray, 171; Doe v. Davies, 10 Q. B. Abb. Trial Ev., 93; Russell v. Jackson, 22 Wend., 276; Cowan v. Hite, 2 A. K. Marsh., 238; Shuman v. Shuman, 27 Penn. St., 90.)

Declarations of persons not members of the family, if known to have been intimately acquainted with the family, may be received. (Gilbert's Ev., 112; 3 Term R., 723.)

Proof by one of the family that a younger brother of the person last seized had many years before gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, has been admitted as good *prima facie* evidence of such person's death without lawful issue. (Doe v. Griffin, 15 East., 293.)

Evidence of hearsay may be given to prove a pedigree. The declarations of persons uninterested- Peters 1.

ed, and who are then dead, admissible. (Strickland v. Poole, 1 Dall., 14; Stein v. Bowman, 13 Pet., 209.)

Declarations of servants and intimate acquaintances are not admissible in questions of pedigree, but only those of kindred. (Johnson v. Lawson, 2 Bing. R., 86.)

The facts of family history which may be proved by hearsay from proper sources are the following:

Birth: North Brookfield v. Warren, 16 Gray, 174; Am. Life Ins. Co. v. Rosenagle, 77 Penn. St., 507, 516.

Living or survival: Johnson v. Pembroke, 11 East., 204.

Marriage: Canjolle v. Ferrie, 23 N. Y., 90; Cunningham v. Cunningham, 2 Dow., 482, 511; Commonwealth v. Stump, 53 Penn. St., 132; Hill v. Burger, 3 Bradf., 432, 437; Lyle v. Ellwood, 11 Moak's Eng., 702.

Issue or want of issue: People v. Fulton Fire Ins. Co., 25 Wend., 208; King v. Fowler, 11 Pick., 302.

Death: Masons v. Fuller, 45 Vt., 29; 1 Tayl. Ev., 570, sec. 572.

The times, either definite or relative of those facts: Doe v. Rawlins, 7 East., 290; Webb v. Rich-

states that she frequently heard him speak of his family connections, and has always understood from him that the late Mrs. Mary North, formerly Mary Peart, and the late Mrs. S. G. Elliott, were cousins, both on the side of the father and mother; and that the statements in the letter correspond with the other statements she heard him make upon the subject of the pedigree of the two ladies; which letter proves the present plaintiffs to be the only heirs of Mrs. Sarah G. Elliott, at the time of her death. Other depositions were read to the same effect.

On the 12th of June, 1813, James Elliott, and Sarah G. Elliott, executed a deed, by which the premises in question were expressed to be conveyed to Benjamin Elliott, under whom the plaintiffs in error claimed to hold the same.

The defendants below moved the Circuit Court to instruct the jury, that the evidence adduced by the plaintiffs to establish their heirship to Sarah G. Elliott was insufficient, and that the same ought to be excluded. The court refused so to do; but, on the contrary, instructed the jury, that the said evidence, if believed by the jury, was *prima facie* testimony that the lessors of the plaintiffs were the legal heirs of the said Sarah Peart, *alias* Sarah G. Elliott.

In relation to the deed of 12th June, 1813, to Benjamin Elliott, it was contended below that Sarah G. Elliott never did execute the same, in the manner described and required by law, and that the fee-simple estate of Mrs. Elliott did not pass thereby. The provisions of the law **331*** relative to the privy examination *of a *feme covert*, by the officer, the clerk of the court, or in open court, and to the recording thereof, were alleged not to have been complied with; and consequently the estate of Mrs. Elliott did not pass, by the conveyance, to Benjamin Elliott. It was also claimed, on the part of the plaintiffs in error, that if a privy examination and acknowledgment were made, it was not recorded; and unless recorded, no title passes to divest the title of the *feme covert*. The Circuit Court decided this point in favor of the defendants in error; and the case was brought up, upon a bill of exceptions.

Mr. Wirt, Attorney-General, for the plaintiffs in error.

1. The letter of Mrs. Ann Braugh to William Peirsol is not evidence. Although the declarations of members of families are evidence in questions of pedigree, yet this rule is not uni-

versal, and it does not apply when higher evidence can be obtained. (3 Stark. Evid., 1099, 1011; 3 Marshall, 321.)

The letter was written with a view to, or under the influence of, the approach of this suit; *post litem motam*, and such evidence is not admissible. (3 Starkie, 1102, 1104.)

2. As to the admissibility of the deed to Benjamin Elliott, and the alleged defect of the acknowledgment of the *feme covert*, Sarah G. Elliott.

1. The Circuit Court of the United States was not competent to inquire into the acts of the court of the State of Kentucky, before which the proceedings relative to the acknowledgment were entertained. This is not done by the Courts of King's Bench, of England, in reference to the proceedings of Ecclesiastical Courts, or Courts of Common Pleas. The Circuit Court could look at nothing but the record from the State Court, and could not inquire in what mode the certificate had been made. But, if this could be done, there were materials enough for the purpose.

The examination of the *feme* was made according to the provisions of the law, but it was not at the time fully stated by the clerk so to have been made. He took the acknowledgment, and the court, subsequently, did no more than fill up the record of what had been actually done, from the testimony of the facts before them. This was done by virtue of the powers which courts have exercised, to correct their records at a subsequent period. (4 Mad., 371; 12 Mad., 384; 2 Stark., 1132, 1156, 1182; 3 Bulst., 114; 8 Coke, 162; Palmer, 509; Rolle's Rep., 272; 2 Saund., 289; Raymond, 39, 209; Sidf., 70; Salkeld, 50; P. L. 13; *Ibid.*, 50; Ld. Ray., 695; Cr. Eliz., 435, 459, 677; 2 Rolle's Rep., 471; Hob. 327; Rolle's Abridg. 209, 210; 2 Jones, 212; Gwl. Bacon, 197, note; Pigot's Recov., 218; Douglass, 134; 1 H. Blk., 238; Barnes, 216; 2 N. Y. T. R., 139; 4 Hen. & Mun., 498; 3 Call., 221, 233; 3 Hen. & Mun., 449.)

*2. The clerk of the court, who took [***332** the acknowledgment, acted as the ministerial agent of the court, and he acts as if he was in court. This act was, therefore, in the power of the court. But if the clerk had the powers of a court in reference to taking acknowledgments of deeds, the authorities cited, showing the rights of courts to correct errors, apply

ardson, 42 Vt., 465; Bridger v. Huett, 2 Fost. & F., 35. Relative age or seniority: Johnson v. Pembroke, 11 East., 504.

Name: Monkton v. Att.-Gen., 2 Russ. & M., 158. Relationship generally, and its degree: Doe v. Randall, 2 Moore & P., 20, 26; Vowles v. Young, 13 Ves., 147; Webb v. Richardson, 42 Vt., 465; Chapman v. Chapman, 2 Conn., 350.

The place of residence when proved for purpose of identification: Cuddy v. Brown, 78 Ill., 415; Shields v. Boucher, 1 DeGex & Sm., 40; Doe v. Randall, 2 Moore & P., 20; Abb. Trial Ev., 91.

See, also, on this subject, North Brookfield v. Warren, 16 Gray, 174; Primm v. Stewart, 7 Tex., 178; Westfield v. Warren, 3 Halst., 249; Stonvenal v. Stephens, 26 How. Pr., 244; Morewood v. Wood, 14 East., 330; Sprigg v. Moale, 28 Md., 497, 509.

The declarations must be those of deceased members of the family, legally related by blood or marriage to the family whose history the fact concerns. (1 Tayl. Ev., 576, 579, 571; Emerson v. White, 29 N. H., 491; Doe v. Randall, 2 Moore & P., 20; Scott v. Ratcliffe, 5 Pet., 81; Waldron v. Tuttle, 4 N. H., 371, 378; Emerson v. White, 29 N. H., 491; Chapman v.

Chapman, 2 Conn., 347; Greenleaf v. Dubuque R. Co., 30 Iowa, 301; Webb v. Richardson, 42 Vt., 465; Alexander v. Chamberlain, 1 Thomp. & C., 600.)

Hearsay, general repute, traditional evidence, ancient writings, physicians' record of birth, &c., admissible in proof of pedigree, death, marriage, &c. (Jackson v. Cooley, 8 John., 128; Jackson v. Boneham, 15 John., 226; Jackson v. Brower, 18 John., 37; Jackson v. King, 5 Cow., 237; Russell v. Jackson, 22 Wend., 277; People v. Fulton Fire Ins. Co., 25 Wend., 205; Canjolle v. Ferrie, 26 Barb., 177; Leggett v. Boyd, 3 Wend., 376; Arms v. Middleton, 23 Barb., 571; Jackson v. Etz, 5 Cow., 314; Barnet v. Day, 3 Wash. C. C., 243; Bondereau v. Montgomery, 4 Wash. C. C., 186; Stein v. Bowman, 13 Pet., 209; Barnet v. Day, 3 Wash. C. C., 243; Seerist v. Green, 3 Wall., 744; Jewell v. Jewell, 1 How., 210; 17 Pet., 213; Scott v. Ratcliffe, 3 Pet., 81; Seerist v. Green, 3 Wall., 744; Fisher v. Carter, 1 Wall., Jr., C. C., 69; Nelson v. Hall, 1 McLean, 518; Beard v. Talbot, Cooke, 142; Matter of Hall, 1 Wall. Jr. C. C., 85; Chamberlain v. Chamberlain, 71 N. Y., 423; Kobbe v. Price, 14 Hun, 55; McCarty v. Terry, 7 Lans., 236; McCarty v. Deming, 4 Lans., 440.)

to his acts; and if such were his powers, the interference of the court, in this case, was surplage.

Mr. Wickliffe, for the defendants in error.

1. The assumption of the power to correct his errors by the clerk of the court, was a nullity in Kentucky, according to the established laws and decisions there. (Hard. Rep., 171, 172.) The laws of Kentucky, relative to taking acknowledgments of deeds, have undergone many modifications; but the law and practice now is, for the clerks to take the acknowledgment and the privy examination of a *feme covert*; and in this they act independent of the courts, and not under their authority; nor have the judges of the courts any power to interfere with their acts or proceedings, in relation to such acknowledgment.¹ The authorities cited **333*** to show the right and practice of courts to correct errors or omissions, do not apply. As to the laws of Kentucky, relative to this subject, there was cited the act of Assembly of 1795. (1 Littel, 595.) The Circuit Court did not, in this case, inquire how the acts or proceedings of the Court of Kentucky had been performed, but whether the laws of the State, on the subject-matter, had been complied with.

2. The facts of the case, as stated in the record, show that the testimony of Mrs. Ann Braugh was not liable to the objection that it was given *post litem motam*; as to the operation of evidence, *post litem mortem*, he cited, Cowper, 594; 14 East, 331; 3 Starkie, 1105.

Mr. Justice TRIMBLE delivered the opinion of the court:

This is an action of ejectment, brought in the Circuit Court for the District of Kentucky, by the lessors of the defendant in error, and against the plaintiffs in error, who were defendants in the court below.

The lessors of the plaintiff, in that court,

1.—By the kindness of Mr. Wickliffe, the reporter has been furnished with the following abstract of the present laws of Kentucky, relative to the execution of conveyances by non-residents, and by husband and wife. (Laws of Kentucky, chap. 278, 1796):

If the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite,* of the sealing and delivering of the writing before any court of law, or the mayor, or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court, to be recorded within eight months after the sealing and delivering, shall be as effectual as if it had been in the last-mentioned court.

Conveyances by husband and wife, how to be executed, &c.

Sec. 4. When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily, and apart from her husband, by one of the justices thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, "to be then shown and explained to her," and wishes not to retract it, and shall, before the said court, acknowledge the said writing, again shown to her, to be her act; or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered

claimed the land in controversy, as heirs-at-law of Sarah G. Elliott, formerly Sarah G. Peart, deceased; who, in her life-time, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliott and Sarah G. Elliott, his wife, in her life-time, to Benjamin Elliott, and a deed reconveying the land from Benjamin Elliott to James Elliott.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the court, in overruling motions made by the defendants for instructions, &c., and in granting instructions to the jury, moved by the *plaint- [**334** iff, in the progress of the trial, and, a verdict and judgment having been rendered against the defendants, they have brought the case before this court by writ of error.

The bill of exceptions states, "that upon the trial of this case, the plaintiffs read as evidence a patent from the Commonwealth to Griffin Peart, dated the 1st of May, 1781, covering the land in controversy (which patent is made part of the bill of exceptions) and sundry depositions, taken and filed in the cause (also made part of the bill of exceptions); and proved that, upon a division of the land granted to Griffin Peart, by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seized thereof in severalty; that the said Sarah G. Elliott died, before the institution of this suit, about the year 1822, without issue; and that the defendants were in possession of the land, allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury, that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and

by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment; the wife being examined privily, and apart from her husband, by those commissioners, shall declare that she willingly signed and sealed the said writing, "to be then shown and explained to her by them," and consenteth that it may be recorded; and the said commissioners shall return, with the said commission, and thereunto annexed, a certificate under their hands and seals, of such privy examination by them, and of such declaration made, and consent yielded by her; in either case, the said writing acknowledged, also, by the husband, or proved by witnesses, to be his act, and recorded, together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower, thereby intended to be conveyed or released, but be as effectual for every other purpose as if she were an unmarried woman.

If out of the United States.

Sec. 5. If the dwelling of the wife be not in the United States of America, the commission, to examine her privily, and take her acknowledgment, shall be directed to any two judges or justices of the peace of any court of law, or to the mayor, or other chief magistrate of any city, town, or corporation, of the county in which the said wife shall dwell, and may be executed by them in the same manner as a commission directed to two justices in the United States of America; and the certificate of the judges or justices of such court, or the certificate of such mayor, or chief magistrate, authenticated in the form, and with the solemnity by them used in other acts, shall be as effectual as the like certificate of the justices in the United States of America.

*—Three witnesses—by a previous section of the law.

that the same ought to be rejected; but the court refused so to instruct, or to exclude the evidence; and, on the contrary, instructed the jury that the said evidence, if believed by them, was *prima facie* evidence that the lessors were the legal heirs of the patentee, Griffin Peart, &c. To which opinion of the court, in all its parts, the defendants except.

The defendants then gave in evidence the deed of conveyance from Sarah G. Elliott and her husband, to Benjamin Elliott (dated the 12th day of June, 1813), for the land in contest, and the deed from Benjamin Elliott, to the said James, together with all the indorsements upon, and authentications annexed to the first-mentioned deed; which indorsements and authentications are in the following words and figures, to wit: "Acknowledged by James Elliott and Sarah G. Elliott. September 11th, 1813.

Attest—J. MCKINNEY, JR., Clerk."

"Woodford County, set.

September 11th, 1813.

This deed, from James Elliott, and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

JOHN MCKINNEY, JR., C. W. C. C."

"Woodford County, set.

November County Court, 1823.

"On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court, by the indorsement on the deed from James Elliott and wife, to him, under date of 12th June, 1813, and by parol proof, that said **335***] deed was acknowledged *in due form of law by Sarah G. Elliott, before the clerk of this court, on the 11th of September, 1813; but that the certificate thereof was defectively made out: It is ordered, that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon said certificate was directed to be amended, so as to read as follows, to wit:

"Woodford County, set.

September 11th, 1813.

This day, the within-named James Elliott, and Sarah G. Elliott, his wife, appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined, privily and apart from her husband, did declare, that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office.

Attest—JOHN MCKINNEY, JR.,

C. W. C. C.

It was proved by John MCKinney, a witness examined on the part of the defendants, that the indorsement made on the back of the deed, from Elliott and wife, to Benjamin Elliott, in these words, to wit, "Acknowledged by James Elliott and Sarah G. Elliott. September 11th, 1813.

Attest—J. MCKINNEY, Clerk,"

was in the handwriting of the said clerk of the Woodford County Court, and was the min-

ute made by him at the time said deed was acknowledged; and it was also proved, that the certificate of the acknowledgement and recording of the said deed, indorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed, that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed; that he knew what his duty required in such cases, and that the acknowledgement and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given conducing to prove that, in point of fact, the said deed from Elliott and his wife was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said MCKinney, upon cross-examination, further proved, that after the said deed and certificate of the acknowledgement *there- [***336** of, had been recorded, and in the life-time of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgement thereof, by Elliott and wife, as they were then upon the record; which copy the plaintiff gave in evidence; that after the death of Mrs. Elliott, application was made to him, by the counsel of the defendants, to alter the certificate of the acknowledgement of the deed from Elliott and wife to Benjamin Elliott, so as to state her privy examination; but which he declined. It was also proved that the deed had remained in the possession of the clerk from the time of its first acknowledgement till after the certificate ordered by the County Court was made upon it.

After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs' counsel, instructed the jury that the parol evidence which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose; that a privy examination and acknowledgement of a *feme covert*, so as to pass or convey her estate, could not, legally, be proved by parol testimony, but by record; and that although they might believe, from the parol evidence, that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all proper explanations given to her; yet, it constituted no defense to the action, unless such privy examination had been duly certified and recorded.

The court further instructed the jury that the certificate of the acknowledgement of said deed, by Elliott and wife, and the after certificate, by order of the County Court, of her privy examination, were not sufficient, in law, to pass her estate; because, the first shows no privy examination, and the County Court had no jurisdiction to order the second to be made. To all which opinions, and decision of the court, the defendants except, &c.

It is argued, by the learned counsel in this court, that the motion of the defendants to exclude the evidence adduced on the part of the

plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this court has not put the question on the ground that taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them down from the patentee, through Sarah S. Elliott, who was seized thereof in severalty.

We have, however, reviewed the evidence with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here is **337*** that a part of the *evidence was incompetent and inadmissible. It is said that so much of the depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition, were incompetent, and ought to have been rejected; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence as incompetent. The argument admits of several answers deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions in relation to the defendant's deed, can by no fair construction be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants; and to use the language of the bill of exceptions, it was the plaintiff's evidence "touching the derivation of the title of the lessors of the plaintiff," which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed; and when we come to consider the defendants' title, after the deed was introduced, it will appear that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were, therefore, harmless. We are not prepared to admit that Mrs. Braugh's letter, on the subject of the family pedigree, proved by her evidence, and made part of her deposition, was not competent evidence to be left to the jury upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree, and several branches of the family, for about seventy years.

The rule of evidence, that in questions of pedigree the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted. But it is argued that this rule is qualified by this exception, that declarations, made *post litem motam*, cannot be given in evidence; and it is insisted this case comes within the exception; for although no suit had been commenced, yet a controversy had arisen, or was expected to arise.

We doubt the application of the exception to this case. A controversy had arisen, or was expected to arise, between the heirs of Mrs. Elliott and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear that any controversy had arisen, or was expected to arise, about who were her heirs. The *lis mota*, if it existed, was not, who were heirs, but Peters 1.

whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any positive *opinion on this point, as other grounds [***338** exist upon which the motion was rightfully overruled.

It is conceded that the defendants' counsel had a right to move the court below to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent; but it is not admitted that he exercised that right. It does not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence, as objectionable, and moved the court to exclude it. But on the contrary, resting his case upon the assumption that the whole evidence of the plaintiffs, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole, or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done on the ground of incompetency, unless the whole was incompetent, which is not pretended; the court was not bound to do more than respond to the motion in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said, the evidence, taken all together, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incomplete, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so. There is, therefore, no error in the decision of the Circuit Court, overruling the motion of the defendants; nor in the instructions given to the jury upon that motion.

We now proceed to an examination of the questions arising out of the instructions given to the jury, on the motion of the plaintiffs, in relation to the deed of James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, set up by the defendants in their defense.

The general question involved in the first instruction, is, can the privy examination, and acknowledgment of a deed, by a *feme covert* so as to pass or convey her estate, be legally proved by parol testimony? We hold that they cannot.

By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely void *ab initio*.

In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and in those States, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

*The Virginia statute of 1748, ch. 1st, [***339** after making provisions to enable *femes covert* to convey their estates by deed, upon acknowledgment and privy examination, according to prescribed forms, in the 7th section, has these words: "Whereas, it has always been adjudg-

ed that where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The 8th section enacts and declares, "That the law herein shall always be held according to the said judgments, and shall never hereafter be questioned, &c."

This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1796 (sec. 1, Litt. Laws, p. 569), provides for the privy examination and acknowledgment of *femes covert* in open court, and where they cannot conveniently attend; authorizes a commission to issue to two justices to take and certify the acknowledgment and privy examination; and declares that "in either case, the said writing acknowledged by the husband, and proved by witnesses to be his act, and recorded, together with such privy examination and acknowledgment, &c., shall not only be sufficient to convey or release any right of dower, &c., but be as effectual for every other purpose as if she were an unmarried woman."

The 1st section of this act authorizes clerks of the County Courts, General Court, and Court of Appeals, to take, in their offices, the acknowledgment or proof of the execution of deeds, and to record them, upon acknowledgments or proofs, so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes covert*.

But, by a subsequent statute, clerks are authorized to take, in their offices, the "acknowledgment of all deeds, according to law." And the act of 1810 (4 Litt. Ky. Laws, 165), which authorizes the clerk of one county to take and certify the acknowledgment of a deed to be recorded by the clerk of another county where the land lies, &c., declares that "if the due acknowledgment, or privy examination of the wife, &c., shall have been taken, &c., by the clerk receiving the acknowledgment of the deed, &c., and that being duly certified with the deed, and recorded, shall transfer such wife's estate, &c.," as fully as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded.

It is by construction of these last recited laws that the clerks are held in, Kentucky, to be authorized to take the acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands.

The Kentucky statutes, above recited, show clearly that the Legislature of that State has never lost sight of the principle declared by the **340*** Virginia statute of 1748: "That when any deed has been acknowledged, by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs."

What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment, or privy examination in fact or not; if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiffs' motion, to manifest its entire correctness. It was "that the first certificate of the acknowledgment and recording of the deed of Elliott and wife, was not sufficient in law to pass her estate; because, it showed no privy examination of the *feme*."

The last instruction given by the court to the jury presents a question of more difficulty. It is "that the after certificate, made by order of the County Court, of her privy examination, is insufficient, in law, to pass her estate; because the County Court had no jurisdiction or authority to order the said second certificate to be made."

It is argued, that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not.

We agree that if the County Court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the County Court could not be questioned, when its proceedings were brought, collaterally, before the Circuit Court. We know nothing in the organization of the Circuit Courts of the Union which can contradistinguish them from other courts in this respect.

Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over ***341** a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

It is well known that the jurisdiction and authority of the County Courts of Kentucky are derived wholly from the statute law of the State. In argument we were referred to no statute which was supposed, either in terms or by fair construction, to confer upon the County Court any supervising or controlling power over the acts of the clerk in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed none such exists. No such supervising and controlling power can result to the court from the general relations which exist between a court and its clerk; for in this case the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him upon his own judgment and responsibility. We think, therefore, with the Circuit Court, that the County Court had no jurisdiction or authority to order the after certificate of Mrs.

Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel, is, that the order of the County Court may be disregarded; and the amendment considered as an amendment made by the clerk of his own authority, and that the clerk was authorized to amend his own certificate and record at any time.

It would be difficult to maintain that the second certificate, or amendment, as it is called, could rightfully be regarded as the clerk's own act, independent of the order of the County Court; it appearing that he refused to do the act until the order was made. But be it so.

Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of opinion he had not.

We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

If a clerk may, after a deed, together with **342*** the acknowledgment *or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

The doctrine that a clerk may, at any time, without limitation alter the record of the acknowledgment of a deed made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.

It is the opinion of this court that there is no error in the judgment and proceedings of the Circuit Court, and the same are affirmed, with costs.

Aff'g, 1 McLean, 13.

Cited—2 Pet., 168; 6 Pet., 97; 10 Pet., 478; 13 Pet., 511; 14 Pet., 600, 602, 627. 628; 2 How., 343; 3 How., 648, 762; 6 How., 38; 8 How., 541; 18 How., 25, 503; 11 Wall., 669; 18 Wall., 467; 1 McLean, 224; 4 McLean, 445, 446; 6 McLean, 204; 1 Story, 553; 2 Ware (Da.), 240; 1 Biss., 270; 3 Biss., 271; 1 Woods, 281; 4 Wash., 190; 2 Curt., 156; 1 Cliff., 437; 5 Sawy., 498; 3 McAr., 147, 200.

343* *LESSEE OF THOMAS SPRATT, ANDREW, WILLIAM, SARAH, JACOB, CATHARINE, AND PIERCE SPRATT, Plaintiffs in Error,

v.

SARAH SPRATT, Defendant in Error.

District of Columbia—construction of Maryland enabling act—aliens.

The act of the Legislature of Maryland, passed 19th December, 1791, entitled, "An act concerning Peters 1.

the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. [349]

A foreigner who becomes a citizen is no longer a foreigner, within the view of the act. Thus, after-purchased lands, vest in him as a citizen, not by virtue of the act of the Legislature of Maryland, but because of his acquiring the rights of citizenship. [349]

Land in the county of Washington, and District of Columbia, purchased by a foreigner before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchasers, who were foreigners; and the capacity so to transmit those lands is given absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner. [349]

ERROR to the Circuit Court of the District of Columbia, for the county of Washington.

This was an action of ejectment brought by the plaintiff in error to recover several messuages, which he claimed by virtue of several demises made to him by Thomas Spratt, and others; the messuages all lying and being in the county of Washington, in the District of Columbia; against Sarah Spratt, the defendant in error, who was the widow of James Spratt, and who was in possession of the premises.

The following facts were agreed in the court below:

James Spratt, before the time of the demise laid in the plaintiff's declaration, died seized in fee-simple of the premises mentioned in the said declaration; that the lessors of the plaintiff are the legitimate brothers and sisters, of the whole blood, of the said James Spratt; and that the defendant was the lawful wife of said James Spratt, at the time of his death, and, as his widow, is still living.¹ Also, that the lessors of the plaintiff made a peaceable entry into the said premises, and executed to the plaintiff the lease mentioned in the said declaration *upon the premises, and that [*344 the plaintiff, being in possession of said premises by virtue of that lease, was therefore ousted by the defendant. That the said James Spratt, and the defendant, his wife, were natives of Ireland, of the United Kingdom of Great Britain and Ireland, and came to the United States of America in the year eighteen hundred and twelve, and before the eighteenth day of June, in that year; and continued to reside therein, and to cohabit as man and wife to the time of his death, which took place on the fourth day of March, eighteen hundred and twenty-four. That the said James Spratt, on the eleventh day of October, in the year 1821, was duly admitted and naturalized as a citizen of the United States, in the Circuit Court of the District of Columbia, and received a certificate of such naturalization in due form, according to the directions and conditions of the several acts of Congress, in such case provided; the said defendant then and there being his lawful wife, and as such, cohabiting with him as

1.—The act of Assembly of Maryland, No. 1786, ch. 45, entitled "An act to direct descents," provides: "If there be no descendants or kindred of the intestate to take the estate, then the same shall go to the husband or wife, as the case may be."

aforesaid. That the defendant, Sarah Spratt, did not, in her own person, comply with any of the directions or conditions required by the said acts of Congress, or any of them, or become in any manner admitted or naturalized as a citizen of the United States, otherwise than by the admission and naturalization of her said husband. That the lessors of the plaintiff are all natives of Ireland, and native born subjects of the King of the United Kingdom of Great Britain and Ireland; that only two of them, to wit, Thomas Spratt, and Pierce Spratt, ever came to the United States; both of whom came to the United States, and resided therein some years before the death of James Spratt, and that none of them were admitted or naturalized citizens of the United States. That James Spratt was not in any manner seized of, or entitled to any of the messuages or tenements in the declaration mentioned at any time before his said naturalization, except of the lot No. ——— in Square ———, which was duly bargained, sold, and conveyed by one Isaac S. Middleton, to the said James Spratt, in fee-simple, on the 11th day of January, 1821; and that all the rest and residue of the said messuages and tenements were purchased by the said James Spratt, and to him duly bargained, sold, and conveyed, in fee-simple, at various times in the year 1822 and 1823, after his said naturalization.

Upon this statement of facts the question of law which arose was as to the true construction of a statute of the State of Maryland, entitled, "An act concerning the territory of Columbia and the city of Washington," passed the 19th of December, 1791; by the 6th section of which it is provided as follows, to wit: "That any foreigner may, by deed or will to be hereafter made, take and hold lands within **345***] that part of the *said territory which lies within this State, in the same manner as if he was a citizen of this State, and the same lands may be conveyed by him and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this State; provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen."

It was contended on the part of the plaintiff that, according to the true construction of that statute, his lessors, who were the heirs and relations of the deceased, James Spratt, inherited all the lands and tenements of which he died seized in fee, and that the circumstance of James Spratt, who was a foreigner, having been naturalized before his death, could not alter the state of their right of inheritance, whether the lands were acquired before or after his act of naturalization.

Mr. Cox, for the plaintiff in error.

The term "foreigner," used in the law of Maryland, is not a technical word, nor has it received a technical definition, and in this respect it differs from "alien." Its true signification must therefore be ascertained by its use, and by a reference to the statute by which it is introduced.

It is probably derived from the Latin, *foris*, and *origo*, the Spanish, *foranto*, or the French, *forain*, and always refers to birth or origin. Alien is obtained from the Latin, *alienus*, and always refers to the present time. One may

cease to be an alien, but can never cease to be a foreigner.

In this sense it is employed in various acts of Congress, in the most precise and formal writings, and in ordinary parlance. This is the proper mode of ascertaining its meaning. (6 Bacon's Abr., 382, stat. 3; referred to acts of Congress, April 10, 1806; Story's laws, 100, 6; act of 1793, ch. 49; *Ibid.*, 282; August 2, 1813, ch. 567; *Ibid.*, 1370: 33d December, 1814; *Ibid.*, 1448-9.)

It has also another signification, equally distinct from alien. Ministers from abroad are called "foreign ministers" in the act of Congress relative to their compensation. The foreign trade and commerce of the United States are, in such terms, the subject of legislation. When applied to persons, it is the correlative of native. Naturalized foreigner is also in use.

The policy of the act was to encourage persons from abroad to purchase and settle in the district, and an opposite construction of the act, from that claimed by the plaintiff, would be in opposition to the purposes of the statute.

The right of everyone from abroad to purchase and transmit "to his heirs or relations," the real estate he may acquire, is conferred by positive statutes; it is absolute and vested, and not to be taken away by implication and inference. As to the *construction of stat- [**346** utes. Cited, 6 Bacon's Abr., 6, 380, 386, 388, 389.

In reply to Mr. Key and Mr. Jones, *Mr. Cox* argued:

In regard to the etymology, alien is derived directly from the Latin *alienus*, and has in common parlance the same signification; foreigner is a modern word derived either mediately or directly from *fores* and *origo*; whenever properly used, it refers to the origin and not to any present relation. One of the authorities cited employs the expression, "a foreigner who has been naturalized, and has become a denizen." It would be a solecism in language to use the phrase "an alien who has been naturalized;" to be equaled only by the language employed in one of the Maryland statutes which has been referred to, which in express terms calls foreigners who have been naturalized "natural born subjects."

It is admitted as a general rule that the naturalization refers back, and confirms a title previously acquired; but that is only when necessary to give validity to it. It can never relate back so as to preclude the party from appealing to the statute, as conferring upon him, originally, a valid title.

The conclusion which has been pressed—that the construction contended for would give to alien heirs privileges superior to those of natural born heirs—can derive no support from the law. They are only relieved from the disabilities incident to their alienage. A remote alien heir is not preferred to a nearer native heir.

It has been contended that inasmuch as the party by his naturalization lost his privilege of inheriting from them, the disability should be reciprocal. Such, however, is not the legal effect of becoming a citizen. An individual becoming naturalized under our laws, thereby loses no privilege of a foreign subject; he acquires no privileges, but loses none formerly possessed.

The law of Maryland merely preserves and legalizes inheritable blood between a citizen and a foreigner, and enables the child or heir, not naturalized, to inherit as if he were. The construction contended for makes it immaterial when the party became a citizen.

The policy of the two acts of the Legislature and the naturalization laws are harmonious and consistent. That if the latter is to induce aliens to become citizens, that of the former is to induce foreigners to purchase and reside in the district. The laws for naturalization ought not to be so construed as by remote reference to involve as a consequence the abrogation and annihilation of privileges vested in the latter as the proprietor of the land.

It is immaterial whether the privilege be considered as one *annexed to the person or attached to the land; the person can only have it as the proprietor of the land, and the land can only have it as being so held.

Mr. Key and Mr. Jones, for the defendant in error: The construction contended for cannot be given to the Maryland statute; and 2d. If it could, it does not affect the case. There is no real distinction between the term "foreigner" and "alien." Their derivation is from words of the same import, and they are used synonymously by writers of all descriptions. The rule of construction stated on the other side is a correct one, viz., looking at other laws in *pari materia*, and seeing how the term in controversy is understood in them. This rule has been applied on the other side, by looking to the laws of the Congress of the United States, where the word "alien" is generally used as opposed to "citizen." But this does not aid us in endeavoring to understand what the Maryland Legislature meant by the expression. For this purpose we must look to laws passed by the same Legislature.

Look, then, to the Maryland laws of naturalization. These cases are evidently meant only to apply to such persons as the counsel for the appellant contends are properly called "aliens." Such persons as are not citizens, but are to be made so. Yet the word used in all these laws is the same word we find in the statute we are now considering, it is "foreigner."

We come at the meaning of the expression by considering the object of the law. It is to enable foreigners to take and hold and transmit lands, who were under disability to do so. Who were they? not "foreigners," as understood on the other side; who, though born in a foreign country, might have become citizens here, and be under no disability—but "foreigners," as understood by the Legislature, who had not become citizens, and who were under the disability.

In the section in controversy the word is used in plain opposition to "citizen." The persons it intended to provide for are to take as if they were "citizens." By this construction of the word the law is made to operate in cases where its operation is necessary. The contrary construction makes it operate where its operation is unnecessary.

2d. What has this law to do with the case?

James Spratt becomes naturalized, becomes to all intents and purposes an American citizen. He purchases lands; how is he entitled to hold Peters 1.

them? By virtue of his citizenship. In the case before the court, it is true, he purchased one of the lots in question before his naturalization; it is well settled that his naturalization relates back and protects his title. It is contended he takes the land not as a citizen, which he is, but as a foreigner, which he is not. That is, a law made for a man *who could [*348 not take without the law, is to give right to him who had it without the law. A citizen shall not take as a citizen, but under a law made for foreigners. If he could take by either (and that is all that can be asked), yet must he not be held to take by the higher and better right, by the privilege acquired by his citizenship, as the heir-at-law takes by descent where he is devisee? It is said this is taking away a privilege from him; what privilege? It is said, that of transmitting to his alien heirs; that by the Maryland laws he had the right of holding lands and so transmitting them, and that it is taking away this right, to make him take as a citizen. But it is plain that if he takes and transmits the land as a foreigner, under the Maryland law, notwithstanding his naturalization, that he must then transmit it to his foreign heirs to the exclusion of his own children, born here. This must be the case according to all decisions upon the subject. for a citizen cannot inherit to a foreigner, nor a foreigner to a citizen. If he holds as a foreigner, foreigners, by this Maryland law, will inherit. Citizens, though his own children, can by no law inherit, if he holds as a foreigner. Here, then, would be the case of a citizen; and his own children, though citizens, are not to inherit to him. Can a citizen hold, in any other way than as a citizen? If he is a citizen, how can he take, why should he take, as a foreigner? only for the sake of these foreign relations, surely not for his own. They show this Maryland law, and want him to take by that, though he chose to take by citizenship. They show a law saying a man may take and transmit as a foreigner; but he may also choose to take by a better right, by citizenship, and he becomes naturalized. They ought to show a law saying he must take and transmit as a foreigner.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is an ejectment, brought in the Circuit Court for the District of Columbia, sitting in the county of Washington, for the recovery of several lots lying in the county of Washington, of which James Spratt died seized. The lessors of the plaintiff are aliens, the legitimate brothers and sisters of the said James; and the defendant, who is also an alien, is his widow; James died without issue.

James Spratt came into America in the year 1812, and became a citizen on the 11th of October, in the year 1821. He purchased one of the lots before he became a citizen, and the others afterwards. The title to the lots in controversy depends on the construction of an act of the State of Maryland, passed the 19th of December, 1791, entitled, "An act concerning the territory of Columbia, and the [*349 city of Washington." The 6th section provides "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within

this State, in the same manner as if he was a citizen of this State; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this State. Provided, that no foreigner shall, in virtue hereof, be entitled to any further, or other privilege of a citizen." The facts were stated in a case agreed, which was substituted for a special verdict. The Circuit Court gave judgment for the defendant, to which the plaintiff has sued out a writ of error.

The plaintiff contends that the word "foreigner," as used in the act, designates a person born in a foreign country, and that such person does not cease to be a foreigner by becoming a citizen of the United States. The words of the act, therefore, apply to him, although he becomes a citizen, and enable him to take and transmit lands to his alien heirs or relations.

The court is not of this opinion. The act is an enabling act, and applies to those only who could not take without it. It enables a foreigner to take "in the same manner as if he was a citizen." This language is entirely inapplicable to a citizen.

An act to enable a citizen to take lands "as if he were a citizen," would be an absurdity too obvious to escape the notice of the Legislature. We think, then, that a foreigner who becomes a citizen is no longer a foreigner within the view of the act. His after-purchased lands vest in him as a citizen, not by virtue of the act of the Legislature of Maryland.

The lot which he purchased while an alien, stands on different principles. This lot was acquired by a foreigner, under the act which was passed for the purpose of enabling him to acquire it. He took and held it under the law, and could transmit it as prescribed by the law. The act, after enabling him to take, adds, "and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this State." The capacity to transmit given by the act extends, in terms, to all lands acquired under the act.

The lands taken "may be conveyed by him," that is, by the taker, "and transmitted to his heirs or relations." This power of transmission is not restricted to his character as a foreigner, but belongs to him as a person taking lands under the act. The power of transmitting is connected with the power of taking, and is co-extensive with it. This power is within the words of the law; and the words which confer it are not inoperative, since they give a capacity which citizenship does not give—the capacity of transmitting to relations who **350*** are "foreigners." This capacity is given, absolutely, by the act; and is not, we think, affected by his becoming a citizen.

The objection urged by the defendant to this construction is, that it would perpetuate the title in aliens to the remotest times, because it attaches the privilege to the land, and not to the person.

We do not think the construction exposed to this objection.

The land passes to the heirs or relations of the said James Spratt precisely as it would have passed had he remained a foreigner. The capacity is not in the land, but in the person,

in relation to that land. It was in him when the land was purchased, and did not pass out of him, under the words of the law, by his becoming a citizen.

It is the opinion of the majority of the court that the Circuit Court erred in deciding that judgment ought to be rendered for the defendant. It ought to be reversed, and the cause remanded to the Circuit Court, with directions to enter judgment for the plaintiff for the lot which was acquired by the said James Spratt while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

This cause came on, &c. On consideration whereof, it is the opinion of this court that the said Circuit Court erred in deciding that judgment ought to be rendered for the defendant, and that the same ought to be reversed. Therefore, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that the cause be remanded to the said Circuit Court, with directions to enter judgment for the plaintiff for lot No. —, which was acquired by the said James Spratt while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

Cited—4 Pet., 409; 4 Otto, 777; 3 Cranch, C. C., 699.

***MONTGOMERY BELL. [*351**

Plaintiff in Error,

v.

**JAMES MORRISON, ANTHONY BUTLER,
AND JONATHAN TAYLOR, Defendants
in Error.**

*Depositions—statute of limitations—local
statutes—partnership.*

The authority given by the act of Congress of 24th September 1789, c. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. [355]

The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. [356]

It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to supply any defects in the taking the deposition. [356]

The statute of limitations in Kentucky, is substantially the same with the statute of 21 James II., c. 16, with the exception that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to in this case, upon the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a State, upon a like subject; for this belongs to the local State tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence. [359]

If the doctrines of the Kentucky courts, in the

NOTE.—As to statute of limitations and new promise, see note to *Wetzell v. Bussard*, 11 Wheat., 309.

construction of a statute of that State, are irreconcilable with the English decisions, upon a statute in similar terms, this court, in conformity with its general practice, will follow the local law, and administer the same justice which the State Court would administer between the same parties. [360]

The statute of limitations, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, should have received such support from courts of justice as would have made it, what it was intended, emphatically, to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. [360]

An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this court, in the case of *Wetzel v. Bussard* (11 Wheat., 309), "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional—it must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." [362]

If the bar of the statute is sought to be removed by the proof of a new promise, that promise as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. [362]

*If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission, of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay—if the expression be equivocal, vague, or indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways—they ought not to go to a jury as evidence of a new promise, to revive the cause of action. [362]

The decisions of the courts of Kentucky, giving a construction to the statute of limitations of that State, are in accordance with the principles which have been sanctioned by this court. Those decisions evince a strong disposition of the courts of Kentucky to restrict, within very close limits, any attempt to revive debts by implied promises resulting from acknowledgments or other confessions by parol. It is the duty of this court, in a case arising in Kentucky, to follow out the spirit of those decisions so far as the court is enabled to gather the principles on which they are founded. [363]

In the construction of local statutes, this court has been in the habit of following the judgments of local tribunals. [363]

The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained what the parties understood the balance to be, would not, by the courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove, *alunde*, any balance, however large it may be. It is indispensable for the party to prove, by independent evidence, the extent of the balance due to him, before there can arise any promise to pay it as a subsisting debt. [365]

The acknowledgment of a debt by one partner, after dissolution of the co-partnership, is not sufficient to take the case out of the statute, as to the other partners. [373]

A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner. [370]

After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. [373]

When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. [373]

THIS was a writ of error to the Seventh Circuit Court of the United States for the District of Kentucky, sued out by the plaintiff below; and the case was presented for the consideration of this court, upon a bill of exceptions, taken by the plaintiff in error.

An action of *assumpsit* was instituted against Charles Wilkins, Jonathan Taylor, James Morrison, Anthony Butler, and Isaac White, in 1823. The defendants on the 1st of March, 1810, by articles of agreement, under their respective hands and seals, entered into a partnership, for the purpose of manufacturing and vending salt, at Saline, near the Wabash, in the *then Illinois territory, under the [*353] firm of Jonathan Taylor & Co.; and the object of this suit is the recovery of about twenty thousand dollars, claimed to be due on the sale and delivery of eastings, to that value or amount. The evidence of the sale and delivery of the articles, and of their value, was complete; and the questions which were presented to the court, by the record, were: 1st. Upon the decision of the Circuit Court, against the admission of a deposition, which had been intended to be taken in conformity with the provisions of the act of Congress of the 24th September, 1789, c. 20, and in reference to the taking of which there was in all respects a compliance with the directions of the act, with the exception that the deposition was not certified to have been reduced to writing by the magistrate, or by the deponent in his presence; and, 2d. On the exclusion of certain testimony, and the validity of the plea of the statute of limitations, upon which plea the decision of the court having been in favor of the defendants, a verdict and judgment was rendered for them.

All the facts considered as proved in the case, and also the written and documentary testimony essential to a full understanding of the case, are stated at length in the opinion of the court, delivered by *Mr. Justice Story*.

The case, for the plaintiff in error, was presented to the court by *Mr. Rowan* and by *Mr. Benton*, and by *Mr. Jones* for the defendants.

For the plaintiff in error, it was stated:

1st. The court erred in excluding the evidence offered by the plaintiff, to take the case out of the statute of limitations.

2d. In rejecting the deposition of John Mockbee.

1. The conversation, proved by the deposition of Patterson Baine, took place in 1818–1819, and the writ was issued in August, 1820; and the language of Morrison, one of the defendants, is sufficient to repel the plea of the statute. He expressed his willingness "to settle with the plaintiff," but the books and papers of the concern were in the hands of Taylor. He said, "he was anxious that the plaintiff's account should be settled." "I know we are owing you." "I am getting old, and I wish to have the business settled." He proposed to give the plaintiff \$7,000.00, in satisfaction of the claim.

These acknowledgments are sufficient, on authority, to maintain this suit. The letters of Butler contain equivalent and similar expressions. The letter of Morrison has the same operation. (2 Camp., 11; 5 Binn., 573, 580, 582; 4 Jolins., 468; 2 T. R., 660.) *Lloyd v. Maund* (2 Taunt., 760), in which a new trial was granted, because the judge at *Nisi Prius* had not left to the jury, for their construction, a letter which contained an admission that something was due. All the cases go to establish the principle, **854*** that where an acknowledgment is proved, the jury are the proper judges of its effect. The court can only say, whether it is relevant to the subject-matter.

Where several are liable, the acknowledgment of one will take the demand out of the statute. (6 John., 267; 2 Bay. 533; 2 H. Bl., 340; 2 Doug., 652; 3 Camp., 32; 2 Camp., 11.)

Every partnership is, *quasi*, a corporation, and every individual in the firm a corporator, they having no power, by dissolution of the same, to affect the rights of creditors, and they continue a corporation until all their debts are paid. Every partner may maintain and give validity to the contract which was entered into during the partnerships. He does not make a new contract by a promise after the dissolution of the firm, but only continues the old one. The whole act, when one acts. There is no agency of one partner for another, but for the whole, where one acts. Second. The deposition of John Mockbee was taken according to all the essential requisites of the act of Congress. It is certified to have been taken in the presence of the magistrate, "and that it is in the deponent's handwriting;" and these circumstances show a conformity with the statute.

Mr. Jones, for the defendants in error.

The question in this case, is whether the statute of limitations shall be restored to its original meaning, or be reduced, as it formerly was in England, to a nullity. The cases erroneously suppose that the statute proceeds on a presumption of a debt. The rule should be that the acknowledgement should be such as, in itself, will support the claim, and thus render any evidence of the original debt unnecessary. The argument that the statute only prevents the remedy, is incorrect; if there is no remedy there is no debt.

The evidence does not show an acknowledgment of a debt, but expressions of a wish to buy peace; and if propositions were made for a settlement, they having been rejected, the transactions of the parties are still open. The original doctrine in England was that there should be a new consideration as well as an acknowledgment, but the more recent cases require an acknowledgment and an express promise to pay. (*Clementson v. Williams*, 8 Cranch, 72; *Wetzell v. Bussard*, 11 Wheat., 309.)

There are decisions upon this point in the State of Kentucky, whose statute is now to be construed. (*Hardin's Rep.*, 302; *Harrison v. Hanley*, 1 Bibb, 445; 2 Bibb, 285; 3 Bibb, 271.)

2. Whether the acknowledgment of a retired partner will bind the other partners. The acts of a partner bind the partnership during its continuance, because each partner is the agent of the firm. (*Whitcomb and Whiting*, 2

Doug., 625.) After *dissolution, payment to the out-going partner is invalid. (Montague on Partnerships, 127.) The acknowledgment of a partner to take a case out of the statute, is a new contract, and therefore cannot operate, if made after dissolution. (Montague on Part., 125, 127; Watson on Part., 448; *Jackson v. Fairbanks*, 2 H. Bl., 340; 1 Barn. & Ald., 463; Norris Peake's Evidence, 423; *Wood v. Braddick*, 1 Taunton, 104.)

Second. The deposition of John Mockbee was properly rejected. Depositions taken under the act of Congress are *ex-parte*, and the form established by law must be strictly complied with. The act requires that the deposition shall be written by the judge or justice taking it, or written by the witness in his presence. This cannot be inferred, and must be stated in the certificate.

Mr. Justice STORY delivered the opinion of the court:

This cause comes before us, upon a writ of error to the Circuit Court of the District of Kentucky. The original action was brought by the plaintiffs in error, against the defendants, on the 16th of August, 1820, to recover the value of certain iron castings, sold and delivered to them by the plaintiff. The defendants pleaded *non assumpserunt*, and *non assumpserunt* within five years (the latter being the time prescribed by the Kentucky statute of limitations, in cases of this nature); upon which pleas, the parties were at issue; and at the trial, a verdict was returned by the jury for the defendants; upon which, judgment passed in their favor. A bill of exceptions was taken to certain points, ruled by the Circuit Court at the trial; and the validity of these exceptions, has constituted the ground of the argument for the reversal, which has been insisted on in this court.

The first objection urged, is the exclusion of the deposition of a Mr. Mockbee, which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion is, that there was no proof by the certificate of the magistrate, or otherwise, that the deposition was reduced to writing in the presence of the magistrate. This is a point altogether dependent upon the construction of the act of Congress of the 4th of September, 1789, ch., 20, under the authority of which the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish that all the requisites of the law have been complied with, before such testimony is admissible. The act of Congress provides "that every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed, to testify the whole truth, and shall subscribe *the testimony by him or her giv- [**356** en, after the same shall be reduced to writing; which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the deposition, so taken, shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken; or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was giv-

en to the adverse party, be by him, the said magistrate, sealed up, and directed to such court; and remain under his seal, until opened in court."

Without doubt, the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. It is not denied that the reducing of the deposition to writing, in the presence of the magistrate, is a fact made material by the statute, and that proof of it is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate to justify the presumption that it was done. The certificate is in these words: "State of Tennessee, Dickson County, ss. At Charlotte, in said county, on the fourth day of July, 1822, before me, James M. Ross, justice of the peace, and one of the judges of the County Court of Dickson County; came, personally, John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned, and sworn, to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing, by him in his own proper hand." The certificate then proceeds to state the reason for taking the deposition, &c., in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate; and it is scarcely presumable that this was accidentally omitted. At all events, every word in the certificate may be perfectly true, and yet, the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it. And we think, in a case of this nature, where evidence is sought to be admitted, contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with. We are therefore of opinion that the deposition was properly rejected.

The more important question in the cause, is that relative to the evidence introduced to repel **357***] the plea of the statute of limitations. In the course of the trial, the plaintiff read to the jury certain articles of copartnership, made between the defendants in March, 1810, whereby the defendants entered into a joint trade and partnership, in the manufacturing of salt, at a place known by the name of the United States Saline, near the Wabash River, within the Illinois Territory, for the term of three years, then next ensuing, under the style of Taylor, Wilkins & Co. He also gave evidence, that large quantities of iron castings had been sold and delivered by him to the company, during the term of the copartnership. He then introduced the testimony of one Patterson Baine, who stated, "that some time in the year 1818, or 1819, the plaintiff, Bell, came to his house, in Lexington, and stated that he had again come up to endeavor to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's (one Peters 1.

of the defendants) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation, on the subject of the plaintiff's account against the Saline Company for metal furnished, which is not recollected by the witness. The witness recollects that Morrison stated that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor (one of the defendants), which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him good-bye, and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison, and returned with the witness to his house, where he remained until after breakfast on the next day; that shortly after breakfast, Morrison came to the house of the witness, and said to Bell (the plaintiff) that he was very anxious that his (the plaintiff's) account should be settled; adding, "I know we are owing you, and I am anxious it should be settled." He then mentioned to the plaintiff, that he (Morrison) was getting old, and did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff seven thousand dollars, and close the business. The plaintiff refused to take it, and they parted; that no account, or papers of any kind, were shown or produced by Bell, at the time of these conversations with Morrison; but he understood the conversations to relate to the claim for castings, furnished by him to the company of Taylor, Wilkins and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that "a half loaf was better than no bread." The plaintiff also introduced certain letters written by Morrison and Butler (two of the defendants) to him. The first was *a letter from Morrison, dated 2d of Octo- [**358** ber, 1814; and it contains, among others, the following expressions: "I wish whatever is due to you should be paid; I have once more to ask you to follow the advice I am about to offer, viz., to come up here, without delay (as Col. Butler may be soon ordered off), and I cannot believe your present suit will answer any purpose," &c. &c. "It is not our wish to keep from you, whatever may be your just due. We have sent for the company books, some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatley's being there, I have no doubt but your account can be adjusted; and that, more to your satisfaction than it ever can be from the result of your suit," &c. "I wish your account settled; and I have no hesitation in saying, on your coming here, it will be done." The next was a letter from Butler, dated 26th October, 1817, in which he informs the plaintiff that, on the 20th of November, Messrs. Morrison and Wilkins will be at Hopkinsville, "for the purpose of adjusting some of the affairs of the old Saline Company," &c.; and desires that he "will be present, in order that a settlement may be effected, if possible, of the account which you (he) set up against the company." The next is from Butler, dated the 8th of November, 1817, again mentioning the intended meeting on the 20th of November, "for the purpose of

adjusting our old account with you;" and he adds, "I hope, therefore, you will be at Hopkinstown, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious." The next is from Butler, dated 23d of October, 1818, in which he alludes to a complaint made by the plaintiff, of Butler's absence from home on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs, "about a day of meeting to adjust the account between the former Saline Company and yourself," and excuses himself for his absence. He adds, "I have now, sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, &c. If it would suit you to be at Frankfort, during the sitting of the Legislature, we might possibly come to some understanding on the subject." The next is a letter from Jonathan Taylor (one of the defendants) to the plaintiff, dated 13th March, 1818, in which he says: "I received a letter last Monday from Col. Butler, inviting me to attend an appointment with you at Hopkinstown, on the 26th of this month, for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we can make an arrangement, equally mutual, for the metal I may hereafter want, it can be **359** done." Other letters of Taylor were read in evidence, but they all bear date in the years 1811 and 1812.

It was further proved, that the plaintiff was present in 1814, when the Saline and improvements were delivered over to Bates, the succeeding lessee; and that the plaintiff was then apprized, that the term of the defendants, as lessees, had terminated. After the evidence on the part of the plaintiff was closed, the defendants' counsel moved the court to exclude the testimony of Patterson Baine, and all the letters bearing date within five years before the bringing of this suit, offered by the plaintiff, to show a promise on the part of the defendants, or any one of them, or any member of said firm or partnership, within five years next before the commencement of this suit; and the court so excluded from the jury the evidence of the said Baine, and all the letters dated within five years aforesaid, tending to prove a promise in five years, next before the commencement of this suit, by the defendants, or either of them, or any member of said firm or partnership, as prayed by the defendants' counsel; and decided, that "there was no sufficient evidence or admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise, in five years before the commencement of this suit, as would take the case out of the statute of limitations, or should be left to the jury, as conducing to that effect." To which opinion of the court the plaintiff filed his bill of exceptions; and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is, whether the evidence so excluded (supposing it to be, in all other respects, unobjectionable) was competent, in point of law, to have been left to the jury to infer a promise sufficient to take the

case out of the statute of limitations. The second is, whether, supposing it would be competent, in ordinary cases, the fact that it was the acknowledgment or promise of one partner, after the dissolution of the partnership, did not justify its exclusion, as incompetent evidence to bind the other partners.

The statute of limitations of Kentucky is substantially the same with the statute of 21 of James, ch. 16, with the exception that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to, upon the present occasion, as illustrative of the true construction of the statute, and, in this view, are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority, upon the construction of the statute passed by a State, upon the like subject; for this justly belongs to the local State tribunals, whose rules of interpretation must be pre-**[360]**sumed to be founded upon a more just and accurate view of their own jurisprudence than those of any foreign tribunal, however respectable. If, therefore, upon examination, it shall be found that the doctrines of the Kentucky courts, upon this subject, are irreconcilable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law, and administer the same justice which the State Court would administer between the same parties.

It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence, *aliunde*, to establish any debt, how-

ever large, and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute, must be, in a great measure, defective; and the statute virtually repealed.

The English decisions upon this subject have gone great lengths; greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and, in some instances, to an extent which is irreconcilable with any just **361***] principle. *There appears, at present, a disposition on the part of the English courts to retrace their steps; and, as far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition. In the recent case of *Bangs v. Hall* (2 Pick. Rep., 368), the principal cases were reviewed by the Supreme Court of Massachusetts; and it was held, that to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed—a doctrine, quite as comprehensive, has been asserted in the Supreme Court of New York. The subject was much considered in the case of *Sands v. Gelston* (15 Johns. Rep., 511), where Mr. Chief Justice Spencer, in delivering the opinion of the court, said, “that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute.” In consonance with this principle, the same court has held, that “if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defense, such an acknowledgment is wholly insufficient.”¹ In the case of *Clementson v. Williams* (8 Cranch, 72), this court expressed the opinion that the decisions on this subject had gone full as far as they ought to be carried, and that the court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case, an attempt was made to charge a partnership, by an acknowledgment made after its dissolution, by one of the partners, when an account was presented to him, that “the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself, and did not know of its being ever paid.” It was held, that this was not a sufficient acknowledgment to take the case out of the statute. The Chief Justice, in delivering the opinion of the court, said: “In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account. But this is not enough. The statute of limitation was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient to take the case out of the act, that the claim should be proved, or be acknowledged

*to have been originally just; the acknowledgment must go to the fact that it is still due.”

In the case of *Wetzell v. Bussard* (11 Wheat., 309), the subject again came before this court; and the English and American authorities were deliberately examined. The court there expressly held, that “an acknowledgment which will revive the original cause of action, must be unqualified and unconditional. It must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances, which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.”

We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed.

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries.

It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light in which it was viewed by English judges at an early period, as a beneficial law, on which the security of all men depends, we think its provisions ought not to be lightly overturned; and that no creditor has a right to complain of a strict construction, since it is only by his own fault and laches that it can be brought to bear injuriously upon him. And, if the early interpretation had been adhered to that nothing but an express promise should take a case out of the statute, [**363**] it is far from being certain that it would not have generally been in promotion of justice.

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky courts, upon the construction of their own statute of limitations, which, if they differed from those of other courts, would, as matter of local law, govern this court upon the present occasion. In the construction of local statutes we have been in the habit of respecting

1.—See also *Brown v. Campbell*, 1 Serg. & Rawle, 176; *Tries v. Boiselet*, 9 Serg. & Rawle, 128. Peters 1.

and following the judgments of the local tribunals.

The first, and leading case, is *Bell v. Rowland's Administrators*, in Hardin's Reports, 301. In that case, the defendant made an acknowledgment, "that he had once owed the plaintiff, but he supposed his brother had paid it, in Virginia (the place where the original transaction took place, in the year 1785); and if his brother had not paid it, he owed it yet." The court held that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise, only, where the party ought to promise; and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the court, which is drawn up with great cleanness and force, goes much further. The court said that the English decisions were not obligatory upon them, in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements, for the purpose of evading the statute, they must be disregarded. If the slightest acknowledgment; if strained, constructive acknowledgments and promises, are held sufficient, it must multiply litigation, produce endless uncertainty, and it is to be feared, a fruitful crop of perjuries.

Slight circumstances, and a man's loose expressions, would be construed into a full acknowledgment of the debt, when he himself neither intended to make, nor understood himself as making any acknowledgment at all. Instances of this sort are frequent in the books; but the example is too dangerous to be countenanced. And the court further declared, "upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable certainty, is, that in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute.

There was another point in the case, deserving of notice, *which was whether the court ought to have instructed the jury as to the law of the case, and then have left it with them to determine, whether an acknowledgment of the debt, and a promise to pay it, had been proved to have been made within the five years; upon which it was held, that it was competent for the court, either to do so, or (as it did in that case), taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, to instruct the jury as to the law arising upon those facts.

This case has never been departed from in Kentucky, and has been frequently recognized. In *Harrison v. Handley* (1 Bibb R., 443), the plaintiff, to take the case out of the statute, produced a witness, who swore "that some time in May or June, 1796, he presented an account to W. H. (the defendant), amounting to £250, or £260; that H. objected to certain articles in the said account; and after the said articles were stricken out of the account, H. then ac-

knowledged it was all right. The court below ruled that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the Court of Appeals. Mr. Chief Justice Bibb, in delivering the opinion of the court, adverted to the case of *Bell v. Rowland's Administrators*, and recognized its authority in the fullest terms. And after expressing a doubt whether an implied promise would not be barred by the statute, he proceeded to say: "Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise, contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time; not whether the debt was once an existing debt. That the law will argumentatively make it a debt, *in presenti*, if the party does not in his acknowledgment say it is not, or prove payment, it is a proposition that cannot be granted in opposition to the provisions of the statute. Where the limitation has run, to get clear of it, the whole burthen of proof is thrown on the plaintiff, to prove a good and subsisting debt, and a promise to pay within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay; there was no express acknowledgment of a then subsisting debt; there was no assent to pay. "H. then acknowledged the amount was all right," is too loose, vague and indefinite an acknowledgment to revive a transaction, and put it under investigation again, after the law had closed it. That the amount was right, could be true, and might well be acknowledged, if the articles had been truly noted, notwithstanding *the party might have [*365 paid it, or was unwilling to acknowledge it as a debt then subsisting; and that is the point to which an express acknowledgment should have been proved." This is certainly a very strong case to illustrate the rule adopted in Kentucky.

In *Gray v. Laveridge* (2 Bibb R., 284) it was proved on the trial that the party had admitted the justice of the account within five years, and that it might go in discharge of the interest due on a bond of the defendant, on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, not the amount thus acknowledged by the plaintiff. The court held that the acknowledgment did not go further than that the demand should be allowed in payment of the interest; and that so much as the party could show of a debt due to him not exceeding the amount of the interest then due, was taken out of the statute, and no further. In *Ormsby v. Letcher* (3 Bibb R., 269) it was decided that an agreement of the defendant within five years that a settlement made with a brother of the defendant should be subject to the examination of either party, did not take the case out of the statute. It may be inferred that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff, although the report does not so state. The court said: "This agreement does not contain an acknowledgment of a subsisting demand, and a promise to pay in consideration thereof." The language of this case, as well as that in *Harrison v.*

Handley, might lead to the impression that the court thought that an acknowledgment of a subsisting debt was not alone sufficient, but that there must be also a promise to pay the debt. But, perhaps it is more correct to construe it as importing no more than that there must be such an acknowledgment, coupled with circumstances, from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions which we have met with in the Kentucky reports on this point. They evince a strong disposition, in the courts of that State, to restrict, within very close limits, every attempt to revive debts by implied promises resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence in the case at bar resolves itself into two heads; first, whether the admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties **366** *understood the balance to be, is sufficient to take the case out of the statute and let in the plaintiff to prove, *aliunde*, any balance, however large it may be; second, if not, whether the admission, on the part of Morrison, of his willingness to pay \$7,000 and close the business, might (under all the circumstances) entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the Circuit Court.

In both of these views the ease is not without its difficulties; and the Kentucky decisions present no authority directly in point. The evidence is clear of the admission of an unsettled account, as well from the letters of Butler as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff, but as he had not the books he could not settle with him. If this evidence stood alone it would be too loose to entitle the plaintiff to recover anything. The language might be equally true, whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go further, and to establish, by independent evidence, the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise, but it requires other intrinsic aid before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands, after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due or some balance owing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question

here is, whether the law will imply such a promise, from language so doubtful and general. The language of the court, in *Harrison v. Handley*, was, that "mere loose expressions or vague acknowledgments will not suffice." We think that such a general admission of an unsettled account, and of an indeterminate debt, would, by the courts of Kentucky, be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassments. Was Morrison's offer of \$7,000, to close the business, the absolute admission of a debt to that amount, or a conditional promise *to pay that sum if the party would [**367** accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself that Morrison did not know the state of the partnership accounts, and had not the partnership books to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old, and was anxious for a settlement. His offer must therefore be deemed to be in the nature of a compromise, to pay the sum, if the plaintiffs would give a complete discharge of his claims; or, to use his own words, "and close the business." It may therefore be fairly deemed a conditional offer to pay a conjectural, not a known balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer, then, upon the clear text of the Kentucky, as well as the English, and of other American decisions, the case would not be taken out of the statute, unless the plaintiff had performed the condition.

But if this view of the case should be more doubtful than it seems to us to be, it still remains to consider whether the acknowledgment of one partner, after the dissolution of the co-partnership, is sufficient to take the case out of the statute, as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt, need not be inquired into; to maintain the present action, it must be binding upon all.

In the case of *Blair v. Huslering* (2 Vent., 151), where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not, three judges, against Ventris, *J.*, held that the plaintiff could not have judgment against the defendant who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the court or of any of the judges proceeded solely upon such a ground.

In *Whitcomb v. Whiting* (2 Doug. Rep., 652), decided in 1781, in an action on a joint and several note brought against one of the makers, it was held that proof of payment, by one of the others, of interest on the note and of part of the principal, within six years, took

the case out of the statute, as against the defendant who was sued. Lord Mansfield said, "payment by one is payment for all, the one acting virtually for all the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due." **368**]* This is the whole reasoning reported *in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very position constitutes the matter in controversy. It is true that a payment by one does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made.

The doctrine of *Whitcomb v. Whiting* has been followed in England in subsequent cases, and was applied to in a strong manner in *Jackson v. Fairbank* (2 H. Bl., 340), where the admission of a creditor to prove a debt, on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In *Clark v. Bradshaw* (3 Esp. R., 155), Lord Kenyon, at *Nisi Prius*, expressed some doubts upon it; and the cause went off on another ground. And in *Brandram v. Wharton* (1 Barn. & Ald., 463), the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion, used language from which his dissatisfaction with the whole doctrine may be clearly inferred. "This doctrine," said he,

"of rebutting the statute of limitations by an acknowledgment other *than that of [***369** the party himself, begun with the case of *Whitcomb v. Whiting*. By that decision, where, however, there was an express acknowledgment, by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others, to a debt, he may have actually paid it, he may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute, by means of an implied acknowledgment."

The English cases decided since the American revolution, are, by an express statute of Kentucky, declared not to be of authority in their courts; and, consequently, *Whitcomb v. Whiting*, in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

In the American courts, so far as our researches have extended, few cases have been litigated upon this question.¹ In *Smith Danor v. D. & G. Ludlow* (6 Johns. R., 267), the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given that the other partner was authorized to adjust all accounts; and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved that the plaintiff called on the partner, who pleaded the statute, before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute; and said, that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not, *of itself, be [***370** evidence of an original debt; for, that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident, from the cases of *Whitcomb v. Whiting*, and *Jackson v. Fairbank*; and it results necessarily from the power given to adjust accounts. The court also thought the acknowledgment of the partner setting up the statute, was sufficient of it-

1.—The reporter has been informed by Mr. Chief Justice Gibson, that at the December term, 1827, of the Supreme Court of Pennsylvania, the court decided, after full argument, that the acknowledg-

ment by a partner, after the dissolution of the partnership, will not take the debt out of the statute so as to make the other former partners liable. This case will be reported by Messrs. Sergeant & Rawle.

self to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him to settle the account. The correctness of the decision cannot, upon the general view taken by the court, be questioned. In *Roosevelt v. Marks* (6 Johns. Ch. Rep., 266, 291), Mr. Chancellor Kent admitted the authority of *Whitcomb v. Whiting*; but denied that of *Jackson v. Fairbank*, for reasons which appear to us solid and satisfactory. Upon some other cases in New York, we shall have occasion hereafter to comment. In *Hunt v. Bridgham* (2 Pick. R., 581), the Supreme Court of Massachusetts, upon the authority of the cases in Douglass, H. Blackstone, and Johnson, held that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. *Shelton v. Cocke* (3 Mumford's R., 191), is to the same effect; and contains a mere annunciation of the rule, without any discussion of its principle. *Simpson v. Morrison* (2 Bay's Rep., 533) proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt., Rep., 104, hereinafter noticed to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases, in other States; as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations, to assist our reasoning, and decide the case now as if it had never been decided before.

By the general law of partnership, the act of each partner, during the continuance of the partnership and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business; but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts; *and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained, by the express delegation of the whole authority to one of the partners.

The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean admitted by the whole partnership or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle

and authority; and if so, as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void, as to them.

There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit* on which an action can be maintained. It was this view of the matter which first created the doubt, whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome; and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts off as a support for the old. What, indeed, would seem to be decisive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the *debt? The [*372 plain reason is, that the promise is a new one, by or to the administrator himself, upon the original consideration, and not a revival of the original promise. So, if a man promises to pay a pre-existing debt barred by the statute, when he is able, or at a future day, his ability must be shown, or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment, but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute or as a conditional promise, which may depend upon the rules of pleading.

This very point came before the twelve judges, in the case of *Hyling v. Hastings* (1 Ld. Raym., 389, 421), in the time of Lord Holt. There one of the points was, "whether the acknowledgment of a debt within six years would amount to a new promise, to bring it out of the statute; and they were all of opinion that it would not, but that it was evidence of a promise." Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise; and that it is the new promise which takes the case out of the statute. Now, what is a new promise but a new contract? a contract to pay, upon a pre-existing consideration, which does not, of itself, bind

the party to pay, independently of the contract? So, in *Boydell v. Drummond* (2 Camp. R., 157), Lord Ellenborough, with his characteristic precision, said: "If a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived." And it may be affirmed that the general current of the English as well as the American authorities conforms to this view of the operation of an acknowledgment. In *Jones v. Moore* (5 Binney R., 573), Mr. Chief Justice Tilghman went into an elaborate examination of this very point, and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise; and he added, "I cannot comprehend the meaning of reviving the old debt in any other manner than by a new promise."

There is a class of cases, not yet adverted to, which materially illustrates the right and powers of partners after the dissolution of the partnership, and bears directly on the point under consideration. In *Hackley v. Patrick* (3 Johns. R., 536), it was said by the court that "after a dissolution of the partnership the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an **373***] account *should bind his copartners any more than his giving a promissory note, in the name of the firm, or any other act." And it was therefore held that the plaintiff must produce further evidence of the existence of an antecedent debt before he could recover; even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court, in *Malden v. Sherburne* (15 Johns. R., 409, 424), although it was admitted that, in *Wood v. Braddick* (1 Taunt., 104), a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence, *aliunde*, of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties, viz., the introduction of stale and dormant demands, of long standing and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the debt, as a debt, but are bound by the acknowledgment of the debt, as a promise, upon extrinsic proof. The doctrine in 1 Taunt., 104, stands upon a clear, if it be a legal ground: that as to the things past, the partnership continues, and always must continue, notwithstanding the dissolution. That, however, is a matter which we

are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is, that after a dissolution of a partnership no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action, whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to ***374** create a new cause of action, to revive a debt which is extinct, and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is, then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist after a dissolution of the partnership in any partner.

There is a case in the Kentucky Reports, not cited at the bar, which coincides, as far as it goes, with our own views; and if taken as a general exposition of the law, according to its terms, is conclusive on this point. It is the case of *Walker and Evans v. Duberry* (1 Marshall's Rep., 189). It is very briefly reported, and the opinion of the court was as follows: "We are of opinion that the court below improperly admitted as evidence against Walker the certificate of J. T. Evans, made after the dissolution of the partnership between Walker and Evans, acknowledging that the partnership firm was indebted to the defendant Duberry in the sum demanded in the action brought by him in the court below. It cites 3 Johns. Rep., 536; 3 Mumf. R., 191.

It does not appear what was the state of facts in the court below, nor whether this was an action in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted, that the acknowledgment of a debt by one partner after a dissolution is not evidence against the other. Whether the court meant to say, in no case whatever, or only when the debt itself was proved, *aliunde*, does not appear. Its language is general, and would seem to include all cases; and if any qualification were intended, it would have been natural for the court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt arises from the citations of 3 Johnson and 3 Mumford. The former has been already adverted to; and the latter, *Shelton v. Cocke et al.* (3 Mumf. R., 191), recognized the distinction asserted in 3 Johns. R. as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view, it leads to the most serious doubts, whether the State Courts of Kentucky would ever adopt the doctrine of *Whitcomb v. Whiting*, in Douglas; especially so, as the early case in

2 Vent., 151, carries an almost irresistible presumption that the courts at that time held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment that there is no error in the decision of the Circuit Court, and it ought to be affirmed.

375*] *It is, however, to be understood that this opinion thus expressed is not unanimous, but of the majority of the court; and as is apparent, from the preceding reasoning, it has been, principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

Judgment affirmed with costs.

Cited—3 Pet., 54, 128; 5 Pet., 618; 6 Pet., 92; 7 How., 704; 11 How., 393; 13 Wall., 256; 1 Otto, 169; 2 McLean, 90, 92; 4 McLean, 205, 384; 6 McLean, 193; Hemp., 592, 615; 2 Wood. & M., 135; 3 Cranch, C. C., 359; 4 Cranch, C. C., 531; Blatchf. & H., 89; Bald., 284; 2 Paine, 440; 1 Curt., 438.

376*] *THE MECHANICS' BANK OF ALEXANDRIA, *Appellants.*

v.

ADAM LYNN, *Appellee.*

Specific performance—chancery practice—power of Court of Equity.

A Court of Equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice, as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. [382]

If a bill charges the defendant with notice of a particular fact, an answer must be given without a special interrogatory to the matter. But, a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. [383]

When a judgment debtor comes into the court, asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant the prayer, upon such conditions as justice demands. [384]

APPEAL from the Circuit Court for the County of Alexandria.

The appellee filed his bill on the chancery side of the Circuit Court for the County of Alexandria, in the District of Columbia, against the Mechanics' Bank of Alexandria, to enjoin the bank from proceeding upon a judgment at law, which the bank had obtained against him, and upon which an execution had issued, and he had been taken and confined.

The bill stated that the judgment which had been obtained against the complainant was for what is called, according to the bank phrase, "an overdraft," amounting to \$1,573.85; and that after this judgment had been obtained, he had made a deed of trust to Thomas F. Mason, to secure the payment of his debts, and that this judgment against him was among the first to be paid; and also that the security provided in the deed was ample for that object.

The bill then states, that the complainant, after this deed had been made, entered into a settlement with the bank of the various claims which they had against him, and agreed with

them upon certain modes of payment of his debts, and among others, of the judgment of \$1,573.85 for the overdraft. That this \$1,573.85 was to be paid out of the trust fund conveyed to Mr. Mason; and as an evidence of it, the bill refers to the account stated in the written settlement, in which the defendant, Lynn, is charged with the judgment for the overdraft, and credited by "the security in deed to Mason for overdraft."

The bill alleges also, that in pursuance of this settlement the complainant carried into effect the terms of the said settlement, and that everything due from him to the bank was satisfied, *except the sum of \$3,700, which [**377**] was to be secured to the satisfaction of the bank; and that so far as respected this \$3,700, he had offered security, such as the committee of the bank had considered ample, and such as the bank ought to have accepted; but which they refused to accept.

The bill then alleges that notwithstanding this settlement and the fulfillment of it, on the part of the complainant, the bank had issued an execution against him upon the judgment for "the overdraft," and had confined him in the bounds of the jail under the execution, and prayed he might be relieved from his imprisonment, and that the bank should look to the security provided in the deed of trust to Mason, and to that fund only. Upon this bill an injunction was granted, and the complainant was released from his confinement under the execution.

The appellants filed an answer to this bill, and among other things stated that they had agreed upon a settlement with the complainant, of the various claims which the bank had upon him. That they were very desirous of securing the payment of these claims, and in order to effect the said settlement, they had given up to the complainant \$784.04; and had agreed to take his bank stock and property at prices above their value; and had also agreed to take their payment for "the overdraft" out of the trust fund in Mason's hands, provided they could have had the full benefit thereof. They admit that in pursuance of this agreement, the defendant Lynn did transfer to the bank his stock and lands, leaving nothing unpaid but the judgment for "the overdraft," and the sum of \$3,700, which was to have been secured to the satisfaction of the bank. They refer to the articles of agreement to show that the security to be given for this \$3,700 was to be such as was satisfactory to the board of directors; and the answer states that it never was secured to their satisfaction, and that no tender or offer of security was ever made, that ought to have been acceded to by the bank; and that the bank was right in refusing the security offered.

The answer also states that as to the judgment for the overdraft, it never was satisfied, and that the deed of trust to Mason was entirely inoperative, as to this debt, and was made upon such terms that the bank could not accede to them. That their cashier, immediately after the agreement had been entered into between Lynn and the bank, had called upon the trustee, Mr. Mason, to know whether the bank might expect payment from that fund; and was informed by him that one of the conditions of the

deed was, that the creditors accepting the benefit of the deed, should within six months of the date of it, release to Lynn all claims and demands which they had upon him; that this deed had been executed on the 16th November, 1820, **378***) and *that the agreement of Lynn with the bank had been executed on the 19th May, 1821, so that the six months had, in fact, expired before the said agreement had been made. The trustee, therefore, informed the cashier, that the bank was not entitled to any benefit under that deed, and that they could not reckon upon that fund for the payment of their said judgment.

The answer then states that the bank, finding they were not entitled to any benefit from the trust funds, and seeing no other means of payment from Lynn, had resorted to an execution upon their judgment, and he was accordingly taken in execution and remained in execution nearly a year, until it became necessary for him to take the oath of insolvency, and under these circumstances he obtained the injunction, and they prayed that it might be dissolved.

The deed of trust to Mason, bearing date the 16th of November, 1820, was filed as an exhibit with the bill of Lynn, the complainant. This deed has in it the following proviso, viz.: "Provided always, however, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatsoever, against the said Adam Lynn; and the period of six months shall be, and is hereby allowed them from the date of this instrument to come in, and elect and sign such discharge; and the dividend or share to which each and all of those who may refuse or neglect for the space of six months as above allowed, for that purpose, to sign and execute such discharge as aforesaid, shall go and be disposed of for the benefit of such of the aforesaid creditors as shall accept of the terms of this deed, and in the order above directed."

The agreement entered into between the defendant Lynn and the bank, was also made an exhibit with the bill. It bears date on the 29th of May, 1821, and so far as respects the matter in dispute is as follows, viz.:

ARTICLE 1st. That the account of A. Lynn, with the Mechanics' Bank be stated as follows:

| | |
|---|-------------|
| To A. Lynn's stock note, - - - - | \$15,360 00 |
| Mrs. Buckland and Mrs. Coryton's, - - - - | 125 00 |
| A Lynn's note indorsed R. Young, - - - - | 11,100 00 |
| Interest on do. to 4th May, 1820, - - - - | 1,356 00 |
| A. Lynn's note indorsed J. Gird, - - - - | 320 00 |
| Interest on do., - - - - - | 36 54 |
| Overdraw, - - - - - | 1,573 85 |
| Five protests, - - - - - | 8 75 |
| | <hr/> |
| | \$29,880 19 |
| By A. Lynn's stock, - - - - - | \$21,014 50 |
| Discount 10 per cent., - - - - - | 2,101 45 |
| | <hr/> |
| | \$18,913 05 |
| By Mrs. B. & Mrs. C. do., - - - - - | 357 50 |
| Discount 10 per cent. - - - - - | 35 75 |
| | <hr/> |
| | \$321 75 |
| Interest on 3553, difference between } stock and stock note, - - - - - | 434 00 |
| 123 acres of land at \$25, - - - - - | 3,087 50 |
| House and lot, - - - - - | 1,500 00 |
| Security in deed to Mason for overdraw, - - - - - | 1,573 85 |
| Balance, - - - - - | 4,049 98 |
| | <hr/> |
| | \$29,880 19 |

*ARTICLE 2d. The above balance, [***379** except \$349.98, say \$3,700 to be secured by A. Lynn to the satisfaction of the board, and to be paid in one, two, and three years.

Depositions were taken on the part of the bank, to prove that the committee of the bank who entered into the settlement with the defendant Lynn, were not authorized to decide upon the security which he had offered for the balance of \$3,700; and that they did not in fact agree to accept the security.

Upon the final hearing of the case in the Circuit Court, on the bill, answer, exhibits and depositions, the court ordered a perpetual injunction; and, to this decretal ordered an appeal was entered to this court by the Mechanics' Bank.

The case was argued by *Mr. Wirt*, Attorney-General, and *Mr. Swan*, District-Attorney, for the appellants, and by *Mr. Jones* and *Mr. Taylor* for the appellees.

For the appellants it was contended:

The deed from Adam Lynn to J. F. Mason does not appear to be recorded; no notice of its contents was given to the bank, nor does it appear that the bank knew of its terms at the time of settlement. As soon as the settlement informed the bank of the deed, application was made for the benefit of its provisions; and it was found, that by its terms the bank was excluded therefrom. 1. Because the period for executing a release had passed; and second, because the bank could not give a general release, as the debt of \$3,700 had not been secured. Equity will not enforce an agreement, when from circumstances subsequently discovered, it appears that the party who made the agreement was misled, or cannot receive under it, what, according to its terms, he expected to receive. (2 Sch. & Lef., 341). If the appellee meant to make use of the deed to Mason, he should have shown in his bill that the bank agreed to abide by it. This is not done, nor is it said by the appellee that the bank was knowing of its nature.

The debt of the appellee for "the overdraw," has never been paid; although the judgment for \$3,700 may, by the result of the proceeding upon the judgment, be satisfied; the overdraw remains due, unless the statement in the agreement as to it, shall release the claim of the bank on Adam Lynn and oblige them to look to the deed of Mason for payment. The bank cannot place itself within the terms of the provisions of that deed.

There is no evidence before the court that none of the creditors of Adam Lynn came in under the deed, and thus the fund to arise from that deed is closed against the bank forever. The effect of the perpetual injunction will be to prevent any of the debt for the overdraw being collected, and give to the appellee the *benefit of the concealment he practised [***380** towards the appellants.

Upon the nature, effects and power, of interrogatories in Courts of Chancery, cited, *Mitford's Pleading's*, 44; *Coopers Equity*, 12. The decisions of the courts of Virginia, 4 *Mumford*, 273, &c.

Mr. Jones and *Mr. Taylor*, for the appellee. The contract of the bank is not one between a creditor and a solvent debtor, having for its object on the one hand the security of the debt,

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and on the other, an extension of time for payment. But it is a compromise with an insolvent, of a debt, in part at least, disputed.

It may therefore be well supposed that the bank was willing to have sacrificed a part of its claim, or to have taken, as to part, an inadequate security to save the rest. The contract with Mason, approved by the board on the 29th of May, is in all its articles executory, except as to the provision for the overdraft, the only one now in dispute. As to that, if the bank is to be considered as having agreed to receive the deed to Mason as a payment of this claim, nothing further on the part of Lynn remained to be done; the deed was beyond his control.

The appellee has carried into effect all the executory part of the contract, he has transferred his stock, conveyed his land, and moreover executed his deed of trust from Young. The bank has obtained payment of the balance of the account of \$3,700, so that everything required of him by the bank has been done; they now reject the only stipulation which was particularly favorable to Lynn and onerous to them.

In deciding on the security to be offered for the \$3,700, the bank did not possess an arbitrary power; it was bound to act with good faith. If the security offered was sufficient, they were bound to have received it as satisfactory. Sufficient security was offered, and was approved of by the committee of the bank, and by the committee recommended to the board of directors of the bank.

This affords at least *prima facie* evidence that the security was adequate, and ought to have been received; it has been opposed by no evidence to negative this presumption.

But this inquiry is now unnecessary; the bank has by execution, not only enforced payment of the \$3,700, but they have enforced it with interest, with which, by the contract, Lynn was not chargeable.

The deed was received as an absolute payment. This may be inferred from the suspension of proceeding on their judgment from the 29th of May, 1821, the date of compromise, to July, 1823, and from other circumstances. And **381** more especially *from the terms of the deed, which annex the condition of a release to Lynn. If the bank accepted "the security in the deed to Mason" it must be in the terms of the deed. No fraud or concealment is charged on the complainant in the answer; the defendant must be presumed to be informed of the subject on which they were treating; they nowhere pretend that they were ignorant of the contents of the deed to Mason; and it may be fairly presumed, that to secure nearly \$29,000 they would be willing to take a doubtful, or even inadequate security for \$1,500. It does not appear that any creditors had accepted of the terms of the deed of trust to Mason, and if so, it was open to all, particularly by the very contract of 29th of May, to the bank.

Their own admissions in their answer show that they considered the arrangement still open; they say they require nothing but the complainant's order to his trustee. This order, so far as the complainant could give it, is given by the contract of 29th of May; so far as he is concerned the prosecution of this suit affirms the right of the bank under the deed of Peters 1.

trust. But, although the release may be a condition precedent, the time is not a part of the condition, but a qualification of it, from which a Court of Chancery, with the consent of the debtor for whose benefit it was introduced, may relieve. (Francis's Maxims, p. 61; max. xxii., Richmond edition; 1 Vernon, 260, 319.)

Mr. Justice THOMPSON delivered the opinion of the court:

Adam Lynn, the complainant in the court below, filed his bill for an injunction to restrain the Mechanics' Bank of Alexandria from proceeding upon a judgment which it had recovered against him at law for \$1,573.85. A perpetual injunction was decreed, to reverse which, the present appeal is brought.

The bill and answer contain many matters not necessary now to be noticed. The grounds upon which the application for an injunction was placed were, that on the 29th of May, 1821, a settlement was made between the parties of various matters, which had been for a long time in dispute between them, among which was the judgment now in question. In the account stated which formed the basis of that settlement, Lynn is charged with this judgment, which is there called "the overdraft," and credited by security in deed to Mason for the same. Upon this statement of the account there was a balance of \$3,700 found in favor of the bank, for which security was to be given. This may, however, be now laid out of view. For, although it appears that some difficulty arose with respect to the security for this balance, yet it is alleged in the bill that *it was **382** afterwards paid to the bank; and this is not denied, but substantially admitted in the answer. And the whole arrangement upon that settlement was carried into execution, except that which related to the judgment now in question.

It is contended on the part of Lynn that the security in the deed to Mason was a complete discharge by the bank of this debt. And, whether it is so to be considered, is the only question necessary now to be noticed.

The deed of trust given by Lynn to Mason bears date the 16th of November, 1820, and provides in the first place for the payment of judgment creditors; then for certain enumerated creditors, and finally, the surplus to be paid to the Mechanics' Bank of Alexandria in discharge of notes discounted for Lynn. This deed contains the following proviso: "Provided always, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatever against the said Adam Lynn. And the period of six months shall be, and is hereby allowed them from the date of this instrument to come in and elect and sign such discharge."

It will be seen from comparing the dates of this deed and the settlement made between the parties, that the six months limited for the creditors to come in and accept of the provision thereby made, had expired when the settlement took place; and the bank, therefore, according to the terms of the deed, was precluded from taking any benefit under it.

The bill alleges that the provision made by the trust deed for the payment of this debt was amply sufficient. The bank denies that the judgment has ever been satisfied, and alleges that on application to the trustee, Mason, for the benefit of the provision thereby made, it was refused because the time had expired within which the creditors were to come in and accept of the benefit of it.

Was this, then, such a settlement and discharge of this judgment, as, under the circumstances, will conclusively bind the bank, and turn it over to this trust fund alone for satisfaction of the debt?

The complainant in the court below asks the aid of a Court of Chancery to restrain the bank from enforcing a judgment at law, and if this is an unconscientious request it would be inconsistent with the course of a Court of Equity to grant it.

The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept in satisfaction of this judgment, the provisions made by Lynn for his creditors in the deed of trust.

383*] *But the court ought not to decree performance, according to the letter, when from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires.

It cannot be presumed, that the bank in point of fact knew that the time had expired within which creditors were allowed to come in and accept of the trust fund. Nor ought it to be presumed that this circumstance was adverted to by Lynn, as it would be charging him with a fraudulent design of imposing upon the bank an unavailable security.

Whether it was available or not is a proper subject of inquiry under the pleadings. The bill alleges that the provision made by the deed for payment of this debt, was abundantly sufficient.

This, the answer denies; because the complainant, by the limitation of the time within which the creditors were to come in, had debarred the bank of availing itself of that security, and that the trustee had excluded this debt on that account. And all that the bank requires is that the complainant should order his trustee, Mason, to pay this debt out of the trust fund.

It is said, however, that the bank is chargeable with notice of this deed, and all its provisions; and has, therefore, accepted the fund, at its own risk, and particularly as notice is not denied in the answer.

There is nothing in the pleadings or proofs showing notice in fact, and the deed was not recorded so as to charge the bank with constructive notice. There may be reasonable grounds to conclude that the bank had information with respect to the trust fund before it agreed to accept it as a substitute for the judgment. But actual knowledge of this limitation cannot reasonably be presumed, as it was a fund from which no benefit could be derived; and the bill contains no charge calling upon the bank for an admission or denial of notice. This was not required by reason of the special in-

terrogatory put in the bill. If the bill had charged the bank with notice, an answer must have been given without such interrogatory. But a defendant is not bound to answer an interrogatory not warranted by some matter contained in a former part of the bill (Mitford, 44); and if the bank was called upon by this interrogatory to admit or deny notice, no answer having been given, exception should have been taken to the answer for insufficiency.

Nothing, therefore, appears which would have precluded the *bank from the aid [***384** of a Court of Chancery; even was its complainant seeking relief against the conclusive operation of this settlement, when the consideration for which the judgment was to be discharged has entirely failed, and that by the act of Lynn himself. But when the judgment debtor comes into the court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify, or grant his prayer, upon such conditions as justice demands.

The arrangement between the parties was executory; no release or discharge of the judgment was given. The account stated was the basis only on which the settlement was made and to be carried into execution. And it must have been the intention of both parties, that the bank should be let in to take the benefit of the trust fund. And justice requires that this should still be done, as far forth as it can be consistently with the safety of the trustee, and the rights of other creditors entitled to the benefit of that fund.

The situation of that fund, however, and what has been done under the trust deed, could not be properly inquired into under the pleadings in this cause; and without other parties before the court.

The proper course for the bank would have been, to have filed a cross bill against the complainant, and such other parties as were necessary to bring that subject completely before the court and enable it to make a final determination of the matter in dispute. If the assent of Lynn is all that is necessary to enable the bank to avail itself of the trust fund, justice requires that this should be given, before the bank is entirely restrained from proceeding on its judgment at law. And it is no doubt within the legitimate powers of a Court of Chancery, under circumstances like the present, to require such assent, and modification of the settlement, before granting a perpetual injunction.

But the rights of other creditors, which may have attached upon this fund, must not be lost sight of; with respect to which, however, we have not before us the means of judging.

We are accordingly of opinion that the decree of the court below granting a perpetual injunction be reversed. And that the cause be sent back with directions to the court to continue the injunction, until the bank has a reasonable time to file a cross bill. And that the continuance of the injunction be subject to such further order of the court as equity and justice may require.

This cause came on, &c. On consideration whereof, it is decreed and ordered by this court, that the decree of said Circuit Court in *this cause granting a perpetual injunc- [***385**

tion be, and the same is hereby reversed and annulled; and it is further ordered by this court that the cause be remanded to the said Circuit Court, with directions to continue the injunction until the bank has a reasonable time to file a cross bill, and that the continuance of such injunction be subject to such further orders of the court as equity and justice may require.

Cited—8 How., 161; 3 Wood. & M., 80.

386*] *JOHN CONARD

v.

THE ATLANTIC INSURANCE COMPANY OF NEW YORK.

Respondentia loan—priority of United States—insolvency—lien of a mortgage, of a judgment—consignee—mortgage to secure future advances—fraud—want of possession—practice—evidence.

It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage; nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. [436]

It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. [437]

The lender on *respondentia*, is not presumed to lend on the faith of any particular appropriation of the money and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run, upon other goods; and it was not a mere contract of wager and hazard. [437]

It seems that the common and usual form of a *respondentia* bond, is that which was used in this case. [437]

What is the nature and effect of the priority of the United States, under the statute of 1799, chap. 128, sec. 65. [438]

It is obvious that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. [439]

Insolvency, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical

sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of *The United States v. Hooc* (3 Cranch, 53); and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute. [439]

Mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but, it must be manifested in one of the three modes pointed out in the explanatory clause of the section. [439]

The priority, as limited, and established in favor of the United States, is not a right which supercedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent its passing by virtue of such assignment to the assignees; but it is a mere right of prior payment, out of the general funds of the debtor in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States. [439]

It is true that in discussions in Courts of Equity a mortgage is sometimes called a lien, for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. The estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgageor. It is therefore only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute, and indefeasible. [441]

It has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to anything, whether it be accompanied by possession or not. [441]

The case of *Thelusson v. Smith* (2 Wheat., 396), turned upon its own particular circumstances, and did not establish any principles different from those which are recognized in this case. And it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States. [444]

It is not understood, that a general lien, by judgment on lands, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. [443]

By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by indorsement, and thus may pass the property. [445]

Strictly speaking, no person but the consignee can by any indorsement on the bill of lading pass

NOTE.—*Bottomry and respondentia loans.*

As to *respondentia* loans, see note to *Blaine v. The Ship Charles Carter* (4 Cranch, 323).

A *respondentia* loan is a loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port. (*Abbott on Shipping*, 150.)

As the lender sustains the hazard of the voyage, he receives upon its happy termination a greater price or premium for his money than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions depends wholly on the contract of the parties. (*Ibid.*, 1 Phillips on Ins., sec. 304.)

The principal difference between *bottomry* and *respondentia* is that the one is a loan upon the ship, the other upon the goods. In the former the ship and tackle, being hypothecated, are liable, as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower. But the personal responsibility of the borrower is not, in all cases, the only security of the lender. Where the money is lent for the outward and the homeward voyage, the goods of the borrower on board, and the returns

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for them, whether in money, or in other goods purchased abroad, with the proceeds of them, are liable to the lender. (*Marshall on Insurance*, 633.)

The money is to be paid to the lender, with the marine interest, upon the safe arrival of the ship, in the one case, and of the goods in the other. In all other respects, these contracts are nearly the same, and are governed by the same principles. (*Ibid.*)

As to *bottomry* and *respondentia* generally, see *Marshall on Insurance*, 632 to 663.

A *bottomry* and *respondentia* bond is in some respects similar to a mortgage, and like it, vests an insurable interest in the lender or creditor, to the amount of the loan, adding the usual rate of interest. (1 Phillips on Ins., sec. 299; 2 *Id.*, sec. 1249; see further 1 Phillips on Ins., secs. 298 to 308.)

The lender on a *bottomry* or *respondentia* bond has a remedy by action at common law for a breach of the stipulations, or forfeiture of a condition of the bond. (2 Phillips on Ins., sec. 1985; 1 *Id.*, secs. 1168 to 1175.)

As to *priority of United States, in cases of insolvency*, see notes to *Prineo v. Bartlett* (8 Cranch, 431); *Thelusson v. Smith* (2 Wheat., 396); *The United States v. Howland* (4 Wheat., 108).

the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner passes the legal title against his agents or factors, and creditors, in favor of the assignee. [445]

Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due. The only question that properly arises in such cases, is the *bona fides* of the transaction. [448]

Without undertaking to suggest, whether in any case the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *prima facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. [449]

In cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud. [449]

On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue, this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection. [450]

388*] A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor, was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *prima facie* evidence of his execution of the instrument. [451]

THIS was an action of trespass brought in the Circuit Court for the District of Pennsylvania, by the Atlantic Insurance Company of New York, against John Conard, the marshal of the District of Pennsylvania, for taking and carrying away certain teas, imported from Canton into the port of Philadelphia, on board the ships Addison and Superior. Pleas the general issue, and a special justification under a *f. fa.* against the goods as the property of Edward Thomson. The suit was instituted, and tried under an agreement, which is recited in the following bond.

Know all men by these presents, that we, the Atlantic Insurance Company of New York, are held, and firmly bound, unto the United States of America, in the sum of forty-two thousand dollars, lawful money of the United States of America, to be paid to the said United States of America, their certain attorneys, successors, or assigns, to which payment, well and truly to be made, and done, we bind ourselves, and our successors, firmly by these presents, sealed with our seal of incorporation, and dated this ninth day of October, in the year of our Lord one thousand eight hundred and twenty-six.

Whereas, the goods and merchandise described in an invoice, a copy of which is annexed, imported in the ship Addison, from Canton, safely arrived at the port of Philadelphia, have been levied on by the marshal of the eastern district of Pennsylvania, by virtue of an execution on a judgment in favor of the United States, against Edward Thomson, of Philadelphia, as the property of the said Edward Thomson; and, whereas, the Atlantic Insur-

ance Company of New York claim to be the owners in law, or equity, of the said goods, and actually hold the bills of lading and invoice thereof; under which the said goods have been duly entered at the custom-house, and the duties thereon secured to be paid according to law. And, whereas, it has been agreed by, and between, the Secretary of the Treasury, in behalf of the United States, and the said Atlantic Insurance Company, that a suit shall be instituted by the said named company, against the said marshal, in which the sole question to be tried, and decided, shall be, whether the United States, or the said Atlantic Insurance Company are entitled to said goods, and the proceeds thereof; and, whereas it has been further agreed, that the said goods shall be delivered to the said Atlantic Insurance Company, without prejudice to the rights of the United States, under the said execution *or [*389 otherwise; and that they shall sell and dispose of the same, in the best manner, and for the best price they can obtain therefor, and for cash, or upon credit, as they may judge expedient; and that the moneys arising from the sales thereof, deducting the duties of all customary charges, and commissions on such sales, shall be deposited by the said Atlantic Insurance Company, as soon as received from, and after the sale, in the bank of the United States, to the credit of the president of said bank, in trust, to be invested by the said president of the said bank in the stock of the United States, in the name of the said president in trust, so to remain, until it shall judicially and finally be decided to whom the said goods or the proceeds thereof, do in right, and according to law belong; and on the further trust, that whenever such decision shall be made, the said president of the said bank, shall deliver the said moneys, or transfer the said stock to the party in whose favor such decision shall be made. And, whereas, in pursuance of the said agreement, the said goods have been this day delivered to the said Atlantic Insurance Company of New York, it being understood and agreed that such delivery of the goods shall not prejudice any existing right of the said company.

Now, the condition of this obligation is such, if the said Atlantic Insurance Company of New York shall comply with the said arrangements, and well, and truly sell, and dispose of the said goods, and cause the moneys arising from the sales thereof, deducting therefrom the duties, charges and commissions, as aforesaid, to be deposited in the bank, in trust, according to the true intent and meaning of the above recited agreement, and for the purposes therein set forth, this obligation to be void; otherwise to be, and remain in full force and virtue.

(Signed) ARCH. GRACIE, Prest. [L. s.]

Attest, GEO. B. RAPELYE, Secretary of the Atlantic Insurance Company of New York.

The facts as they appeared by the record, were as follows: On the 21st June, 1825, the plaintiffs below lent to Edward Thomson the sum of \$21,000, upon *respondentia*, by the Addison, for which the following bond was executed and delivered to the company:

Know all men by these presents, that we, Edward Thomson, of the city of Philadelphia,

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Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, of the city of New York, are held and firmly bound unto the Atlantic Insurance Company of New York, in the sum of forty-two thousand dollars, lawful money of the United States of America, to be paid to the said The Atlantic Insurance Company of New York, their certain attorney, successors, or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, our **390***) and each of our *heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty-five.

Whereas the said Atlantic Insurance Company of New York have this day lent and advanced to the above-named Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, the sum of twenty-one thousand dollars, lawful money of the United States of America, upon the goods, wares, merchandise, and specie, to that amount laden or to be laden, on board the American ship, called the Addison, of Philadelphia, whereof Hidelius is master, or which may be laden on account of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, on board the said vessel, at any time during her intended voyage hereinafter mentioned.

And whereas the said vessel is now bound on a voyage at, and from Philadelphia to Canton, and at and from thence back to Philadelphia, with the usual privileges for trade and refreshments.

And whereas the said The Atlantic Insurance Company of New York, are content to stand and bear the risks against which the said company usually insure by their cargo policies, on the said sum so lent and advanced on the said goods, wares, merchandise, and specie, laden or to be laden on board of the said vessel as aforesaid, during the said voyage, so as the same do not exceed the term of twelve calendar months, to be computed from the day of the date of the bill of lading, viz., the twenty-first day of April, 1825.

Now, the condition of this obligation is such, that if the said ship laden with the said goods, wares, merchandise, and specie, do and shall, with all convenient speed, proceed and sail on the said voyage from Philadelphia to Canton, and at, and from thence back to Philadelphia, and return and come to Philadelphia, having on board the above-stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages, both outward and homeward, to end her voyage there, by or before the end or expiration of twelve calendar months, to be computed from the date aforesaid, and that without deviation (the dangers and casualties of the seas excepted), and if the above bounden Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, or either of them, or either of their heirs, executors, or administrators, shall, and do well and truly pay, or cause to be paid, at the city of New York, to the above-named The Atlantic Insurance Company of New York, their attorney, successors, or assigns, the full sum of twenty-one thousand dollars, lawful money as aforesaid, immediately upon the first and next Peters 1.

return and arrival of the said *ship, at [***391** the port of Philadelphia, or at and upon the end and expiration of twelve calendar months, to be computed as aforesaid, whichever shall first happen, together with the sum of two thousand two hundred and five dollars, lawful money as aforesaid, that being the stipulated marine interest and premium, on the said loan; or if the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, or either of them, their, or either of their heirs, executors, or administrators, shall and do immediately upon the first and next return and arrival of the said vessel, at the port of Philadelphia as aforesaid, provided such return and arrival happen within the space of twelve calendar months, to be computed as aforesaid, give security satisfactory to the said The Atlantic Insurance Company of New York, to pay at the city of New York, to the said The Atlantic Insurance Company of New York, their successors, or assigns, the said sum of twenty-one thousand dollars, together with the said sum of two thousand two hundred and five dollars, within three months from the time of such return and arrival, with lawful interest thereupon, from the time of such return and arrival, and shall, and do well and truly pay the same accordingly, at the expiration of the said three months; or if, in the said voyage, and before the end of the said twelve months, to be computed as aforesaid, a total loss of the said goods, wares, merchandise, and specie, by the risks against which said company usually insure by their cargo policies, shall unavoidably happen, and the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, their heirs, executors, or administrators, shall, and do well and sufficiently abandon, transfer, and assign, to the said The Atlantic Insurance Company of New York, their successors or assigns, all the said goods, wares, merchandise, and specie of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, so laden, and to be carried from the said port of Philadelphia, on board the said ship, and all other goods, wares, merchandise, and specie, which shall be acquired during the said voyage, by reason of, or from the proceeds of the said last-mentioned goods, wares, merchandise, and specie, and the net proceeds thereof, and well and truly do account for and pay, upon oath or affirmation, within four calendar months, to be computed from the time of such loss, to the said The Atlantic Insurance Company of New York, or their successors, a just and proportionable average on all the said specie, goods, wares, and merchandise, and proceeds, if any salvage, average, or allowance, shall be obtained by reason of, or upon the same, notwithstanding such loss, then this obligation to be void; otherwise to remain in full force and virtue.

It being first declared to be the mutual understanding and *agreement of the [***392** parties to this contract, that the lender shall not be liable for any charge, damage or loss, that may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; but that the lenders shall be liable to losses and averages, and entitled to the benefit of salvage, in the same manner, to

all intents and purposes, as underwriters on a policy of insurance, according to the usages and practices in the city of New York; and that in like manner the borrowers shall be subject to all the duties imposed on the assured, by the usual policies of insurance, and the customs and practices of the said city.

Sealed and delivered in the presence of us,

PETER MACKIE, CHARLES MACKIE,

To the signature of EDWARD THOMSON,

J. H. CLINCH, H. W. NICOLL,

To the three last named.

EDWARD THOMSON, [L. s.]

EDW. H. NICOLL, per } [L. s.]

ROBERT SMITH, att'y, }

FRANCIS H. NICOLL, [L. s.]

FLOYD S. BAILEY, [L. s.]

At the sametime the following memorandum, bill of lading, and assignment thereon, were also executed and delivered to the company:

Whereas, it hath been agreed that the bills of lading for the goods, specie, wares, and merchandise, mentioned in the within obligation, shall be indorsed to "The Atlantic Insurance Company of New York," as a collateral security for the loan within mentioned.

And whereas, it has been further agreed, that the property to be shipped homeward as aforesaid, being the proceeds of the said loan, shall be for the account and risk of us, the said borrowers, or some of us; that the bills of lading, therefore, shall express the same, and shall also express that the said property shall be deliverable to the order of the shippers, and that the same shall be indorsed in blank, and shall be placed in the hands of the said "Atlantic Insurance Company of New York," either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security, to the performance of which we do bind ourselves.

Now, by this instrument it is expressly declared, that such indorsement, or consignment, shall not be held to exonerate the persons of the obligors, nor compel the said "The Atlantic Insurance Company of New York" to accept the goods and merchandise, which may arrive under such bill of lading and consignment, **393*** in discharge of such debt; but it shall be lawful for the said "The Atlantic Insurance Company of New York" to receive and hold the said goods, specie, wares, and merchandise, for the space of ninety days after their arrival at the port of Philadelphia.

And in case the principal, interest, and premium, in the within obligation mentioned, shall not be paid or satisfied within the said time, to dispose of the same at public auction, and to charge the obligors with the balance that may remain due, after deducting from the amount of said sales, the freight, duties, commissions, and all other just and proper charges.

Sealed and delivered in presence of us,

PETER MACKIE, CHARLES MACKIE,

To the signature of EDWARD THOMSON.

J. H. CLINCH, H. W. NICOLL,

To the three last named.

EDWARD THOMSON, [L. s.]

EDW. H. NICOLL, per } [L. s.]

ROBERT SMITH, att'y, }

F. H. NICOLL, [L. s.]

FLOYD S. BAILEY, [L. s.]

Shipped in good order and condition, by Edward Thomson, in and upon the ship called the Addison, whereof Hidelius is master for this voyage, now lying in the port of Philadelphia, and bound for Canton, seven kegs, containing three thousand Spanish dollars, for account and risk of the shipper, a native citizen of the United States of America, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Canton (the danger of the seas only excepted), unto John R. Thomson, Esq., or to his assigns, he or they paying freight for the said goods, at the rate of nothing, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to the three bills of lading, all of this tenor and date; one of which being accomplished, the other to stand void. Dated at Philadelphia the 21st day of April, 1825.

ANDREW HIDEIUS, JR.

No. 5 (E. T.), 38 a 44, 7 kegs containing 3,000 each.

An assignment indorsed thereon, dated the 21st June, 1825, as follows:

(COPY.)

For value received, I do hereby, assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, wares, and merchandise, to be procured thereon, or thereby; and any return cargo to be obtained *by the within- **[*394]** mentioned outward cargo, and specie, or the proceeds thereof, and all the return cargo to be taken on board the within-named ship, by or for my account, as collateral security, according to an agreement, duly executed and adjoined to a *respondentia* bond given by myself, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, dated this twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty-five, for the sum of twenty-one thousand dollars. Witness my hand and seal, this 21st day of June, 1825.

EDWD. THOMSON.

PETER MACKIE, } Witnesses.
BARCLAY ARNY, }

The Addison sailed from Philadelphia for Canton, on or about the 21st April, 1825.

On the 14th July, 1825, the plaintiffs also lent to Edward Thomson the sum of \$13,960 upon *respondentia* by the Superior, for which a similar bond, and memorandum, and a corresponding bill of lading and assignment, were executed to the lenders. The Superior sailed from Philadelphia for Canton on or about the 6th June, 1825.

There was no difference between these two operations, except this, that the entire loan of \$21,000 by the Addison was paid by the company to the agents of Thomson, whereas the loan by the Superior was applied, with his consent, to pay a previous loan on *respondentia* by another ship of Thomson's, which had fallen due.

On the 19th November, 1825, Edward Thomson, being very largely indebted to the United States upon duty bonds, and for duties on teas not bonded, made a general assignment of all his estate and effects to Richard Renshaw and Peter Mackie, in trust for his creditors; and

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on the 13th March, 1826, he confessed a judgment to the United States for half a million of dollars, upon which a *fi. fa.* was issued on the same day.

In the month of March, 1826, and a few days before the arrival of the *Addison*, the assignees of Thomson received, under a blank envelope addressed to him, a duplicate bill of lading and invoice of a shipment homeward by that vessel, for the teas in question in this suit, and delivered them to the agents of the Insurance Company. They were respectively dated the 22d November, 1825, deliverable to the order of the shipper at Canton, R. Fisher, attorney for John R. Thomson, and by him indorsed in blank. The invoice stated the account and risk to be for Edward Thomson. That the teas in this invoice were the returns of the outward specie in the bill of lading assigned to the company, was proved by means of the words and figure No. 5, on the homeward invoice, and the same number and figure on the outward bill of lading; which were the **395*** means concerted *between Edward Thomson and his supercargo in Canton, to fix the identity. The original bill of lading and invoice were received by the assignees on the arrival of the *Addison*, and in like manner delivered to the company. In the same month Peter Mackie, one of the assignees, received from Canton the homeward bill of lading and invoice of a shipment of teas, &c., by the Superior, dated the 2d December, 1825, deliverable to his own order; and Barclay Arny, a clerk in the service of Thomson, received a bill of lading and invoice of another shipment by the Superior, bearing the same date, and deliverable to his order. These returns, being, as was proved at the trial, purchased with the specie in the outward bill of lading by the Superior, assigned to the company, the consignees, Mackie and Arny, on the 22d March, 1826, indorsed the papers to the plaintiffs; the rest of the shipment of \$13,960 was expended for ship's disbursements in Canton.

Both shipments by the *Addison* and Superior were levied upon by the marshal, under the *fi. fa.* before mentioned, on the 15th March, 1826, while the ships were below in the river, and taken into his custody, where they remained until the arrangement recited in the bond of the 9th October, 1826; in consequence of which they were given up.

It further appeared upon the trial, that the *Addison* brought with her, addressed to Thomson, a general bill of lading for her entire cargo, deliverable to Edward Thomson, or assigns, but not signed by the captain; and also a general invoice, stating the cargo to be for his account and risk, and deliverable to his order. The manifest which had been made out in Canton by the agent of Thomson, stated the cargo to be consigned to Thomson, and not to order; and when the agent delivered it to the captain, he told him that it was done to save him the necessity of overhauling his papers at sea, and that he might rely on it as being correct. The captain, however, on receiving a letter from the assignees, upon his arriving on the American coast, examined his bills of lading, and finding that they were deliverable to order, altered his manifest in conformity. The object of these double papers, it was alleged,

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was to enable Thomson after settling with the lenders on *respondentia*, as he had done upon former occasions, to cancel the particular bills and invoices, and after procuring the signature of the captain to the general bill of lading, to enter the cargo as consigned to him.

The preceding statement is all that is necessary to introduce the points of evidence and law that were raised upon the record, and which came up for revision in this court.

The plaintiffs' counsel having offered at the trial to give evidence of the *respondentia* bond by the *Addison*, it was objected *to, [**396** until they had proved that the company were duly incorporated according to law. The plaintiffs' counsel then gave notice to the defendant's counsel, the District Attorney of the United States, to produce the bond of 9th October, 1826; and gave in evidence the agreement of counsel for entering the action, wherein it was stated that the question to be tried was, whether the plaintiffs or the United States were entitled to the goods mentioned in the declaration or the proceeds thereof, and that the merits should be determined without further form. The bond not being produced, the plaintiffs' counsel called Austin L. Sands to prove the delivery of that bond to the District-Attorney, and also its contents; and began by asking him if he was an agent of the Atlantic Insurance Company. To this question the counsel for the defendant objected, and the court overruled the objection. To this opinion of the court a bill of exceptions was tendered and sealed.

The bond of 9th October, 1826, being then proved, the counsel for the plaintiffs contended that they were authorized, without further proof, to give evidence of the *respondentia* bond, of which opinion was the court; and to this opinion also the defendant's counsel tendered an exception.

Mackie, the subscribing witness to E. Thomson's signature to the *respondentia* bond, memorandum, and assignment of the bill of lading, proved the handwriting of Thomson, his own attestation, and that of Charles Mackie, and also the handwriting of Clinch and Nicoll, the other witnesses to the bond and memorandum, who resided in New York and were not produced. The counsel for the plaintiffs then offered to read that bond in evidence, to which the counsel for the defendant objected, but the court suffered it to be read, as the several bond of Thomson; to which opinion an exception was also tendered.

Upon the examination of A. Hidellius, the captain of the *Addison*, a witness produced on behalf of the defendant, the counsel proposed to ask him the following question: Did Mr. Mackie and Mr. Nicoll make out a new manifest, altering the destination of the *Addison*, and ask you to enter it as a true manifest at the custom-house? This question was objected to by the plaintiffs' counsel, and overruled by the court; to whose opinion the defendant again excepted.

The defendant's counsel proposed then to ask the same witness the following question: Did you see Mr. Mackie pay money to the pilot for being first on board the *Addison*? Which question was objected to, overruled, and the rejection excepted to in like manner.

The defendant's counsel having then pro-

duced an original letter from Thomson to Captain Hidellius, with a postscript by the assignee, giving the captain a caution in regard to his **397*** manifest, *proposed to ask Peter Mackie the following question: Was the greater part of the letter now produced signed by Edward Thomson, and countersigned by his assignees, drafted by the District-Attorney? This question was in like manner objected to and overruled, and an exception taken.

The same counsel proposed to ask of Barclay Army, another witness, the following question: Do you know how the money was applied that was borrowed on the Addison and Superior of the plaintiffs? This question was objected to, unless the application was with the plaintiffs' knowledge, and was overruled. To this opinion a bill of exceptions was also tendered by the defendant.

At the close of the argument to the court and jury on the law and fact of the case, *Mr. Justice WASHINGTON* delivered the following points, in charge to the jury:

First. That the bonds given by Edward Thomson to the plaintiffs for securing the loans of twenty-one thousand dollars on the cargo of the Addison, and of thirteen thousand nine hundred and sixty dollars on that of the Superior, are not invalid as marine contracts, for the reason alleged by the counsel for the defendant; that is to say, because in respect to the former, the loan was made after the Addison had sailed upon her voyage, and in respect to the latter, for the same reason; and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time said security was given.

Second. That it is no objection to the validity of the bond given for securing the loan, on the cargo of the Addison, upon the ground of usury, that such cargo was known, by the parties, at the time the said bond was given, to have been in safety at and upon the departure of the said vessel from Philadelphia; since the real question for the jury to decide in relation to that subject was, whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable, or for a part of the voyage only, and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo at any particular period of the voyage, or of the assumed risk, is not, *per se*, an objection to the contract on the ground of usury. If Edward Thomson was to pay interest from a period antecedent to the loan, there can be no question but that the contract was usurious, and it would be so **al-**
398* though *no more than the legal rate of interest was reserved. How that fact is, the jury must decide from the evidence before them.

Third. That the loan upon the cargo of the Addison was, by the terms of the aforesaid

bond, given to secure it at the risk of the plaintiffs during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond; there being other and equivalent expressions in the said instrument.

Fourth. That the above bond given for securing the loan made upon the cargo of the Addison, together with the memorandum indorsed on it, the bill of lading outward, and the indorsement thereon, are all to be considered as forming parts of one entire contract; and as such, they do, upon a fair and legal construction of them, cover that part of the homeward cargo which was the investment of the outward cargo on which the loan was secured; and that the same principles are applicable to the contract in relation to the Superior. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return cargoes of those vessels; if upon the evidence given in the cause, the jury should be of opinion that those return cargoes were in point of fact the investment of the outward cargoes of the Addison and Superior, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of the Addison's cargo, indorsed in blank, and an assignment to the plaintiffs by Mackie and Army of the homeward bills of lading of the cargo of the Superior.

Fifth. That the equitable title of the plaintiffs, so vested in them on the nineteenth day of November 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was not defeated or affected by the right of preference, which that act gave to the United States to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one, by the subsequent delivery to the plaintiffs of the bills of lading indorsed in blank of the Addison's homeward cargo, and of the assignment by Mackie and Army, of those of the cargo of the Superior.

Sixth. That the actual possession of the above return cargoes by the masters of the Addison and Superior, until they were levied upon under executions at the suit of the United States against Thomson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to those cargoes.

Seventh. That as to the charge of fraud, which it is insisted by the counsel for the defendant taints this transaction throughout, *that is a subject exclusively for the **[*399]** consideration and determination of the jury, upon the evidence laid before them; in deciding upon which, they are to observe, first. That actual fraud must be proved, and ought not to be presumed; and, second. That no fraud which may have been practiced, or attempted, by Edward Thomson, his captains or agents, ought to affect the validity of these contracts; unless they should be satisfied, from the evidence, that the plaintiffs in some way or other participated in the same.

Lastly. That if the jury should be of opinion, upon the whole of the evidence, that the transactions between the plaintiffs and E. Thomson,

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which constitute the basis of this action, were fair, so far as the plaintiffs were concerned in them; and that they stand clear of the imputation of usury, on the ground that interest was reserved from a period antecedent to the loan; and if further they are satisfied, that the homeward cargoes were the proceeds of the outward cargoes on which the securities were given, then their verdict ought to be for the plaintiff, otherwise not. It was further stated by the judge that he had declined giving a construction of the 62d section of the act imposing duties, or an opinion on the question whether under that section the consignee of imported goods is liable for the duties on them; considering it to be unnecessary from the view which he had taken of the case.

And in explanation of the charge, the following questions were propounded by the counsel and answered by the court.

1. The defendant's counsel requested the court to charge the jury, that if the agreement of the plaintiffs with Edward Thomson was made with the view to deprive the United States of their duties, it was fraudulent, and the plaintiffs could not recover. To which the judge answered, that if the agreement was made with that view, such would be the legal consequence; but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2. The court was asked by the same counsel, to charge, that if the contract of Edward Thomson with the defendant, was to pay more than lawful interest during a period when there was no marine risk, the contract was usurious and void. To which the judge answered, that if the contract was a cover to charge more than lawful interest, when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' books which had been given in evidence, but that the fact upon which the question is predicated, was proper for the decision of the jury.

3. The court was then asked by the plaintiffs' counsel to charge, that the parties were at liberty to agree for a marine interest greater than the legal rate for the time that the money ^{400*} was exposed to marine risks, or the loan was at hazard by the marine risk of the goods, on which it was made. To which the judge answered that they certainly were.

To all which the defendant's counsel excepted, and the judges sealed a bill of exceptions.

Mr. Ingersoll, for the plaintiff in error, stated, that after several years of actual but concealed insolvency, Thomson owned it on the 19th of November, 1825, by the public assignment of all his property. He then was the debtor to the United States \$979,102.63 for duties on his importations in the years 1823-4-5, which duties were due at the importations, though bonded with credit for future payments. Such is the doctrine of the case of *The United States v. Lyman* (1 Mass., 482). Thus the contest arose between the United States, who loaned these credits, and the defendant in error, who also claim re-imbursement for loans; but the fund in dispute is the only resource of the United States, while the insurance company have the other obligors, besides Thomson, on the *respondentia* bond to look to. The United States are privileged creditors; not, as is often imputed, by prerogative, but by a lawful priority, which belongs to every sovereignty or government. Their credits on importation are loans, for which the consideration and equivalent are priority of payment, before any other creditors; and the fund in dispute proceeds from loans thus privileged. It is as just and equitable, as it is established by law, that for such loans the government should be paid before any other creditor, no matter what security he has for his debt. This principle is the privilege of every government, and as consonant with republican as with regal sovereignty. It belongs to all codes, in all ages and countries. Thus, in England, before the statute of Aetion Burnell, the crown had execution against the person and the lands of its debtors, which was not allowed to any subject at that time. (Plowd., 441; 3 Co., 11; 2 Bac. Abridg., 686.) Government is not bound by certificate of bankruptcy, by act of limitations, or to pay costs; principles common to the American as to the England law. The crown may assign a chose in action, and its assignee may sue in his own name. (Cro. Jac., 179, *Rex v. Twine*.) Such was the ancient Roman law. (Wood's Inst. of the Civ. Law, b. 3, ch. 1, p. 141.) The State was preferred for all debts, and had a lien on the property of all receivers of public funds, with the right of execution from the treasury, without any suit; which are provisions similar to those of the acts of Congress. The modern civil law is the same; *fiscus semper habet jus pignoris*. (Poth. De Hypothèque, ch. 1, art. 3, p. 116.) All are bound to pay the State before private creditors. (Grot. de Jure, B. & P., b. 2, ch. 1, sec. 6.) These principles are indispensable to good government. It is neither politic nor ^{per-}mitted for the judiciary to enfeeble by construction what the Legislature has done to establish them. Neither property nor lien is asserted for the United States, but privilege to be first paid out of the insolvent debtor's effects, before any other debtor.

To this privilege, however, the United States superadd the advantage, which the law always allows to vigilance in the pursuit of debts. On the 11th of March, 1826, they obtained judgment against Thomson; on the 13th of that month and year issued their *fi. fa.*, and on the 15th levied it on the ships and cargoes, whose proceeds are in question. Such legal and equitable positions are immovable by any mere debtor; the defendants in error must show that Thomson had no property in the goods levied upon as his, but that it was transferred beforehand to them. This burthen of proof they undertake, and to dislodge the public priority and possession, by proving property out of Thomson, and in the insurance company. They claim to be, if not owners, at least creditors with qualified property by specific lien; having loaned money on *respondentia* bonds secured by assignments, indorsed on the outward bills of lading.

Use, disposition, risk, profit and loss—in short, all ownership, real and ostensible—remained in Thomson throughout. The vessels were far at sea when the loans were made, so that it was physically impossible to appropriate the parts affected to the several loans. All the homeward documents were addressed under seal to Thomson, and nothing but a secret mark on one

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set of the double papers, enabled the assignees to deliver the respective parcels, which were levied upon by the executions of the United States, when thus symbolically and conjecturally appropriated. The contract between the insurance company and Thomson is to be gathered from the bond, the annexed memorandum, and the assignment on the outward bill of lading, all considered together as one instrument. The bond does not contain a single word or indication of transfer of property or specific lien, but the contrary; and it is well settled that a *respondentia* bond creates no lien, but only gives personal security. (4 East, 319, *Busk v. Fearon*; *The United States v. The Delaware Insurance Company*, MS.) The memorandum annexed to the bond, is a *caveat* against the idea of property, which the lenders repel. The assignment on the bill of lading is cautiously qualified and referential, relying upon the memorandum for the meaning of the parties. By all these instruments, taken either together or separately, there is no unqualified transfer of property; no possession changed; the account and risk are kept in the borrower; no consignment to the lenders who lend their money on the promise of the borrower to place a blank bill of lading in their hands after the voyage ends, and that and then expressly, as no more than collateral security for the loan.

402*] *The lenders trust, the borrowers covenant, throughout—no more. Usually in case of *respondentia* loans there is an unqualified assignment at home, and an unqualified consignment from abroad, with separate letters of advice, orders, and an entire documentary possession in the lenders; whereas here, the lenders shun every indication of ownership or possession, which are left with Thomson, to enable him by false appearances of property to get credits for duties, which the insurance company thus evade liability for. The 62d section of the act of Congress (Laws of U. S., Vol. III., 195) holds the consignee liable for the duties, notwithstanding any transfers. By clandestine transfer the lenders have a secret lien on these effects, without notice and registry, contravening all appearances, and inevitably tempting to frauds. Can an equitable right spring from so polluted a source? Can the public priority be annulled by such an equity? By mortgage, the legal title is transferred and so registered. By pawn, the thing is deposited and thus possession changed. But in this case, all but a secret hold remained with the borrower, as the very means with which to defraud the revenue. Would chancery compel performance of such a contract? Would trover lie at common law for the property? Could the insurance company have taken possession of it at any time? Could not Thomson have ordered and sent it to Europe or Australasia, instead of Philadelphia? His obligation was nothing but a mere executory promise to place a blank bill of lading in the lender's hands, which promise they had no means of compelling him to keep. Indeed, the consideration for that promise was a mere contingency, inasmuch as no debt was due till the voyage ended; and then, by the bond, the lenders stipulate to accept satisfactory security for payment; which security, according to

Army's testimony, was always a mere negotiable note from Thomson.

Such was the course of dealing uniformly. No instance ever occurred of his placing the blank bill of lading in their hands. Contracting that the returns should be consigned by Thomson's foreign agent to his orders, was contracting that the property should remain in him. Such is the universal and familiar effect of such consignments, by which most of the large British shipments to this country are regulated. (Abb. by Stor., 240; 1 H. Black., 359; 1 Wheat., 208, *St. Jose Indiano*; 8 Cra., 253, 275, *The Venus*; *Ibid.*, 328, *The Merimaek*; *Ibid.*, 354; 9 Cra., 183, *The Frances*.) To which it may be added, that by act of Congress every manifest must designate ownership by fixing the consignee. (Section 23d of the Duty Act, Vol. III., Laws U. S., 158.) All bills of lading must conform to the manifest section (30th of the same act, p. 166); and the property, as fixed in the consignee, remains in him notwithstanding any transfer. (Section *62d of [*403 the same act, p. 195.] Indeed, it is a principle of universal law, that possession of chattels must accompany property. (1 Wils., 260, *Ryall v. Roll*; 2 T. R., 587, *Edwards v. Harben*; 1 Cra., 316, *Hamilton v. Russel*.) Secret liens and clandestine titles, are destructive of that free mutation of property which is vital to commerce. It is not denied that property at sea may be transferred by the documents. But the question here is whether a secret title, which disowns property till third persons are involved, may be construed into force, in order to frustrate fair claims. In *Coxe v. Harden*, (4 East, 241), *The Frances* (8 Cra., 335) and *Potter v. Lansing* (1 Johns., 215), it is said, that even the account and risk, are strongly indicative of the property. In the case of *The United States v. The Delaware Insurance Company* (C. C. U. S. Pen. D.), it was adjudged that a bill of lading does not transfer the property, but merely gives a right to demand it; and that a bill to order or in blank continues the property in the shipper till a consignee takes lawful possession of it. The argument for the United States, far from any encroachment on the settled doctrines of commercial law or the common law, labors, on the contrary, to uphold them against a perilous innovation by construction. Furthermore: Was not the question of property for the jury to determine? The written instruments on which the court determined the question are no more than evidential of the parties' intention, which was a matter of fact. Such was the use made of similar written instruments in the analogous cases of *Hibbert v. Carter* (1 T. R., 748), *Huille v. Smith* (1 B. & P., 563), *Barrow v. Coles* (3 Campb., 92), *Dyer v. Pearson* (3 B. & C., 38), *Maryland Insurance Company v. Rudens* (6 Cra., 338), and *Blagg v. The Phoenix Insurance Company* (3 Wash. C. C. Rep., 5). In all these cases, the court left the property as a fact for the jury to ascertain.

But conceding, for argument's sake, that this is a case of equitable lien or special property, that does not supplant the public priority. The lieu of a judgment certainly does not. (2 Wheat., 396, *Theusson v. Smith*.) What more, in this inquiry, is a special than a general lien?

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Either claim is but a debt secured by a pledge; and all debts are postponed to the public privilege. The instruments relied upon, all mention collateral security, which is only title to the property, not in it; not like a mortgage, which transfers the legal right, and leaves but an equity of redemption. There was no right to take possession, much less any possession given by these documents. The general lien of a judgment gives the right of taking possession by means of execution; but the right in question was no more than a right of action, which the creditor had as much without it. The three exceptions stated by **404*** the court to the general *rule laid down in *Thelussou v. Smith*, are all possessory, viz., sale with delivery, executions executed, and mortgage. All liens are possessory; enforceable without suit. Liens for freight, general balance of factors, auctioneers, attorneys, carriers, tradesmen, material men, for purchase money, all depend in having hold of the thing liable to the lien; but none of them give a property in it. Indeed, the legal understanding of lien and of property, are inconsistent with each other. Loss or gain do not affect the lien holder, but the owner of the property; to whom also, any surplus belongs after satisfying the lien debt. In *Blaine v. The Ship Charles Carter* (4 Cra., 325), the court say that a bottomry bond gives no interest in the ship, but a claim upon her, which may be enforced with the dispatch of admiralty process. In *Seaman v. Loring* (1 Mass., 139), Judge Story considers it of the very essence of a lien on goods that possession accompany it. In *Haille v. Smith* (1 B. & P., 563), *Ch. J. Eyre* says, the goods were set apart to remain in deposit, from which moment the property was changed. *Hibbert v. Carter* (1 T. R., 745), and *Lempriere v. Pasley* (2 T. R., 485), turned on the right of possession. But a *respondentia* bond gives no lien. (4 East, 319, *Busk v. Fearon*.) There is no lien for demurrage. (3 M. & S., 205, *Binley v. Gladstone*; 15 East, 547, *Philips v. Rodie*; 2 Rose, 355, *Ex parte Heywood*.) In *Hammonds v. Barclay* (2 East, 235), lien is defined to be a right to detain for debt property placed in the creditor's possession. In *Lickbarrow v. Mason* (6 East, 25), it is called a qualified right to be exercised over another's property. In *Wilson v. Balfour* (2 Camp., 579), it is defined a right to hold. In *Hallet v. Bausfield* (18 Ves., 188), it is called the right of a party having possession to retain it. In *Heywood v. Waring* (4 Campb., 291), a right to hold. In *Wilson v. Heathen* (4 Taunt., 642), lien, or the right to hold, is contradistinguished from pledge, which is said to be matter of special contract. Lien is no more than a right of set-off, being the same in equity as at law. (2 T. R., 492, *Lempriere v. Pasley*.) It is a claim with possession, either personal, as by bond, covenant, or contract; or real, as by judgment, statute, or recognizance. (*Termes de la Ley*, 427.) It is a right *in rem* but not *ad rem*; a claim, with hold, but without property, in the thing held.

Justice and necessity originated liens. Policy and convenience have increased them. But of late courts lean against them, and will not add to their number or extent. (7 East, 229, *Rushforth v. Hadfield*.) No court in England has acknowledged a new instance of lien for the Peters 1.

last twenty years. (9 East, 426.) The civil law abounds with liens, therein termed privileges; that is, prior rights of payment; such as the lien of the State for its debts, the lien of mechanics and workmen, and of lenders of money. (Wood's Inst., *220.) The [***405** common law, the admiralty law, and the statute law, are familiar with various liens. The right of landlords to distrain may be considered a lien. But these privileged claims, though all specific, and affecting the property (with notice) in all hands, wherever transmitted, were never held to give or change property. Its risk, diminution, enhancement, and disposition, are all the debtor's, not the creditor's; at the debtor's death, it is his assets. If Thomson had died when he became insolvent, his administrators would have taken the fund in dispute, and must have paid the proceeds to the United States. (2 Cra., 390, *Fisher v. Blight*.)

The whole question turns on the possession; for without possession there can be no lien. (*Jones v. Pearle*, Stra., 556; *Ex parte Shank*, 1 Atk., 254; *Kruger v. Wilcox*, AmbL., 252; Doug., 97; *McCormbie v. Davis*, 7 East, 5.) Now, possession, once parted with, puts an end to lien. (*Sweet v. Pym*, 1 East, 4.) Indeed, actual possession, without the assertion of legal right to it, is of no avail. (4 Wheat., 438, *The General Smith*.) And slight circumstances will be laid hold of to show that the creditor does not rely on lien. (12 Wheat., 611, *Ramsey v. Allegre*.) No possession was ever taken or asserted by the Atlantic Insurance Company. They repudiated it, together with every sign of ownership, lest they should be called on for the duties. They were content to be creditors with mere hypothecation, without deposit or pawn. (2 Black. Com., 159.) Whether even pawn gives property, is doubtful; but it is unquestionable that hypothecation does not. The latter gives but right of action. (Wood's Inst., 219, ch. 2, b. 3; Poth. de bienf., Vol. II., p. 355; Nantissement, ch. 1, art. 1, sec. 2.) True, ships at sea may be delivered by bill of sale *ex necessitate*, (2 T. R., 462, *Atkinson v. Maling*); and cargoes may change hands by the documents. But without delivery of some kind, the whole is fraudulent and void. (*Ryall v. Rolle*, 1 Wils., 260, and 1 Atk., 167; *Brown v. Heathcote*, 1 Atk., 160; *Fulkener v. Case*, 1 Br., 125.) In this case Kenyon gave up the ships because not delivered. See his argument in *Lempriere v. Pasley* (2 T. R., 485, 496). By the civil law, a chattel cannot be hypothecated or mortgaged. And as between the State and a creditor by hypothecation, the public privilege prevails. (Domat., b. 3, Tit. 1, sec. 2, p. 356-7.) In the case of *The Frances* (8 Cra., 418), it was settled that liens for loans, advances, general balance, or anything but freight, yield to the pre-eminent law of prize, which is as near as may be the principle in question. It has also been adjudged that the lien of a foreign attachment, by which the thing attached is taken into possession, is superseded by the public priority. (5 Cra., 289, *Harrison v. Sterry*; 2 S. & R., 221, *Willing v. Bleacher*.) In *Thelussou v. Smith*, the court, though they mention *mortgage as an [***406** exception to the general rule, yet do so only *obiter*, nor has it ever been adjudged that even a mortgage will dislodge the public priority.

No lien is pretended for it. But an equitable title to these funds, much better founded in justice than that of the insurance company, whose asserted lien, without possession or property, is a mischievous taint secretly affecting the right to the fund, and most disastrous in its influence on free and fair circulation. To sustain it, judicious legislation must add to the catalogue and character of liens, and abrogate the act of Congress providing for the public priority.

The three first divisions of the charge affirm the bonds in question, whose validity is denied either as *respondentia* bonds, or *bona fide* obligations. They were executed long after the ships and cargoes were at sea, not predicated of any maritime necessity, to make provision for foreign voyages, but were part of a general scheme of gambling and usurious speculation. In form, character and substance, they differ from all *respondentia* bonds heretofore known. (2 Marsh. on Ins., 827; 8 S. & R., 138, *The Pennsylvania Insurance Company v. Dural*.) It is said in the *Consolato del Mare*, that Demosthenes gives us the form of a *respondentia* bond, precisely as used ever since. (Boucher's Trans., Vol. I., ch. 6.) And the principles and regulations of the Roman *pecunia trajectitia* are familiarized by abundant publications. From no source of legitimate information can such a contract as the present derive support. All the English authorities, Molloy, Beawes, Weskett, Postlewaite and Park, like the Roman law, concur in considering *respondentia* loans, as to begin before the voyage begins, and to be warranted only by its necessities. Roccus is explicit to the same point. (Ingers. Trans., note 75, p. 136.) Pothier does not notice the distinction. Emerigon and Valin may perhaps be quoted as contrary, and Marshall inclines to their opinion. (2 Marsh. on Ins., 747.) Bynkershoek's well-known chapter on this subject also leaves his opinion in doubt. (Quest. Jur. priv., lib. 3, ch. 16.) But the origin and reason of the contract argue conclusively the necessity of confining it to loans before the voyage begins, and to make it begin. Otherwise, as in this instance, the loan never was at risk, or at sea at all, nor were any purchases made abroad with the proceeds of it. Though the terms of the bond are at and from Philadelphia, yet the money was not loaned till the vessels were half-way to China; and it will be as lawful to borrow money on *respondentia* after the vessel's return as before her departure if such devices are sanctioned. They are mere wagers without interest. The vessels, cargoes, voyages, and risks, together with the ocean, and the foreign destination, are mere dramatic suppositions. No risk was run to justify marine interest. *By the original doctrine, the lender at marine interest accompanied the loan in the vessel and superintended its returns; and so he must now; not perhaps in person—the improvements in modern navigation have rendered his actual presence unnecessary—but by correspondence, documents, foreign agents, supercargoes, self-appropriated consignments, and all the securities which have attended every *respondentia* loan, till these innovations were attempted. Without such precaution it is mere trust, without other than personal security. In France, every *respondentia* contract must be reg-

istered within ten days, on pain of nullity. The whole ground of *respondentia* is encroached on the common law; and courts of justice should look well to the landmarks, which none but legislators should change; and they cautiously, if at all. Otherwise, all the gambling adventures of profligate speculation will be legalized, all the wholesome restraints on usury abated. There can be no marine interest without, first, absolute need; second, a want of all other means of supply; third, it must clearly appear that the loan was applied to the very voyage created by it; and lastly, there must be a sea voyage in which that very loan is risked. It is all *strictissimi juris*. Now, there was no consideration for this loan till the voyage ended, till when the lenders insured the borrowers against all sea risks; and those risks were half run before the loan was made. By the law of New York, which governs this contract, the slightest infusion of usury vitiates and annuls the whole contract. (3 Johns. Cas., 66, 206, *Wilkie v. Rosevelt*; 2 Cow., 678, *N. Y. Firemen's Ins. Co. v. Ely*; *Id.*, 712, *Bank of Utica v. Wager*; *Id.*, 770, *Same v. Smalley*.) It will be said that this was left as a question which the jury have settled. The reply is, that though that may be so, yet the court should have also left it to the jury to determine whether the whole transaction was not a gambling and fraudulent speculation, of which the loan, bond, supposed sea risk, and marine interest, were but parts of the contrivance and collusion.

Of the points of evidence ruled, the 1st and 2d concern the corporate existence of the company, which, not having been proved as usual, was allowed to be inferred from the circumstance of the collector's having accepted their bond, with the approbation of the district attorney. But those officers cannot give away the rights of the government; nor should their courtesy, at all events, be construed into such concession. The 4th, 5th, 6th, and 7th points respect evidence of fraud overruled, because it was not first brought home to the insurance company. The plaintiff in error strove to prove the whole scheme, the double papers, falsified manifests, altered letters; in short, all the fraudulent manœuvres, conceiving it competent to connect the company with these acts, either afterwards or inferentially, *of which [*408 the jury were to determine. Lastly, the attempt to prove what became of the money loaned, after proof that none of it went to Thomson's pocket, was also deemed proper as part of the whole *rerum gestarum*, for the consideration of the jury.

Mr. Binney, for the defendants in error.

The record presents questions of very different degrees of importance, some of them being without the least influence on the final decision of the cause, while others must decisively rule this controversy, as they will also rule other suits now depending, and an immense amount of property. The same time and attention are not to be given to these unequal questions; but some attention is due to the least, since the counsel for the United States have raised them for discussion.

It is proper first to dispose of those which have no connection with the merits of this controversy—the exceptions to evidence admitted and rejected.

1. Overruling an exception by the defendants' counsel, to a question by the plaintiffs to their witness, Mr. Sands, as to his agency in their behalf. The question was merely introductory to the inquiry, whether he had not delivered the bond of 9th October, 1826, to the district-attorney. But had his agency been a material fact, he was competent to prove it. There was nothing to show that his power was conferred by writing, nor was it necessary that it should have been so conferred. A corporation may create an agent by parol, and the agent may prove it. (*Mifflin v. Nicholson*, 2 Yeates, 38; *Bank of Columbia v. Patterson's Administrators*, 7 Cranch, 308; *Bank of the United States v. Dandridge*, 12 Wheat., 69.)

2. The objection to evidence of the *respondentia* bond, because the corporate capacity was not proved, was contrary to the agreement on which the suit was brought. The United States were precluded from questioning the plaintiffs' right to sue as a corporation. They compelled the plaintiffs so to sue, and took their bond under their corporate name and seal to insure the suit. The cases of *Henriques v. The Dutch E. I. Co.* (Ld. Ray., 1535), and *Duchess Manufactory v. Davis* (14 Johns., 238), are analogous. The arrangement was at least *prima facie* evidence of charter, upon this trial, between these parties. The objection under any circumstances would have been without weight; for it was a mere question of the order of proof, which the court was competent to regulate at its pleasure. The bond might as well be proved before the charter, as the charter before the bond.

3. That the bond was well proved, as the several bond of Thomson, admits of no doubt, unless it is meant to question the proof, because the witness swore to the signing, and not to the sealing. But, as the bond purported to be 409th sealed and delivered, *proof of signing was sufficient to go to the jury. (*Talbot v. Hodson*, 7 Taunt., 251; *Curtin v. Hill*, 1 Southard, 148; *Long v. Ramsay*, 1 Serg. & Rawl., 72; *Phill. on Evid.*, 413.)

4. Overruling the question in regard to the application of the money loaned upon the Addison, was in conformity with settled law. The question of application by the borrower, did not concern the lender, by the principles of either the common or the maritime law. By the common law, the borrower was competent to dispose of it at his pleasure. The application of a loan does not affect either the debt or the security given for it. The maritime law, as to this species of loan, is the same. The doctrine of application arises only where the master hypothecates, not where the owner bottomries, or borrows on *respondentia*. Even in the former case, though a necessity for the advance must be shown, the application does not concern the lender, unless there be a misapplication by collusion with him, or with his privy. (2 Emerig., 440, 502, 562; 1 Valin, 454; 2 Valin, art. 9; 7 Pothier, 257; *Canzanaves v. Brig St. Trinidad*, Hopk. Adm. Dec. 35; *The Jane*, Dodson, 465.)

5. The remaining exceptions to the rejection of evidence, may be dismissed with the remark, that the offered testimony concerned the acts and declarations of persons, between whom and

the plaintiffs there was no privity, and after the plaintiffs' title had accrued.

The more material exceptions concern the charge of the court, in which are to be found the principles of law by which the title of the plaintiffs to the property in question is to be maintained.

The cause turns upon the decision of the court, that a contract of insurance loan made with the owner of merchandise, after it has departed on a voyage, and reserving a marine interest, is not invalid, for that cause as a marine contract; neither is it so, if it be a renewal of a previous loan of the same nature; and that if there was neither gambling, usury, nor fraud, but the transaction was fair, and there was a real risk, the papers in question created a trust in the specie outward and in the proceeds homeward, for payment of the loan, which gave the plaintiffs a title superior to the priority asserted for the United States.

Under the facts submitted to the jury, who by their verdict have negated all actual fraud, gambling, and usury, and have affirmed the reality of the risk, and the fairness of the entire transaction, it is contended that these contracts were valid, and passed an effectual title to the property. 1. By the common law. 2. By the maritime law.

1. By the common law. Without at present giving a name to these contracts, it may be safely asserted, that all their elements are *sanctioned by well-settled principles. [*410] The contracts involve an advance of money at a premium beyond the rate of the statute, dependent for its return on the result of a real risk—a risk in which the borrower had an interest to the whole extent of the loan—an assignment of the goods at risk, to secure the payment of principal and interest on the happening of a contingency; and a continuance of the actual possession of the goods assigned with the agents of the borrowers, until the purposes of their employment were answered, and they returned within the reach of the lender. All these features of the contract are of indisputable legality and efficacy.

The excess of the premium, beyond the rate of the statute, has the sanction of the law, as the return of the principal, and not that of the interest only, depended upon a real and not a colorable contingency. Notwithstanding the dispositions of the courts of Westminster Hall to enforce the statute of usury, it has been settled with the most harmonious consent, that if the principal and interest of the loan be at hazard upon a real contingency, it is not a case for the imputation of usury. (*Martin v. Abdee*, 1 Show., 8; *Sharpley v. Hurrell*, Cro. Jac. 209; *Roberts v. Tremayne*, Cro. Jac. 507; *Redingfield v. Ashley*, Cro. Eliz., 741; *Sayer v. Glenn*, 1 Lev., 54; *Appleton v. Brian*, 1 Kbble, 711; *Murray v. Harding*, W. Bl., 859; 3 Wils., 390, S. C.) It is on this principle that contracts of *post obit* and annuity are allowed. (*Batley v. Lloyd*, 1 Vern., 141; 2 Eq. Abr., 275; *Chesterfield v. Jansen*, 1 Atk., 301.) Such cases are not contracts of loan, but of insurance on hazard. They are placed by the civil law in the class of aleatory contracts. They may be gambling, but cannot be usurious.

In this case they were not gambling, because

the borrower had an interest in the risk to the whole extent of the loan. This relieves the court from the embarrassment that would attend a gambling insurance. In New York, where the contract was made, such a wager is lawful. (*Clendenning v. Clark*, 3 Caines, 141.) They follow the English doctrine, prior to the 19 G. II., c. 37. (*Crawford v. Hunter*, 8 T. R., 23.) Massachusetts is the other way (*Amory v. Gilman*, 2 Mass., 1), and Pennsylvania agrees with her. (*Pritchett v. Ins. Co. N. A.*, 3 Yeates, 461.)

The assignment of a security for the repayment of the advance and interest on the happening of the contingency, has been seriously questioned on the very ground of the contingency. There is no authority for this. Security may be given as well for a contingent, as for a certain debt. It does not change the nature of the hazard or of the loan. The assignment transfers the title to a chattel, as a collateral security for the performance of the borrower's duty, if the goods escape the hazard; and this [*411] *has the sanction of law in analogous cases. It is of the very nature of bottomry or hypothecation to give a mortgage upon the vessel; yet it is upon the contingency of her safety that the loan is made returnable. The same is true of *respondentia*, by the law of France. Analogous securities have been given in England without question. (*Redingfield v. Ashley*, Cro. Eliz., 741; *Batty v. Lloyd*, 1 Vern., 141.) The lender is not obliged to run the risk of the borrower's insolvency, as well as of the seas.

The property in the goods was transferred by the assignments on the bills of lading without delivery of actual possession, which was neither according to the agreement nor within the power of the parties before the arrival in Philadelphia. They are assignments in trust on their face, according to the agreement, and are therefore honest assignments, as they tell the whole truth. The counsel for the United States think they should have been unqualified or absolute, and that they are vitiated by the account and risk continuing for Thomson. Had the assignment been absolute, on its face, there must have been a purchase or a secret trust. The lenders did not mean to be the absolute owners, nor to conceal their interest. The account and risk were to continue in Thomson, for his was to be the profit and loss; and the property was to be in the company in trust, for securing the debt. This was precisely *Haille v. Smith* (1 Bos. & Pull., 570). It is perfectly immaterial whether the assignments passed an equitable or a legal title. The Circuit Court thought it an equitable title only; and it certainly was a title that an indorsement of the bills of lading by the supercargo to a *bona fide* purchaser would have defeated. This, however, is owing to the confidence which the law, for the sake of commerce, authorizes a purchaser to place in this document, and not because the assignment passes the equitable title. The weight of authority and principle are in favor of its passing a legal title to the specie outward, and to the returns. (2 Holt on Shipp., 72; *Meyer v. Sharpe*, 5 Taunt., 80; *Giles v. Nathan*, 5 Taunt., 558.) Beyond doubt no substantial property was left in Thomson that any creditor could obtain by administration, assignment, or execution, except the re-

sulting or remaining interest after satisfaction of the bond. Whether this was legal or equitable it is needless further to inquire.

The non-delivery of possession was, under the circumstances, of no effect. It was not intended to be taken by the borrower until the voyage was at an end. This appears by the memorandum of the agreement, and answers the objection. The possession of chattels by the assignor or his agents, after an assignment which provides for such a possession, is, *per se*, no objection; the possession is according to the deed. If the deed *be absolute, and [*412] purport to transfer the possession, the impossibility of taking it by its absence at sea, or for any other cause, is an answer to the presumption of fraud that might otherwise arise. (*Cole v. Davis*, 1 Lord Ray., 724; *Meggott v. Mills*, 1 Lord Ray., 286; *Brown v. Heathcot*, 1 Atk., 160; *Flyn v. Mathews*, 1 Atk., 185; *Atkinson v. Maybury*, 2 T. R., 462; *Ex-parte Batson*, 3 Bro. C. C., 362; Coote on Mortgages, 263-4.) In this case there was both a provision for possession by the agents of Thomson until the return of the adventure to the United States, and an impossibility of taking possession had the agreement called for it. It is in all respects the same case as *Bucknell v. Royston* (Prec. Chan., 289), in which the title of a lender on a similar assignment for security was traced through successive voyages, sales, and shipments, during several years, and enforced against the personal representative of the borrower.

It was not for the court to let the jury decide the question of property as inferable from the fact of possession. The fact of possession did not stand alone, but was governed by written instruments which legally made that fact of no importance. The jury were not prevented from deciding the question of fraud, as connected with the fact of possession, but they were deprived of the right of inferring it from mere want of possession, because it was a question of law that under such circumstances of inability, agreement, and contingent debt, possession by the assignor was not *per se* a badge of fraud.

The property, then, being passed to us, and passed as openly as transfers of chattels at sea are ever made, it is submitted, that the priority acts do not affect us. The case is not placed by the Circuit Court on the ground of lien; it need not be so placed in this court. It is of no importance whether a general, or even specific lien will prevail against the priority of the United States. *Thebisson v. Smith* (2 Wheat., 426), is a difficult case. The case of a master with the possession of goods and his lien for their freight—the possession and lien of a factor for his advances and commissions—would be more difficult, if it be true that the priority of the United States is to defeat these securities. This it is apprehended will never be decided. The United States have no rights but as a creditor. They derived nothing from their execution and levy on these teas. If they were not ours by the assignment on the bill of lading, they passed to Thomson's general assignees by his assignment of the 19th November, 1825. The United States can claim only as a creditor against the assignees, who are trustees for all the creditors, and for the gov-

ernment first before all; but what the assignees cannot overthrow, be it specific, or be it general lien, is secure against the government. **413***] For the present cause this discussion *is, however, unnecessary; for here is more than lien of the highest kind, a transfer and conveyance of property by terms of grant of the most decisive import—a mortgage or deed of trust, upon the efficacy of which to exclude the priority of the United States, this court have already passed their judgment in *The United States v. Hooe* (3 Cranch, 73). It is a security saved also by *Thelusson v. Smith*. There can be no difference between a mortgage of chattels and one of land.

Thus stands the case on the principles of the common law. But the point mainly and almost exclusively pressed below, was, that although this might be so according to the rules of the common law, yet that these were loans at marine interest, a technical contract, which the maritime or universal law did not permit under the circumstances of this case. On the contrary, it is admitted that

2. These contracts are equally effectual by the maritime and universal law.

The objections urged against them are two: 1. That both the loans were made upon goods already at risk by the departure of the ships. 2. That the loan by the Superior was applied to pay a former loan, or was in other words a renewed loan.

1. The first objection is supposed to be derived from the Roman law, which it is suggested limited this contract under the name of *pecunia trajectitia*, to such loans as were themselves to be transported, or were applied to purchase goods for transportation. The language of the digest is, "*trajectitia ea pecunia est quæ trans mare vehitur. Ceterum si eodem loci consumatur, non erit trajectitia. Sed videndum, an merces ex ea pecunia comparata, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajectitiæ pecunia fit.*" (Digest, lib. 22, tit. 2.)

The Roman law upon this subject is misapprehended. Whatever is said upon this subject in the Code, the foundation of that law is as a regulation of the rate of interest, without any definition of the contract, or any limitation of it. Any contract attended by the risk of transportation by sea, was within its principle. That which the Digest contains in regard to it is not a limitation, but an illustration of the contract; and both in the Digest and Novels the illustrations given show that the asserted limitation was unknown to the Roman law, and that any loan dependent for repayment upon the safety of goods at risk, was within the rule of *pecunia trajectitia*.

The Code under the title *de Usuris*, does not define the contract, but limits the parties in *trajectitiis contractibus*, to 12 per cent. as the maximum interest. Under the title *de nautico fœnore*, it does not describe what shall not be a *contractus trajectitiæ*, but it defines the events in which maritime interest shall cease, or **414***] *shall not accrue, and in what event the creditor shall lose his money, or shall receive it though the goods be lost. The subject is left here by the Code.

The description of the contract is first given in the Digest, from the works of the civil law-
Peters 1.

yers. The passage above cited is taken from Modestinus, who was of opinion that the principle of the code in regard to *pecunia trajectitia*, was applicable to a case in which the merchandise bought with the loan was transported by sea at the risk of the lender. But the distinction in the view of the Digest was not between goods bought, and goods not bought with the loan, but between a loan on goods transported at the risk of the lender, and a loan without any risk whatever; for this is the only sensible distinction in a title of the law which had reference to the rate of interest. It is accordingly made plain by the opinion of Scævola (Digest, Lib. 22, tit. 2, sec. 5.) *Periculi pretium est, et si conditione quamvis pœnali non existente recepturus sis quod dederis, et insuper aliquid præter pecuniam, si modo in alcæ speciem non cadat; veluti ea, ex quibus conditiones nasci solent, ut si manumittas, si non illud facias, si non convatuero, et cætera. Nec dubitabis, si piscatori erogato in apparatus, plurimum pecuniæ dederim, ut si cepisset redderet; et athletæ, unde se exhiberet, excerneretque, ut si vicisset, redderet.* If a contract by an *athlete* to return a loan with its interest, upon his gaining the prize, was within the rule of a *contractus trajectitiæ*, as is here asserted, it is obvious that this rule comprehended a loan on goods already exposed to the risk of the sea. The same is equally obvious from the language of Paulus. (Dig. lib. 22, tit. 2, sec. 6.) *Fœnerator, pecuniam usuris maritimis mutuam dando, quasdam merces in nave pignori accepit; ex quibus, si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum, propriisque fœneratoribus obligatarum, si quid superfuisset, pignori accepit.* The question he asks, and answers in the negative, is whether the goods being lost on which the creditor loaned specifically, and being of value equal to the loan, he could resort to the surplus of the other loans, for repayment; and nothing can show more decisively the practice of loaning on goods generally, after the modern practice, than such a question.

The custom of merchants in the time of Justinian without doubt embraced *respondentia* loans for successive voyages, where the goods were repeatedly changed. (Novel, 106.) In this constitution of the Emperor the practice is detailed at length, and confirmed. Such a practice shows that the transportation of the specific loan, or of the specific goods bought with it, was no necessary part of the Roman law of *respondentia*.

The just inference is, that it is only the element of the contract that is stated in the Digest, and not its limitation, namely, *that the goods, on the security of [**415** which, or for which, the loan is made, shall be at the risk of the lender; but not that they should be the specific loan, or its investment.

The practice of modern nations is free from all obscurity on this head. They sanction, with great harmony, *respondentia* loans made after the goods are at risk. Upon this point the two distinguished commentators, Valin and Emerigon, agree. The difference between them is upon an independent point, whether a loan made after the departure of the goods is attended by a right to participate with prior loans, as if all the lenders were co-mortgagees

—a question of no application in this cause. (2 Emerig., 382, 385, 386, 484; 1 Valin, 366; 2 Marsh., 747, *a*; 2 Emerig., 401.)

2. That a renewed loan, like that by the Superior, is free from objection, is clear from many authorities precisely to the point. (2 Emerig., 573; Pothier, 259; 2 Valin, 11, 12; Le Guidon, 87, ch. 19; Ordenanzas de Bilbao, cap. 23; Code de Commerce, Art. 323.)

A shorter answer to both these objections, is that the law of *respondentia* loans is not an universal law. The contract is not one of universal nature and form, but depending upon the pleasure of the parties, and varying in different countries, according to the prevalent sense of expediency, and the principles of the code of particular law there in force. (4 East, 319, *Bush v. Fearon*; 8 Mass., 348, *Appleton v. Crowninshield*.) No statute in this country restrains it; it is a beneficial contract; and all its provisions being sanctioned by the common law, that law alone is the standard of the contract in this court.

Mr. Binney concluded his argument by applying the principles contended for to the specific points of the court's charge.

Mr. Webster, also for the defendants.

The question in this case is important, but perhaps not difficult. The transaction out of which it arises, is one of a commercial character. The United States are large creditors of Edward Thomson, and they have no other hope of attaining payment but from success in this case. But the character of the case is not altered by this circumstance; as the defendants are not answerable for the frauds of the debtor to the United States, nor for the neglect of the offices of the customs. They had no connection with the custom-house, in the course of the transaction now before the court. Nor is there anything in the argument that the defendants have other security for the debt due to them, by a resort to the co-obligors on the *respondentia* bond; all these persons are insolvent; and if they were not, the defendants assert, as they of right may do, their claim to their own property.

416*] *The United States are said to be privileged creditors. They are so, as far as the law goes, but no further. In this case they have no privileges, and they stand in relation to the property in controversy, like any other execution creditors of their debtor.

Thomson assigned in November, 1825. All he had passed to his assignees, and the priority of the United States exists only to payment out of the fund which passed to the assignees. The law of the United States gives an action against the assignees, but it does not prevent the property from passing under the assignment.

What is the priority which the statute gives to the United States? It is not a prerogative, superseding the titles of others to property. It does not extend the rights of creditors on property. It is, what it purports to be, a priority among creditors, a right of first payment out of the common fund. The United States are creditors, and at the head of the list; they are *primi inter pares*; and no more.

Two propositions may be maintained: First. The priority does not affect the transfer of property at all. It never attaches on lands or goods,

as lands or goods of this debtor. It arises only:

1st. In bankruptcy; 2d. In cases of conveyances to assignees; 3. Against executors and administrators; and in all those three cases, it attaches in the fund, and not on the specific property.

It does not operate to prevent the passing of the property either to assignees in bankruptcy, or to assignees under a conveyance; or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others.

The language of the statute (sect. 65) fully establishes those positions; assignees in bankruptcy, assignees in insolvency, and executors and administrators, are all ranked together. What is law for the one, is law for all. The words are, "the United States shall be first satisfied;" obviously out of the estate. The provision, making the persons holding the estate personally liable, is then introduced to operate in the event of their not satisfying the debt of the United States, out of the estate of the debtor.

Now, will it be contended that in regular bankruptcy, the United States could levy on property which had passed to the assignees, or that this could be done on the estates of insolvents, or of deceased persons in the hands of trustees, or executors? The correlative words of the statute, in which priority is given to the surety who pays the debt due to the United States are, that he is to be paid "out of the estate and effects of such insolvent, *or deceased [*417 person." These words confirm the construction assumed for the defendants.

The 63d section of the bankrupt act of 1799 (ch. 4) also confirms this construction. It makes no new provision; but declares the payment shall be made out of the fund, and refers to the previously existing act.

It is plain, upon the fair construction of the statute, that it is priority on the fund. It says the right shall exist, when the debtor has assigned his property. This is a different thing from saying that his property has vested in the United States, and shall not be deemed to have passed by the assignment.

It may also be well observed, that connecting the priority of the United States with executors or administrators, who can only be responsible, for the property which may come into their hands, and giving a personal action against assignees in case of default in paying over the funds in their hands, are conclusive evidence to show that the understanding of law is, that all the property of the debtor passes by the assignment.

There is no decided case in opposition to these principles, unless that of *Thebisson v. Smith* may be so construed.

Few cases have been presented to the consideration of courts of the United States, upon this subject. They are:

1. *Fisher v. Blight* (2 Cranch, 358), which decides two points: 1. That the priority extends to debtors, generally, under the act of March 3d, 1797. 2. That it is not in the nature of a lien on the property.

2. *The United States v. Hovee* (3 Cranch, 73), which decides, 1. That priority is not a lien—a

principle always to be recollected; 2. That to create a case, where in case of insolvency the priority will attach, there must be an assignment of all the property of the debtor.

3. *Prince v. Bartlett* (8 Cranch, 431), which decides that the insolvency is not a mere inability to pay, but must be some notorious act.

4. *The United States v. Bryan & Woodcock* (9 Cranch, 377), which only says the priority given by the act of 1797 does not apply to debts due before the passing of the law.

The case of *Thelusson v. Smith* (2 Wheat., 396) does not apply to the present case. The sale which was made by the marshal of the United States, under the judgment against Mr. Crammond, was not objected to by the assignees. The point was not made, and the assignees suffered the estate to be turned into money, and let the parties contend afterwards for their respective rights. It is obvious, that if the assignees had objected to the sale of the estate of Mr. Crammond by the marshal, the sale could not have been made.

Suppose the assignees had sold the land. **418*** They had the *power to sell it, and it might have been their duty to sell it. They might have been compelled to execute their trust; and they had therefore a right to the fund. The execution, therefore, could only, in that case, have been levied on the land with the assignees' consent.

2. The second proposition is, that notwithstanding the decision of the Court in *Thelusson v. Smith*, it may be argued that the provisions of the law, which gives the priority, were not intended to extend the general rights of creditors.

It will scarcely be claimed that the United States can dislodge all liens. The case of freight—the advances of a factor—insurance brokers' accounts, cannot be supposed to be affected by the law.

The argument on the other side is, that the assignees cannot, under the injunctions of the law, pay any debt until the United States are fully paid. This evidently is, that they are to pay out of the estate in their hands. Now, what is the estate of the debtor in the hands of the assignees? Not the land unembarrassed, but the land subject to the liens upon it.

Again, assignees do not pay prior judgments in favor of creditors. The judgment creditor proceeds against the land, not against the assignees; and he obtains payment, not from the assignees, but from the fund raised by a sale of the land, under the execution. How is any other construction of the law practicable? The assignees take the property, subject to the lien. Does it pass free of the lien or not, just as it may appear the United States are or are not creditors? They may not be named in the assignment at all.

Again, if the United States are creditors, does the property pass free of all liens; and after paying the United States, go to the other creditors?

It is true the case of *Thelusson v. Smith* is sufficient for the defendants. It expressly saves the case of a mortgage.

Do the documents, or either of them, exhibited by the defendants, vest any interest in the outward cargoes of the vessels named in them in the defendants? It is contended that Peters 1.

they vest a clear legal interest in the outward cargo, mentioned in the bill of lading. It should not be called the creation of a lien, but the transfer of a legal interest in the cargo.

The bond creates no lien, it contains no words of positive conveyance. The assignment does; and by it the owner transfers the property. This might have been done by other writings. Property at sea may be legally sold, without indorsement of the bill of lading. Strictly speaking, the evidence in this case does not show an assignment of a bill of lading, such an assignment being properly by the consignee; but it shows a transfer of the goods, written on the bill of lading by the shipper, and the admitted owner. It passes [***419** the property; nor could the consignee, by an assignment of the bill of lading, give the property to any other, because the bill carries notice of another ownership. (*Barrow v. Coles* 3 Camp., 92.)

A bill of lading is no more effectual to pass property than any other instrument, except that it is negotiable. A buyer under it, for value, without notice, may hold against all other or intermediate rights. (2 Holt, 72.)

Property in goods, shipped under a bill of lading, may be transferred by delivery to a third person, without indorsement of the bill of lading; and such transfer will be good, against all the world, except the indorser of a bill of lading, for a valuable consideration. (5 Taunton, 558; *Ibid.*, 79, 759; 1 Mar., 233; 4 East, 211.)

And the property in goods, shipped under a bill of lading, may be vested in another without either delivery or indorsement of the bill of lading; as, by an agreement between the owners of the goods and third persons, either in the character of creditors or purchasers, accompanied by acts, vesting the property in the goods in such persons. (3 East, 585; 4 Campbell, 31; 4 East, 211; 3 Chitty, 404; *Ibid.*, 350, 351.)

This last case is thus: "Vendor did not send bill of sale; but agreed to deliver goods, vendee accepted bills for the purchase, and before the arrival, sold the goods, and became bankrupt. Held, that the purchaser could hold against the vendee.

Here, then, was a transfer of the interest of Thomson in the specie, and strictly speaking, it was not a qualified, but a positive, direct, and absolute transfer, as is shown by the words employed for the purpose. Its only limitation was the specification of the object for which it was made. It is a collateral security, and is just what it should be; for if it had appeared to be an absolute sale, when only security was intended, it would have worn a badge of fraud. The conveyance is made to carry a lawful agreement into effect, and the words of the assignment are full and clear, and are restrained only by the designation of the purpose.

It is hinted, that it is not to be taken as conceded, that a mortgage of personal chattels can stand against the United States priority.

The general principle is, that a mortgage of goods is like a mortgage of lands. Where there is good faith, and the thing is actually delivered, this position cannot be questioned. The 13th Eliz., ch. 5, applies both to goods and lands, and saves both, if "made upon good con-

sideration, and *bona fide*." It may obstruct creditors, or delay them, and yet be good. (*Meux v. Howell*, 4 East, 1; 5 John., 258.)

It is a strong proposition, that the priority of the United States is to override mortgages of 420*] personal chattels. It may be *said to be an *ultra principle*. Goods are mortgaged, and ships are mortgaged, every day. The rule, if it exist at all, must be made general. It cannot apply only to those mortgages where possession follows, for some mortgages do not allow possession, and are good without it. Such a doctrine is alarming.

Was there a good consideration for the assignment of the specie made by Thomson to the defendants?

Thomson was a borrower of the defendants' money. He had given a bond for it. Events might discharge him, but, until they did, he was their debtor, and at the proper time he must pay. This was sufficient. (*United States v. Hooe*, 3 Cranch, 73.) A similar transfer of any other goods would have been equally available to secure the bond.

There being a legal conveyance by the owners of the property to the defendants, it must be assailable on other grounds.

The first objection is that the instrument was not a *respondentia* bond, because the goods were already on board, and the ship had sailed two months before the loan.

1. To this it is answered that there is no law requiring the very goods and money to be put on board. The mode of transacting business of this kind has changed; and when the money or goods may be on board is now of no consequence. In the very form of a *respondentia* bond (2 Holt, 433), the consideration is the acceptance of a bill of exchange at four months.

2. No matter whether this is a *respondentia* bond or not, there was a transfer of all the goods for a sufficient consideration.

3. The contract, it is said, was illegal, and, therefore, everything done to carry it into effect was void. It was illegal because it was usurious, and usurious because the vessel had sailed before the loan, and part of the risk and time was therefore gone.

The vessel, it is true, had sailed, but no information had been received from her since her sailing; and the defendants, therefore, bore all the risk from the wharf. There is no limit, by law, to marine interest. If this was intended to be a *bona fide* marine risk, it is not usurious, whether the premium be high or low.

The next objection is that the possession and appearance of property remained in Thomson.

The answer to this is that the possession of the property was in the master of the vessel. Property in the defendants was shown by the papers. But if this had not been the fact, the consequences claimed by the United States would not follow. As between the defendants and Thomson, the property had passed to the defendants, and no change was made by the reshipment, John R. Thomson, at Canton, being only an agent; the rights of the defendant could not be divested by any act of 421*] *the consignees, as he received the property for the use of the assignees of Edward Thomson; and when the shipment was made

in Canton by the agent, the rights of the defendants were perfect against Thomson, against creditors, and all others but a *bona fide* purchaser. The result of this reasoning is the transfer and assignment of goods at sea, by a proper written instrument, for an adequate consideration, and in execution of a valid contract, gave the defendants a legal interest in the goods; and as this transfer was on the bill of lading, so that no title by indorsement of the bill could be attained against the defendants, their title was indefeasible.

The title of the defendants was a legal title, the equitable interest remaining in Thomson. He was entitled to a proper application of the proceeds, to an account, and to profits, because the shipment was for his account and risk.

When the vessel returned to the United States, the legal title was in the defendants before as well as after the delivery of the bills of lading. Their title was not derived from the bills of lading, but from an earlier source, and the delivery of the bill of lading had no other effect but to identify the property, and to prevent any other title being acquired by purchase under those bills.

No one claims the property under the bill of lading as purchaser. On the 19th of November the bill of lading had not changed the property, and it still was in the defendants. It had not, and could not have got back to Thomson, and therefore could not pass to his assignees.

The defendants had a right to claim this property against the assignees. The United States could not, as has been shown, levy upon it; and if the United States could, for their priority, disregard the assignment, they are only prior creditors, and as such had no right to the property. As if there had not been a general assignment, the general creditors could not levy upon this property; so disregarding the assignment, if the United States claim so to do, they, as creditors, could not levy on it. It is contended that goods may be mortgaged, and if the transaction is *bona fide*, possession need not follow if the bargain be otherwise. (Cook, 264, 4th class of his cases; Prec. in Chancery, 285; 1 Pick. Rep., 389; 2 *Ibid.*, 607; 5 John., 258; 3 Caines, 166; 2 Term Rep., 389; 10 Ves., 139; 4 Bin., 258; *Barrow v. Paxon*, 5 John., 258; 8 *Ibid.*, 446; *Craig v. Ward*, 9 *Ibid.*, 197; 15 Mass., 244.)

Mr. Wirt, for the plaintiff, in conclusion.

On the 19th November, 1825, Edward Thomson made a general assignment of all his property for the benefit of his creditors. It is, therefore, one of the cases of established insolvency on which the priority of the United States arises.

*The debt to the United States was [*422 due for duties on foreign goods imported.

The case, then, depends on the operation of the act of 2d March, 1799 (3 L. U. S., 197, 565), which provides that in all cases of such an insolvency the debt due to the United States shall be first paid before any other debt.

Was there a debt due on that day to the Atlantic Insurance Company? Is it of this debt they claim satisfaction? The statute answers that the debt of the United States is first to be

paid. By this statute it is manifest that the United States are preferred to all other creditors. Was the Atlantic Insurance Company creditors? If so, they are postponed to the United States.

Is a creditor by mortgage a postponed creditor within this statute? This question has never been solemnly decided by this court, either as to a real or personal mortgage.

In *Fisher v. Blight* (2 Cranch, 358), the question did not arise. The question there was whether the preference given to the United States extended to all persons, or was confined to a particular class of debtors, public officers, and agents of the United States.

In the *United States v. Hooe et al.* (3 Cranch, 73), the question did not arise—the only point then decided being that a mortgage of part of a man's effects did not establish an insolvency within the statutes, on which the preference of the United States arose.

In *Harrison v. Sterry* (5 Cranch, 289), the case went off on the ground that the prior assignment was a fraud upon the bankrupt laws, and did not affect the priority of the United States.

In *Thelusson v. Smith* (2 Wheat., 396), the question of a prior lien by mortgage did not arise.

But the question of a prior lien by judgment did arise, and then the court, after quoting the words of the act of Congress, say: "These expressions are as general as any that could be used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States if, in case of insolvency, they pay any debt previous to those due to the United States. The law makes no exception in favor of prior judgment creditors; and no lien has been, or, we think, can be shown to warrant this court in making one."

The *United States v. Howland & Allen* (4 Wheat., 108) only re-asserts the principles of former cases; and this is the last case upon the subject of these statutes.

It is true that in the argument of the former cases it has been occasionally said at the 423*] bar, *arguendo*, that a mortgage *would defeat the priority of the United States. And in some of the cases the court, *arguendo*, has incidentally admitted the position. These were but *dicta*. But it has never been solemnly decided by this court; and they have never been required to look solemnly at the question, with a view to its decision, by hearing an adverse argument against the proposition. They have said that this priority is not in the nature of a lien, so as to avoid prior alienations of property by the debtor. And this admitted, he may sell it, he may part with his title to the property, and the alienation will be good.

But this is not the question.

The question is, whether the creation of a lien in favor of a creditor does not leave that creditor still a creditor—the debt, still a debt. And whether, if he retains this character of a creditor down to the time of the insolvency, differing from other creditors in no other way than by having a lien for his debt, that creditor with his lien and that debt, be not post-

poned to the United States, by force of the act of 1799.

It is not meant to admit, that the case before the court is the case of a mortgage. But taking it in the first instance in this, the strongest attitude which it is capable of assuming, the court is asked, whether, under this statute, a mortgage creditor finds any protection in its terms or meaning against the priority given to the United States.

In *Thelusson v. Smith* this court said: "The law makes no exception in favor of prior judgment creditors." Does the law make any exception in favor of prior mortgage creditors? The answer must be the same in both cases. It makes no exception in favor of any creditors. Whoever, therefore, stands in relation of a creditor to the insolvent, whoever is claiming a debt against him, is expressly postponed to the United States. The existence of a prior lien in his favor, will not protect him from this consequence. There was a prior lien in *Thelusson v. Smith*; the court decided the case upon the concession that the judgment was a lien upon all the lands of the defendant. And when a lien is all that the creditor claims, it cannot vary the determination that the lien is on a part of the estate instead of being on the whole.

A lien upon the whole, considered merely as a lien, is precisely of the same nature with a lien upon a part. The terms *general* and *specific* lien, cheat the mind with an imaginary distinction which has no real existence either in law or reason. For, considered in the light of a lien, merely, the one means nothing more than a lien upon the whole—the other a lien upon a part. And it is not conceivable that a lien upon part can strengthen a lien upon the whole.

Now, what is a mortgage, but a lien on an estate for the security *of a debt? In a [*424 court of law it is, from its form, considered as an absolute conveyance of the estate; and the mortgagee can recover it in ejectment. But in equity, even after the day of payment has passed, it is still considered as a mere security for a debt. And the act of 1799 looks through the form to the substance of the thing. Is the mortgagee still a creditor? The terms of the act postpone him to the United States. Is the debt for which the mortgage is given still a debt? It is postponed to the debts of the United States. Is the mortgage, in its essence, and object, anything more than a security for a debt? Is it anything more than a lien on a particular subject for a debt?

It is objected that the priority given to the act of 1799 is only a priority to be paid out of the estate of the debtor; and the subject having been previously mortgaged, constitutes no part of his estate; but has become a part of the estate of the mortgagee. The answer to this is, that this is the very question in controversy.

Lord Hardwicke says expressly: "The person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." And again, "by a decree of all lands, tenements, or hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed;" and again, "the interest of

the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and, therefore, must remain in the mortgageor." (1 Atk., 605-6, *Carbone v. Scarfe*.)

Is it not perfectly familiar to us all, that in a case of equity, a mortgage is considered as a mere security for a debt? Blackstone puts it in this view of the case, on the same footing with a bond—a mortgage, says he, "is also landed security, as a bond is a personal security for the money lent." (3 B. C., 435.)

Now, suppose a question between the United States and a prior mortgage, to arise before a Court of Equity of the United States. The United States claim priority of payment out of the estate of the insolvent mortgageor, insisting that the mortgaged subject is a part of his estate. The mortgagee on the other hand alleges that the estate is not in the mortgageor, but in him. That the mortgagee is the owner of the property. Would not the court answer him in the language of Lord Hardwicke "you are not the owner; the mortgageor is the owner—the interest is in him; and the instrument you hold is not a conveyance of the estate, but a mere security upon it. It is a lien in your favor, but it leaves the ownership in the mortgageor; it leaves you still a mere creditor for a debt, holding, indeed, a lien on the estate—a lien intended to give you a preference—but that intention is defeated by a statute which creates a preference in favor of **425***] the *United States which rides over all other liens; and considering you merely in the light of a creditor claiming a debt, must be postponed to the United States."

If this would be the language of a Court of Equity, in such a case, in expounding and applying the statute, will the question be varied, because the construction of that statute arise before a court of law? Will the statute have a different application in one court from that which it would have in the other? In a question arising on the same statute, would a creditor be postponed in a Court of Equity, who would be preferred in a court of law? Would it be of any substantial use to the mortgage creditor, to prefer him in a court of law, if he must be postponed when carried before a Court of Equity?

The United States being remediless before a court of law, could they then, on that ground, go into a Court of Equity, and there strip the mortgagee of the momentary advantage which he had gained in the court of law? It is most manifest, that if the protection claimed for the mortgagee against the priority of the United States, proceeds only on the postulate that he is the owner of the mortgage subject, that postulate could not avail him before a Court of Equity; where it is expressly held that he is not the owner, but that the mortgageor is the owner; the mortgagee being still a mere creditor, holding nothing more than a security on the subject for the debt; and if he be a creditor, holding merely a security, and not the owner of the property, it has never been disputed that the United States are to be preferred.

There is no hardship in the case, which does not apply with equal force to any other private creditor. Every man, like the mortgagee, trusts another on the credit of his property,

and means and consequent ability, to meet his engagements. It is hard upon them all to be postponed to the government; and as hard upon the vigilant judgment creditor as upon the mortgagee. Nor is it perceived how postponing the mortgage creditor would tend any more to shake the confidence of man in man, and to embarrass the commercial operations of the country, than the postponement of all the other creditors. All men deal now upon an understanding that the payment of the debts depends on the solvency of the debtor; and, that in a case of established insolvency, the government has the preference. Mortgages and all other liens and preferences, would still hold between private creditors. It is only to the government that these and all other creditors would give way.

It is submitted, therefore, to the court, that if this were the case of a mortgage, the mortgagee would still be a creditor merely, and as such expressly postponed by the statute. We are dealing here with an equitable title; so the charge considers *it, and we are con- **426** struing the statute with reference to such a title.

But if before a court of law a mortgage, from its peculiar form and structure, would be considered as conveying the amount of the property, because such a court could not look from the terms of the conveyance to the private understanding of the parties, and that it should be a mere security for a debt, the difficulty does not exist here. Because here, upon the face of the agreement, and in its express terms, the court see that nothing more was in the contemplation of the parties than to create a security for a debt. At every step it is proclaimed that the intention of the parties looked no farther than to the mere creation of a security—"a collateral security for the loan—a continuation of the collateral security for such loan." This is the express language, both of the memorandum on the bond and the assignment of the bill of lading. It is not, as in the case of a mortgage, a consideration paid in purchase of the goods; but a sum loaned and security taken for the repayment of the loan.

With this avowed, clear, continued, uniform declaration of the intention of both parties, can the court impute to them a different intention? And if their intention went no farther than to create a security for a debt, does not the creation of the security leave the owner of that debt still a mere creditor? Would not the repayment of the loan, either by Thomson or his assignee, be the mere payment of a debt to a private creditor? And is not the payment of any private debt forbidden by the statute until the debts due to the United States shall first be satisfied?

But it is argued that although the object is admitted to be to create a security for a debt, that security was intended to be created, and was created by conveying to the creditor the title to the property, who thereby became the owner of it. The answer is he is a creditor, then, upon the security of a fund of which he is the owner. Is not this a legal solecism? If the fund be his, he is no longer a creditor with regard to that fund, unless a man can be a creditor to himself.

It is also asked, is not this the case with a

mortgage? No. The moment that the mortgage is viewed in the light of a security, the ownership is at an end. In a Court of Equity, where it is considered in this light, we have seen that the ownership of the mortgagee is denied. In a court of law the mortgage after the day of payment is passed, is not considered as a security, but as a conveyance of the title, and then the mortgagee is held to be the owner, but not a creditor on the security of the fund.

But we are yet to see a case where before the same tribunal a party has been considered as being at once a creditor upon the security of a fund, and the owner of that fund. He may have a **427**] *special or qualified property, as that of a bailee, which will enable him to maintain trover against him, but still he is not the owner of the fund as against the bailer. He may have a lien accompanied with possession, which will authorize him to hold the possession even against the owner—but still it is a lien which he has and nothing more—and a lien will not prevail against the United States. So with regard to a pawn or pledge—it is in a court of law on the same footing with a mortgage in that court. Before the day of payment has passed the lender on a pawn, though he has the possession, is considered as a creditor on the security of the subject pledged. When the day of payment is past, he ceases to be a creditor, and becomes the owner.

The notion, then, of a lien on a fund which belongs to the holder of the lien, is a legal solecism. They cannot co-exist; the character of a creditor with his lien ceases at the same moment when his ownership begins.

It has been already admitted on the authority of decided cases, that the priority of the United States constitutes no lien, but leaves the power of alienation free. Is the creation of a lien an alienation either total or partial? If a lien be an alienation to the amount of the debt, then to the amount of that lien the priority of the United States cannot attach. But if such be the effect of a lien, the same effect must be produced whether that lien be created by the act of the party or the act of law. Being in both cases a lien, the legal effect must be the same. But in the case of *Thelussou v. Smith* it was conceded by this court that the judgment was a lien on all the defendant's lands.

If, therefore, the effect of a lien be to divest the estate of the debtor to the amount of that lien; to alienate that estate and make it *pro tanto* the estate of the creditor that effect was produced here, and the priority of the United States so far defeated. Yet it was not produced here, nor was the priority of the United States defeated, or in the slightest degree affected by that conceded lien. Why? Because the act of Congress had made no exception in favor of creditors, holding a lien, or of judgment creditors, who were conceded to be creditors holding a lien.

But if a difference should be supposed to exist between a lien created by the act of the law, and a lien created by the act of the party, and that the latter necessarily alienates the property *pro tanto*, we have a decision of this court to the contrary; a decision which marks the distinction between the creation of a lien, and the alienation of the title by the act of the party. A bottomry bond is a contract, in the nature Peters 1.

of a mortgage, when money is raised for the repairs of a ship, and the master or the owner pledges the keel or bottom of the ship to secure the repayment *of the money. Here [**428** all the books concede that there is a clear lien created by the act of the party, but does that lien produce an alienation of the property? *Blaine v. The Ship Charles Carter* (4 Cranch, 332) proves the reverse. It does not pass the title, and, therefore, the holder of the lien in that case lost it by laches. It is merely a lien to be enforced in a Court of Admiralty.

The question, then, returns:

What was the condition of the Atlantic Insurance Company with regard to the property on the 19th of November, 1825, when the insolvency occurred, and the priority of the United States arose; were they the owners of this property in part or in whole, or were they merely creditors holding a security on this property for the satisfaction of the debts—and this merely on a par with the holder of a lien by bottomry? This depends on the construction of the documents.

1. The first document on which they rest their claim is the *respondentia* bond. The loan on which this *respondentia* bond was given was confessedly made two months after the vessel and cargo had sailed for China. The interest charged is marine interest, at 10½ per cent. per annum. Was the contract valid, upon the law which governs that peculiar contract?

It is needless to carry the investigation to the law of Rome and of France, with which it is agreed we have nothing to do. It may be remarked, however, in passing that under these laws it was never pretended that this species of loan divested the borrower of his title to the property. Nothing more was ever thought of than that he stood upon the footing of a privileged creditor—and the question was always one of mere precedence in the order of payment—which, however material among private creditors, could have been no question of lien, where the precedence of the government takes place over all others.

Passing from the law of Rome and France to our own law, none is known which we have upon this subject except the law of England; and with regard to that law, while the elementary writers by their definitions and their commentaries, treat it as essential that the loan should precede the departure of the vessel, or at least have been applied to the voyage; there is not a single adjudged case which recognizes a loan on such mode, for any other purpose than the purpose of the voyage.

The question is not whether marine interest is against the statute of usury, when the principal as well as the interest is put at risk. It is conceded that it is not—*i. e.*, that such interest would not be a violation of the statute of usury.

The single question on this point made in the Circuit Court was whether, according to the law of this peculiar contract it was not essential that the money should have been lent for the purposes of the voyage, and under circumstances in which it *might have been [**429** applied to those purposes. Not that the lender was bound to see to the application, but that he was bound to look to the case, so far as to ascertain that the loan was made under circum-

stances in which it might have been so applied.

The only difference between bottomry and *respondentia* is that the first gives a lien on the ship; the last gives a lien on the goods. In all other respects, bottomry and *respondentia* are declared to be identical, so that a definition of the one is a definition of the other. (Park, 410, Eng. ed.)

Now, what is the definition of bottomry?

1. 2 Black. Co., 457-8. "Bottomry (which originally arose from permitting the master of a ship in a foreign country to hypothecate the ship, in order to raise money to refit) is in the nature of a mortgage of a ship, where the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship, part of the whole, as a security for these payments."

Park, 410. "The contract of bottomry is in the nature of a mortgage, in which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed."

2 Marsh., 733. "Bottomry is a contract in nature of a mortgage of a ship, in which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed."

Again, Marshall 2, 736, says: "If the money was spent in the place where it was lent, it was not *pecunia trajectitia*, &c." So that, with the Romans, as with the moderns, it was of the essence of this contract, that the loan should be exposed to the perils of the sea, at the risk of the lender."

In the next page (737), he says: "In bottomry, the lender furnishes the borrower with money to purchase the goods which are put in risk. And Park says (413, 415, 4th edition), "the lender supplies the borrower with money to purchase those effects upon which he is to run the risk."

Now, if the court say that a man who borrows money to pay for his common purposes, and for other objects and concerns, is a borrower at *respondentia* on a bottomry, because he puts the payment on the return of a ship from sea, with which the loan has no connection, there is an end of the objection. But there is certainly nothing in the English law which countenances such a position.

With regard to the presumption that the money was so applied, the United States offered to repel it by showing that it never was so applied; but the inquiry was stopped in the case of *Army*, the court seeming to entertain the opinion that the inquiry was immaterial. There is no English case which give a different view of the law of *respondentia* and bottomry, from those extracted from Blackstone, Park, and Marshall. The cases cited from the old Eng-
430*lish reporters apply only to the *question of usury under the statute, when the principal is put at risk. The form of the bonds, as referred to by Mr. Ingersoll, are in conformity with the law as laid down. But suppose the court to be of opinion that the bond is free from objection on this ground, the question still is, whether this bond in coming in with the other documents, passed the ownership of the property to the insurance company. The *respondentia* bond did not even create a

lien. (Park, 410). A bottomry bond creates a lien, but does not pass the title. (*Blaine v. Ship Charles Carter*, 4 Cra., 332).

Does the memorandum on the bond stipulate for a transfer of the title? It stipulates for all that was afterwards done, but expressly for the purpose of creating a collateral security; not for that of passing the title.

Did the assignment of the outward bill of lading pass the title? That again expressly declares that the whole object was to create a security, and to continue that security. Did the legal effect of the act reach beyond the intention of the parties? Such a construction could not be attached; the intention clearly expressed always governs the construction of the contract.

What are the authorities on this subject? Do they say that the assignment of a bill of lading always produces the effect of passing the property? The assignment of a bill of lading does not always produce the same effect. It always depends on the relation of the parties, and the intent with which the act is done. "It depends," says Holt, "on the mutual understanding" of the parties. (2 Holt, 72). Here the understanding is clear; it is to be done merely to create a collateral security. The modern cases in England, that have been cited as to the effect of the assignment of a bill of lading, are generally cases between the assignee of the bill and the assignees of the bankrupt; and not on the general provisions of the bankrupt law of England.

The bankrupt law of England (5 Geo. II., c. 30, s. 28) places the assignees of the bankrupt precisely on the same footing in which the bankrupt himself stood at the moment of his bankruptcy. In cases of mutual credit, they are subject to all the set-offs to which he was subject, and to all the liens which he had created. The others represent only the private creditors, and when offered to another creditor, they are all of equal dignity; all liens therefore stand according to their priority.

Hence, a mere agreement to assign a bill of lading, between such parties has been held equivalent to an assignment, for the purpose of creating a preference among these equal creditors. Such was the case of *Lempriere v. Paisley*; the Court of King's Bench held that such an agreement created a lien; and that the assignees of the bankrupt could not take the property, without discharging the
***431**lien. (2 T. R., 455, Pigott's Arg., 489; Ashhurst, 490; argument of Lord Kenyon, as cited by him, p. 493.) Ashhurst calls it an equitable lien; not an equitable title; and he says as "between the person who holds the equitable lien, and the assignees, if the lien subsists before the bankruptcy, they shall never recover or retain the thing without discharging the money due;" why? he gives the reason. "The party who has the equitable lien, ought not to have footing with the rest of the creditors, for whom the assignees are the trustees," &c.

There it was a question of preference of payment between creditors of equal dignity.

The case of *Atty et al. Assignees of Jamieson, bankrupt, v. Hatson* (4 Campb., 325), is another case of preference of payment among creditors of equal degree, by force of such a lien. The case of *Olive v. Smith* (5 Taunt., 56) is another,

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where the whole bearing of the bankrupt law is decided upon, and all these cases are found to turn on it. *Huile v. Smith* (1 Bos. & Pull., 563) is another case under the bankrupt law; and there the effect of the bill of lading was expressed, and by the prior intention of the parties, it was held to transfer the property, because such was the prior intention, and that transfer was absolute.

On these bankrupt cases in England, it is proper to remark, that they are no guides for a decision under the statute of the United States. They were questions of preference between creditors of equal degree, and the question then always was, whether such a preference had been created by the bankrupt, before his bankruptcy, as gave him a preference to the other creditors. But here, under our statute, there is a creditor of the highest degree, who settles all questions of preference as soon as he appears, by taking it himself, under the authority of the public law. These cases, therefore, are inapposite to the question before the court.

It has been already said, that in England the effect of the assignment of a bill of lading is not absolute, but depends on the intention of the parties. It may now be added, that there is no case in England, where the assignment of a bill of lading, or the consignment of a cargo, has been held to pass the property, but where there is a present debt, and where such consignment or assignment is made and received, as a payment *pro tanto*. Such was the case of *Hibbert v. Carter*, which was at first decided on that position.

But afterwards, on proof that it was not the intention to pass the whole property, that decision was changed, and the ultimate recovery was on that intention against the indication afforded by the bill of lading (1 T. R., 745; *Lick-432** *barrow and Mason*, 2 T. R., 63), is not a question between the original parties; as to whom, it is there said, that their intention may be inquired into; but it was the case of a purchaser, who had purchased and paid for the cargo, and took an assignment of the bill of lading to herself. The result of all the cases is, that such an assignment, as between the original parties, passes the property or not, according to the intention. And this conforms to the case in Precedents in Chancery, 289, *Bucknell & Co. v. Hoyleston*. This case was the case of a bill of sale, which in *Hartle and Smith* is said to be a different thing from an agreement with regard to a bill of lading. This bill of sale was held, upon the intention of the parties, to amount to an equitable security; sufficient to prevail against a general creditor; or the general creditors of the deceased, as giving a lien with regard to the specific subject, against other creditors of equal degree. Now, that the intention of the parties in this case looked no farther than to the creation of a security is averred by the holder.

And when we come to look at the situation of the parties, we will find that the creation of a security by way of lien, was all that was proposed.

There was no debt due; it depended on a contingency whether there ever would be a debt. At the time of the insolvency there was no debt. The holder of a *respondentia* bond is not considered as a creditor at all. Hence, in *Peters* 1.

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England, he could not prove his debt under a commission of bankruptcy, until a special statute was there made for his case. (1 Holt, 424.)

It is not contended that a contingent debt cannot be secured; there is no doubt that it may. But the absolute transfer of property, so as to throw the ownership on a merely contingent creditor, is contrary to the nature of the case. The creation of a lien to meet the contingency, is natural and proper, and this is all that the parties propose.

With regard to the return cargo, which was the property in question, there is strong grounds for saying that there was a marked intention to keep the property out of the lender, till the return of the vessel, and the delivery of the bill of lading.

For what he does stipulate from it, is not for a bill of lading consigning the goods to him; but to order. Now, in whom does the property under such a title abide? Clearly in the shipper; until the title is actually delivered to order. The latter effect is a transfer only for that time, and here, not delivered till the priority of the United States had attached; say, then, that the assignment of the outward bill, if standing alone, would have passed not only the outward cargo of specie, but the proceeds in the return cargo; yet that very assignment stipulated for an inward bill to order, which threw the property upon the shipper in Canton, who was the representative of Edward Thomson; *and if the priority of the United [*433 States, could not attach before, because the property was in the company, it attached the very moment the property fell back on Thomson, with the consent of the company; while the return cargo, then, was crossing the ocean with a bill of lading to order, in whom was the property of that cargo? Clearly in the shipper; charged, if you please, with an equitable lien in behalf of the company.

A lien which they could have enforced only in a Court of Equity, if the bill had not been delivered to their order. Because, at law, the title was manifestly in the shipper by virtue of the bill to order, for which they had stipulated.

It is not disputed, that under the authority of the decree in Precedents in Chancery, 289, they could have successfully enforced that lien against the other general creditors, and claimed a preference of them, by virtue of that prior lien.

But could they have asserted that preference against the United States?

Now, this case is to be considered as it stood prior to the delivery of the bill to order; because the priority of the United States arose prior to that time, and ranged through the whole period during which the ship was crossing the ocean. If it attached at any time during that period, it could not be dislodged by anything subsequently done, because it is to be tested only by the state of things which existed, when it arose, and when it was in full force.

The trustees, under the general deed of assignment, had no power to alter the condition in which they found the property, so as to affect the priority of the United States.

If they had acted ever so fairly, nothing done by them could have changed the condition of things to the prejudice of the rights of the

United States. Clear of their priority by law, the United States are the first object of that trust itself; could the trustees, by any fraudulent act on their part, create a legal preference among those creditors? Whether the parties to be benefited by it were connusant of that fraud or not, it is apprehended they could take no benefit by a fraud of the trustee. Hence the impropriety of arresting the evidence on this subject.

The positions are again asserted, that with regard to the return cargo, the sole subject of controversy, the legal title to that was in the shipper; that is, in Edward Thomson, by virtue of the bill to order not yet delivered.

That this being the very bill stipulated for in the assignment, the legal title was in Thomson, by the consent of the plaintiffs below, charged, at the best, with an equitable lien in their behalf.

That in this condition of things the priority of the United States fell upon the subject.

434*] *That although the equitable lien of the plaintiffs below would have prevailed against general creditors, and given the plaintiffs a preference to payment as against them, yet it is claimed that the preference yielded to the priority of the United States, which, having fastened upon the property in its condition, could not be dislodged by the subsequent delivery of the bills to order.

Mr. Justice STORY delivered the opinion of the court:

This is an action of trespass, *de bonis asportatis*, brought in the Circuit Court for the District of Pennsylvania, by the Atlantic Insurance Company, to recover against the defendant, John Conard, the marshal of that district, the value of certain teas, shipped on board the ships Addison and Superior, and levied upon by him, upon an execution, in favor of the United States, against one Edward Thomson, as the property of the latter. The real question in the cause is, whether the Insurance Company or the United States are entitled to the teas or their proceeds.

The material facts, disclosed at the trial in the Circuit Court, were as follows: Edward Thomson was a merchant, largely engaged in trade in the city of Philadelphia in the year 1825; and on the 21st day of June, of that year, borrowed, at *respondentia*, of the Insurance Company, the sum of \$21,000, upon goods, &c., on board of the ship Addison, of that port, on a voyage, at and from Philadelphia to Canton, and at and from thence back to Philadelphia; beginning the risk on the 21st of the preceding April, about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of the Addison, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J. R. Thomson, his agent and his assigns, and deliverable to him in Canton; and regular bills of lading were accordingly signed; one of which was retained by the shipper. At the time of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties, and an assignment made on the back of this bill of lading. The form and effect of these instruments will be matter of more particular comment hereafter; at present it is only neces-

sary to add, that the loan purports, on the face of the bond, to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll, and F. S. Bailey; but in reality, the transaction was for the use and benefit of E. Thomson, and the goods shipped in the Addison were on his sole account.

On the 14th July of the same year, a loan was made to Edward Thomson, of \$13,960, on goods on board the ship Superior, which had sailed on a similar voyage, on the 6th of June preceding. *A *respondentia* bond was [***435** taken in the same form, from the same parties, on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was, that this loan was applied in part payment of a former loan, made by the Insurance Company on another ship of E. Thomson's. On the 19th of November, E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie and Richard Renshaw, for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The Addison left Canton on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the \$21,000, consigned by the shipper (Mr. Fisher, attorney for J. R. Thomson) to order, in blank, and indorsed, in blank, by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the \$21,000. Mr. Fisher also gave the master a manifest, stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo, consigning it to E. Thomson. The invoice and bill of lading were dated 22d November, 1825. The general bill of lading was not signed. The Superior left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at \$3,393, consigned to Peter Mackie, and also a bill of lading of certain articles, valued at \$1,139.86, consigned to Barclay Arny, and both dated 2d December, 1825. Before the arrival of these ships in America, the United States had obtained judgments against E. Thomson for large sums of money due upon his bonds at the custom-house. Both ships arrived in Delaware Bay almost at the same time; and an execution issued on behalf of the United States, on one of the judgments against E. Thomson, on the 13th March, 1826, and was levied on the ships and their cargoes on the 15th of March, while they were yet in the bay. It was under this levy that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of lading of the cargo of the Addison, delivered them to the agents of the Insurance Company at Philadelphia; and upon the arrival of the ship itself, handed over, to the same agent, the invoices and bills of lading brought by the master. On the 22d of March, 1826, Peter Mackie and Barclay Arny indorsed to the Insurance Company the invoices and bills of lading, which came to their order by the Superior. These papers came under cover to Edward Thomson, several being inclosed in the same envelop; and Mackie allotted them to their respective owners by means of the num-

bers indorsed upon them. These numbers were **436***] originally *placed upon the outward and homeward bills of lading and invoices, for the purpose of designating the proceeds of each particular shipment. It appeared that part of the \$13,960, borrowed of the Insurance Company on the goods in the Superior, was expended in disbursements in Canton; and the two invoices to Mackie and Army were consigned to them contrary to instructions; and they assigned them to the Insurance Company, under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading, consigning the cargo to Edward Thomson, was to enable him to cuter the cargo in his own name, after he had settled with the Insurance Company, and paid the *respondentia* loans. The several particular invoices and bills of lading were then to be cancelled, and the master was to sign the general bill of lading, and the cargo was to be entered at the custom-house in the name of E. Thomson. He was in the habit of taking up other large sums, at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in the Superior, as has been already stated, differs from that on the shipment in the Addison only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased; and the mode of its application, if it be otherwise *bona fide* and equal, does not change the posture of the rights of the lender. We shall therefore dismiss at once all further consideration of this point, and treat both cases as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds, to impeach their original validity. It is said that they ought to be treated as usurious, or gaming contracts; that they are not to be deemed *bona fide* transactions upon real risks, but transactions void, in point of law, upon their face. So far as the questions of usury, or gaming, or *bona fides*, upon substantial risks, are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them; so far as there are matters of law appercent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose: First, that the loans were made after the sailing of the ships on the voyage; and second, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property on which the risk was run. In our judgment, neither of these objections can be sustained. It is not **437***] necessary that *a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the ad-

vance be in good faith, for a maritime premium; it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to leud upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run upon other goods, and it was not a mere contract of wager and hazard. What could be the effect if it were a mere wagering contract, it is unnecessary to consider; because there is the clearest proof here that there was property on board belonging to the borrower, and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, as far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that, as the ordinary case. But it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port; and if, before the bonds were given, the property had been actually lost by any of the perils enumerated in it, it is clear that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety, then, of the property at that particular period, does not vary the rights of the parties; and from the very nature of the transaction it must have been utterly unknown to both, whether the ship was at the time in safety or not. They entered into the contract upon the usual footing of policies of insurance, lost or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract, as a genuine maritime loan, it was left to the jury to draw such inferences as upon the whole circumstances they were warranted to draw. The charge of the learned judge, in the Circuit Court, was as favorable to the defense on this point as it could be upon the principles of law.

The next question is, in whom was the property in the shipment vested at the time of the levy of the execution of the United States? Was it so vested in the insurance company, *either [**438** in law or equity, that they are now entitled to maintain the present suit, or, in other words, to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions and acts of the parties, as disclosed in the bonds and the accompanying papers. When these are once ascertained and settled it will not be difficult to arrive at the proper legal conclusion.

It is contended, on behalf of the United States, that no title or interest in the property shipped passed by the instruments taken collectively, to the insurance company; that Edward Thomson remained the sole owner of the goods and their proceeds, during the whole voyage; that at most the insurance company had but a lien upon them for the security of their debt, which was displaced by the priority

of the United States, and finally, that if the insurance company had any title or interest in the property, it was not absolute, but by way of mortgage; and even this coming in competition with the priority of the United States by operation of law, yields to their superior privilege.

Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider what is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128. Although that subject has been several times before this court, the observations which have fallen from the bar show that the opinions of the court have, sometimes, not been understood according to their true import. The 65th section of the act declares that "in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, &c., shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof." A subsequent clause of the same section declares that "the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the **439***] *estate and effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed." It is obvious that this latter clause is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment. Insolvency, then, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of *The United States v. Hooe* (3 Cranch, 73), and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute. So, too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to. That was the point on which the case of *Prince v. Bartlett* (8 Cranch, 431) turned.

What, then, is the nature of the priority thus limited and established in favor of the United

States? It is a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignees? Or, is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignees? We are of opinion that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent, and it must be strained from its ordinary import to speak any other.

Assuming that the words "in all cases of insolvency," indicate an entire class of cases, and that the other member of the sentence "or when any estate," &c., is to be read distributively, as has been contended for, on behalf of the United States, it does not in the slightest degree vary the construction of the statute. It will then read that "in all cases of insolvency the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable if they omit to discharge such debt or debts. To enable the assignees to pay the United States it is indispensable that the fund should pass to them, and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the statute would not be accomplished. *If the Legislature had in- **440** tended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed would be to declare, that so far, such assignments should be void. Then, again, the very enumeration of the cases of insolvency, in all of which the assignment passes, and is to pass the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases, where by law there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy; and in the act on this subject, passed in the next session of Congress, there is an express provision, in the 62d section, that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided by any law heretofore passed. Yet the bankrupt act contains no exception as to the property to be passed to the assignees in favor of any person. In the case of *The United States v. Fisher et al.* (2 Cranch, 358), which was decided upon great deliberation, this court held, in the construction of a similar clause in the act of 3d March, 1797, ch. 74, that "no lien is created by this law; no *bona fide* transfer of property in the ordinary course of business is overruled. It is only a priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally if he be dead." And this doctrine was again recognized in *The United States v. Hooe* (3 Cranch, 73, 90).

If, then, the property of the debtor passes to the assignees; if debts due to the United States

constitute no lien on such property; if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund, it would seem to follow as a necessary consequence that even if the teas in controversy were the property of Edward Thomson, they passed by his general assignment, in November, 1825 (which is not denied to have been a *bona fide* and valid transaction), to his assignees, and become their property for distribution among his creditors, and were not liable to the levy under the execution of the United States.

That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain their present suit.

Then, again, it is contended on behalf of the United States, that the priority thus created by § 441*] law, if it be not of itself a lien, is still superior to any lien, and even to an actual mortgage, on the personal property of the debtor.

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelusson v. Smith* (2 Wheat., 396) has been mainly relied on, in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned judge who delivered the opinion of the court in that case is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States." The same doctrine may be deduced from the case of *United States v. Fisher* (2 Cranch, 358), where the court declared that "no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes;" and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *The United States v. Hove* (3 Cranch, 73).

It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagee. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this court that the priority of

the United States will divest a specific lien attached to a thing, whether it be accompanied by possession or not. Cases of lien, accompanied by possession, are among others; the lien of a ship's owner to detain goods for freight; the lien of a factor on the goods of his principal for balances due him; the lien of an artisan for work and services upon the specific thing. On the other hand, there are liens *where [*442 the right is perfect, independent of possession; as the lien of a seaman for wages, and the lien of a bottomry holder on the ship for the sum loaned. In none of these cases has it ever been decided that in a conflict of satisfaction out of the thing itself, the priority of the United States out the lien of the particular creditor. And before such decision is made it will deserve very grave deliberation and a marked attention to what fell from the court in *Nathan v. Giles* (5 Taunt., 558, 574). At present it is wholly unnecessary to decide it, for reasons which will hereafter appear. The case of *Thelusson v. Smith* (2 Wheat., 396) is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment, *nisi*, was obtained against Crammond on the 20th of May, 1805, in favor of *Thelusson* and others. On the 22d of the same month he executed a general assignment of all his estate to trustees for the payment of his debts. At that time he was indebted to the United States on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were obtained and executions issued against Crammond, under which a landed estate called *Sedgely* was levied upon and sold by the marshal; and the action was brought by *Thelusson* and others, against the marshal, to recover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of *Thelusson* and others against Crammond, and of course there had been no levy under that judgment on the *Sedgely* estate, before or after the levy in favor of the United States. It was admitted that in Pennsylvania a judgment constitutes a lien on the real estate of the judgment debtor; and it was assumed by this court, in the argument of the cause, that the judgment of *Thelusson* and others, bound the estate from the 20th of May, when it was entered, *nisi*, although in fact it was not finally entered until nearly a year afterwards. The posture of the case then was, that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal, upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor; that judgment never having been consummated by any levy on the land itself. The court decided that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this court. But the arguments of the counsel point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only upon the ground that they could establish in themselves a rightful title to the proceeds. Whether the land *itself was rightfully [*443 sold under the execution of the United States,

or any title to it passed by the sale, as against the assignees of Crammond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor the priority of the United States attached; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds could not be disturbed by third persons. Now, it is not understood that a general lien by judgment on land, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor who is entitled to hold it against every other person except such judgment creditor; and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy or sale. The title to the land does not pass under it. In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of vendor or vendee, or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things the language of the court in *Thelusson v. Smith* is to be applied when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear that the Sedgely estate had not been divested out of the debtor by any execution on the judgment of *Thelusson* and others; that it either remained in *the debtor, and was liable to the execution of any other of his creditors who choose to levy upon it, subject, of course, to have his title overruled by their subsequent levy when perfected; or, that, subject in like manner, it passed by the assignment (if that was *bona fide*) to the assignees, and in their hands the United States would have a priority of payment out of it, as general funds in their hands. The judgment creditors, as such, had no title to any fund in the hands of the assignees until the priority of the United States

was satisfied; for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact that a judgment creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possess such a lien he must enforce it in the manner prescribed by law; and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no rights to the fund, until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the court where, speaking of the priority of the United States, it is said, "the law makes no exception in favor of prior judgment creditors, &c. Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then it must be out of the debtor's estate." The real ground of the decision was that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision; and it is obvious, that it established no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien.

We may then dismiss any farther consideration of this topic, unless it shall appear that the right of the *respondentia* holders in the present case is reduced to a mere general lien; and as to them, at least (however it may be as to the assignees), no legal right exists to maintain an action for the proceeds. *The attention [*445 of the court will then be at once addressed to the question, what was the nature and extent of the interest of the Insurance Company in the shipments in question. It is unnecessary to discuss what would have been the rights of the parties if the *respondentia* bonds had stood alone, for that is not the posture of this case. The whole instruments must be taken together, and construed as one entire agreement. We must then examine the memorandum, the outward bill of lading and assignments thereon, in connection with the bond. The bill of lading purports, on its face, to be a shipment by Edward Thomson, of seven kegs containing \$21,000, for account and risk of the shipper; to be delivered at Canton to John R. Thomson, or his assigns. By the well-settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsements of the bill of lading, to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter

becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee, in such case, be the buyer of the goods, or the factor, or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of mere indorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet, by any assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his agents and factors, but also against his creditors, in favor of the assignee. It is unnecessary to cite particular authorities on these points; they will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt, and Mr. Chitty, on this subject; and particularly by *Nathan v. Giles* (5 Taunt., 558.) In the present case Edward Thomson was the owner of the goods, and the consignee was merely his factor. He therefore had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale against anybody, but a purchaser *without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.

The question, then, is, whether the indorsement upon this bill of lading constitutes such an instrument. We are of opinion that it does. It purports to be a transfer in *presenti*; and uses the appropriate phrases of grant. The words are, "for value received, I hereby assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, &c., to be procured thereon and thereby, and any return cargo, to be obtained &c., by the proceeds thereof; and all the return cargo to be taken on board the within-named ship, by or on my account, as collateral security, according to an agreement duly executed, and adjoined to a *respondentia* bond, &c., (referring to the memorandum hereinafter stated). This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument; but it is of the goods contained in it, and the bill of lading is referred to by way of description of the subject-matter of the grant. There was a valuable consideration for it; and as Edward Thomson was the legal owner of the goods, the words "assign and transfer" are sufficient words of grant to pass his legal title to the same; unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this; but it supposes that the accompanying memorandum shows that

such was not the intention of the parties, and therefore the words are to be construed according to that intention; which was to create a mere lien or equity, on the part of the insurance company, on the goods. Let us, then, examine the nature and scope of that memorandum. It begins by a recital, that it hath been agreed that the bill of lading for the goods, &c., mentioned in the *respondentia* bond, shall be indorsed to the insurance company, as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite that it has been further agreed that the property to be shipped homeward, as aforesaid, being the proceeds of the loan (thus considering the specie on board as a substituted loan), shall be for the account and risk of the borrowers; that the bills of lading, therefore, shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be indorsed in blank, and shall be placed in the hands of the insurance company, either before or on the arrival of the said ship, at Philadelphia, as a continuation of such collateral security.

Now, supposing the transaction *bona fide*, what is there here that controls, even by way of recital, the operation of the words *of [447] transfer. If the case were one of absolute transfer, there might be some room for doubt. But here the transfer was as collateral security. It was therefore a mortgage of the goods, and the returns. The shipment out and home was, as in each case it must be, at the risk, and for the account of the shipper; subject, however, to the rights of the mortgagee; and the very provision that the bills of lading should be delivered to the order of the shipper, and indorsed in blank, and placed in the hands of the insurance company, establishes the fact that it was the intention of the parties that the property of the return cargo should rest by such indorsement in them. The memorandum then proceeds to state, that it is expressly declared that the indorsement or consignment shall not be held to exonerate the persons of the borrowers; nor compel the Insurance Company to accept the goods, &c., which may arrive under such bill of lading and consignment, in discharge of such debt; but that it shall be lawful for the company to receive and hold the goods, &c., for ninety days after their arrival at Philadelphia; and if the debt was not then paid, to sell the same at auction, and charge the borrowers with the balance. The plain effect of this stipulation is to avow an explicit understanding that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time, to discharge the debt, *pro tanto*. So far from the intention being indicated, that no property at all was to pass to the company, the solicitude of the parties seems most carefully employed to repel the notion that the transfer was absolute and not by way of mortgage, as collateral security. The memorandum, therefore, confirms, and does not impugn, in any degree, the natural construction of the language of the assignment indorsed on the bill of lading, as importing a present transfer. Indeed, we may go farther, and assert that the obvious intention of the

parties was to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and that to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be, not to follow, but to frustrate their intention. Of what use could this great apparatus of instruments, so anxiously prepared by the parties, be, if it conveyed no *jus in re*, and left the title of the insurance company to the goods, at the mercy of the creditors of Thomson, to be intercepted at any time before it reached their hands, on its arrival. We are therefore of opinion, that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof, against Thomson and his assignees and creditors. If, indeed, the assignment had been **448*** of the outward shipment of *goods only, it would have carried the return cargo, purchased with the proceeds; because the product or substitute for the original thing by sale or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases where there has been a fraudulent or tortious misapplication of property. The case of *Taylor v. Plumer* (3 Maule & Selw., 562) is directly in point, and contains a large collection of the authorities in the elaborate opinion of the court, pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment, in terms, transfers the proceeds and returns, and cuts off all possibility of question upon this head. If, indeed, the title to the proceeds had originally been only an equitable title, and not strictly legal; yet as soon as the company had perfected that equity, by indorsement in blank, and possession of the homeward bills of lading, their right would have been consummated at law, so as to entitle them to maintain a suit therefor. The case of *Haille v. Smith* (1 Bos. & Pull., 563) was not so strong as the present; and there the court held that the property passed, clothed with a trust for the payment of the debt.

If this, then, be the result of the general principles of law, in cases of this nature, what is there to prevent their application to the present case? First, it is said that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage, as collateral security for the payment of it. We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts, as those which already exist, and are certain and due. The only question that properly arises in such cases is, the *bona fides* of the transaction. Then, again, it is said that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion that there is no necessary implication of law on the face of these papers, which stamps it fraudulent; for aught that appears, the agreement may have been entered in-

to with the most sincere and scrupulous good faith, and whether fraudulent or not, in fact, was a question for the jury upon the whole evidence, which was properly left to their consideration; and they have, by their verdict, negatived the fraud.

The circumstance, that the goods were to be at the risk of the shipper and on their account, does not, of itself, affect either the validity or *bona fides* of the transfer. That must ordinarily occur, where the transfer is made as collateral security, and it *was one of the leading [***449** facts in *Haille v. Smith*, already cited. (1 Bos. & Pull., 563.)

But the main objection relied on, and which, indeed, constitutes one of the exceptions to the opinion of the Circuit Court, is, that possession of the return shipment was not obtained until after the levy by the United States; and it is contended, that the want of such possession is, *per se*, a badge of fraud. The Circuit Court on this point decided, "that the actual possession of the above return cargoes, by the masters of the Superior and Addison, until levied upon by execution at the suit of *The United States v. Thomson*, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes."

It appears to us that this decision is entirely correct in point of law, under the circumstances of the case.

Without undertaking to suggest whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *prima facie*, a presumption of fraud—a question upon which much diversity of judgment has been expressed—it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties.

A familiar example of this doctrine is in the case of a sale of a ship, or goods at sea, where possession is dispensed with upon the plain ground of its impossibility; and it is sufficient if the vendee takes possession of the property, within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *a fortiori*, if flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of *Bucknal v. Roynston* (Prec. in Chan., 285) runs almost upon all fours with the present. The case of *Sturtevant v. Ballard* (9 John., 338), and *Bissell v. Hopkins* (3 Cowen, 166), contains strong illustrations of the principle; and being decisions in the very State by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the Circuit Court, in the most ample manner; and there is a learned note by the reporter to the latter case, which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now, in the case at bar, the goods at the time of the transfer were at sea, on a voyage, in which they were to be sold, or exchanged by the consignee, and the proceeds sent back in the same ships. It was therefore properly in

the contemplation of the parties, and, indeed, a necessary result of their stipulations, that the **450*** goods should not be intercepted, or taken possession of by the company, until the close of the voyage; and that the return shipments should conform to this arrangement.

There is no pretence to say that the plaintiffs did not seek possession of the goods within a reasonable time after the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is, not that it was so left, but that the court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, *per se*, a badge of fraud.

We have already expressed an opinion, that the court were right in the instructions actually given.

Upon the whole, we are of opinion that the directions of the court upon the merits of the cause at the trial, were correct in point of law; and that consequently there is no error in that part of the judgment.

It remains to consider, very briefly, certain exceptions taken to the testimony in the progress of the trial.

The first exception is, that the corporate capacity of the plaintiffs was not regularly proved, before the introduction of the *respondentia* bond. It is to be considered that this was a trial upon the merits; and by pleading to the merits, the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do was a waiver of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States, as security to refund the amount, if judgment should pass against the plaintiffs, was certainly *prima facie* evidence of an admission, on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burthen of proof on the other side.

The second exception was to the question put to Austin L. Sands, whether he was agent of the company.

We see no objection to this question. It was put in a form most unexceptionable; and it was a matter of subsequent inquiry, in what manner his agency was created; and it does not appear from the nature of the question, whether it might not have been sufficient to establish that he was an agent, *de facto*, to receive the bond. It was, indeed, but an exception to the order of proofs, where several things are to be established to lead to a result; and in what order the **451*** inquiry is to be had, is matter of discretion in the court itself, and not of absolute right in the party.

The next exception is to the allowance of the bond to go to the jury, upon proof of its execution, by Thomson only.

It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiffs' case. It was not introduced as general evidence, as to all the parties who were named in it; but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson was, under the circumstances, *prima facie* evidence of his execution of the instrument.

The fourth, fifth, sixth, and seventh exceptions, turned altogether upon the question whether acts and proceedings of third persons not in privity with the insurance company, nor known to them, were evidence against them. Most clearly they were not.

The eighth exception involves the point, whether the plaintiffs were bound to look to the application of the loan made by them. If not, the question asked was properly rejected. And we are of opinion that the plaintiffs had nothing to do with the application of the money; and that when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the Circuit Court is to be affirmed with costs.

Mr. Justice JOHNSON.

I concur in the opinion delivered in this cause, and the rather, because I think it overturns the report of the decision in the case of *Thelusson v. Smith*. It would be vain to endeavor to reconcile this decision with that which is imputed to the ease referred to.

This was nothing in its origin but a mortgage to the Atlantic Insurance Company; and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately, or more forcibly, than a judgment upon land under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson v. Smith*. I have never acknowledged its authority in my circuit, on the point supposed to be decided by it; to wit, the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment; and I propose now to show, what I think anyone may see by a close inspection of the facts, even as stated in the report, to wit, that the question there supposed to be decided, really never was raised by the special verdict. It is true, it was argued, and no other question, judging from the report, *was argued. [**452** But when the court came to inspect the record, it must have seen that the special verdict did not raise the question, as between the parties to that suit. And, moreover, I find that the reporter has omitted one very material fact found in the special verdict; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Crammond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found, "that on the 22d of May, 1805, William Crammond, of Philadelphia, merchant, stood indebted to the United States in several bonds for duties, as follows: (describing the bonds, all of which were due after the date

of the assignment). On the respective bonds suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Crammond, and the proceeds thence arising came to the hands of the defendant, John Smith, marshal of Pennsylvania District, from whom it is claimed by the plaintiffs, (who are creditors of the said William Crammond) on the following grounds: A suit was instituted by the plaintiffs, in the Circuit Court of the United States for the District of Pennsylvania, against the said William Crammond, as of October sessions, 1802, and a judgment in the said suit, in favor of the plaintiffs, and against the said Crammond, was obtained for \$32,253, on the 20th of May, 1805. On the 22d of May, 1805, the said William Crammond was insolvent, and had not sufficient property to pay all his debts. But his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Crammond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (prout assignment); being on the said 22d of May unable to satisfy all his debts. The moneys in the hands of the defendants, are claimed by the assignees under the said assignment, who have satisfied the United States the amount of the debts due the United States. If, upon the whole matter,"&c., in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise; but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject, in a book of grave authority, and the truth of which this court has had occasion to verify not unfrequently; the purport of which is, that counsel ought not to "move anything in arrest of judgment, 453*] except *the roll wherein the judgment is entered, or the *postea* be in court (22 Cas. B. B.), and the reason assigned is, that the court may be satisfied that the matter moved in arrest of judgment is truly recited from the record; for the court will not rely upon the allegation of counsel at the bar."

It often happens, after the most protracted discussions, that the court differ from counsel in their views of the questions actually raised on the record, and on grounds which have not been argued.

In the case of *Thelusson v. Smith*, I hold it to be incontrovertible, that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record.

The special verdict does not give the date of the levy, and sale by the marshal, under the judgment by the United States; but as all Crammond's bonds to the United States fell due after the date of the assignment, it follows that the judgment, and necessarily all proceedings under it, were subsequent to the execution of that deed. The land levied on, therefore, had passed out of Crammond before the judgment of the United States was obtained, and of conse-

quence the levy and sale under their execution was a mere nullity. Could this furnish the ground of an action for money had and received by the Thelussons, in right of a judgment prior to the consignment, against Smith, the marshal? It obviously could not. For as against the Thelussons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal; and the assignees might have sued for, and recovered, the land; in which case it would have been held by them, as before, subject to Thelusson's judgment. But as between Thelusson and the marshal, there was no privity of action. And this was the true ground for rendering the judgment of this court, in the suit against the marshal.

It is true the special verdict introduces the assignees into the cause, as claiming the money raised by the marshal, on the supposition, that after satisfying the United States, they succeeded to the priority of the United States. But suppose this recovery had been had against Smith, what was there to prevent the assignees from going on at law, to recover the land of the vendee? They were no parties to the record, and there is nothing in the pleadings, or the verdict, to show that they had intervened, or had a right to intervene in the name of the United States. They could not maintain a right to succeed to the United States, under the provisions of the 65th section of the act of 1799, 3d vol., p. 197; because that right is extended only to sureties upon the bond. If they had acquired any right as against the Thelussons, it was a mere general equity, which could *only have been asserted in a Court of [*454 Equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood that I concurred in the judgment in the case of *Thelusson v. Smith* on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity, as is distinctly affirmed in the present decision, because the assignment devested all the interest of the insolvent, so as to place it beyond the action of the *fiery facias*, issuing on the judgment of the United States.

Judgment affirmed with costs.

Aff'd—4 Pet., 310; S. C., 4 Wash., 662.

Cited—4 Pet., 150, 151, 501, 503; 8 Pet., 275; 10 Pet., 611, 612; 12 Pet., 136; 1 How., 318; 7 How., 767; 8 How., 399, 400; 14 How., 511; 21 How., 214; 23 How., 27; 2 Black., 437; 7 Wall., 217; 12 Wall., 158; 14 Wall., 106; 16 Wall., 623, 641; 22 Wall., 101; 2 Wood. & M., 81, 99, 387, 388, 413; 3 Wood. & M., 69, 248, 249, 251, 254, 256; 3 Story, 81; Olcott, 203, 351, 501; Taney, 513; 1 Ware, 169; Bald., 139; 2 Sumn., 188; 3 Sumn., 352, 355, 492; 6 Bank. Reg., 131; 2 McLean, 83; 4 McLean, 446, 622, 630; 1 Low., 432; 5 Mason, 284, 285; 4 Biss., 141; 2 Paine, 257; 2 Cliff., 562; 3 Cliff., 107; Woolw., 97; 5 Dill., 277.

**455*] *THE PRESIDENT, DIRECTORS
AND COMPANY OF THE BANK OF
COLUMBIA**

v.

PETER HAGNER.

Contract for the purchase of land—covenants dependent—time—pleading—title.

When no specific time for the payment of money is fixed in a contract by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. [463]

In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears. [464]

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the intimation of courts have strongly favored the latter construction, as being obviously the most just. [465]

In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal. [465]

An averment of performance is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. [465]

The time fixed for the performance of a contract, is, at law, deemed the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay, in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. [465]

It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. And this averment must be sustained by proof; unless the tender has been waived by the purchaser. [467]

If before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of a suit unnecessary. But this rule can never apply, except in cases where the act which is construed into a waiver, occurs previous to the time for performance. [467]

The taking possession of property by the vendee, before conveyance, is a circumstance from which is to be inferred that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase money, had it been paid. [468]

Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a Court of Equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase money. It would be compelling him to take a law suit instead of the land. [468]

THE plaintiffs instituted their suit in the Circuit Court for the county of Washington, against the defendant, on a special agreement to purchase two lots of ground in the city of Washington. The plaintiffs, to support the issues joined on their part, offered in evidence certain deeds, papers and letters; the handwrit-

ing of the parties and the delivery of the letters, at their several dates, being admitted.

John Templeman, being indebted to the plaintiffs in a large amount, conveyed by deed, dated 31st March, 1809, to Walter Smith, in trust to secure the debt, certain lots in the city of Washington, the two lots alleged to have been sold to the defendant included; the said trustee being authorized to sell, at public sale, the property conveyed.

On the 31st of March, 1821, the bank, under seal, authorized Walter Smith to release the two lots to John Templeman, and under this authority the trustee conveyed the property to Templeman, who, by deed dated 29th April, 1821, conveyed the same to Peter Hagner, the defendant.

The conveyance by Walter Smith to Templeman, and from Templeman to Mr. Hagner, were made by the direction of the bank, for the purpose of vesting a title to the two lots in Mr. Hagner, in execution of their part of the agreement upon which the suit was founded, and before the suit was commenced.

The material evidence offered by the plaintiffs to establish their claim upon Mr. Hagner, and to prove a contract made by him, for the purchase of the two lots, was contained in a correspondence, &c., between General John Mason, the president of the bank, and Mr. Hagner; commencing on the 14th May, 1817, and ending on the 19th of May, 1821, numbered from 1 to 11.

No. 1. dated 14th May, 1817, letter, Peter Hagner to General Mason, expressed a wish to purchase the lots, if the bank was disposed to sell them at a reasonable price; No. 2, from General Mason to Mr. Hagner, dated October 16th, 1817, stated that the board of directors had fixed the price of the lots at twenty-five cents per square foot; No. 3, from Mr. Hagner to General Mason, dated October 17th, 1817, communicated an offer of ten cents per square foot, which, by letter dated 17th December, 1817, No. 4, was extended to fifteen cents per square foot; No. 5 was a memorandum sent by Mr. Hagner to General Mason, to be signed by him, and which was so done, on the 27th of April, 1818; the memorandum bearing date April 25th, 1818, and stating that the [*457] lots were on that day sold to Mr. Hagner, at twenty-five cents per square foot; "payable at such periods as the bank may approve."

On the 27th April, 1818, No. 6, Mr. Hagner wrote to General Mason, desiring to have the payments for the lots purchased by him, at twenty-five cents per square foot, to meet his income; and proposed to have the same divided into six quarterly payments, the first to be made on the first day of the following October; offering his notes, and asking for a deed; or if this should not be agreed to, stating that he would bind himself to pay the money as proposed, "and receive a bond of conveyance, conditioned to give a full title when the money should be paid." This letter requested a return of the memorandum, No. 5.

Upon this letter, there was written, in pencil, in the handwriting of General Mason, according to the usual practice at the sittings of the board of directors, "accepted—interest on each note, as it becomes due;" No. 7, April 27th, 1818, from General Mason to Mr. Hagner, in

NOTE.—As to *covenants dependent and independent*, see note to *Goldsborough v. Orr* (8 Wheat., 218). Peters 1.

closed the memorandum, No. 5, and mentions that his proposition would be submitted to the board.

On the 7th October, 1818, Mr. Hagner wrote to Gen. Mason (No. 8), stating that he was prepared to pay the installment falling due on the 1st October, and requesting a bond of conveyance. December 26, 1820 (No. 9), Mr. Hagner, by letter, states that a long time had passed since his purchase, without the title to the lots having been completed; and the bank continues without authority to convey. The bank at the time of the purchase had no authority to sell at private sale, and must have made title by a circuitous and doubtful process of a public auction, at which some one might have interposed and obtained the lot. That the bank might have held him bound to take the property, although not reciprocally bound; and that the answer of the president of the bank was not certain and absolute, but was referred to and made dependent on the determination of the board of directors. Under these, and other circumstances stated by him, he communicates his determination to relinquish the purchase.

On the 8th May, 1821, Mr. Hagner notifies General Mason (No. 10), that he considers his agreement to purchase the lots void, and that he has no claim or title to them. In reply to this letter, upon the 19th May, 1821 (No. 11), Gen. Mason says:

"You will no doubt, sir, recollect a conversation I had with you soon after the reception of your letter of the 26th December last, when I informed you that that letter had been submitted *to the board of directors, and that it had been determined that the purchase by you of the lots in question being considered in all respects a firm and *bona fide* purchase, it would not be relinquished, and that measures would be taken to make you a title valid in law. I am now instructed to inform you that those measures have been taken—that deeds to that effect have been made by the proper parties, which are expected to be soon received here, when they will be tendered you, and a compliance with your part of the contract expected."

Evidence was also given, on the part of the plaintiffs, to prove the entire insolvency of John Templeman, and the non-payment by him of any part of his debt to the plaintiffs. That on the 28th September, 1821, a tender of the deeds already mentioned was made by an officer of the bank to the defendant, who refused to accept them. The deed of Templeman to Hagner, dated 3d of April, 1821, was recorded by the consent without prejudice.

A witness also proved, that in the month of June, 1818, he was employed by defendant to inclose the two lots in question, and did inclose them with a board fence; that before inclosing the said lots, an old house was pulled down by order of the defendant, and some part of the materials used in making the inclosure; that some time afterwards, the witness was employed by defendant to pull down the fence, which was done, and the lots left open; that the said house was a small frame house, very old, and in bad repair, that it had been inhabited some time before, but was not in tenantable order and condition; that if the house had been put in good repair, which would have cost half as much as

building a new house of the same size and kind, it would have rented for about three dollars per month.

The clerk of the Circuit Court of the District of Columbia certified that there was no judgment in force on the 30th day of March, 1821, against John Templeman, and proof was also made that the taxes on the two lots of ground from 1809 to 1821 inclusive, had been assessed to, and paid by the Bank of Columbia.

On the 19th of May, 1821, the situation of the lots was examined by order of the president of the bank, and it was found "that the fence had been removed apparently that spring, and the lots appeared to have been cultivated the fall before."

Upon this evidence the defendant, by his counsel, prayed the court to instruct the jury, that upon the evidence, so given on the part of the plaintiffs, though found by the jury to be true as above stated, the plaintiffs are not entitled to recover in this *action the pur- [*459 chase money for the lots in the declaration mentioned; which instruction the court gave as prayed.

The plaintiffs prayed the court to instruct the jury, that upon the evidence the plaintiffs were entitled to recover such damages as the jury should think the plaintiffs had sustained by the defendant refusing to comply with the contract stated in the declaration, if they should believe from the said evidence that the defendant consented to the delay on the part of the plaintiffs to make a deed, or give a bond of conveyance for the lots mentioned in the declaration; which instruction the court refused to give.

A bill of exception was then tendered, by the counsel of the plaintiffs, to the instructions given by the court on the prayers of the counsel for the defendant, and also to their refusal by the court to give the instructions to the jury prayed for by the counsel for the plaintiffs.

While the bill of exceptions was preparing, the following additional evidence was discovered by the plaintiffs, and was offered and read to the jury:

A deed, commissioners to J. Templeton 19th September, 1801. (Liber G., fol. 490.)

A deed, Templeman & Stoddart to Bank of Columbia, 19th January, 1802. (H., 386.)

A deed, Stoddart to Templeman, 25th September, 1804. (M. No. 12, 151.)

A deed, Templeman to Bank of Columbia, 7th March, 1807. (No. 18, 346.)

The deed of 7th March, 1807, conveyed *inter alia* to the plaintiffs the two lots alleged to have been sold by Mr. Hagner, and authorized the bank to sell the property vested in them by private or public sale.

This evidence being exhibited, the court adhered to the instructions and opinions given to the jury, and an additional exception was taken thereto by the counsel for the plaintiffs, and a writ of error was prosecuted by this court.

For the plaintiffs in error it was contended, that upon the evidence, the plaintiffs were entitled to recover, and that the Circuit Court ought to have so instructed the jury.

Mr. Key, for the plaintiffs.

1. A contract for the purchase and sale of the two lots of ground was made between Mr. Hagner and the Bank of Columbia, the presi-

Peters 1.

dent of the bank having full authority from the board of directors to conclude the same. That the defendant had no evidence of the authority of the president to make the contract was his own neglect, and he dealt with him as the agent of the bank, and under the contract took possession of the property.

460*] *By the contract the defendant was to pay for the lots, according to his proposition in the letter of the 27th of April, 1817, and the acceptance, "noted in pencil," is the agreement in writing by the bank to the terms proposed, of which, sufficient evidence exists, in addition to the circumstances of the defendant's entry on the lots, showing that he knew of the agreement of the bank.

2. The contract subsisted down to the period of the defendant's refusal to fulfil it.

It subsisted on the 7th October, 1818, as shown by his letter referring to his propositions of payment upon the 27th April, 1817; by his remaining in possession, and this continued until January, 1820, when all the payments became due, no application having been made to complete the title, although it may be inferred that he knew some measures would be required for the purpose. The acquiescence of the defendant in the delay, bound him during its existence.

3. When, on the 26th December, 1820, he communicated his determination to withdraw from the contract, he had no such privilege. He was bound to wait, if the title was not incurably bad, a reasonable time, until it should be completed. (Sugden, 252-3-4-5.) If aware of the difficulties in the title arising from the sale made under the deed of trust by Walter Smith, by which a public and not a private sale of the lots was to be made, he should have tendered performance on his part and demanded performance of the vendors. Instead of this, if by that letter he intended to renounce at once, this could not be done, legally, unless in the case of an incurably bad title. The formal relinquishment is made on the 8th of May, 1821, and this being the first complaint of non-performance by the bank, it was promptly attended to. (Cited, Sugden on Vendors, 157, 249-50-51-52, 34, 35.) The refusal on the part of the defendant made a tender of performance by the plaintiffs, previous to a bill of specific performance on this action, unnecessary. (Sugden, 162, 163; 3 Douglass, 684.) But no such tender was necessary. (Sugden on Vendors, 160, 164.)

The bank did offer a good title, as is shown by the evidence. Templeman had no ultimate interest; it was released, and his deed, made with the consent of the bank, gave a good title. Those who are entitled to the money, which may arise from the sale of an estate are the substantial owners of it. (Sugden, 300.) To sustain this suit, it is sufficient if a good title can now be made, and this can be done under the deed of 7th March, 1807. (Sugden, 250-1.)

Mr. Jones, for the defendant.

1. There never was a complete contract entered into by Mr. *Hagner. He made propositions, and they were never fully accepted by the bank; nor was he at any time informed of the order or determination of the bank thereon. It was the duty of the plaintiffs, when the money became due, to have Peters 1.

tendered a performance of their contract, and not to have postponed the same until September, 1821, the day before the action was instituted.

No purchaser is bound to take an equitable title, and in this case the bank had not a legal title under the conveyance to Walter Smith, under which the title tendered was derived. The title must be complete at the time of performance of the contract. (Sugden on Vendors, 158.)

When the original security is in form of a trust, it must remain so until the trust is executed, by a sale of the property in the time prescribed.

A Court of Equity would not have confirmed the title to the defendant, they would have said to the trustee Walter Smith, go and execute your trust.

As to the title of the 28th of September, 1821, tendered to the defendant, it was not a valid title. By the law of Maryland, no land can be conveyed by a power of attorney; it was not made by the bank, and it passed through Templeman, who was insolvent. The defendant could not be compelled to accept such a title. There is no authority to be found by which a vendor can call on another to complete a title which he contracted to give.

Entry on the property does not furnish anything but a presumption that a title would be made; and this was never done.

As to the time which will be allowed for completing a title, the following cases were cited: Sugden on Vendors, 284; 1 Marshall, 583; 6 Taunt., 259; 5 East, 198; 1 Smith's Rep., 390.

The plaintiffs, after the case had gone to the jury, exhibited a new title. The first was as a creditor, and the conveyance was to be derived from the trustee; the second title was under an old deed, by which the bank was authorized to convey. The deed of 1807 was controlled or revoked by the subsequent deed; and notwithstanding that deed, the trustee alone could make the sale. (1 Marshall, 285; 5 Taunt., 282; 3 Bos. & Pull., 181.)

Mr. Justice THOMPSON delivered the opinion of the court:

This case comes up from the Circuit Court of the District of Columbia, upon a writ of error. It was an action against the defendant Hagner, on a special agreement to purchase of the plaintiffs two lots of ground in the city of Washington. The *court below, on the [***462** prayer of the defendant, instructed the jury, that upon the evidence given on the part of the plaintiffs, though found by them to be true, would not entitle the plaintiffs to recover, in this action, the purchase money for the lots mentioned in the declaration. Under which instruction a verdict was found, and judgment rendered for the defendant; to reverse which, the present writ of error has been brought.

The special agreement as stated in the declaration is, substantially, that on the 25th of April, 1818, it was agreed between the plaintiffs and defendant, that the plaintiffs should sell to defendant lots No. 1 and 2, in square 141, in the city of Washington, the property of the plaintiffs, at and for the price of twenty-five cents for each and every square foot con-

tained in said lots; and that defendant agreed to purchase the lots, at that price, and to pay for the same, when thereunto required by the plaintiffs; setting out the quantity of land and amount of the purchase money, with an averment that the plaintiffs had full power and authority to make the sale, and that they then were, and ever since have been fully competent and able to make and deliver a good and sufficient deed, conveying to the defendant a good title in fee, to said lots. And that afterwards, on or about the 8th day of May, 1821, the defendant declared and gave notice to the plaintiffs, that he considered the agreement and sale void, and would not comply with the same, and discharged the plaintiffs from making or causing to be made any deed of conveyance, and the plaintiffs further aver, that afterwards, on the 28th September, in the year 1821, they being willing and able to make a conveyance of a good title to said lots, offered so to do, and requested the defendant to pay the purchase money, according to the terms of the agreement, which he refused to do. The first inquiry that naturally arises, is, whether any contract was in point of fact concluded between the parties. It has been objected, that it does not appear that General Mason, through whom, in behalf of the bank, the negotiation was carried on, had any authority for that purpose. There is certainly great plausibility in this objection. There is no evidence, expressly showing such authority. But this, perhaps, ought to be considered as having been waived by the defendant; as that part of the correspondence from which the contract is supposed to be collected, was carried on with him in his official character of president of the bank. And the defendant at no time puts his objection to carrying the contract (if any was made) into execution, upon the want of authority in Mason to make it.

The contract is alleged, in the declaration, to have been made on the 25th of April, 1818, and **463** the letter of Mason, of that date, and signed by him, as president of the bank, has been considered as closing the contract. This letter is as follows:

"I have this day sold to Peter Hagner, of Washington city, lots No. 1 and 2, in square 141 in Washington city, and belonging to the Bank of Columbia, at twenty-five cents per square foot; payable at such periods as the bank may approve."

The time of payment being left to the option of the bank, it is said, that in judgment of law the purchase money was payable on demand; and this is no doubt true, if the bank had then closed the negotiation, and apprized the defendant that such was their determination, as to the payment of the purchase money. But this was not done; and the terms of the letter look to, and necessarily imply some further negotiation. The payment was to be at such periods as the bank may approve. It was therefore clearly understood to be payable by installments; and the periods to be approved by the bank which would seem to leave the subject open to propositions to be made on the part of Hagner, and submitted to the bank to be approved. And that such was the understanding of the parties is evident from the letter written by the defendant two

days after, April 27th, 1818, to the president of the bank, as follows:

"It would be desirable to me to have the payments to make for the lots No. 1 and 2 in square 141, purchased of you by me on Saturday, at 25 cents per square foot, in proportions, and at periods to be met by my income. I accordingly propose that the whole amount of the purchase money be divided into six quarterly payments, the first to be on the first of October next. If this be approved by the bank I will give my notes, and I presume the bank will have no objections to give me a deed. If, however, it be preferred, I will bind myself to pay the money at the times stated above, and receive a bond of conveyance, conditional to give a full title when the money is paid. Do me the favor to send me, in return, a memorandum of our agreement on Saturday." Upon this letter was written in pencil, by General Mason, "accept interest on each note as it becomes due."

Whatever, therefore, might have been the right of the bank to have closed the contract in the terms of the letter of the 25th of April, it was certainly waived by an acceptance of the modification contained in the letter of the 27th of April. Nor would any contract seem to be closed by this letter. It contained two distinct propositions by the defendant; the one to give his notes for the purchase money, payable in six quarterly payments, the first to be made on the 1st of October then next, and take a deed from the bank; the other, to bind **464** himself to pay the money at the times stated, and take a bond for a deed, to be given when the whole purchase money was paid. This necessarily required some further answer from the plaintiffs, not only to signify their election between the propositions, but to do some further act, in confirmation of such election. Either to give the deed, or a bond for the deed. The note in pencil, made by the president of the bank, upon the letter, could not fairly be understood as implying anything more than an acceptance of the proposition to pay by installments; and settling the terms of the contract to be concluded between the parties upon the bank's electing which proposition to accept, as to the mode of concluding the contract. But the contract could not be said to be consummated until such election was made and the writings executed.

Here the matter rested for nearly three years without anything being done on the part of the bank to close the contract; or to intimate that they considered any contract in force in relation to the purchase; and, that, not until after the defendant had given them formal notice that he considered the agreement void and at an end.

And he certainly had very good reason to think the bank so considered it. Or that no agreement had in fact ever been concluded. For the defendant, by his letter of the 7th of October, 1818, gave the plaintiffs notice that he was prepared to pay the first installment; which according to his proposition fell due on the first of that month; and requesting of them a bond for a deed; to which no answer appears to have been given, nor any one of the instruments paid or demanded; although the whole purchase money became payable by the first of

January, 1820, according to the proposed terms of the contract.

Upon this view of the case, it is at least very doubtful whether any contract was concluded between the parties; and if the cause turned upon this point alone, the judgment of the court below would be affirmed by a division of opinion in this court. But, as there are other questions in the cause, the determination of which leads to the same result, and upon which no difference of opinion exists, it has been thought proper to notice them.

Admitting, then, that a contract was entered into between the parties, the inquiry arises, whether the plaintiffs have shown such a performance on their part as will entitle them, in a court of law, to sustain an action for the recovery of the purchase money.

In contracts of this description the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it.

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract are to be considered independent, or dependent, yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. And that the one now before the court must be considered a contract of this description, cannot admit of a doubt.

The plaintiffs, however, aver that they were willing and able to make a conveyance of a good title, and offered so to do on the 28th day of September, 1821; but this was only the day before the suit was commenced, and nearly two years after the time fixed for performance; and they set up, as an excuse for the delay in making the tender of a deed, the notice received from the defendant on the 8th of May, 1821, that he considered the agreement void, and refused to carry it into effect.

The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. In Sugden's Law of Vendors, 275, it is said: "The general opinion has always been that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties, if Peters 1.

in every case it must be referred to a jury to consider whether the act was done within a reasonable time; and the precise contract of the parties would be avoided in order to introduce an uncertain rule, which would lead to endless litigation. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed." But he justly adds, perhaps there is cause to regret that even equity assumed this power of dispensing with the literal performance of contracts in cases like those.

It was urged at the bar, that the rule on this subject was the same at law and in equity, and the case of *Thompson v. Miles* (1 Esp. Ca., 184) was referred to in support of this proposition. And it is true that some of the remarks which fell from Lord Kenyon, on the trial of that cause, would seem to countenance such an opinion. For he permitted the seller to prove he had a good title, although the power of making that title was attained after the action was brought.

This was certainly going great lengths for a Court of Law. But it ought to be observed, that in that case no time appears to have been fixed for completing the contract; and an application for the title had not been made by the purchaser previous to the action brought by the vendor for breach of the contract; which, it seems, was considered necessary in that case. But, that Lord Kenyon did not mean to be understood as holding that the evidence would have been admissible to sustain the action, if there had been a time fixed for the performance of the contract, is very evident from his doctrine in numerous other cases before him. Thus in the case of *Bury v. Young* (2 Esp. Ca., 641), he says, a seller of an estate ought to be prepared to produce his title deeds at the particular day. That a Court of Equity will, under particular circumstances, enlarge the time. And in the case of *Cornish v. Rowley* (1 Wharton Selwyn, 137), the action was for money had and received, to recover back money paid as a deposit on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was to be completed; the counsel for the defendant said they were ready to make out a good title; to which Lord Kenyon replied: "As to the sentiments I have long entertained relative to the purchase of real estate, I find no reason for receding from them; they have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when the title is to become completed." On which the counsel for the defendant asked, "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance." To which Lord Kenyon answered, "He certainly may; and avoid the contract." And he directed the jury to find a verdict for the plaintiff, for the deposit money.

In the case of *Davis v. Hone* (2 Sch. & Lef.,

347), Lord Redesdale said a Court of Equity frequently decrees specific performance, when **467*** the action at law has been lost by the default of the very party seeking the specific performance. To sustain an action at law, performance must be averred, according to the very terms of the contract. And again in the case of *Lennon v. Napper* (2 Sch. & Lef., 684) he reiterates the same doctrine, that Courts of Equity in all cases of contracts for lands, have been in the habit of relieving, where the party, from his own neglect, had suffered a lapse of time, and from that and other circumstances, could not sustain an action to recover damages at law; for at law the party plaintiff must have strictly performed his part of the contract. And in the case of *Wilde v. Fort et al.* (4 Taunt., 334), the rule is recognized that if the vendor of an estate at auction does not show a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. A purchaser is not bound to accept a doubtful title.

From these authorities it may be laid down as a settled rule, that at law, to entitle the vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.

The time fixed for the performance of the contract, in this case, must be understood to have been the 1st of January, 1820. The payment of the consideration money was to have been completed on that day, and no part of it having been paid, the defendant had a right to abandon his contract, unless the plaintiffs were then ready and offered to perform, on their part, of which there was no evidence whatever offered upon the trial. They have attempted, however, to show that a tender of the deed was rendered unnecessary by reason of the letter of the defendant of the 8th of May, 1821; in which he gave notice of rescinding the contract. But this letter can have no such effect. It was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If, before the period had arrived when the deed was to be delivered, the defendant had declared he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might in such case have prevented the act from being done; and he who prevents a thing from being done shall never be permitted to avail himself of the non-performance, which he himself has occasioned. But that rule can never apply, **468*** except in cases where the act, which is construed into a waiver, occurs previous to the time fixed for performance.

The possession taken of the lots by the defendant, could, at most, only be considered a circumstance from which to infer that he considered the contract closed, but could not deprive him of the right of relinquishing it and restoring the possession if the plaintiffs were unable to make a title to him, or neglected to

do it. The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiffs, and a full title conveyed to him; but if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and would have sustained an action to recover back the purchase money, had it been paid. (Sug. on Vend., 173, 183, and cases there cited.)

The plaintiffs have therefore clearly failed to show such a performance on their part, as to entitle them, in a Court of Law, to call upon the defendant for payment of the purchase money.

But admitting that no objection in point of time lay to the tender of the deeds, the day before the commencement of the present action, no title was thereby conveyed to the defendant, or at all events, not such a one as he would at any time have been bound to accept. It was a title derived from John Templeman, under the deed of the 31st of March, 1809. Whereas, Templeman had previously conveyed the same lots to the plaintiffs, by his deed of 7th of March, 1807, in trust, with authority to sell the same for the payment of a debt, due to the bank, and to pay over to him the supplies, if any there should be. The legal title to these lots is therefore still in the bank, and may be subject to the trust declared in the deed, from anything that appeared upon the trial. And to allow the bank to recover the purchase money, and turn the defendant over to a Court of Chancery to obtain a title, would be going farther than any known principles in courts of law will warrant; no act whatever having been done by the plaintiffs to transfer to the defendant the title vested in them under the deed of 1807.

To substantiate the present action under such circumstances, would be compelling the defendant to take a lawsuit, instead of the land, for which he contracted.

Judgment affirmed with costs.

Cited—5 Mason, 255.

DOE** on the demise of JOHN A. [469**
ELMORE, *Plaintiff in Error.*

v.

WILLIAM A. GRYMES, AND JOHN J.
BEATIE, *Defendants in Error.*

Nonsuit—practice.

The Courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff might agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it. [471]

When the state of the record did not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. [472]

AN action of ejectment was instituted in the Circuit Court of the United States for the District of Georgia, for the recovery of 287½ acres of land, in which the plaintiffs claimed title as follows: A grant from the State of

Georgia to Samuel Alexander; and a deed from John Cessna, styling himself, "Sheriff of Greene county in the State of Georgia," purporting to convey to Buckner Harris, by virtue of a sale under an execution against Herod Gibbs, "two hundred and eighty-seven and a half acres of land in said county, on Little Beaver Dam, on the waters of Richland Creek, and bounded on Academy lands, and land belonging to William Alexander, which land was formerly the property of Samuel Alexander;" a deed from Buckner Harris to Ezekiel E. Park, for a tract of land "containing two hundred and eighty-seven and a half acres, in the county of Greene, and State of Georgia, on the Little Beaver Dam of Richland Creek; being an equal half of the double bounty of land granted to Samuel Alexander, adjoining Academy lands."

The plaintiff then introduced a witness, who testified that "Ezekiel Park was in possession of a tract of land lying in Greene county, usually called Park's old Mill tract, on Beaver Dam Creek, for about twenty years. He then produced a deed from Ezekiel E. Park to John A. Elmore, for a tract of land "in the county of Greene, and State of Georgia, on the Little Beaver Dam Creek, or fork of Richland Creek, being one equal half of a double bounty tract, originally granted to Samuel Alexander, adjoining lands belonging to the University; being the same originally sold and conveyed to Herod Gibbs, by the grantee, on the 14th of March, 1790." He then exhibited a deposition of the county surveyor, stating that he had made a re-survey of the premises in dispute, agreeably to a plot annexed to his deposition, which corresponded in its outlines with that annexed to the original grant, "completely covering *the premises in dispute;" which he designated on the plat.

The plaintiff then called a witness, who testified that W. A. Grymes was in possession of the premises at the commencement of the action, and then closed his testimony.

The defendant's counsel, thereupon, moved for a nonsuit, on the following grounds:

1st. Because the plaintiff had failed to make out his title by the documentary evidence on which he rested his case.

2d. Because there was no sufficient evidence of possession to give a title, under and by force of the statute of limitations of Georgia.

The Circuit Court ordered a nonsuit to be entered, against the consent of the plaintiff; and a writ of error was prosecuted by him, and the cause brought before this court.

Upon the judgment of nonsuit, the defendants in error claimed to maintain before the court—

That the Circuit Court had power to order a nonsuit, without the assent of the plaintiff.

The case was argued by *Mr. Wilde* and *Mr. M'Duffie* for the plaintiff in error, and by *Mr. Berrien* for the defendant.

Mr. Berrien. The doctrine laid down in the books of practice, and adopted in some of the State Courts, is not supported by any express decision in the courts of Great Britain. That proposition is, that a plaintiff, on the bare allegations of his declaration, without a title of proof, is entitled to demand the verdict of a jury in his cause.

Any modification of this proposition admits the power, and objects only to the mode of its exercise. An examination of the adjudged cases in England will show that they do not warrant the position. *Watkins v. Towers* (2 T. R., 275) was a motion to enter nonsuit after verdict.

Santler v. Heard, was a verdict taken subject to the opinion of the court, whether plaintiff ought not to have been nonsuited. (2 Bl. Rep., 1031; 2 Salk., 669).

Macbeth v. Haldermand (1 T. R., 172). The point was not made on a motion for a new trial. On reporting the fact, Buller J. said, that on the trial, he had thought the plaintiff ought to be nonsuited; but his counsel appearing, when plaintiff was called, he had left the question to the jury. It is said, that the plaintiff would be deprived of his writ of error to this court. This is not so.

Final judgments spoken of in the judicial act, are meant to be contradistinguished from interlocutory judgments.

Any judgment which is final in the suit, though not final as *between the parties [*471 ties, with the exceptions mentioned in the act, may be brought here by writ of error.

A judgment of nonsuit is such a judgment, and may be the foundation of a writ of error. The defendant is entitled to judgment and execution for costs. The suit is finally disposed of. It is a final judgment in a civil action. In England, error lies on such a judgment. (*Baz v. Bennet*, 1 H. Bl., 432; *Kempland v. Mearley*, 4 T. R., 436. *Evans v. Phillips* (4 Wheat., 73) does not contradict this. The ground of that decision was that the plaintiff had assented to the nonsuit. Why may not the errors of the court below be corrected in this form, as well as by an exception to instructions, or the refusal to give them.

Mr. Wilde and *Mr. M'Duffie*, for the plaintiff in error.

1. It has always been considered that a nonsuit cannot be ordered without the consent of the plaintiff, who has a right to submit his case to a jury and the court; and the court, should the jury err, may order a new trial.

In the Courts of the United States, another obligation exists to the exercise of such a power, as the court has decided that a writ of error will not lie on a judgment of nonsuit (*Evans v. Phillips*, 73), it not being a final judgment. If the courts below should have this power, a plaintiff may be prevented the opportunity of bringing this case before the highest judicial tribunal of the United States. If a court can in any instance order a nonsuit against the consent of the plaintiff, it may only be when no questions of facts are involved, but the only matter before the court is a question of law. This case exhibits facts upon which a jury were the proper judges. The plaintiff claimed the land by possession; this, and the extent of the possession, was exclusively for the consideration of the jury.

The practice of the State of Georgia as to the entry of nonsuits, has been fluctuating. The judicial system of that state does not comprehend an Appellate Court, with exclusive final judicial powers, but each Circuit Court has a right of granting appeals to itself, and on such appeals a second trial takes place. Hence,

this point has been decided differently in different courts, and at different periods; and hence, the practice of the courts of Georgia is unsettled, and as various, as it necessarily must be, in the absence of a Supreme Court to regulate and determine the same.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The court has had this case under its consideration, and is of opinion that the Circuit Court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had **472*** a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the court could not compel him to submit to it. But the state of the record does not enable this court to render a final judgment, because the record is defective, in not showing a judgment of nonsuit, entered in the Circuit Court. Although the bill of exceptions states that fact, yet the record does not contain the judgment itself.

The plaintiff may therefore apply for a *certiorari*, to bring up a perfect record, or dismiss the present writ of error and proceed anew, as his counsel may think best for the interest of their client.

Mr. Justice JOHNSON dissentiente:

The only question of any importance in this case, is, whether a Circuit Court can, in any case, order a plaintiff to be nonsuited. I ordered the plaintiff below to be nonsuited, because the evidence was so inadequate to maintain his suit; but had the jury found for him, I should have set aside the verdict, and ordered a new trial. The practice of the court from which this cause comes up, is this: when the plaintiff has closed his evidence, the defendant is at liberty to move for a nonsuit, or proceed with his testimony. If he introduces evidence, it is too late to move for a nonsuit; and the question always to be examined is, whether, upon the evidence introduced by the plaintiff, admitting it to be true, the jury can find a verdict for him. So that, it is in fact, a substitute for a demurrer to evidence, or for a motion for instruction, that the plaintiff cannot recover, upon the case made out by him in evidence.

There are several reasons why I must maintain that the courts of the sixth circuit have a right to exercise the power to order a nonsuit, even against the will of the plaintiff; and why it would be wise, in all our circuits, to introduce the same practice.

It happens unfortunately for the defendant in error here, that a majority of the judges of this court have pursued a different practice in their circuits; but this, I must insist, is no sufficient reason for subverting, otherwise than by rule, the practice of other States in which this right has been recognized in the administration of justice, coevally with the existence of their courts. Such has been the case in the states of which the sixth circuit consists, and the acts of 1789, and 1792, have adopted into the courts of the United States, of the respective circuits, not only the forms of process, but the "modes of proceeding," in suits known to the States respectively. That this comes under the denomination of a mode of proceeding, or in other words, an established practice of the State com-

posing the sixth circuit, appears to me incontrovertible.

*By what right, then, can this court [***473**] reverse a judgment of that circuit, founded in a practice thus sanctioned by law? It does seem to me that the defendant below has a right in this judgment, vested by express statute law, and ought not to be put to the expense of this reversal. For what purpose is power given to this court to alter the practice of the circuits, by such regulations as they may deem expedient, if such practice is not to be held legal, until altered by a rule of this court?

This court surely does not mean to decide that such was not the received practice of that circuit; this would be a decision in the teeth of positive fact; and if the purport of the decision be, that it is an illegal practice, the immemorial practice itself, and the process acts of the United States, furnish an express negative to such a decision.

The idea seems to be, that it is a practice inconsistent with the relation in which our Circuit Courts stand to this court—that ours is not a *Nisi Prius* system, or something to that effect. What then? This court can alter the practice by a rule, but, to overturn a judgment that has already been rendered under such a practice, I must respectfully contend, approaches very near to *ex post facto* legislation, not adjudication; the province of which is to operate only upon existing laws. But it is not a practice appropriate exclusively to a *Nisi Prius* system, as is proved by this, that writs of error are sued out continually in England, upon judgments, on nonsuits (see the cases cited in 1 Archb. Practice, 229–30), and, though it had been, the States were at liberty to adopt it into their practice, although the *Nisi Prius* system be unknown to them. That they had adopted it, is conclusive against this assumed incompatibility. And in practice it subserves the purposes of justice under our system, as effectually as a bill of exceptions, or a demurrer to evidence; and in several respects much better. It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary nonsuit, and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his client; and it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or from surprise.

In point of convenience and expedition, in the administration of justice, I presume there cannot be two opinions. On this point, as far as *exemplum docet*, we may cite Great Britain, Massachusetts and New York, with some confidence, against Pennsylvania, Maryland, and Virginia.

But, it is contended, that in England the plaintiff is not nonsuited, if he insists on answering when called. If the fact be admitted, what then? England is not altogether absolute in dictating to the courts of the United States, and if those of the *States of the sixth cir- [***474**]cuit have asserted some independence in their rules of practice on this subject, I presume their right was unquestionable to do so.

But I want no other authority than the courts of Great Britain, to justify the practice of the sixth circuit in this behalf. From the earliest

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period we find the English courts, in the exercise of this power, and whoever will examine the cases collected in Mr. Morgan's treatise on the doctrine of new trials (3d vol. Essays), will find what a very wide range has been taken by those courts in the application of that practice. Nor have the more modern cases manifested any inclination to retrace their steps. Its salutary effects are universally felt, and perhaps contribute as largely as any other cause to the rapid progress of their courts in disposing of their dockets. If there exists any case prior to that of *Macbeth v. Haldeman* (1 Term R., 172), in which the right of the plaintiff to refuse to be nonsuited was recognized, I cannot recollect it; since in that case it would seem that in ordinary cases the right is recognized. But there is abundant proof that the British courts do assert the power to control the exercise of that right, by the plaintiff, when they think proper. In the cases of change of *venue*, on motion of plaintiffs (3 Black., 1031), the right is disputed, on the assumed ground that he undertakes to prove some material fact. Now, where can be the objection to applying the same reason to every case that goes to a jury? Does not a plaintiff, in fact, undertake the same thing whenever he troubles a court with his suit, and has a jury sworn to try his cause upon evidence? He is no longer subjected to amercement if he fails to recover, and the right to nonsuit him, where he fails to produce evidence that will justify a verdict, is but a reasonable substitute for the absolute penalty to which he was once subjected.

But it is contended that an absurdity is produced, and an acknowledged right violated. Yet the alternative exhibits a more direct and obvious absurdity, since in the case of *Macbeth v. Haldeman*, and in every case of the kind, the court asserts a positive control over the consciences of the jury, by telling them "they are bound to find for the defendant." And the greater absurdity must henceforward be incurred, of swearing a jury in a cause, and requiring a verdict at the caprice of a plaintiff, who produces not a tittle of evidence to maintain his issue. Nor is any right of the plaintiff taken from him, if his rights be regarded in their just extent. He cannot claim a verdict of the jury if he does not produce evidence to sustain it, and it is only in that case that he is precluded from submitting his case to their consciences. When we consider what were the ancient penalties for a false verdict, before they were superseded by the introduction of new 475*] trials, it must appear just and reasonable, that the plaintiff should rather be exposed to the necessity of bringing a new suit, or moving for a new trial, than that the jury should be subjected to attain, at his will. And on the subject of fiction, and legal absurdity, it is certainly too late at this day for our courts of justice to be very fastidious, on a consideration which has been so thoroughly set at naught, by the action of ejectment, fine and recovery, and sundry other matters of the kind; to which they have resorted for the purpose of substantial justice and public convenience.

I must submit, I suppose, but I cannot do it without protesting against the right of forcing upon my circuit the practice of other circuits in this mode.

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By a rule of this court, it is, unquestionably, in the power of the court to do it. But until then, I can never know what is the practice of my own circuit; until I come here to learn it.

Cited—6 Pet., 609; 14 How., 222; 23 How., 183; 1 Wall., 369; 18 Wall., 250; 1 Blatchf., 461 (n); 5 Blatchf., 91; 2 Wood. & M., 535.

*JAMES D'WOLF, JUNIOR, Plaintiff [*476
in Error,
v.

DAVID JACQUES RABAUD, JEAN
PHILIPPE FREDERICK RABAUD, AL-
PHONSE MARC RABAUD, Aliens, and
Subjects of the King of France, and AN-
DREW E. BELKNAP, a Citizen of the
State of Massachusetts, Defendants in Error.

*Nonsuit—pleading—statute of frauds—decisions
of New York courts construing New York
statutes.*

A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff. [497]

A question of the citizenship of a party to a cause, cannot constitute a part of the issue on the merits; and must be brought forward by a proper plea in abatement, in an earlier stage of the cause than the trial on the merits. [498]

The statute of frauds of New York, is a transcript on this subject, of the statute 29 Charles II., ch. 3. It declares that no action shall be brought to charge a defendant on a special promise for the debt, default, or miscarriage of another; unless the agreement, or some memorandum, or note thereof, be in the writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute; and have been introduced by courts to explain its objects, and expound its true interpretation. [499]

Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least in those States where the English authorities have been fully recognized and adopted in practice. [499]

If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money, is not coincident with, nor the same contract with C to do the act. Each is an original promise; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of either B or C, but upon the promise of both *diverso intuitu*, and each becomes liable to A, not upon a joint, but a several original undertaking. Each is a direct original promise, founded upon the same consideration. [500]

NOTE.—That decisions of State Courts, as to its own statutes, are a guide to United States Courts, see notes to *Clark v. Graham* (6 Wheat., 577); and note to *Elmendorf v. Taylor* (10 Wheat., 152); and note to *Darby v. Mayer* (10 Wheat., 465); and note to *Jackson v. Chew* (12 Wheat., 153); *McCormick v. Sullivan* (10 Wheat., 192); *Davis v. Mason* (post, 503); *Waring v. Jackson* (post, 510).

The case of *Wain v. Warlters* (5 East, 10) was the first case which settled the point that it was necessary in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms or by necessary implication. That case has been adopted, to a limited extent, by the courts of New York into its jurisprudence, as a sound construction of the statute. [501] 477*] *The decisions in the courts of New York on the construction of its own statute, and the extent of the rules deduced from it, present to this court a guide in its decisions upon the construction of their statute. [501]

ERROR to the Circuit Court of New York for the Southern District.

The defendants in error brought an action of *assumpsit*, in the Circuit Court of the United States for the Southern District of New York, against the plaintiff in error, to recover damages for the breach of his contract to ship to them, at Marseilles, five hundred boxes of white Havana sugar.

The declaration contains several special counts, of which the first and second only were relied upon at the trial.

The first count stated, that at the time of making the respective promises and undertakings of the defendant, the plaintiffs were co-partners in trade, carrying on business at Marseilles in France, under the firm of Rabaud, Brothers and Company. That one George D'Wolf, of Bristol, Rhode Island, being desirous of drawing upon the plaintiffs at Marseilles for 100,000 francs, on the 15th of March, 1825, at New York, in consideration that the plaintiffs, at the special instance and request of the defendant, would authorize the said George D'Wolf to draw bills of exchange upon the plaintiffs for the said sum of 100,000 francs, the defendant undertook, and promised that he would ship for the account of George D'Wolf, on board of such vessel as George D'Wolf should direct, five hundred boxes of white Havana sugars, consigned to the plaintiffs at Marseilles; and the plaintiffs afterwards did duly authorize George D'Wolf to draw bills of exchange upon them at Marseilles, for the said sum of 100,000 francs, which bills were drawn by him on the 16th of November, 1825, and paid by the plaintiffs on the 3d day of March, 1826. That on the 4th day of January, 1825, at the city of New York, George D'Wolf did direct and name a vessel, the brig *Quito*, then laying in the port of New York, and ready to receive the said sugars, on board of which vessel the sugar should and ought to have been shipped by the defendant, on account of George D'Wolf, and consigned to the plaintiffs at Marseilles, according to his said promise and undertaking; of all which promises the defendant had notice; and although he was then and there requested to ship the sugar on board the said vessel, yet he did wholly refuse the same.

The second count differs from the first only in stating the contract to have been, that, "in consideration that the plaintiffs, at the request of the defendant, would authorize George D'Wolf to draw bills of exchange upon them at Marseilles for another sum of 100,000 francs, on account of other five hundred boxes of 478*] white Havana sugar, to be shipped by the defendant for account of George D'Wolf,

on board of such vessel as George D'Wolf should direct, and consigned to them, the plaintiffs, at Marseilles, the defendant undertook, &c.," and averring, that relying on the promise and undertaking of the defendant so made, they, the plaintiffs, after the making thereof, did duly authorize George D'Wolf to draw bills of exchange upon them for another sum of 100,000 francs, on account of the last-mentioned five hundred boxes of white Havana sugars, to be shipped by the defendant on account of George D'Wolf, and consigned to the plaintiffs at Marseilles.

The cause was tried at the October term of the Circuit Court of the United States for the Southern District of New York, in 1826, when the jury, under the charge of the court, found a verdict for the plaintiffs below for \$19,950.85. The opinion of the court, in the charge to the jury, was excepted to by the counsel for the defendant, and a bill of exceptions sealed by *Mr. Justice Thomson*, sitting as Judge of the Circuit Court; and the opinion delivered by him states the evidence adduced in the cause.

On the trial of the cause in the Circuit Court, the plaintiffs below gave evidence, by the testimony of George D'Wolf, who was examined under a commission at Havana, that he, George D'Wolf, had several transactions with the plaintiffs previous to that which gave rise to this suit, and had at various times drawn bills on them. That he had three interviews with *Mr. Belknap* on the subject of the shipment of the sugars; which interviews were had, first, in Wall street in the city of New York; second, at the counting-house of James D'Wolf, Jun., the plaintiff in error; and third, at the boarding house of *Mr. Belknap*. James D'Wolf, Jun., was present at the first interview, and he with a certain Frederick G. Bull was present at the second, at his counting-house.

Mr. George D'Wolf stated that the transactions relative to the shipment of the sugars were: that, in Wall street, he proposed to *Mr. Belknap* to address him five hundred boxes of sugars to the house at Marseilles, on receiving authority to draw on account of the same to the extent of 100,000 francs. *Mr. Belknap* being engaged, an interview was proposed at the counting-house of *Mr. James D'Wolf, Jr.*, which took place, and at which *Mr. Belknap* observed that the advance was heavy; and a calculation was made by *F. G. Bull*, the confidential clerk of *Mr. James D'Wolf, Jr.*, and by *Mr. James D'Wolf* himself, of the value of the sugar, compared with the proposed advance; the conclusion of which was an agreement that the sugars should be shipped, and the authority to draw granted to George D'Wolf; *Mr. James D'Wolf* engaging, by letter, *to ship the sugars in behalf of [*479 *George D'Wolf*; which form of letter was afterwards carried by George D'Wolf to *Mr. Belknap*, was assented to by him; was signed by *Mr. James D'Wolf, Jr.*, and the authority to draw granted and used accordingly.

This letter, and the authority to draw, are in the following terms:

NEW YORK. 15th November, 1825.

MR. JAMES D'WOLF, Jr.

DEAR SIR—You will please ship for my account, on board of such a vessel as I shall di-

Peters 1.

rect, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brother & Co., Marseilles, and oblige your friend and obedient servant.

GEORGE D'WOLF.

Agreed to, JAMES D'WOLF, Jr.

NEW YORK, 15th November, 1825.

MESSRS. RABAUD, BROTHERS & CO., Marseilles.

I have this day authorized George D'Wolf, Esq., to draw on you for thousand francs, and I request you to honor his bills to that amount.

Your obedient servant, A. E. BELKNAP.

Mr. George D'Wolf also stated, that his object was to ship the sugars in one of his own vessels; that he was then indebted to the house in Marseilles, about thirty thousand francs, but could not say that Mr. James D'Wolf knew of the debt. The sugars were shipped to obtain the usual advance, and the consignees were to have the usual commissions in the transaction.

Bills to the amount of the advance were afterwards drawn and negotiated in Boston, and the proceeds of the same applied as follows: \$13,000 remitted to Mr. James D'Wolf, in checks on the bank, and in an acceptance of Isaac Clapp, a broker in Boston; and the residue of the proceeds of the transaction passed to the account of George D'Wolf by Mr. Clapp. It was admitted that the bills were regularly paid at Marseilles by the defendants in error.

It was also in evidence, by the testimony of Mr. George D'Wolf, that at the time of the negotiation for the bills, Mr. George D'Wolf had in the hands of the plaintiff in error from three to four hundred boxes of sugar; of which sixty had been remitted from Rhode Island, on account of which he drew the sum of four thousand dollars, and the remainder were purchased for his account by Mr. James D'Wolf, Jr., and at the same time he was indebted to Mr. James D'Wolf, Jr., a considerable amount. **480***] *Mr. George D'Wolf also testified that the sugars to be shipped were to be on his account, and not on that of the plaintiff in error; that the agreement with Mr. James D'Wolf was that the proceeds of the negotiation of the advance should be remitted to him, and upon this verbal agreement, Mr. James D'Wolf granted his signature to the letter of the 15th of November, 1825. Mr. James D'Wolf afterwards wrote to the witness, that he should decline to make the shipment in question, until he should receive the remittances agreed upon. When the letter was first presented, Mr. James D'Wolf declined signing it, deferring it to the next morning, when he should see Mr. Bull; and it was signed the next morning. That the letter or memorandum of agreement, had for its sole object the shipment of the sugars to Marseilles, that market being preferred to New York; and to place in the hands of Mr. James D'Wolf, Jr., the proceeds of the bills, in order to further the shipment; and not with reference to accounts existing between him and the plaintiff in error; and that the plaintiff in error knew the defendants, and particularly Mr. Belknap, in the transaction as stated.

Mr. George D'Wolf also stated in his evidence, that he did not know that Mr. Belknap was Peters 1.

acquainted with the circumstance that the proceeds of the bills were to go to the plaintiff in error, or with the state of accounts between him and Mr. James D'Wolf, Jr.

Evidence was also given to show that the plaintiffs below carried on business in Marseilles, in France, and that all of the said parties, with the exception of Mr. Belknap, were native subjects of France; and that Mr. Belknap was a native citizen of the United States, had resided some years in France, and now, always considering Boston as his home, resided in Boston; where he lodged in a boarding-house, in which he hired rooms by the year; and was understood to pay taxes in Boston; his letters of business were addressed to Boston; and he was absent from there in the United States, occasionally, for the purposes of transacting business for the firm in Marseilles.

Soon after the negotiation of the 15th November, Mr. George D'Wolf became insolvent, and at the time of his failure he was largely indebted to the plaintiff in error. Being thus embarrassed he addressed to Mr. Belknap the following letter:

BRISTOL, R. I., 27th December, 1825.

MR. A. E. BELKNAP.

DEAR SIR—I am in receipt of yours of the 23d instant, and note its contents. Owing to my embarrassments, the Magnet which I had *wrote you would proceed to New [***481** York to take the sugars, which Mr. James D'Wolf, Jr., was to ship to your house in Marseilles, will not go on. You are therefore at liberty to make any arrangements with him you may think proper, for the interest of all concerned. I am extremely sorry that you met with an accident to prevent your visiting me, as it would have afforded me much pleasure in seeing you.

Believe me very truly your friend,

GEORGE D'WOLF.

Which letter was upon the 27th day of December, 1825, shown to the plaintiff in error, by Mr. Belknap; and a copy of the same was, upon the 3d of January, 1826, delivered to him inclosed in the following letter:

NEW YORK, January 3d, 1826.

MR. JAMES D'WOLF, JR., New York.

SIR—I inclose you a copy of a letter which I yesterday received from Mr. George D'Wolf, of Bristol, Rhode Island. In pursuance of the authority given me by him, I shall, without delay, engage and provide a vessel, on board of which I shall require you (according to your contract of the 15th November last) to ship for account of Mr. George D'Wolf five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles.

Your obedient servant, A. E. BELKNAP.

On the 4th January, 1826, Mr. Belknap addressed the plaintiff in error in the following terms:

NEW YORK, January 4th, 1826.

MR. JAMES D'WOLF, JR., New York.

SIR—In pursuance of the notice I gave you in my letter of yesterday, I have engaged the American brig Quito, Captain Wing, now lying at Fly Market wharf, in this city, for the purpose of receiving, on freight, for Marseilles, five hundred boxes of white Havana sugar.

The Quito is a good staunch vessel, and is now ready to receive the sugar. I therefore require you to ship on board of her for account of Mr. George D'Wolf, of Bristol, R. I., five hundred boxes of white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., of Marseilles, according to your contract of 15th November last. Herewith, is a copy of a letter I addressed to Mr. George D'Wolf, on the 23d of December last, his answer to which I showed you yesterday; at the same time I gave you a copy of it. If you prefer to ship the sugar in any vessel other than the Quito, I have no objection, *provided you will designate the vessel, and give notice to me immediately, and make the shipment without delay.

Your obedient servant, A. E. BELKNAP.

To this letter the plaintiff replied as follows:

NEW YORK, January 5th, 1826.

MR. A. E. BELKNAP.

SIR—In answer to your letter of the 4th instant, I have merely to say, that whenever Mr. George D'Wolf, or any person authorized by him, will pay me for five hundred boxes of Havana sugar, I will ship the same consigned to Messrs. Rabaud, Brothers & Co., at Marseilles.

Your obedient servant,

JAMES D'WOLF, JUN.

Evidence was also given, that the brig Quito was engaged early in January, 1826, by Mr. Belknap to carry the sugar to Marseilles, that she was a competent vessel for the purpose, and that the freight to be paid for the transportation of the sugar was the usual and customary charge for the same.

The plaintiffs in error objected at the trial to the reading of the letter of 27th December, 1825, from George D'Wolf to Mr. Belknap, which objection was overruled by the court.

On the part of the plaintiffs in error, at the trial of the cause before the Circuit Court, Frederick G. Bull was introduced as a witness, whose testimony is stated in the bill of exceptions to have been given as follows:

That he is, and for nine years past has been, a confidential clerk in the employment of the said James D'Wolf, Junior; that he was present at the counting-room of the said defendant on the 15th day of November, 1825, when the interview mentioned and described in the said deposition of the said George D'Wolf took place, between the said George D'Wolf, the said Andrew E. Belknap and the said James D'Wolf, Junior; that the said George D'Wolf and Andrew E. Belknap, came into the counting-room on said 15th day of November in company, and were conversing together; that they there found the said James D'Wolf, Junior, and the witness; that after some little time had elapsed the said James D'Wolf, Junior, and the witness withdrew into an inner apartment or adjoining room, and were in a few minutes followed by the said George D'Wolf and the said Andrew E. Belknap; that while the said Andrew E. Belknap and the said George D'Wolf were in conversation the latter addressed a question to the said James D'Wolf, Junior, and asked him how much five hundred **483*** boxes of sugar would bring, or amount to, at some specified price; that the said James D'Wolf, Junior, turned to the witness and asked him to make the calculation; that the witness

did make a hasty calculation, and gave for answer, "about seventeen thousand dollars;" that he heard no proposition made by the said James D'Wolf, Junior, to the said Andrew E. Belknap, nor by the said Andrew E. Belknap to the said James D'Wolf, Junior, nor any conversation between the said Belknap and the said defendant of any importance, although he thinks that the said defendant did speak to the said Belknap once or twice during the said interview; that the said James D'Wolf, Junior, appeared, so far as the witness observed, to take little or no interest in the conversation or business which was going forward and taking place between the said George D'Wolf and the said Andrew E. Belknap; that during the time of said conversation and interview, (which occupied not more than ten or fifteen minutes) the said James D'Wolf, Junior, left the counting-room for a short time and returned; that the said James D'Wolf, Junior, is in the habit of communicating all matters of business to the witness, and consulting him concerning the same, and the witness does not think it at all probable that the said James D'Wolf, Junior, would have made any contract or agreement with the said Andrew E. Belknap, either at that time or any other, without the knowledge of the witness; that the said James D'Wolf, Junior, during part of the time of the said interview, was walking about his counting-room, while the said George D'Wolf and the said Andrew E. Belknap were conversing together, and at one time came up to the witness and addressed some remarks to him; that the witness was writing at the desk, and occupied in his own affairs of business, and did not pay very particular attention to the conversation of the said parties; that the defendant and Belknap might have conversed on the subject of the sugar without the witness knowing it; and the witness would not undertake to say that an agreement by the said defendant with the said plaintiff might not have been made without the knowledge of the witness; that the witness does not know that the said Andrew E. Belknap knew that the proceeds of said bills were to have been remitted to the said defendant, by the said George D'Wolf, before the said defendant was bound to ship the said sugar; that the said George D'Wolf was, on the 15th day of November, 1825, and for a long period anterior thereto, and ever since has been, largely indebted to the said James D'Wolf, Junior, that the sum of thirteen thousand dollars, for and on account of the five hundred boxes of sugar mentioned in the said deposition of George D'Wolf, was never paid by the said George to the said defendant, and never came into his hands; *that George **484** D'Wolf did, on or about the 23d day of November, 1825, remit to the defendant, his, George D'Wolf's, draft for six thousand dollars, on Isaac Clapp, of Boston, at three days' sight, and a check upon the United States Branch Bank at New York, for one thousand dollars; which said draft and check were both paid, and the amount thereof received by the said James D'Wolf, Junior; that the said George D'Wolf did also shortly after transmit to the defendant his, the said George D'Wolf's, draft upon the said Isaac Clapp, at thirty days' sight for seven thousand dollars, which was

received by the defendant, but was never paid, either by the acceptor, the said Isaac Clapp, or the drawer, the said George D'Wolf; but the same was protested for non-payment, and still remains due and unpaid.

The counsel for the defendant below then offered to prove by Mr. Bull that there was an express understanding and agreement between the defendant and George D'Wolf at the time the said letter of the 15th of November was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of said sugar, before the said defendant would be under any obligation to ship the same.

This testimony was not permitted to go to the jury, the court stating that "the defendant below could offer no testimony to the jury of any arrangement between him and George D'Wolf relating to the funds for the payment for the sugar, unless it should also appear that Mr. Belknap was party thereto, or that the same was brought to his knowledge." The counsel for the defendant below excepted to this opinion.

The defendant below also gave in evidence on the trial the following letter, containing matter contradictory to the testimony of George D'Wolf.

BOSTON, November 28th, 1825.

MR. JAMES D'WOLF, JUNIOR.

Dear Sir—I send you my draft on Mr. Clapp for \$6,000, at three days' sight, as he cannot get any drafts or checks on New York, having tried all the banks and brokers; he has not sold the exchange, or any part of it as yet, but thinks he can in three or four days. Last sales 19½ cents; money very scarce: the New Yorkers have sent on a great deal of paper; banks stopped discounting. He will remit you the balance as soon as he sells, then, if a draft can be procured; or otherwise will authorize you to draw on him for the balance. I inclose a check on the branch for \$1,000, making \$7,000 which credit this account.

I am your friend and obedient servant,
GEORGE D'WOLF.

485*] *The case was argued by Mr. Ogden and Mr. Jonathan Prescott Hall for the plaintiff in error, and by Mr. Webster and Mr. Charles C. King for the defendants.¹

1.—The following charge was delivered by Mr. Justice THOMPSON to the jury:

This case is of considerable importance in point of amount, and may be considered as a struggle between two innocent parties to throw off from their own shoulders a loss which must fall upon one or the other by reason of the failure of George D'Wolf. In such cases, it is reasonable to expect that each party will urge with great zeal the points relied on to effect his object.

It has been distinctly stated by the counsel that situated as this cause is, it is not probable that a decision here will put an end to the controversy, but that it will be carried to the Supreme Court of the United States; and to enable the parties to avail themselves of their rights in this respect and to take exceptions to the opinion I may express, it may be necessary for me not only to be explicit, but to repeat in some measure what I have already had occasion to say in disposing of the motion for a nonsuit.

The result in the present case will depend principally upon the questions of law which are involved, and with which you have no concern. Some of these questions are, however, so connected with facts which it is your province to decide; Peters 1.

*Mr. Hall and Mr. Ogden, for the [*486 plaintiff in error.

The defendants in error brought an action of *assumpsit* in the court below against the plaintiff in error, founded upon a *special [*487 agreement; they are therefore bound to prove the contract stated in the declaration expressly as laid. This is a cardinal rule in pleading. (Anon. L. Ray., 735; *Hockin v. Cooke*, *4 [*488 T. R., 314.) The plaintiffs must, in the first place, prove a promise from the defendant to the plaintiffs, and then any consideration of benefit to the defendant or of injury to the plaintiffs, moving between the parties, will sustain the promise. (1 Roll. Abr., 6.)

It is admitted by the learned judge, in his charge to the jury, *that "the letter" [*489 from Geo. D'Wolf to the defendant, dated November 15th, 1825, and upon which the latter subscribed the words "agreed to," is the principal evidence in the cause. This letter, we say, neither proves nor conduces to prove the promise laid in the declaration. In the first place the plaintiffs are not parties to the contract contained in the writing; and it is a general rule that no person can maintain an action of *assumpsit* upon an agreement to which he is not a party; for in such a case there can be no contract, express or implied. (*Jordan v. Jordan*, Cro. Eliz., 369; *Crow v. Rogers*, 1 Strange, 592; *Bourne v. Mason*, 1 Vent., 6.)

The construction to be put upon this letter is matter of law, and it ought not to pass to the jury without explanation from the court. (1 T. R., 172.) This agreement, upon its face, clearly purports to be a contract between George D'Wolf upon the one part, and James D'Wolf, Jun., upon the other. The words of the letter are to be explained according to their natural import; and we are not to go in search of conjectures, in order to extend them, when the meaning conveyed by the terms of the agreement is evident, and leads to no absurd conclusion. (Clitty on Com. & Mar., Vol. III., 107; Powell on Con. title "Interpretation"; Vattel's L. of N., 224.)

An express contract is gathered merely from the words of the parties themselves, who are bound to know the meaning which the law will attach to express words. It rests on no uncertain inferences of the probable meaning of the parties, but on the actual declaration of inten-

and for the purpose of enabling the parties to avail themselves of whatever exceptions they may have to take, many remarks may be made in the course of my charge to you which in strictness are not to be addressed to a jury.

The first question arising is whether the plaintiffs have shown themselves entitled, under the constitution and laws of the United States, to come into this court to prosecute their action. It has not been denied but that all the plaintiffs except Belknap are aliens, and have a right to bring their suit in this court. The declaration avers that Belknap is a citizen of the State of Massachusetts, and it is contended on the part of the defendant that this averment has not been proved.

From the evidence it appears that Belknap was either born in Boston or removed there with his father at a very early age from New Hampshire, and continued to live in Boston until he went to France, where he remained ten or twelve years, when he returned to Boston. That he is an unmarried man, having no family; lives at lodgings; has rooms, as one of the witnesses understood, hired by the year, and is there about two-thirds of the time. The residue of the time he is absent on business of the firm of which he is a partner, prin-

tion, made in direct terms. (Chitty on Com. & Mar., Vol. III., pages 3 and 4.)

"The letter" judged by these rules, is plainly a contract between the defendant and Geo. D'Wolf, resting upon a consideration passing between them, and the insertion of the names of the plaintiffs was a mere direction as to whose care the sugar, when shipped, should be committed. The plaintiffs are the mere agents or intended bailees of Geo. D'Wolf, and have no apparent interest in the subject-matter of the contract. The agreement is placed, by the terms made use of, entirely under the control of Geo. D'Wolf, who has the power of designating a vessel to receive the sugar. He is a party in fact, and a party in interest, and by complying with the terms of the agreement imposed upon him, he would have the right, and the sole right to seek an enforcement of the contract. The words "for my account," contained in the letter, prove that the agreement was not made with, nor for the plaintiffs, and they have no authority for bringing an action in their own names, for a violation of the contract.

This position may be supported by an analogy drawn from bills of lading. A bill of lading,

expressed in the ordinary, *form trans- [*490]fers the property absolutely to the consignee, and he becomes, in legal contemplation, the owner of the goods. But if words are made use of in the bill of lading, which show that the property of the shipment remains in the consignor, and that the consignee is the mere agent or factor of the consignor, then no action for a violation of the contract contained in the bill of lading will lie in the name of the consignee. It must be brought in the name of the consignor. If the rights of the consignee, arising from advances made in expectation of the consignment, are violated, he has no remedy upon the contract, but must bring trover, or go into a Court of Equity. (*Evans v. Martlett*, 12 Mod., 156; Chitty on Com. & Mar., Vol. III., 401, n. 2, n. 5; *Potter v. Lansing*, 1 John., 215; *Davis v. Jordan*, 5 Burrows, 2680; *Sargeant v. Morris*, 3 B. & A., 277.)

The action must be brought in the name of the party who has the legal interest in the subject-matter of the contract; and a mere equitable right, if any exist, will not support an action upon an express agreement to which the plaintiffs are not parties. If this sugar had

cipally in New York and Philadelphia, and other cities of the United States. One of the witnesses testified that on one occasion he went with him to town meeting to vote at an election, he did not see him vote, but understood he went there for that purpose. All the witnesses, in answer to the general question, where was the home of Belknap, say it was at Boston, that they should address him at that place as his place of residence if they did not know of his absence. That letters from abroad are addressed to him at that place. These are the leading and principal facts in evidence as to Belknap's being a citizen of Massachusetts. That he is a citizen of the United States cannot be questioned; and if a citizen of any particular state, within the sense and meaning of the Constitution and law, it must be of Massachusetts. No evidence has been offered to raise a doubt on this point. Whenever absent from Boston it was temporarily, and on the business of the plaintiffs; and to deprive an American citizen of the right of suing in this court, on the ground of his not being a citizen of any particular State, there ought to be very strong evidence of his being a mere wanderer without a home. Belknap does not appear to stand in this situation. His domicile, his home and permanent residence may, with the greatest propriety, be said to be in Boston. There is no pretense that this was merely colorable for the purpose of qualifying himself to bring this action, and to deprive him of that privilege would be extending this disability beyond the reason and policy of the law. The facts in relation to Belknap do not appear to be in dispute so far as I have understood them; and if according to your understanding of the evidence they are as I have stated, the averment that he is a citizen of the State of Massachusetts is sufficiently proved.

2. The next inquiry relates to the merits of the cause, and embraces the main question upon which the rights of the parties must be decided.

The action is founded on a special contract alleged to have been entered into by the defendant, and which he has not complied with. The declaration contains several counts, in which the cause of action is in some respects laid in different ways, but is substantially that the defendant, in consideration that Belknap would authorize George D'Wolf to draw on the plaintiffs for one hundred thousand francs, undertook and promised to ship for account of George D'Wolf, on board such vessel as he should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs in this cause, accompanied with the necessary averments and allegations of breaches. And the great question is, whether this contract has been proved by such evidence as to make it legally binding on the defendant.

The letter of the 15th of November, 1825, from George D'Wolf to the defendant, requesting him to ship for his account five hundred boxes of white

Havana sugar, consigned to the plaintiffs, and underwritten by the defendant "agreed to," is the principal evidence in this cause to establish the contract.

It is said, that this letter, under the statute of frauds, does not on its face contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction. The evidence on this point rests principally on the deposition of George D'Wolf. For although Mr. Bull did not hear the defendant assent to the arrangement, yet from his own statement such an arrangement or contract might have been entered into by the defendant without his hearing it; it is, therefore, at most, but a negative kind of evidence, and ought not to outweigh the positive testimony of George D'Wolf, unless he is discredited in some way, of which you will judge. His testimony is in writing, and will be submitted to the jury when they withdraw to make up their verdict. They will read and judge for themselves. I understood him to say that the defendant was with him when they first met in Wall street and had some conversation about the authority to draw, and the shipment of the sugar; he, George D'Wolf, then stating to Belknap that he had between three and four hundred boxes of sugar then in the defendant's possession; that a time was appointed to meet at the defendant's counting-house to negotiate further on the subject; that such meeting did take place, and the agreement then concluded, as contained in the letter of the 15th of November, 1825. The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for a hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at the same time with that between Belknap and George D'Wolf, so as to form one entire transaction. This evidence does not in any manner contradict the written agreement, but is perfectly consistent with it. As between the plaintiffs and George D'Wolf, the consideration might clearly be supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration moving from the plaintiffs to him; the consideration of George D'Wolf was sufficient to uphold and support the contract of the defend-

been shipped, it would have been shipped as the property of Geo. D'Wolf, who would have been liable for freight, insurance, and commissions. The property would have been at his risk; and in case of the bankruptcy of the plaintiffs, Geo. D'Wolf would have had the right to repay to them the advance received, and to stop the goods *in transitu*.

"This not being an action for deceit and imposition, but on a written contract, the right of the plaintiffs to recover is measured precisely by that contract." (*Taylor v. Riggs*, 1 Peters's Reports of the Decisions of the S. C., 1828, *post*.)

2. The letter upon its face, is plainly a contract between the defendant and Geo. D'Wolf. It is not negotiable, and the delivery of it, therefore, to the plaintiffs, by Geo. D'Wolf, gives them no authority to maintain an action upon the agreement in their own names. This instrument bears no analogy to a bill of exchange, not being made payable in money and containing no operative words of transfer. It is a mere executory agreement to ship merchandise, and if valid would only subject the defendant to damages for its violation, as

ant. The undertaking of the defendant to make the shipment was certainly the principal, if not the sole consideration upon which Belknap authorized the drafts on the plaintiffs; for George D'Wolf says expressly that he does not believe the authority would have been given without such undertaking by the defendant; so that it might be urged with great force that the whole credit was given and rested on the engagement of the defendant to make the shipment. If the contract of the defendant was entered at the counting-house at the time mentioned, it is of no consequence that the letter was not signed until the day after. This was only reducing to form and putting into the shape agreed upon and consummating the arrangement, and would have relation as between these parties to the time when the agreement was in point of fact entered into.

But if I should be mistaken in this view of the evidence, and the jury should be of opinion that the contract between Belknap and George D'Wolf was completed and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence is not sufficient to maintain the present action. It would then be a collateral undertaking made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract. Whether it is indispensable that such consideration should be expressed in the written agreement or not, it is unnecessary to decide, because no such consideration has been proved, if it was admissible to supply it by parolevidence.

3. It is said in the next place that the plaintiffs have failed in establishing a right to recover in this action, by reason of a variance between the allegation in the declaration and the proof in support of it. In relation to the letter of advice from Belknap to his copartners, apprizing them of his having authorized the drafts of George D'Wolf. The declaration alleges, "that in consideration that the plaintiffs would authorize George D'Wolf to draw upon them for one hundred thousand francs, the defendant undertook and promised, &c." But that the written authority shown in evidence was in blank as to the sum to be drawn, and that in this consisted the variance.

This letter being in blank, cannot be set up as a variance between the allegation and the proof. The declaration does not state that the authority was in writing, or refer in any way to the letter in question, and George D'Wolf swears that he was authorized to draw on the plaintiffs for one hundred thousand francs. That in pursuance of such authority he did draw upon them for that sum, and his bills were accepted and paid. The drafts which accompanied the latter of advice showed the amount, and the bills having been paid, the blank is of no importance in the present action.

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between the original parties. (*Smith v. Smith*, 2 Johns., 240; *Jerome v. Whitney*, 7 Johns., 321; *Coolidge v. Ruggles*, 15 Mass.) If this letter or order had been for the payment of money, but drawn in its present restricted form, it would not have entitled the plaintiffs to maintain an action in their own names upon the acceptance or special contract. No instrument in the form of a bill of exchange was ever held to be negotiable, unless in some substantial form made payable to order on the face of it. The law, as laid down in the case of *Hill v. Lewis*, (1 Salk., 133), has always been adhered to. (See *Gerard v. La Coste et al.*, 1 Dallas, 194; *Downing v. Backtoes*, 3 Caines, [*491 137; *Stephens v. Hill*, 5 Esp. N. P. Cases, 247.)

3. This letter being a contract between Geo. D'Wolf and the defendant, is, as between the original parties, *nudum pactum*, for the want of mutuality, and void. George D'Wolf was not bound to designate a vessel nor to receive the sugar; and it is an universal rule that a contract cannot bind one party and not the other. "A promise may be voluntary, but an agreement to be binding, must contain a mutual engagement." (*Lyon v. Lamb*, Fell. on Mer.

4. The next inquiry is, whether any vessel was designated to receive the sugars according to the terms of the agreement. By the contract the sugars were to be shipped on board such vessel as George D'Wolf should direct. He having become insolvent, wrote a letter to Belknap authorizing him to make arrangement with the defendant on this subject, and to designate the vessel; which he accordingly did, and gave notice thereof to the defendant, and demanded the shipment of the sugars. This was amply sufficient. The authority reserved to George D'Wolf to direct in what vessel the shipment should be made, was for his benefit, which he might waive. He was not bound personally to designate such vessel; he might do this by his agent, and the authority given to Belknap was constituting him such agent for that purpose; and the act of Belknap in this respect was, in judgment of law, the act of George D'Wolf; and it is in proof that the vessel designated was in every respect fitted for the purpose. Nor was any objection made by the defendant at the time on this ground; but he declined making the shipment because George D'Wolf had not furnished him with funds to purchase the sugars; and the objection that the vessel was not designated by George D'Wolf cannot now be set up. The act of his agent was his act, and the evidence, therefore, fully supports the contract as laid in the declaration.

5. The only remaining question is as to the rule by which the damages are to be ascertained. Upon this subject much of the evidence which has been introduced on the part of the plaintiffs, and the various estimates and calculations which have been submitted to the jury, may be entirely laid aside, according to the view which I have taken of the question. I concur with the defendant's counsel on this point, that the measure of damages must be the value of sugars in New York at the time of the breach of the contract by the defendant, in refusing to make the shipment according to his contract. If this was a question between George D'Wolf and the plaintiffs, for settling the account of the proceeds of the sugars, had they been shipped, it might have required the application of different principles. But the breach of the contract on the part of the defendant, consists in not making the shipment and consignment according to his undertaking. He did not undertake to deliver the sugars to the plaintiffs at Marseilles. He had no concern with the transportation or the expenses incident thereto. If he had shipped the sugars on board the vessel designated, consigned to the plaintiffs, his contract would have been complied with. The plaintiffs are accordingly entitled to recover the value of the sugars in New York at the time when the defendant was bound by his contract to make the shipment. This amount the jury will ascertain from the evidence that has been offered them on that subject.

Guar., 336; 1 Roll. Ab., 23. Coke Litt., 55, a; *Doe v. Smith*, 2 T. R., 438; *Clayton v. Jennings*, 2 W. B. R., 706; *Payne v. Cane*, 3 T. R., 148; *Cooke v. Oxley*, 3 T. R., 148; *Waine v. Warlters*, 5 East, 16; *Kington v. Phelps*, Peake's N. P. Cas., 227; *Tucker v. Woods*, 12 John., 190; *Parkhurst v. Van Cortlandt*, 1 John. C. R., 282; *Jenkins v. Reynolds*, 3 Brod. & B., 13; *Woods v. Edwards*, 19 John., 211; *McLemore v. Powell*, 12 Wheat., 557; 2 Black. Com., 447; 1 Fonb. Eq., 383, n. a., Vol. III., 129; 4 T. R., 764-5; 7 *Ibid.*, 129-131; 7 Bro. P. C., 184.)

4. But if the agreement be not void for want of mutuality, still, payment of the value of the sugar to the defendant is a condition precedent to his undertaking to ship, clearly implied from the face of the instrument, and should have been averred in the declaration. (Chit. Plea., 314-15; 1 Wm. Saund., 320, note 4 at the end; Com. Dig., title Pleader C., 51; 1 T. R., 645; 7 *Ibid.*, 121; 1 Saund., 319, 320; 1 East, 203, 208, 619; *Cowper v. Andrews*, Hobart, 41, 1 H. Black., 363.)

5. The contract of the defendant relative to the shipment of the sugar was entirely in writing, and is contained in the letter of November 15th, 1825. If this agreement is free from ambiguity, so as to be capable of a sensible exposition from its own terms, without reference to extrinsic matters, *dehors* the instrument itself; then no parol evidence can be introduced to vary the terms of the agreement, or to change the parties thereto. (*Clarke v. Russell*, 3 Dall., 421; *Gunnis v. Erhart*, 1 H. Black., 289; *Coker v. Guy*, 2 Bos. & Pull., 565; *Thompson v. Ketchum*, 8 John., 146; *Gilpins v. Consequa*, 1 Pet., 87; *Dean v. Mason*, 4 Cou. R.; *The N. Y. Ins. Co. v. Thomas*, 3 John., Cas., 1; *Jackson v. Croy*, 12 John., 427; 11 Mass., 27; 2 Bro. Ch., 219; Peake's Ev., 117; *Vandervoort v. Cols. In. Co.*, 2 Caines, 155; *Mumford v. McPherson*, 1 John. Rep., 418; *Brigham v. Rogers*, 17 Mass.; *Powell v. Edmunds*, 12 East, 10; *Jackson v. Sill*, 11 John., 216; *Parkhurst v. Van Cortlandt*, 1 J. C. R., 283; *Hampshire v. Pierce*, 2 Ves., 216; *Jackson v. Hart*, 12 John., 17; *Grant v. Naylor*, 4 Cranch, 224.)

6. But if there is any doubt upon this subject, and the parol evidence be admitted to explain the agreement, then we say, that neither the parol proof, nor "the letter" taken **492** in connection *with the parol proof, can sustain the plaintiffs' declaration. 1. Because there is no proof upon the record that the defendant ever made the promise set forth in the declaration, either to or for the plaintiffs; but on the contrary, the evidence is conclusive that the very promise, claimed by the plaintiffs to have been made to them and for their benefit, was made by the defendant to George D'Wolf, and for his benefit. The defendant having moved for a nonsuit at the trial, has a right to examine the testimony upon this point at this time, in the same manner as upon the original motion. If the testimony offered in evidence by the plaintiff be insufficient, in point of law, to sustain his declaration, the defendant has a right to call upon the court to nonsuit the plaintiff. (*Swift v. Livingston*, 2 John. Cases, 112; *Clements v. Benjamin*, 12 John., 298; *Pratt v. Hull*, 13 John., 298; *Crookshank v. Gray*, 20 John., 350.)

2. The consideration upon which the de-

fendant's promise was made is entirely different from that set forth in the declaration, and this is a fatal variance. (*King v. Robinson*, Cro. Eliz., 79; Com. Dig., Vol. I., 334, title, action upon the case upon *assumpsit*.)

3. Were there any doubt upon these points, the defendant ought to have been permitted to remove them by the testimony of Mr. Bull. If it be contended that this promise, although not made directly to the plaintiffs, was, nevertheless, made to Geo. D'Wolf for their benefit, then the testimony offered by the defendant at the trial ought to have been received to contradict this assertion.

4. But the promise contained in the letter, if made to Geo. D'Wolf for the benefit of the plaintiffs, will not sustain the declaration, unless he can be considered as the mere agent of the plaintiffs; and this supposition is contradicted, not only by the words of the instrument itself, but by the plaintiffs' own witness. [The counsel here referred to and commented on the following cases: *Dutton v. Pool*, 2 Lev., 210; *Schermerhorn v. Vanderheyden*, 1 John. Rep., 9; *Felton v. Dickenson*, 10 Mass., 287; *Piggott v. Thompson*, 3 Bos. & Pull., 149, and the note; *Martyn v. Hynde*, Cowp., 437; *Com. of Feltmakers v. Davis*, 1 Bos. & Pull., 102; 3 Salk., 234; Comb., 450; 3 T. R., 757; Chit. on Plea., Vol. I., p. 4; Com. Dig., Vol. I., 309, and the note p., title, action upon the case upon *assumpsit*.] Indeed, in the case of a written contract "*inter partes*," no other than an immediate party to the instrument itself can maintain an action upon it. (*Offley v. Warde*, 1 Lev., 235; *Gilbey v. Copley*, 3 Lev., 139; *Salter v. Kingsley*, Carth., 77.)

If Geo. D'Wolf was the agent of the plaintiffs, then they are bound by his acts, and must place the proceeds of the bills of exchange in the hands of the defendant, according to George D'Wolf's express promise, before he will be under any obligation to ship the sugar.

7. No vessel has ever been designated by George D'Wolf, on board of which the defendant has been required by George D'Wolf to ship the sugar; and until such designation, no right of action will accrue in favor of any person against the defendant. The letter of George D'Wolf, dated December 27th, 1825, and addressed to A. E. Belknap (relied upon by the counsel for the plaintiffs to prove an authority in Belknap to designate a vessel as the agent of George D'Wolf), is insufficient for that purpose. It gives Belknap no such authority; and, besides, George D'Wolf had no right, legal or moral, after his bankruptcy, and after failing to place funds in the hands of the defendants, either for the purchase or payment of the sugar, to call upon him to ship the same, consigned to the plaintiffs at Marseilles.

8. The agreement of the defendant relative to the shipment of the sugar, if made with the plaintiffs at all, was collateral to an undertaking on the part of George D'Wolf that he would cause the sugar to be shipped by the defendant, in consideration of an authority to be given to him to draw bills of exchange upon the plaintiffs, for his own benefit. For the non-fulfillment of this promise, George D'Wolf was and is liable, and the defendant's undertaking is essentially a guarantee, given

in aid of George D'Wolf's credit, or for the performance of an act which he was bound by a promise, confessedly original, to perform. From the performance of this promise George D'Wolf has never been exonerated, and the defendant's undertaking is collateral to that of George D'Wolf.¹ The testimony of the plaintiffs is, therefore, inadmissible under the statute of frauds, to prove their declaration for the want of a sufficient memorandum of the agreement in writing. Whatever doubts may have existed upon this subject, it is now well settled that in cases under the statute of 29 Char. II., chap. 3. sec. 4 (1 N. Y. Revised Laws, page 78, chap. 44, sec. 11), the consideration upon which the agreement rests, as well as the promise itself, must appear upon the writing. (*Wain v. Warlters*, 5 East, 16; *Lyon v. Lamb*, Fell. on Guar.; *Saunders v. Wakefield*, 3 B. & Ald., 595; *Jenkins v. Reynold*, B. & Bing., 14; *Jean v. Brink*, 3 John., 211; *Leonard v. Vredenburg*, 8 John., 27; *Stewart v. M'Givin*, 1 Cow., 99; *Sloan v. Wilson*, 4 Har. & John., 322; *Stephens, Ramsay & Co. v. Winn*, 2 Nott & M'Cord, 372.)

494*] **Mr. Webster* and *Mr. King*, for the defendants.

1. As this cause is brought here by a writ of error, we apprehend that the court will not go into an examination of the weight of the testimony. The verdict of the jury is conclusive that the defendant made the agreement stated in the plaintiffs' declaration.

It is unnecessary now to inquire what was the agreement between the defendant and George D'Wolf, or whether that agreement could be enforced; and it was equally so at the trial unless that agreement was brought home to the knowledge of Belknap, so as to become a part of the defendant's contract with the plaintiffs.

2. But aside from the verdict. The testimony proved the contract was laid in the declaration. If we put the case upon the verbal agreement between the parties, as we contend that we may (3 Dall., 300), then the testimony of George D'Wolf clearly made out our case. The letter is only corroborative of the verbal agreement. If we go upon the written contract, as contained in the letter of the 15th November, 1825, then we contend that the written agreement is, in its terms, as much an agreement with the plaintiffs as with George D'Wolf, and may inure to their benefit. If the letter had not expressed that the sugars were to be shipped for the account of George D'Wolf, the agreement of the defendant would have been a mere undertaking with the plaintiffs.

But for the purpose of this action it is sufficient that the agreement contained in the letter of the 15th November was in fact made and entered into by the defendant for the use and benefit of the plaintiffs. That it was so was fully proved. They advanced the consideration of the undertaking in the faith of its being performed; and the defendant, at the

time when he signed the letter, knew that it was to be delivered to Mr. Belknap, who, on its credit, would authorize George D'Wolf to draw the bills.

It was not necessary, in order to entitle the plaintiffs to maintain their action, that George D'Wolf should have been a mere agent without interest. The cases cited do not support the position of the counsel. The rule is that if the promise is made to A for the benefit of B, from whom that consideration moves, the law will intend that A is the mere agent of B. (1 Com. Dig., action on the case *assumpsit*, E and note; *Weston v. Barker*, 12 John. Rep., 276; *Lawrason v. Mason*, 3 Cranch, 492.)

3. The main question, and that which involves the merits of this cause, arises upon that part of the charge of the learned judge, in which he instructed the jury "that if the undertaking of the defendant was entered into at the same time with that between Belknap and George D'Wolf, so as to form one entire *transaction, then the consideration of [*495 the defendant's undertaking might be proved by parol."

It is conceded that if the undertaking of the defendant was original, and not within the statute of frauds, parol evidence of the consideration was admissible. If the consideration be stated in connection with the written agreement, the undertaking is, in its terms, direct to the plaintiffs; and nothing more remains to be supplied by parol evidence. But if it were necessary, parol evidence was admissible to prove the *res gesta* and purpose of that letter and agreement. (*Bateman v. Phillips*, 15 East, 272; 7 Taunt., 295; 5 Wheat., 326.)

But it is contended that the undertaking of the defendant (if an undertaking to the plaintiffs) was a collateral agreement within the statute of frauds, and that the consideration, as well as the promise, must be in writing in order to be binding upon the defendant.

Admitting the law to be now settled by the English cases, as we say it ought not to be, we contend that if the general proposition, which was first laid down by Lord Ellenborough in the case of *Wain v. Warlters*, can be maintained, still our case cannot in any view of it be brought within the principle of that case.

In *Wain v. Warlters*, the defendant undertook to pay the previously subsisting debt of another person, upon a new consideration, that the plaintiff would forbear to sue. In the present case, the jury have expressly found that the arrangement between Mr. Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of the sugar, and the undertaking of the defendant to make that shipment, were made and entered into at one and the same time, so as to form one entire transaction; and that the authority given by Mr. Belknap to George D'Wolf to draw on the plaintiffs for 100,000 francs was the consideration of the entire agreement. If, then, the undertaking of the defendant was collateral, and within the statute of frauds, it was simultaneous with the original undertaking, and supported by the same consideration, and upon the authority of *Leonard*

1.—*Buckmyr v. Darnall*, 2 L. Ray., 1085; *Anderson v. Hayman*, 1 H. B., 120; *Gordon v. Martyn*, Fitz., 302; *Matson v. Wharham*, 2 T. R., 80; *Jones v. Ballard*, *Chase v. Day*, 17 John., 114; *Buller's N. P.*, 280, c. 281; *Jackson v. Raynor*, 12 John., 291. Peters 1.

v. Vredenburg (8 Johns. Rep., 29), the parol evidence of the consideration was admissible. *Leonard v. Vredenburg* was decided upon deliberate consideration, and has been followed and confirmed in the subsequent cases, *Bailey v. Freeman* (11 Johns. Rep., 221); *Nelson v. Dubois* (13 Johns. Rep., 175), and it is regarded as settled law in the State of New York.

4. The undertaking of the defendant was not collateral in any sense, but was an original undertaking, exclusively his, and need not have been in writing.

By agreeing to ship the sugars and to consign **496** them to the *plaintiffs, on the account of George D'Wolf, the defendant did not undertake to pay any debt of George D'Wolf, then existing, or about to be created. The defendant was the only person who undertook or was bound to make the shipment. He did not engage that George D'Wolf should ship the sugars, or that he would ship on the default of George; but he assumed the entire and exclusive responsibility of providing and shipping the five hundred boxes, according to the terms of the letter.

5. The letter from George D'Wolf to Mr. Belknap, dated at Bristol on the 27th December, 1828, constituted Mr. Belknap the agent of George D'Wolf for the purpose of naming the vessel on board of which the defendant was to make the shipment. It was intended as an authorization for that purpose, and was regarded as such both by Mr. Belknap and the defendant. But whatever objections might have been made by the defendant, either to the sufficiency of that authority, or to the right of George D'Wolf, after his bankruptcy, either to name the vessel, or to authorize Mr. Belknap or any other person to do so, they were waived by the defendant in his letter to Mr. Belknap, under the date of the 6th of January, 1826, wherein he puts his refusal to ship the sugars on the single ground that they had not been paid for.

Mr. Justice STORY delivered the opinion of the court:

Messrs. Rabaud, Brothers & Co., of Marseilles, brought a suit in the Circuit Court of the Southern District of New York, against James D'Wolf, Jun., (the plaintiff in error) to recover damages for not shipping them five hundred boxes of sugar on account of one George D'Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated, is that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud, Brothers & Co.) would authorize George D'Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised, that he would ship for the account of George D'Wolf, on board such vessel as he, George D'Wolf, should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs at Marseilles. The declaration then proceeds with the proper averments, and breaches, necessary to maintain the action; upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this court upon a writ of error, and bill of exceptions, taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the *learned judge who presided at the **497** trial. It is unnecessary to refer to that evidence, or to consider its nature, bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court, to which an exception has been taken. The whole facts were left open to the jury, and so far as they were imperfect, or inconclusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of the 27th of December, 1825, written by George D'Wolf to Belknap, was offered by the defendants in evidence, for the purpose of showing an authority from George D'Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled. This constitutes the first ground of error, now insisted on by the defendant. We are of opinion that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority, and the defendant made no objection to it at the time, on account of any insufficiency in this respect; but put his defense by his letter of the 5th of January, 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court upon the application of the defendant, and cannot, we have had occasion to decide, at the present term, be ordered in any case without the consent and acquiescence of the plaintiff. (*Elmore v. Grymes*, ante, page 469). In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George D'Wolf, at the time the letter of the 15th November, 1825 (which will be hereafter more particularly noticed), was signed by the defendant; that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the court, unless it should also appear that Belknap was a party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George D'Wolf constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta*; and had no legal *tendency either to disprove the plaintiff's case, or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury, upon the summing of the court, upon points of law.

The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and, indeed, could not now be maintained, because it has been recently decided, by this court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause.

The great question upon the merits, arises upon that part of the charge which relates to the agreement contained in the letter of the 15th of November, 1825, from George D'Wolf to the defendant, and the accompanying assent of the latter, with reference to the statute of frauds.

That letter is in the following terms:

New York, 15th November, 1825.

MR. JAMES D'WOLF, JUN.

Dear Sir—You will please ship for my account on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles, and oblige your friend and obedient servant,

(Signed) GEORGE D'WOLF.

Agreed to, (Signed) JAMES D'WOLF, JUN.

Upon this part of the case, the charge was as follows: "It is said that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction." The judge then proceeded to sum up the evidence on this point, and added: "The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at 499*] the same time with that between Belknap and George D'Wolf, so as to form one entire transaction. The evidence does not, in any manner, contradict the written agreement, and is perfectly consistent with it; as between the plaintiffs and George D'Wolf the consideration might be clearly supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him; the consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant." And he finally stated if he was mistaken in this view of the evidence, "and the jury should be of opinion that the contract between Belknap and George D'Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence was not suffi-

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cient to maintain the present action. It will then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arrangement with George D'Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible, to charge the defendant.

The statute of frauds of New York, is a transcript, on this subject, of the statute of 29th of Charles II., ch. 3. It declares "that no action shall be brought to charge the defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by anyone by 'him authorized.'" The terms "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute, it was to extend to cases where the collateral promise (so-called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties, or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination; at least in those states where the English authorities have been fully *rec-⁵⁰⁰ognized and adopted in practice. If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking; but rather, if one might use the phrase, a tripartite contract. The contract of B to repay the money, is not coincident with, nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary, or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint, but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors upon co-existing contracts, forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was, that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and, indeed, as part execution of it, to bind the defendant,

not merely to George D'Wolf, but to the plaintiffs (and so it has been established by the verdict), then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview, it remains to consider whether the arguments at the bar do establish any error in the opinion of the Circuit Court.

In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the latter was to establish the fact that there was a sufficient consideration for the agreement; and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed, by the assent of all the parties for the purpose of being delivered to Belknap, as a voucher, and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time, there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said with George D'Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it **501***] should express the joint assent *of George D'Wolf and the defendant, to the shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then, precisely, what the parties require it to be. It was for the jury so say whether the evidence disclosed that as the true object of it, and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of *Sargent v. Morris* (3 Barn. & Ald., 277), furnishes no uninstructional analogy for its admission.

In the next place, was the parol evidence inadmissible to supply the defect of the written instrument, as to the consideration, and *res gestæ*, between the parties. The case of *Wain v. Warlters* (5 East, 10) was the first case which settled the point, that it was necessary to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar and on the bench, in England and America. After many doubts, it seems at last in England, by the recent decisions of *Saunders v. Wakefield* (4 Barn. & Ald., 595), and *Jenkins v. Reynolds* (3 Brod. & Bing., 14), to have settled down into an approved authority. It has, however, not received a uniform recognition in America; although in several of the States, and particularly in New York, it has to

a limited extent been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the Supreme Court of Massachusetts, in *Packard v. Richardson* (17 Mass., 122), where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish in the present case a clear guide for this court. In the case of *Leonard v. Vredenburg* (8 John. R., 29), Mr. Chief Justice Kent, in delivering the opinion of the court, adverting to the fact that that case was one of a guarantee, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor, added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary by parol proof; and the decision in *Wain v. Warlters* did not stand in the way."

One of the points in that case was, whether the parol proof *of the consideration [**502** was not improperly rejected at the trial; and the decision of the court was, that it ought to have been admitted. It is not, therefore, as was suggested at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognized by the same court in *Bailey v. Freeman* (11 Johns. R., 221), and in *Nelson v. Dubois* (13 Johns. R., 175).

It does not seem necessary to pursue this subject farther, because here is a clear authority justifying the admission of the parol evidence, upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But whether so or not, it sustains the opinion of the Circuit Court in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit, to the designation of a vessel for the shipment as ineffectually made, has been already in part answered; and we entirely coincide with the views expressed on this point by the Circuit Court.

. Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the Circuit Court, and it is therefore to be affirmed with costs.

Cited—2 Pet., 182; 6 Pet., 609; 7 How., 216; 14 How., 222, 511; 19 How., 590; 23 How., 183; 1 Wall., 369; 1 Wood. & M., 38; 2 Wood. & M., 535; 3 Wood. & M., 53; Bald., 302; 1 Blatchf., 461 (n); 5 Blatchf., 91, 340; Woolw., 211.

*JOHN DAVIS ET AL., *Plaintiffs in Error*,
503*]

v.

RICHARD B. MASON, *Lessee*.

Ejectment—courtesy—evidence—wills—law of Kentucky.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky is the law of this court, in deciding the rights of the parties. [505]

It seems, that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by courtesy, in waste, or what is sometimes styled "wild lands." [506]

If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. [508]

At present it is fully settled in equity, that the husband shall have courtesy of trust as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands. [508]

Under the law of the State of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will. [508]

It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. [509]

THE lessee of Richard B. Mason commenced an action of ejectment in the Circuit Court for the District of Kentucky, against John Davis and others, tenants in possession, for the recovery of eight thousand acres of land, claiming to recover the same under a right of entry, under and by virtue of a grant from the State of Virginia to George Mason, of Fairfax, dated 19th of March, 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest (they being children of the patentec), to George Mason, of Lexington, the eldest son of George Mason, the patentec. George Mason, the grantee and the father of the lessor, died the day of December, 1796, having first made his last will and testament; in a codicil to which, made on the 3d of November, 1796, he devised to the child of which his wife was then *enstent*, his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, is, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved, and admitted to record, according to the laws of Kentucky, and was said to vest the title in Richard B. Mason.

At the trial of the cause in the Circuit Court, the plaintiffs in error requested the court, by 504*] instructions to the jury, 1st. *To exclude the depositions of Lund Washington and George Graham, on the alleged ground that they were not taken and certified according to law.

2d. To exclude what the defendants desig-

nated as "the third codicil" annexed to the will of George Mason, which it was said was not proved and certified according to law.

3d. That the plaintiff could not recover, unless he could show that the land sued for was entered after George Mason, the elder, made his will, and not patented at his death.

4th. That if from the evidence they believe that the daughters of the patentec were dead before the commencement of this suit, they should find for the defendants, as the deed from the husbands did not pass the interest of the *femes*; nor had the husbands a right by courtesy to the lands, as they never had other or further possession of the lands than that given by deed.

The court refused to give the several instructions prayed for, and a bill of exceptions was tendered, upon which the case was brought before this court. The facts of the case which appeared upon the record, in connection with the matters contained in the exceptions, are stated in the opinion of the court.

The defendants in error insisted, 1st. That the court should have excluded the third codicil. It was not, upon proof, ordered to be recorded by the County Court of Fairfax county. It is not certified as having been proved, and ordered, or admitted to record. It was not proved upon the trial, by any admissible and competent proof, to have been executed by George Mason.

2d. That there was no competent proof upon the trial that the land in contest passed by conveyance to George Mason. It does not appear that they were not patented before the date of the will of George Mason, and otherwise disposed of by him in his will. The plaintiff should have proved that the lands were acquired by the said George Mason after his will, and not having done so, the court should have given the instructions asked for, on that point, by defendants.

3d. The court erred in stating to the jury that the deed conveyed to George Mason the courtesy right of the husbands of the *femes covert*, daughters of George Mason, Sen.

4th. The court erred in refusing to give the instructions asked for by defendants, upon the other points stated in the bill of exceptions.

The case was argued by *Mr. Rowan* for the plaintiffs in error, and by *Mr. Wickliffe* for the defendant in error. In reference to the rights of the husbands in the estates of their wives, *Mr. Wickliffe* cited 3 Bos. & Pull., 643.

**Mr. Justice Johnson* delivered the [*505 opinion of the court:

The plaintiffs here were defendants below, to an action of ejectment, brought to recover eight thousand acres of land lying in the State of Kentucky.

The law of real estates in Kentucky, therefore, is the law of this court, in deciding on the rights of the parties. The plaintiffs below derives title under, 1st, a patent to George Mason, of Gunston, issued in 1787; 2d, a deed of bargain and sale, from seven out of nine legal representatives of the patentec, their brother, to George Mason, of Lexington, executed in 1794; 3d, a codicil to the will of George Mason, of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for

NOTE.—That the law of real estate, in a State, as settled by the decisions of the State Court, is the law of the United States Courts, see note to *Clark v. Graham* (6 Wheat., 577); and note to *Elmendorf v. Taylor* (10 Wheat., 152); and note to *Darby v. Mayer*, (10 Wheat., 465); and note to *Jackson v. Chew* (12 Wheat., 153); *McCormick v. Sullivan* (10 Wheat., 192); *D'Wolf v. Rabaud* (*ante*, 476); *Waring v. Jackson*, *post*, 510.)

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plaintiffs, to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason, but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below; and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question in this order relates to the deed executed by the representatives of Mason, the elder, to Mason, the younger, under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof, upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first, it was insisted that it could pass nothing, unless the plaintiffs should show that the land sued for was entered after George Mason, Senior, made his will, and not patented at his death, on the ground that, otherwise, it passed under his will, and did not descend to these donors.

But it is obvious that this instruction was properly refused, since the fact nowhere appears in the record that the elder Mason ever made a will competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children: but *non constat*, whether that intention had ever been signified, otherwise than by parol or by an informal will. If a will had ever been executed, with the formalities necessary to defeat the heir-at-law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by defendants, and rejected by the court, was, "that if from the evidence the jury believed that the daughters of the patentee were dead before the suit was brought, that then they ought to find for defendants as to the undivided interest of such daughters, and that the deed did not pass their interest. The court instructed the jury **506*** [that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by courtesy; although they had never had other or further possession of the land than what they acquired by deed.

To understand this part of the bill of exceptions it is necessary to notice that from the record it appears that among the parties of the first part to the deed to G. Mason, the younger, were four daughters of G. Mason, the elder, and their husbands; that the daughters had formally executed a release of inheritance under a commission issued from a court in Virginia, but because the States were then separated, as a judicial proceeding it had no validity as to lands in Kentucky; and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands, as tenants by the courtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the Act of Congress. To the introduction of this testimony an objection was made and overruled; and this constituted another ground of exception, which, however, has been very properly waived by the counsel in

argument here. It appears that the requisitions of the Act have been well complied with.

This testimony, besides establishing the pedigree, marriage, and birth of issue, &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason, the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether, in the absence of evidence of actual seisin, the husbands had good estates as tenants by the courtesy, in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives their estates were determined. To repel this objection to the vesting of the estate by the courtesy, evidence is introduced into the bill of exceptions to prove that "the adverse possession of the premises relied on by the defendants did not commence until after the execution of the deed, and after the death of George Mason; in other words, that the land was waste, or as is sometimes styled, "wild lands," at the time of executing the deed, and at all times before and down to the time of the devise from George Mason, Jun., to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the State of New York (8 John. Rep., 271) these rules have been solemnly repelled; and we know of no adjudged case, in any of the States, in which they have been recognized as applicable. *It would indeed be idle to compel an heir or purchaser to find his way through pathless deserts, into lands still overrun by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the conqueror introduced this tenure, the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel.

It is true that Perkins and Littleton, and other authors of high antiquity and great authority, lay down the necessity of actual seisin, in very strong terms, and exemplify it by cases which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason.

The distinction is taken between things which lie in livery and things which lie in grant; and with regard to the latter, the seisin in law is enough, because they admit of no other; and as Lord Coke observes, "the books say it would be unreasonable the husband should suffer for what no industry of his could prevent;" and further, "that the true reason is, that the wife had those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant when she has a right to it, and nobody else interposes to prevent it." And in another place he says, "a husband shall be tenant by courtesy, in respect to his wife's seisin in law, where it was impossible for him to get an actual seisin," for "the favor which the law shows to the husband that has issue by his wife shall not be lost without some default in him." So, when describing what is livery of seisin,

and defining the distinction between livery and deed, and livery in law, he says of the latter, "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time the common law had begun to untrammel itself of the rigorous rule that livery of seisin, or entry, was indispensable to vesting a freehold, the fact may be cited that livery of seizin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known arose out of an effort to disembarass the transfer of titles of an idle form which had survived the feudal system.

As it relates to the tenure by courtesy, the necessity of entry grew out of the rule which invariably existed, that an entry must be made in order to vest a freehold (Co. Lit., 51); and out of that member of the definition of the tenure by courtesy, which requires that it should be inheritable by the issue. When a descent was cast the entry of the mother was **508*** necessary, or the ***heir** made title direct from the grandfather, or other person last seized.

But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery, or in any mode affecting the course of descent.

If a right of entry therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin in law "he has the thing if he has a right to have it." Such was not the ancient law; but the reason of it has ceased. It has been shown that in the most remote periods exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure. A husband, formerly, could not have courtesy of an use; that is, where his wife was *cestui que use* (Perkins's Curtesy, fol. 89), and this continued to be the law down to the time of Baron Gilbert (Law of Uses and Trusts, 239); at present it is fully settled in equity that the husband shall have courtesy of a trust as well as of a legal estate (2 Vern., 536; 1 P. W., 108; Atk., 606), of an equity of redemption, a contingent use, or money to be laid out in lands.

The case made out in the bill of exceptions is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants did not take place until after the death of George Mason, Jun., and of consequence after the transfer of title by the husbands, and after the devise took effect in favor of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, Jun., or rather of the codicil under which the lessor of the plaintiffs makes title.

Under a law of the State of Kentucky, and the decision of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will.

The objection here is, that it does not appear from the exemplified copy that this codicil was duly proved, because the probate does not go to that codicil, but to another; and second, because it appears to have been admitted to record on the testimony of a single witness.

The** probate purports "that the two [509** codicils were proved by the oath of Daniel M'Carty." From the exemplification it appears that at three several dates the testator added to his will, what he calls codicils, but as there is no signature to the first, we are satisfied that the first and second were well considered as making but one; and therefore that the probate, although purporting to go to two codicils only, was well considered as going to this; which, but for the want of the signature to the first, would have been the third codicil. What is decisive on this subject, is, that the first two codicils have no subscribing witness, distinct from the last; and the name of M'Carty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point.

There were two witnesses to this codicil, to wit, Thompson Mason and M'Carty. M'Carty only was sworn, and the probate upon which it was ordered to be recorded, imports that the two codicils were proved by the oath of Daniel M'Carty. In the case of *Harper et al. v. Wilson et al.*, decided in the Court of Appeals of the State of Kentucky, in 1820, in which the right to lands was in controversy, the probate was in these words: "This will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was: "As, to the proof of the execution of the will it need only be remarked that its admission to record is sufficient to show that the witness by whom it was proven in that court, established every fact essential to its due execution; and it is a settled rule, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." (2 Marshall, 467.) The same doctrine has been since fully recognized in the case of *Turner v. Turner* (1 Litt. Rep., 103), adjudged in the same court in 1822; and the identity of the certificate and facts in this case with those in the case of *Harper v. Wilson*, leaves nothing for this court to deliberate upon.

There is spread upon the record a considerable body of testimony, taken by the court by which the will had been previously admitted to record, and which upon the face of it, appears to have been taken in order to remove all doubt on the sufficiency of the will, and authenticity of the attestations to it. But as it does not appear to have been followed up by

510*] any order *of that court, it was not taken into view in the bill of exceptions, and made no part in the evidence in the court below. It therefore only required this remark in order to prevent any misapprehension on this point.

We are of opinion that there was no error in the judgment below, and that it be affirmed with costs.

511*] *THE AMERICAN INSURANCE COMPANY, AND THE OCEAN INSURANCE COMPANY (of New York), Appellants,

v.

356 BALES OF COTTON.

DAVID CANTER, Claimant and Appellee.

Treaty-making power—usage of nations as to occupation of conquered territory—legal status of Florida after its cession to the United States—powers of federal courts, of Florida courts.

The Constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. [542]

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it, and the law which may be denominated political, is, necessarily, changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly created power of the State. [542]

The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admit the inhabitants of Florida to the enjoyments of the privileges, rights, and immunities of the citizens of the United States. They do not, however, participate in political power; they do not share in the government, until Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers "Congress to make all needful rules and regulations respecting the territory, or other property belonging to the United States." [542]

The powers of the territorial Legislature of Florida, extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." [543]

All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle, by using the words "laws of the territory now in force therein." No laws could, then, have been in force but those enacted by the Spanish government. If among them there existed a law on the subject of salvage--and it is scarcely possible there should not have been such a law--jurisdiction over it was conferred by the act of Congress relative to the territory of Florida, on the Superior Court; but that jurisdiction was not exclusive. A

territorial act, conferring jurisdiction over the same cases as an inferior court, would not have been inconsistent with the seventh section of the act, vesting the whole judicial power of the territory in two Superior Courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish. [544]

*The eleventh section of the act declares [*512 "that the laws of the United States relating to the revenue and its collection, and all other public acts not inconsistent or repugnant to the act, shall extend to and have full force and effect in the territory of Florida." The laws which are extended to the territory by this section, were either for the punishment of crimes, or for civil purposes. Jurisdiction is given in all criminal cases by the seventh section, but in civil cases, that section gives jurisdiction only in those which arise under, and are cognizable by the laws of the territory. Consequently, all civil cases arising under the laws which are extended to the territory by the eleventh section, are cognizable in the territorial courts by virtue of the eighth section; and in those cases, the Superior Courts may exercise the same jurisdiction as is exercised by the court for the Kentucky District. [544]

The Constitution and laws of the United States give jurisdiction to the District Courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. [545]

The Constitution declares that "the judicial power shall extend to all cases in law and equity arising under it--the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them is conclusive against their identity. [545]

A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the eighth section of the territorial act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial courts of Florida. Consequently, if that jurisdiction is exclusive, it is not made so by the reference in the act of Congress to the District Court of Kentucky. [545]

The judges of the Superior Courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial powers conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of its powers over the territories of the United States. [546]

Although admiralty jurisdiction can be exercised in the States, in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and State governments. [546]

The act of the territorial Legislature of Florida, erecting a court which proceeded under the provisions of the law to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and Constitution of the United States, and is valid; and consequently a sale of the property made in pursuance of it changed the property. [546]

*APPEAL from the Circuit Court of [*513 the United States for the District of South Carolina.

The libel filed in this cause in the District Court of South Carolina, on the 18th April,

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1225, alleged that five hundred and eighty-four bales of cotton, insured by the libelants, were shipped on board the ship *Point a Petre*, on a voyage from New Orleans to Havre de Grace in France, and was in February, 1825, wrecked on the coast of Florida; from which it was saved, and carried into Key West, in the territory of Florida, where it was sold, without any previous adjudication by a court of competent jurisdiction, for the ostensible purpose of satisfying a claim for salvage, amounting to seventy-six per cent. of the property saved. That the cotton thus insured, was abandoned to the underwriters, the libelants, and the abandonment was accepted by them on the 10th March, 1825. That part of the cargo, amounting to one hundred and forty bales, subsequently arrived in the port of New York, and was there proceeded against by the libelants, as their property under the abandonment. That another part of the cargo, amounting to between three hundred and three hundred and fifty-six bales, had arrived in the port of Charleston, within the jurisdiction of the court, in the possession of one David Canter, and was fraudulently sold in Charleston, at auction, on the 13th of April, 1825. Restitution of this last-mentioned part was therefore prayed by the libelants, and process was issued against the said Canter *in personam*.

The marshal returned to the warrant that he had taken one hundred and sixty bales of cotton, and the person of Canter. Fifty-four bales of the cotton, specifically brought into court, were ordered to be sold, and the proceeds paid into the registry; and the supposed value of the remainder in dispute, to be secured by stipulation.

David Canter filed his answer claiming three hundred and fifty-six bales of cotton, as a *bona fide* purchaser, under a sale at public auction at Key West, by virtue of the decree of a certain court, consisting of a notary and five jurors, proceeding under an act of the Governor and Legislative Council of Florida, passed the 4th of July, 1823, which decree awarded to the salvors seventy-six per cent. on the net proceeds of sale.

The testimony of witnesses was taken, and other evidence produced, relating to the title of the libelants under the insurances and abandonments thereon, and to the proceedings in the court at Key West.

The District Judge pronounced the proceedings in the court at Key West a nullity; but decreed restitution to the libelants of thirty-nine bales of the cotton only (deducting a salvage of **514**] *fifty per cent.); considering the evidence of the identity of the residue, as insufficient to establish their proprietary interest.

The libelants and claimant both appealed from this decree to the Circuit Court.

Further testimony was taken in the Circuit Court; and at the hearing, the decree of the District Court was reversed, and the entire cotton decreed to the claimant with costs; upon the ground that the proceedings of the court at Key West were legal, and transferred the property to the alleged purchaser under them.

From this decree the libelants appealed to this court.

The documents exhibited and evidence taken in the case, showed that three hundred and

thirty-three bales of the cotton, on board the *Point a Petre*, were insured by the American, and three hundred and fifty-one by the Ocean office. The whole cargo of the ship consisted of eight hundred and ninety-one bales, but to whom the other three hundred and seventeen bales belonged, did not appear. The ship sailed on the voyage insured on the 17th February, 1825, and was wrecked on Carysfort Reef, on the east coast of West Florida, about eight miles from the shore. She filled with water, and was abandoned by the captain and crew.

In the depositions taken in the cause, it was stated, that when the vessel was first seen, she was filled with water, abandoned, bilged, and lying on her broadside. The cotton was taken out of her, hove into the sea, rafts made of it, towed inside of the reef, and then put on board of vessels. The captain of the ship was picked up on the shore with his men, about fourteen miles from the wreck, and he went with the salvors to Key West, where the property saved was carried; and the proceedings for salvage were at Key West, carried on, as was alleged, with the co-operation and concurrence of the master of the ship.

The danger in saving the property was said to have been very great, the weather to have been stormy, some of the men were injured, and the saving was done during the night as well as the day; most of the cotton was much injured.

After the sale, the agent of the appellants, Mr. Ogden, came on from New York to Key West, for the purpose of attending the sale, and he expressed his willingness to pay to the purchasers of the cotton a considerable sum beyond what had been paid for it at the sale.

It was also in evidence, that the marks on the cotton were defaced, and that the efforts to ascertain the particular marks on that imported into Charleston by the appellee, were, to a great extent, without success. A large portion of the cotton brought to Charleston by the claimant, was sold at auction as *dam-**[515]** aged cotton. An agreement between the two insurance companies, the appellants, was made previous to the institution of the suit, that the same should be for their joint benefit. David Canter, the appellee, claimed three hundred and fifty-six bales of the cotton, as a *bona fide* purchaser under the decree of the court of Key West, instituted by, and proceeding under a law of the Legislative Council of Florida, passed 4th July, 1823; which decree awarded seventy-six per cent. to the salvors, of the net proceeds of the sale.

The appellants filed the following "reasons of appeal:"

That the decision of the Circuit Court is erroneous, inasmuch as the said tribunal at Key West was not legally organized, nor of competent jurisdiction in the premises.

1st. Because the Constitution and laws of the United States are of full force and effect within the territory of Florida.

2d. Because jurisdiction of salvage was not a rightful subject of legislation, with the Floridian government; and the wrecking law enacted by the same, is, in various respects, inconsistent with the said Constitution and laws.

3d. Because the Superior Courts of the said

territory are vested with plenary and exclusive jurisdiction over all admiralty and maritime cases; and this was a case of that description.

4th. Because, even if the jurisdiction of the said courts were confined to "cases arising under the Constitution and laws of the United States," this was a case of that class.

5th. Because the said Superior Courts were vested with original cognizance in all cases, where the amount in issue exceeded the value of \$100.¹

516* *David Canter claimed all the cotton except thirty-nine bales on the ground:

517* *First—That he was in the possession of it, not tortiously, but as a *bona fide* purchaser, and that that possession, thus acquired,

518* *is good against all but the person who proves a better title to this identical cotton.

519* *Second—That the salvors had a rightful lien upon the cargo saved; that the captain

of the Point a Petre was agent for the *un-[***520** derwriters, and had authority to settle the amount of that claim, either by agreement or an award of third persons; that *he ap-[***521** plied to these third persons, and agreed to their proceedings, and to the sale; that the sale was afterwards ratified by Ogden, the special agent of the underwriters.

*Third—He claims the whole three [***522** hundred and fifty-six bales, on the ground of a sale by a court of the territory of Florida.

*Fourth—That was a foreign court, [***523** acting under a municipal law, and having the property within its reach; its jurisdiction cannot be inquired into.

Fifth—If the jurisdiction of that court can be inquired into, they contend that jurisdiction was conferred upon it:

Sixth—With the 8th section of the act of Congress of the 3d March, 1823, which is in

1.—The reporter acknowledges with pleasure, his obligations to Mr. Justice Johnson, by whom he has been furnished with a copy of the opinion delivered by him on the decision of this case.

Mr. Justice JOHNSON: This case comes up on a cross appeal, from a decision of the District Court, adjudging a part of the *res subjecta* to the libellants, and the residue to the claimants.

The decree establishes the right of the parties libellant to recover, but dismisses the libel as to a great proportion of the cotton, on the ground of a defect of evidence to identify it.

From the pleadings and testimony, it appears that the libellants were insurers to a large amount on a quantity of cotton shipped by certain individuals, in the French ship Point a Petre, on a voyage from Orleans to Havre. That the ship was stranded and lost on the coast of Florida, and the cotton abandoned to these underwriters. That the cotton libeled was a part of the cargo of the Point a Petre, is admitted; but it appears, that after being saved from the wreck, it was deposited at Key West, where it was sold and purchased by Canter the claimant, under the order of a municipal court, constituted under a law of Florida, with jurisdiction over cases of salvage.

The preliminary question alone has now been argued, to wit, whether the sale by that court was effectual to divest the interest of the underwriters.

The general principle is not denied as to the mutations of property which takes place through the intervention of courts of justice; but it was argued that the Constitution of the United States vests the admiralty jurisdiction exclusively in the general government—that no State can exercise a concurrent jurisdiction over admiralty and maritime cause, and that salvage was of that description. Wherefore the Legislature of Florida had, in organizing this court, exercised a power not legally vested in it, and the act constituting it being a void act, it was as though no such court existed. That moreover, the nullity of that court did not rest merely on an inherent want of power to constitute it, but on positive prohibition contained in the acts organizing the government of the territory to pass any laws contrary to the laws and Constitution of the United States. That the act organizing this court was an act of this nature, inasmuch as jurisdiction of causes, admiralty and maritime, were expressly vested in the Superior Courts of Florida; and, that, without the right of exercising a concurrent power over the subject vesting this jurisdiction in an inferior court, is *quoad hoc*, divesting the Superior Court of its jurisdiction, and rendering null the act of Congress, which vests the admiralty jurisdiction in that alone.

On the other hand, it has been contended, that salvage is a subject of municipal and common law cognizance, not exclusively belonging to the admiralty; that although the Constitution may vest the exclusive cognizance of admiralty and maritime causes in the United States, in those instances in which the admiralty at the adoption of the Constitution had exclusive jurisdiction of the subject, yet, in those cases in which the common law exercised a concurrent jurisdiction with the admiralty there is no reason for carrying the grant beyond a

concurrent jurisdiction with the common law courts of the States.

That the court which ordered this sale was properly a Municipal Court, and a court of a separate and distinct jurisdiction from the courts of the United States, and as such its acts are not to be reviewed in a foreign tribunal; of which description it was contended, were the courts of the United States for South Carolina District. That the District of Florida was no part of the United States, but only an acquisition or dependency, and as such the Constitution, *per se*, had no binding effect in or over it; and finally that the argument drawn from the assumed fact that the admiralty and maritime jurisdiction was by law expressly vested in another court, originates in a misconception of the law, inasmuch as no act of Congress vests in the Superior Court any other portion of the jurisdiction of the Kentucky Court than that of causes arising under the laws of the United States: that this is not a cause of that description; it is one arising under a casualty in which no law of the United States came necessarily under review.

To this it was replied that it was a cause arising under a law of the United States, and the case of *Osborne v. The Bank of the United States* was quoted and insisted on as furnishing a decision in point. That if the cause there was one of that description, because the bank was incorporated by a law of the United States, for the same reason was this a cause of that description. Because the body politic here was like the body corporate there, created by a law of the United States; and, if at every step there the court was met by the law which made the one a bank, gave it power to make by-laws, and to act under those by-laws, so was it equally met here by the laws which made this a State gave it power to legislate, and legalized this transfer of property under laws which, without the laws of the United States, were mere nullities.

It becomes indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States; and give a correct construction to the second section of the act of Congress of May the 26th, 1824, respecting the territorial government of Florida; correct views on these two subjects will dispose of all the points that have been considered in argument.

And first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest), within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the State or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty.

The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is, that

these words: "That each of the said Superior Courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which by an act to establish the Judicial Courts of the United States, approved the 27th September, 1789, and an act in addition to said act, approved the 2d of March, 1793, was vested in the court of Kentucky District."

The case was argued by *Mr. Ogden* for the appellants, and by *Mr. Whipple* and *Mr. Webster* for the claimants.

Mr. Ogden.

The great question in this case is the validity of the proceedings of the Territorial Court; and upon the threshold of this inquiry it is asked, how far it is competent for this court to examine the constitutionality of the court at Key West, and the legality of its proceedings.

the government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of Congress of March 30th, 1822, section 9th, we have an enumeration of the acts of Congress which are to be held in force in the territory; and, in the 10th section an enumeration, in nature of a bill of rights, of privileges, and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession.

As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the Constitution on this subject.

At the time the Constitution was formed the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted in part of organized States, and in part of territories, the absolute property and dependencies of the United States. These States, this territory, and future States to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is uncontrolled by treaty. By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory. The laws, rights and institutions of the territory so acquired remain in full force until rightfully altered by the new government. In the present instance, however, the laws of Florida were not left to derive their force from general principles alone; for by the 13th section of the same act it is declared, "That the laws in force in the said territory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the Legislature."

From these views of the subject it results,

1st. That whatever may be the correct idea of the distribution of the admiralty jurisdictions as between the States and United States, it can have no application here, since this territory does not stand in the relation of a State to the United States.

2nd. That whether salvage be of admiralty jurisdiction exclusively or not, it is immaterial to this cause, since the whole power of legislation over the subject in Florida existed exclusively in the general government.

3d. That the general principles of international law on the immunities of foreign courts and foreign decisions have no application here, since the courts of Florida have a common origin with this court—our authority flows from the same source—we are connected at the fountain-head, governed by the same legislative power, and have equal access to the laws which constitute and govern us. It follows that neither can regard the

Peters 1.

The libel filed in the District Court, sought the restoration of the cotton, subject to a reasonable salvage. The claimant asserts his right to it under a sale, and the inquiry is, whether the property was changed by the proceedings directing the sale. The decision upon this inquiry, rests upon the right of the court to take jurisdiction of the subject-matter.

The common law rule is, that when a court acts within its powers, its acts are binding on all the world; but if beyond them, they are entirely void. It is therefore necessary to look into the constitution of the court. (Abbot on Ship; 11 ed., 16 n.; Starkie, 215; 9 Mass., 462; 3 Wheat., 234.)

The next inquiry is into the nature of the case, of which the court took cognizance; and then, whether it was within its jurisdiction?

It was a case of salvage, and salvage is of admiralty jurisdiction. (1 Wheat., 335; Sergeant's

decisions of the other, if acting without authority derived through the Legislature of the Union.

The act entitled "An act for the establishment of a territorial government in Florida," and the acts *in pari materia* of the 3d March, 1823, and the 26th May, 1824, constitute what may be properly termed the constitution of Florida. The first provides for the appointment of an executive, with powers not material here to be considered. It constitutes a Legislature, organizes a judiciary, and imposes upon the one and the other some general restrictions, subject to which they are empowered to exercise the legislative, judicial and executive powers which belong generally to an organized government.

The act of March, 1823, goes over the same ground, and repeals the preceding act so far as the provisions of the latter are inconsistent with those of the former act. And with regard to both, or either, as far as the latter remains unrepealed, the position is incontrovertible that the legislative power could enact nothing inconsistent with what Congress has made inherent and permanent in the form of government of the territory. Therefore, if the admiralty jurisdiction is made inherent in the Superior Courts it was not in the power of the territorial Legislature to transfer it to any inferior tribunal.

To determine this question we must examine the provisions of the several acts touching the exercise of legislative and judicial power.

In defining the legislative power the words of the act of 1822 are these: "They shall have power to alter, modify, or repeal the laws which may be in force at the commencement of this act. These legislative powers shall, also, extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States, or which lay any person under restraint, burthen or disability, on account of his religious opinions, professions or worship; in all which he shall be free to maintain his own, and not to be burthened with those of another."

The language of the act of 1823 is: "They shall have legislative power over all rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States; or, which lay any person under restraint, &c."

That jurisdiction of salvage is a rightful subject of legislation, is not to be questioned. The jurisdiction, then, vested by the Legislature in this municipal court, must be sustained, unless inconsistent with the laws or Constitution of the United States. But with the Constitution, in legislating on the subject of salvage, there can be no incongruity; it is only, therefore, the supposed inconsistency with the act of Congress of May, 1824, that can impugn it.

The provisions of that act upon this subject are these:

"Each of the said courts (meaning the Superior Courts of the District of Florida), shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th day of September, 1789, and 'an

Constitutional Law, 206.) In England there was a great contest upon this question, but it was finally settled in favor of the jurisdiction of the admiralty, by the statute of Rich., III. (Abbot on Ship., 433.)

It is now to be inquired, could the court at Key West lawfully exercise admiralty jurisdiction?

The Constitution was made for the whole people of the United States, without reference to their being within the original thirteen States. The 3d article, 2d section, defines, "the judicial powers," and declares "it shall extend to all cases of admiralty and maritime jurisdiction."

524*] *The treaty with Great Britain of 1783, ceded a large tract of country to the United States, a great portion of which, if not the whole, was within the limits of the thirteen States, and was claimed by several of the

States, but was afterwards ceded to the United States.

Thus the United States became possessed of all these territories by cession, all of which, except that ceded by Georgia, having been acquired under the confederation, the people upon those territories became citizens of the United States by those cessions, and were entitled to all the rights and privileges of citizens.

In the articles of confederation, there is no provision for acquiring rights to lands; but on the contrary, the lands within the territories of the several States, were considered as belonging to those States. By what authority did the confederation acquire a right to the lands ceded to them? Whence, then, did the confederation draw the capacity to take and hold those lands? Not from any municipal regulations, or from the laws of the States; or from the express terms of the articles of confederation; but from

act in addition to the act entitled an act to establish the judicial courts of the United States, approved the 2d March, 1793, 'was vested in the court of Kentucky District.'

The question, then, is reduced to this, in what cases, arising under the laws and Constitution of the United States, is jurisdiction vested in the court of Kentucky District, by the two acts of the 24th September, 1789, and the 2d of March, 1793?

It has been erroneously assumed, that all the jurisdiction vested by those acts in the Kentucky court, was vested by this law in the Superior Court of Florida; it is expressly confined to cases arising under the laws and Constitution of the United States; and the reason is obvious. In all cases arising under the laws of the district, jurisdiction is given by the preceding section of the same act; but as most of the laws of the United States had been made of force in the territory as before observed, the 2d section is intended to extend the jurisdiction of the court to cases arising under the latter laws, and further, if necessary, to all cases arising under laws of the United States, over which jurisdiction had been given to the Kentucky court—a practice in defining jurisdiction that had been pursued by Congress, with regard to all the territories subsequent to the time when the Kentucky court was established.

In the original organization of the judiciary of the United States, Kentucky and Maine were excluded from the arrangement of circuits. And, as no Circuit Court was required in law to be held there, the District Court was vested with Circuit Court jurisdiction. This is the whole purport of the act of 1789, referred to in the Florida act of 1824. The other act there referred to, to wit, that of 1793, has no other operation as to the Kentucky court, besides vesting in it the power given to the Circuit Courts to hold special sessions.

If the Florida act were as broad in its operation as the two acts referred to, it would indeed be a serious question, whether the Legislature of Florida could divest its Superior Court of any part of its admiralty jurisdiction, as existing in and exercised by the District Courts of the United States. But I think it incontestable, that the jurisdiction here given is explicitly restricted to so much of the jurisdiction of the Kentucky court only as comes within the description of cases arising under the laws and Constitution of the United States.

Now, excepting in the single instance of the present Bank of the United States, Congress never has vested a jurisdiction even in its Circuit Courts, generally, over causes arising under the Constitution and laws of the United States. It has given an appellate jurisdiction, and that only to the Supreme Court, over causes of that description, when such causes arise in the State courts, but we look in vain through the law defining the jurisdiction of the Kentucky court for any general claim to jurisdiction under the description of "cases arising under the laws and Constitution of the United States."

Yet, very ample operation must be given to these words of the Florida act, considered in reference to the jurisdiction actually possessed and exercised by the Kentucky court, under the two laws of 1789 and 1793. The land laws, revenue laws, laws of trade, criminal laws, and many other public laws, were all

laws of the United States, under which cases might arise, and over which the Kentucky court was undoubtedly vested with jurisdiction. Nor do I doubt that the admiralty jurisdiction over revenue cases, as exercised by the Kentucky court, is rightfully vested (and that beyond the control of the Florida Legislature) in the Superior Court of this district.

But here, it appears to me, the grant of jurisdiction terminates. The admiralty jurisdiction, beyond this limit, is left to be administered under the laws of the territory, for this simple reason, that other causes, occurring in the admiralty, cannot be brought within this description of causes, arising under the laws of the United States—at least, this appears incontrovertible, when applied to questions of salvage arising on wreck of the sea—to questions of salvage on captures as prize of war, I am inclined to think it would extend, at least, to all causes, in which the distribution of prize money depends upon laws of the United States.

But it is argued, that this is a cause arising under the laws of the United States, within the reason of the decision of the Supreme Court, in the case of *Osborne v. The Bank of the United States*; that the validity of the sale, divesting the interests of these libellants, depends upon the legality of the powers exercised by the court of Key West, which depends upon the powers vested in the Legislature of Florida, which finally depends upon the acts of Congress which created the body politic of Florida; that creating a body politic, is only creating a body corporate on a larger scale, but essentially the exercise of one and the same power; that whether the one or the other sues or defends, legislates or acts, by itself or its agents, all must be done with reference to the law that creates and organizes it; and in fine, in the language of the court, in the case cited, "the charter not only creates it, but gives it every faculty that it possesses. The power to acquire rights of any description, to transact the business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions, and all its rights, are dependent on the same law," &c.

I have taken a week to reflect upon this question alone, and I cannot withhold from the gentleman, who argued the cause for the libellants, an acknowledgment, that I have not been able to draw any line of discrimination, between this and the decided cause, which satisfies my mind. Yet, I am thoroughly persuaded that the learned men who decided that cause, never contemplated that such an application would have been given of their decision. I am happy in the prospect that this cause will finally be disposed of elsewhere, not doubting that the mental acumen of those who decided the other, will be found fully adequate to distinguish or reconcile the two cases, on grounds which have escaped my reflections. At present, I must content myself with observing, that it is too much to require of a court, upon mere analogy, to sustain an argument that not only proves too much, if it proves anything, but which leads, in fact, to positive absurdity.

the great principles of public law. The powers of Congress were to make war and peace, and to make treaties; and in those and the other powers, were included those under which territories were acquired and governed.

That Congress considered themselves possessed of those powers is shown by the resolutions of 6th September, 1780, and 10th October, 1780, recommending to the States to cede their unappropriated lands—and also by the ordinance of the government of the territory north-west of the river Ohio, passed 13th July, 1787.

That the inhabitants of the territories thus acquired, were citizens of the United States, is manifest from the fact that as soon as they were sufficiently numerous to protect themselves, and to form a State government, they became a part of the Union. The territories to which these observations apply, were not part of the

nation at the time of the establishment of the Constitution.

The Circuit Court, in delivering their opinion, draw a distinction between territories so situated and those which were afterwards acquired. Is there any foundation for this distinction?

The rights of the United States to hold territories, not a part of the nation at the time of the confederation, in the same manner as the right to all those within the original thirteen States, is derived from the same universal principles of general law; from the powers of making peace and war, and of making treaties, &c. It is necessary, for the peace of the Union, that they should possess those powers.

In what relation, then, do the inhabitants of an acquired territory stand to the [*525 United States? Are they citizens, or subjects? This is a grave question, and merits the serious consideration of the court.

It will be recollected that it is not only in the territories that we find bodies politic created by the laws of the United States, but that near one-half the States derive their origin and admission into the Union under laws of the United States. But will it be contended that all the causes arising under their laws, are causes arising under laws of the United States? It is true, that in the District of Columbia, the appellate jurisdiction given to the Supreme Court, can be maintained only on the ground that the laws of that district are laws of the United States; and that all the laws of the District of Florida derive directly, or indirectly, their force from the same origin. But in the case of the District of Columbia, this power is expressly given to the Supreme Court, and we are not now inquiring whether Congress might not have vested this jurisdiction in the Superior Court of Florida, but whether they have so vested it. The simple inquiry is, what force and operation is to be given to those words, in the second section of the act of 1824, "Jurisdiction in all cases arising under the laws and Constitution of the United States?" And what could be more absurd than to decide that the same force is to be given to those words as if they were not there. Expunge that sentence altogether, and the construction of the clause will be necessarily and precisely that contended for by the libelants, to wit, an unrestricted grant of the jurisdiction vested by law in the Kentucky court. It not unfrequently happens, that in the construction of a whole law, or a section, or a clause of a law, words, or even sentences, are declared surplusage, or irreconcilable with other words or sentences; but here we are called upon to give a meaning to words, which deprives them of all meaning, and that without any incongruity with other words, or want of distinct meaning in themselves, but from an analogy with another case, in which similar words have received a construction which produces that consequence, when applied to these words.

Until better advised, I must maintain that these words have a definite meaning and bearing in their place in this law, and amount to a restriction of the jurisdiction of the Superior Court of Florida, to a class of cases which does not comprise salvage on wreck of the sea.

Some minor grounds have been dwelt upon in argument, of which it is proper to take a brief notice.

It has been argued that the Superior Court of Florida acquired jurisdiction in another way, to wit, that the 9th section of the Florida act of 1822, makes of force in the territory, all public laws of the United States, not repugnant to the provisions of that act. That the judiciary acts are acts of that description, and, therefore, are laws of the territory. But this argument is without point, until such an organization of Circuit and District Courts of the United States takes place in that territory as will admit of the application of this law to the jurisdiction of its courts. Or rather, it takes effect as to the subject now under consideration, only through those clauses which relate to the jurisdiction of the Kentucky court, and thus returns, in a circle, to the argument which we have been before considering.

It has also been contended that the Florida act, under which the court at Key West was organized, is Peters 1.

void. 1st. Because never ratified by Congress; and 2d, because inconsistent with that provision of the first section of the act of 1824, which gives original jurisdiction to the Superior Courts of the territory, in all cases of \$100 in value.

To the first of these reasons, the 5th section of the act of 1822 furnishes an unequivocal answer. It is only the right of repealing that Congress retains over the laws of Florida. That clause which requires the Governor to report the laws of the territory to the President, to be laid before Congress, is merely directory, but has no bearing upon the validity of those laws, until repealed. The words are "which, if disapproved by Congress, shall thenceforth be of no force;" necessarily implying their previous operation.

With regard to the second, I have no doubt but that the individual who chooses to resort to his common law remedy, of an action for work and labor, instead of libeling for salvage, may maintain an original suit in the Superior Court of the territory. But I see nothing in the act which makes that jurisdiction exclusive, in a case in which both remedies are open to the choice of the party. The language of the 6th section is, "that the judicial power shall be vested in two Superior Courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." The 7th section of this act, and the 2d of the subsequent act, confine to the Superior Courts exclusively, the jurisdiction over the cases arising under the laws, &c., of the United States, of which the Kentucky court had jurisdiction—but as to all others, I perceive nothing in the law which precluded the Florida Legislature from making any distribution of jurisdiction consistent with preserving to the Superior Court a concurrent jurisdiction, to be exercised according to its own terms.

It is proper to remark here, that whatever may be the fact as to the integrity and propriety, which regulate the proceedings of the court of Key West, there is nothing novel or unprecedented in the organization of that court. The model of it is of great antiquity, and throughout the civilized world, some such summary mode of adjusting salvage, in cases of wreck of the sea, is to be found. We had just such a court here, and I believe in most of the States, when the Constitution was adopted; and although jurisdiction of the subject has been everywhere abandoned to the District Courts of the United States, where it is generally adjusted with great solemnity and discretion, and I believe, very much to the satisfaction of all the commercial world, there exists no reason to preclude the Congress of the United States from constituting similar summary tribunals, whenever and wherever it may become necessary. The establishment of this tribunal, therefore, however justice may be distributed in it, is no unwarrantable exercise of the legislative or judicial power vested in Florida.

Finally, I am of opinion that there is error in the decision of the District Court, and adjudge that it be reversed, and the goods restored to the claimant with costs.

H. N. Cruger for libelants, King and Gadsden for claimant.

The first territory acquired by the United States, was Louisiana; and by the third article of the treaty, as well as by subsequent legislative acts, the inhabitants of the country became entitled to the privileges of citizens. The acquiescence of the people of the United States fully establishes that the powers exercised in reference to Louisiana were properly exercised.

The third section, fourth article, of the Constitution, authorizes the admission of new States into the Union. This section of the Constitution, gives to Congress a power, only limited by their own discretion, to admit as many States as they may think proper, in what manner soever the territory composing those new States may have been acquired.

After the acquisition of Louisiana, Congress considered and treated the people of the country in the same manner they considered the inhabitants of every other territory of the United States, as a part of the nation at the time of the confederation. The various legislative acts in reference to Louisiana, establish this position.

The next great acquisition of the United States by cession from a foreign government, was that of Florida from Spain. The sixth article of the treaty declares, "The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty, shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights and immunities of citizens of the United States."

The provisions of this article, in all respects similar to that on the Louisiana treaty, stipulating for the privileges of the inhabitants of the country, authorize the belief that the government of the United States doubted their power under the Constitution to receive a cession upon any other terms than that the people inhabiting the country should be citizens of the United States.

The act of Congress entitled "an act for the establishment of a territorial government in Florida," followed this treaty, and was passed 20th March, 1802.

The fifth section of this act constitutes a legislative body for the territory, and declares that their legislative powers shall extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the Constitution and laws of the United States. The sixth section establishes the judicial power, and appoints a Superior Court, and gives the territorial* Legislature power to establish inferior courts. The seventh section prescribes the jurisdiction of the Superior Court and declares that the said Superior Court shall have and exercise the same jurisdiction within its limits in all cases arising under the laws and Constitution of the United States, which was vested in the court of the Kentucky District by the judiciary act of 1789, and the act in addition thereto of 2d March, 1793, and writs of error and appeal from the decision in the said Superior Court, authorized by this section of the act, shall be made to the Supreme Court of the United States in the same cases and under the same regulations as from the Circuit Court of the United States. By the eighth section the judges of the Superior Courts and other officers are to be appointed by the President, by and

with the advice and consent of the Senate, and all the judges are to take an oath to support the Constitution of the United States before they enter on the duties of their office, and the salaries of the Governor, judges, &c., are to be paid out of the Treasury of the United States.

The 9th section declares that certain acts of Congress which are enumerated in the section, "and all other public laws of the United States, which are not repugnant to the provisions of this act, shall extend to, and have full force and effect in the territory aforesaid."

The 14th section provides for the appointment of one delegate to Congress for the territory.

The Circuit Court, in their opinion in this case, say, "they have the most explicit proof that the understanding of the public functionaries is that the government of the United States does not extend to such territories by the mere act of cession. For in the act of Congress of March, 1822, section 9th, we have an enumeration of the acts of Congress which are to be held in force in the territory; and in the 10th section an enumeration in the nature of a bill of rights of privileges, and which could not be denied to the inhabitants of the territory, if they came under the Constitution, by the mere act of cession."

An examination of the act will show that it does not warrant this construction. The 5th section declares no law shall be passed by the territorial Legislature which is inconsistent with the Constitution and laws of the United States. This shows that Congress did consider the Constitution and laws as extending there. Why prohibit the passage of a law inconsistent with them, if they had no operation there?

The 7th section gives the Supreme Court jurisdiction in all cases under the laws and Constitution of the United States. Those laws must therefore have been considered to extend *there, or why empower their enforce- [*527 ment by the Supreme Court?

The 8th section provides for the appointment of the officers of the government, including the judges of the Supreme Court, by the President, by and with the advice of the Senate. This manifests the admission that the Constitution extends there, as by the Constitution this mode of appointment is established.

The law also provides that the officers of the territory, appointed according to its purposes, shall take an oath to support the Constitution of the United States. Why take this oath if that Constitution does not extend to the territory? The payment of the officers of the territory out of the Treasury of the United States, which could not be constitutionally authorized by Congress, unless the Constitution operated there, may also be referred to as evidence of the principles contended for by the appellants.

Because Congress have enumerated certain laws as extending to the territory, in the 9th section of the act, it is inferred that Congress desired none other should extend there, and that without such enactment none would have been in operation there.

The language of the section disaffirms this position. After enumerating certain acts it closes with a provision, "That all the other public laws of the United States, which are not

repugnant to the provisions of this act, shall extend to and have full force in the territory." By the enumeration of "some laws," it is therefore evident that Congress did not mean to exclude those not enumerated. But it is said the 10th section contains an enumeration in the nature of a bill of rights of privileges, which, if the Constitution extended there, could not be denied. This is not admitted. The introduction of this provision was necessary for the purpose of controlling the powers granted by the local Legislature, and to secure to the inhabitants rights which they had under the Constitution, but which might have been otherwise infringed, unless provisions were made to carry the principles of the Constitution into effect.

It has been shown: 1st. That the people in the territories of the United States are citizens of the United States, entitled to all the benefits derived from the laws and Constitution of the United States, and subject to all the provisions of the Constitution and the laws passed under it.

2. That in principle there can be no difference between a territory formed out of a country within the old limits of the United States, and a territory in newly-acquired country.

3. And that, therefore, the people of Florida **528** *] da, immediately *upon its cession, or at any rate upon the passing of the act instituting the territorial government, became citizens of the United States, to whom the laws and Constitution extended.

The inquiry now is, whether, in establishing the court or tribunal by which the cotton claimed in this case was ordered to be sold, the Legislature of Florida have not violated the Constitution of the United States and the laws of Congress passed under it. If they have, then the court is an illegal court, and all its acts are void.

It is not only upon general principles that the act of establishing the court is invalid, but also by the provision of the act of Congress which prohibits the passing any law inconsistent with the laws and Constitution of the United States.

In the article of the Constitution relative to the judicial power of the government, it is declared that it shall extend to all cases of admiralty and maritime jurisdiction. It has been shown that the provision applies to territories as well as States, the Constitution being necessarily paramount within the limits of the United States.

The Constitution having vested the judicial power in a Supreme Court and such inferior courts as Congress may from time to time establish, the legislative power under this provision has been exercised by the acts of March, 1822 and 1823. Superior Courts have been erected, to which, in addition to the powers of territorial courts, jurisdiction is assigned within its limits in all cases arising under the laws and Constitution of the United States which, by the judicial acts of the United States was vested in the court of Kentucky District, with a right of appeal, and a writ of error to this court.

By the same acts authority is given to the territorial Legislature to establish inferior courts strictly territorial, and the jurisdiction of which extends to subjects not within the cognizance of the tribunals of the Union.

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What are the powers of the court of the Kentucky District?

Among other subjects of jurisdiction in the District Court of the United States it is declared, by the ninth section of the judiciary act of 1799, "that they shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures under the laws of import, navigation and trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen." Thus the Kentucky District had exclusive cognizance of cases of admiralty and maritime jurisdiction, and consequently it has exclusive control over cases of salvage.

The tenth section provides that the District Court of Kentucky shall, besides the jurisdiction aforesaid, have jurisdiction *of all [***529** other causes, except of appeals made cognizable in a Circuit Court, &c.

It follows from the provisions of the act relative to the territorial government, and its reference for the jurisdiction of the Superior Court, to that existing in the court of the Kentucky District, that in the Superior Court of Florida, there is exclusively jurisdiction over admiralty and maritime causes, and, of course, of the claims of the salvors of the cotton, comprising part of the cargo of the Point a Petre. The jurisdiction is exclusive, for it could not be given to the territorial courts by an act of the territorial Legislature, they not having the power to give it; the laws of the United States, having vested it in the Supreme Court, having similar powers to the District Court of Kentucky, and the powers of the territorial court being limited within the observance of the provisions of the laws of the United States.

Independent of the restriction imposed upon the territorial Legislature, by which they were disabled from giving admiralty and maritime jurisdiction to the inferior courts of Florida, the Constitution of the United States would have been violated by such legislation. The Constitution is the supreme law of the land; and, if without a prohibition in the territorial law, the Legislative authority of Florida could not "coin money" or "issue bills of credit," the establishing of a court with admiralty and maritime jurisdiction would be equally repugnant to the Constitution; such jurisdiction being exclusively, by the Constitution, in courts established by Congress.

It is said in the opinion of the Circuit Court, that the jurisdiction in cases of salvage is not vested by Congress in the Superior Courts of Florida. A reference to the laws establishing the court of the District of Kentucky, and to the act relative to Florida, authorizes a different position. Jurisdiction is given by those laws, "in cases arising under the Constitution and laws of the United States." What is such a case? Is not the extent of the judicial power of the courts of the United States a question arising under the Constitution? The Constitution having declared, that the judicial power shall extend to cases of admiralty and maritime jurisdiction, is not a case of admiralty jurisdiction a question of this character? A prohibition in a State Court in a case of admiralty jurisdiction, and a plea interposed, that exclusive cognizance of admiralty cases is in the courts of

the United States, would at once raise a question under the Constitution. The principle seems to be, that whenever a case arises, in which the question is as to the jurisdiction of the courts of the United States, it is necessarily and always a question arising under the Constitution and laws of the United States.

530*] *A case of salvage does not, strictly speaking, arise under the laws and Constitution of the United States, as the right to salvage depends on the principles of maritime law; but the amount of salvage depends on the decision of a court, guided by the circumstances of the case, and exercising admiralty and maritime jurisdiction. Thus, as the jurisdiction over the case is given by the Constitution, the decision upon it becomes a case arising under the Constitution.

Whether a man is bound to pay a promissory note is not a question of this description, and yet in cases of promissory notes held by the Bank of the United States, this court have always decided that the courts of the United States have jurisdiction; because all actions brought by the bank, are cases arising under the Constitution and laws of the United States. Congress could give this court jurisdiction of such cases on no other principle.

If, then, under a clause in the Constitution extending the judicial power of the United States to all cases arising under the Constitution and laws of the United States, this court will sustain jurisdiction upon a promissory note, with the making of which, and the extent of the liability of the parties thereto, the Constitution and laws of the United States have nothing to do; if those liabilities are questions arising under a different law, and the jurisdiction is sustained by the court only in the particular case of the Bank of the United States, as a case arising under the Constitution and laws of the United States; why is a different rule to apply in a case of salvage, of which the exclusive jurisdiction is given by the Constitution and law of the United States to the District Court? Is not the one as much a case arising under the laws of the United States as the other?

Upon the whole, it is contended that the Superior Courts of Florida, having the same jurisdiction in cases arising under the laws and Constitution of the United States, as the District Court of Kentucky had, under the acts of Congress; and as the District Court of Kentucky has exclusive jurisdiction in all civil cases of admiralty and maritime jurisdiction; that, therefore, the Superior Courts in Florida have exclusive jurisdiction in all civil, admiralty and maritime cases—that salvage is a case of admiralty and maritime jurisdiction—and that, therefore, any law of Florida, giving jurisdiction in a case of salvage to any other court is unconstitutional; and all the acts of the court under it are void.

Mr. Whipple and *Mr. Webster* for the claimant.

Mr. Whipple contended:

1. That Canter was a purchaser at Key West of the property in question, which was sold by the consent of the owners.

After the disaster and abandonment, the captain of the Point *a Petre acted as agent to the underwriters. When the cotton arrived at Key West, the salvors and the cap-

tain were owners of it as tenants in common. The captain had a legal right to sell the proportion that belonged to the underwriters, or to consent to a division of it, through the agency of a court.

He chose the latter mode. He himself, with the salvors, applied to the justice to issue process; and he co-operated in all the subsequent proceedings, and he received his proportion of the sale of the part of the cargo which was saved. These acts were subsequently ratified by the agent, who, it is in evidence, offered the claimant \$7,500 for his bargain.

Upon these facts it is contended that the consent of the party operates as a change of title to the property. It will not supply a defect of power in the court, acting as a court, but the court is the mere organ of the will of the party. As between the original parties, a plaintiff may take advantage of the want of jurisdiction of the court to which he has resorted. But can he obtain judgment, proceed to execution, obtain a sale, under which a third person purchases; and then dispute the title of that third person, for an alleged want of jurisdiction in the court?

The court at Key West had jurisdiction, and its decree cannot be questioned.

It may be proper to consider, in the first place, whether the jurisdiction of the Key West Court can be inquired into by this court? Was it not the judge of its own jurisdiction? It was a Municipal Court, acting, *in rem*, under a municipal law. (2 Dal., 273; 2 Blac. Rep., 977; 4 T. R., 191; 2 H. Blac., 410; 4 Cranch, 271, 268, 275-6, 293; 3 Wheat., 236, note; 15 John., 144; 1 Stark., 215-16; 9 Mass., 46; 9 East, 192.)

In *Rose v. Himely* (4 Crauch, 268) it is said, "but of their own jurisdiction, so far as it depends on municipal laws, the courts of every country are the exclusive judges."

Can the Key West Court be considered a foreign court? It was constituted by Congress, or by a power derived from Congress; yet it may be considered that the United States has two sovereignties, one over the people of the United States, the other over the territories; and that they are as foreign to each other as the Parliament of England and the Legislature of Jamaica; and that the courts of each are as foreign as the courts of Westminster and Kingston. Perhaps a distinction may be also taken between the power of this court to inquire into the jurisdiction of another court, in a case in which a third person, not a party to the original suit, defends his right to the property purchased under that judgment, and a case where a party to the original judgment seeks to enforce that judgment in this court, and thereby to acquire new rights under it. Another distinction may be taken between a defect of jurisdiction, in consequence of the absence of some fact necessary to confer jurisdiction, and that want of jurisdiction which arises from the different construction put upon a municipal law by this court, from the construction adopted by the Municipal Court.

Instead of considering the territorial court of Florida, a strictly foreign court, suppose the same right to inquire into its jurisdiction that exists to inquire into the jurisdiction of a State Court is admitted.

As a general principal, it is true that the proceedings of a court are void unless it has jurisdiction over the subject-matter. This, however, like all general rules, has its limits and its qualifications.

Whether the subject-matter (the person or property) is within the power of the court, is a question of fact, to be decided, generally, by the return of an officer. The court may be supposed to act upon the existence of that fact. When it is proved in another court that the court whose jurisdiction is questioned had been deceived as to that essential fact, it does not impugn its judgment, to say that it acted without jurisdiction.

But the construction of the statutes of the States is peculiarly the province of the courts of the State; and a uniform construction becomes the settled law of the State. The jurisdiction cannot be settled in any other way than by the courts of the State. It presents a question of law, and the decision of that question, though it relates to jurisdiction, is as binding upon the parties as though it related to the merits of the case. The question as to the extent of the power of the court under a statute is a question of law, and the decision conclusive on the parties.

The courts of Florida alone are to construe the Acts of Congress in relation to the jurisdiction of Florida. Had the justice at Key West jurisdiction of the question of salvage?

By the territorial act of 1823, called the "wreckers' act," it was admitted that sufficient authority was given to the justice over this subject. The question arises out of the Act of Congress of March, 1823, and is this, does that Act of Congress grant sufficient power to the Legislature of Florida to pass such a law?

The Act of Congress of March, 1823, authorizes the territorial Legislature "to legislate upon all rightful subjects of legislation."

It makes it the duty of the Governor to lay before Congress, annually, all the acts passed by the Legislature. If either of those acts are disapproved of by Congress, it is, from thenceforth, to be of no effect. The act concerning wreck-
533*] ers was laid before *Congress in December, 1823, and its attention particularly pointed to that subject by a memorial in which the necessity of such a law was enforced. Congress did not disapprove or annul that law until 1826. In the opinion of Congress, then, this law did not violate the provisions of the Constitution, or of any general law of the United States.

It ought to be noticed that the right conferred on the territorial Legislature "to legislate upon all rightful subjects of legislation," was qualified by the condition that no law should be valid "if inconsistent with the Constitution or laws of the United States."

Much argument has been used in order to show that the Constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States.

How the Constitution became of force in Florida has not been shown. Was it by the act of cession? Is there any principle in the law of nations which, upon the act of cession or conquest, gives to the ceded or conquered country a right to participate in the privileges
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of the Constitution of the parent country? The usages of nations from the period of Grecian colonization to the present moment are precisely the reverse. Such a right never was asserted.

The Constitution was established by the people of the United States for the United States. It provides for the future admission of territories into the Union, and expressly confers upon Congress the power of governing them as territories until they are admitted as States.

If the Constitution is in force in Florida, why is it not represented in Congress? Why was it necessary to pass an Act of Congress extending several of the laws of the United States to Florida? Why did Congress designate particular laws such as the crimes act, the slave trade and revenue acts, and introduce them as laws into Florida. Why enumerate particular rights secured to the people of the United States if the inhabitants of Florida were entitled to them upon the act of cession?

It is denied that all the cases of admiralty and maritime jurisdiction are exclusively vested in the courts of the Union. On the contrary, it is asserted that many cases within the admiralty are also within the common law jurisdiction of the State Courts. Seamen's wages, salvage, marine *torts*, collision, &c., are of this description. (2 Doug., 614; Abb. on Ship., 433, 436; 3 Bos. & Pull., 612; 8 East, 57; 2 Selw., N. P., 1287; 1 John., 175; 1 Nott & M'Cord, 170; 18 John., 257; 2 Gall., 399; 1 Kent's Commentaries, 351-2.)

If, however, salvage is admitted to be exclusively vested in *the courts of the [***534** United States, as a part of their admiralty jurisdiction, how does that deprive Congress of the power of distributing that jurisdiction among the courts of the territories as it pleases? It is vested in the courts of the Union; exclusive of the courts of the States. The State Courts are constituted by State Legislatures, over which Congress has no control. They are in a measure adverse jurisdictions. If it is admitted that Congress has no power to vest any part of admiralty jurisdiction in the State Courts, over which it has no control, how does it follow that it has no power to vest it in a Territorial Court, over which it has control?

Congress can constitute new courts within the States and confer portions of admiralty jurisdiction upon them. It can confer that jurisdiction upon the superior or inferior courts of the territory, or it can authorize the territorial Legislature to do it. And this, whether the Constitution is or is not in force in Florida.

The power of Congress over the territory is the same in the one case as in the other. The Constitution authorizes Congress to provide for the government of the territories. It has all the power over them that Congress and the Legislature of a State have over a State. Its power to appoint courts of admiralty jurisdiction, can be as legally delegated as its power to appoint any other courts. All the courts of Florida, whether appointed by Congress or by the territorial Legislature, are dependent upon Congress, and are courts of the United States. They are, therefore, upon the admission of the opposite counsel, capable of receiving grants of admiralty jurisdiction. It is only State Courts which are independent of Congress, that can-

not be clothed with such a power. If the power of Congress to distribute admiralty jurisdiction among the courts of the territory as it pleases is denied, its power to distribute it among the courts of the United States as it pleases, must be denied. Of what consequence is it, then, whether the Constitution is or is not in force in Florida, since the Constitution excludes the State Courts alone from the exercise of admiralty jurisdiction?

The ground assumed is this, that Congress authorized the territorial Legislature "to legislate upon all rightful subjects of legislation," unless inconsistent with the Constitution. That salvage is a rightful, and in Florida a necessary subject of legislation; that the necessary import of the words of this grant includes the exercise of the power in question; that the exercise of that power, by enacting the wreckers' act, was not inconsistent with the Constitution or laws of the United States; and that consequently it must be supported, unless it can be clearly shown that it is inconsistent with some other parts of the Act of Congress of March, 1823.

535*] *This is attempted by resorting to the 8th section, which confers jurisdiction upon the Superior Courts of Florida. These Superior Courts were appointed by Congress, and jurisdiction was conferred by Congress, and the argument is, that as Congress have conferred exclusive admiralty jurisdiction upon these courts of its own appointment, that the power given to the Legislature in the same act to appoint other inferior courts, and "to legislate upon all rightful subjects of legislation," was not intended to include the power over subjects of admiralty jurisdiction.

As the necessary import of the terms of the grant to the Legislature does include the power in question, it must be shown that the necessary import of the grant of jurisdiction to the Superior Courts excludes it. Words of a clear import are not to be controlled by other words in the same statute, unless their import is equally clear; for doubtful words shall not limit the operation of clear and precise ones.

Two propositions must be established, as the necessary result of these words of the 8th section: 1st. That an exclusive admiralty jurisdiction is conferred upon the Superior Courts. 2d. That that exclusive jurisdiction extends to all cases.

The words are, the "same jurisdiction." And it is argued that because the jurisdiction of the Kentucky Court was exclusive, that these terms, necessarily, vest an exclusive jurisdiction in the Superior Courts.

The grant is, "the same jurisdiction." Must it necessarily be exclusive in Florida because it was exclusive in Kentucky? Are the terms, exclusive or concurrent, parts or qualities of the jurisdiction, so that a grant of the principle carries them along with it, as incidents? Or are they in fact no part of the jurisdiction itself, but terms used to express the relation which that court has to some other court? Is not the term "exclusive" intended to prohibit other courts from exercising the same jurisdiction? Is a jurisdiction more extensive when exclusive, or less so when concurrent? Is it not precisely the same in the one case as in the other? The power of the court over the parties, the subject-matter

and the process, is the same in the one case as in the other. A grant, then, of the "same jurisdiction," does not necessarily carry with it the same relation to other jurisdictions. It may be concurrent in Kentucky, and exclusive in Florida. Suppose two courts in Florida whose jurisdiction extended over the same district. Congress confers upon these two courts the "same jurisdiction" that the Kentucky Court possessed. It was exclusive in Kentucky, but as it was conferred on two courts, would it not be concurrent in Florida?

These terms, then, do not necessarily import an exclusive jurisdiction, and ought [*536 not to limit the grant of power to the Legislature. The intention of Congress might have been one way or the other. It is probable they did not intend an exclusive jurisdiction. In Kentucky this admiralty power is exclusive of the State Courts, over which Congress has no control. Why in Florida should it be exclusive of the territorial courts, over which Congress had a control.

The libelants, then, fail to establish the first proposition, that the necessary import of the terms confers an exclusive jurisdiction on the Superior Courts. These cond proposition, it is apprehended, cannot be established, which is, that jurisdiction over all cases, to which the jurisdiction of the Kentucky Court extended, was intended to be conferred. The words of the act are, "all cases arising under the laws of the United States."

It is at once perceived, that unless it can be established that the case of salvage tried before the justice and jury was a case arising under the law of the United States, that Congress have not conferred jurisdiction over it on the Superior Courts, and consequently that the territorial Legislature had the right of conferring it upon an inferior court.

The reasoning adopted to show that it was a case arising under the laws of the United States is somewhat novel. The jurisdiction of the justice depended upon the territorial law; the right of the territorial legislation to enact that law depended on the act of Congress; it was therefore a case arising under the laws of the United States. And the case of *Osborne v. The Bank of the United States* (9 Wheat. 738) is relied upon as an authority.

The case of *Osborne v. The Bank* did not involve the right of the bank to sue in a particular court, not a mere question of jurisdiction, but the right of the bank to sue in any court; its right to a legal existence. The fact of the legal existence of the bank depended on a law of the United States. The decision of the question settled the case between the parties. No suit could be afterwards brought by the bank in another court. But if the justice in Florida had decided against his own jurisdiction, it would have left the rights of the parties as they were before—to be decided upon in another court. It would have effected the remedy in that court, and that alone.

Besides, if every case which involves a question of jurisdiction under a law of the United States, is a case arising under the laws of the United States, then every case which by possibility can be brought in the Kentucky Court is of that description, because every case involves that question. What meaning, then, have the

words "arising under the laws of the United States?" Why not omit them entirely and read the section thus: "The same jurisdiction in all cases which the Kentucky Court has." If **537*** those words do not limit the grant to cases where some right is claimed under a law, they are wholly inoperative.

It will be found, not only that these words are inoperative upon the construction of the libelants, but that distinct and independent provisions in the act of Congress of 1824 are also inoperative. Immediately following these words conferring jurisdiction upon the Superior Courts, it is provided that "all cases arising under the laws of the United States" shall be tried the first six days of the term, and all other cases afterwards; that in such cases the clerk shall have the same fees that the clerks of the District Courts have, but in all other cases, such fees as the Legislature shall establish. Now, if every case brought in a territorial court, involves a question of the jurisdiction of the court, and that alone gives it the character of "a case under the laws of the United States," according to the meaning of Congress, how can the distinction as to the time of trial, and the amount of fees exist? Congress has established two classes of cases, one under, and the other not under, the law of the United States. The libelants say there is but one class. All cases brought in the courts of Florida are cases arising under the laws of the United States, because they all involve a question of jurisdiction. This view of the subject appears conclusive.

The whole case results in this, that Congress, being the sovereign, *de facto*, or under the Constitution of Florida, had a right to provide for its government by a direct or a delegated exercise of power, or by both. That it had the right of distributing all branches of judicial power among the several courts of Florida as it pleased, and how it pleased, and this to the same extent if the Constitution is, or if it is not, *per se*, in force in Florida.

That the grant of power to the territorial Legislature clearly embraces the exercise of it in question, and that so far from a clear grant of exclusive jurisdiction in all admiralty cases, being conferred upon the Superior Courts, which could alone limit the grant of power to the Legislature, that it is very doubtful whether any exclusive jurisdiction was intended, and if it was, it was only in relation to cases in which some right or power is claimed under a law of the United States. It is agreed that salvage is not of that description, unless the possibility of a question of jurisdiction makes it so.

Mr. Webster. This will be a hard case against the claimant of the property, should he lose it, having purchased it in good faith under the decree of a court exercising jurisdiction over the matter, and to which jurisdiction no objection was made by the parties to the proceeding.

538* How did the District Court of South Carolina obtain jurisdiction in this case? No wrong was done; no *tor*t was committed. That court had not, therefore, jurisdiction of the subject. Salvage is too indefinite a term to designate jurisdiction. Marine salvage, when the service has been rendered at sea, may form a proceeding in the admiralty, but in this case, the services were after the vessel was a wreck; and therefore the same principles do not apply.

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This proceeding is in the nature of an action of trespass; the process was against the *res*, and the person of the claimant; and because there had been a question of salvage in the court under whose decree the *res* is held by the claimant, it does not follow that there is jurisdiction in the courts of the United States. It is said the property has not passed by any valid decree; and trespass or trover would lie.

Has there been such a judicial sale as conveyed the property to the claimant? If not, the insurance companies claim to hold the property. What is Florida? It is no part of the United States. How can it be? how is it represented? Do the laws of the United States reach Florida? Not unless by particular provision.

The territory and all within it are to be governed by the acquiring power, except where there are reservations by treaty.

By the law of England, when possession is taken of territories, the King, *jure coronæ*, has the power of legislation until Parliament shall interfere. Congress have the *jus coronæ* in this case, and Florida was to be governed by Congress as she thought proper.

What has Congress done? She might have done anything; she might have refused the trial by jury, and refused a Legislature. She has given a Legislature, to be exercised at her will; and a government of a mixed nature, in which she has endeavored to distinguish between State and United States jurisdiction, anticipating the future erection of the territory into a State.

Does the law establishing the court at Key West come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory, the law cannot be inconsistent with the national Constitution.

It is said that the court erected for the territory by the law of the United States has exclusive jurisdiction over this case, and that the interference of the local Legislature is unauthorized. Does the law erecting the Superior Court of Florida give this exclusive jurisdiction?

The jurisdiction given to the Florida Court is the same as that given to the Circuit Court of Kentucky; and as the District Court of Kentucky has jurisdiction of all cases arising under the laws of the United States, [**539**] it is inferred that the same is vested in the Florida Court. But it does not follow, from the language of the act, that the jurisdiction is exclusive; and thus the power of the court erected by the Legislature of Florida may be, and was concurrent. The main point in this case is, whether it is a case arising under the Constitution of the United States. What are the cases which are referred to in the provision, and is this one?

The principles of those cases have been examined, and enough has been settled to show that this is one which does not so arise. A case is not one arising under a law of the United States, because, in some part of it, a question may arise under a law of the United States. The meaning of the provision of the Constitution cannot be, that when a law of the United States can have any influence in a case, it is to be considered as one arising under the law of the United States.

How does the cause before the court arise under a law of the United States? It is a claim for salvage. The goods are brought into Key West, and there is no law of the United States limiting or fixing the amount of salvage. Salvage is not a right arising under a law of the United States; it is a common law right; and the action for its recovery, or the rate to be allowed, does not depend upon any law of the United States. It cannot be claimed that any laws operated in the case, unless the general laws which extended over the territory. The case of *Osborn v. The Bank of the United States*, decided in this court, does not apply to this case. The law giving to the bank their charter, gave to that institution a power to sue in the courts of the United States. But, as has been stated, the salvors of the cotton did not claim salvage under any law of the Union. The salvage might have been sued for, wherever the goods could be found and libeled, in England or in France, or elsewhere.

The argument that this court should lay its hands on the proceedings of the courts of Key West, because of the great injuries sustained by merchants and underwriters, if it could, at any time, have force here, cannot have it now; as the law establishing the court which is so much complained of has been repealed.

Mr. Ogden, in reply. The place where the service is done, ascertains the jurisdiction. It is upon this principle that questions of seamen's wages are subjects of admiralty jurisdiction, and entertained in Admiralty Courts; and upon this principle, the case before the court is of admiralty cognizance. The whole of the services of the salvors were at sea; the place where the *Point a Petre* was wrecked, was at a distance from the main land, and there the goods were saved.

540* It is admitted, that for the cotton, which is the subject of this suit, an action of trover will lie; but this is a concurrent remedy with that afforded in a Court of Admiralty.

Territories acquired by conquest, and by cession, stand under different relations to the United States. Where territories are ceded, they become part of the United States. It has been the uniform understanding, that this shall be the case. Those territories obtained by treaties with France and Spain, were so considered, and the provisions in those treaties relative to the rights and privileges of the inhabitants, were introduced under the belief that Congress would not interfere.

The act relative to the territory of Florida provides, that no law shall be passed against the provisions of the Constitution of the United States. The officers appointed under it, take an oath to support the Constitution, and thus the full force and operation of the Constitution is acknowledged in the territory.

By the Constitution, the courts of the United States have jurisdiction in all cases of admiralty and maritime jurisdiction; and it therefore follows, that this is exclusive. What courts have Congress ordained and established in the territory of Florida to exercise the jurisdiction assigned by the Constitution to the courts of the United States? The law establishes a Superior Court with general jurisdiction, similar to the courts established in the States; it then provides that inferior courts may be erected by

the territorial Legislature, whose jurisdiction shall not exceed one hundred dollars; and it is afterwards said in the law, that the Superior Court shall, in addition to the defined powers, exercise all such powers as are granted to the United States Court of Kentucky. The court established in Kentucky has given to it admiralty and maritime jurisdiction, and therefore the Superior Court of Florida has the same jurisdiction. If, then, it is given by Congress to the Superior Court, it exists nowhere else.

It is said that Congress has given to the territorial Legislature all the rights of legislation they have. Legislative powers cannot be delegated. *Delegatus non potest delegare.*

Whether the Territorial Court had jurisdiction, is a question arising under the Constitution of the United States. How else does it arise? Suppose a jurisdiction in admiralty cases, assumed by New York during a war. How can the powers thus assumed be examined before the courts of the United States, but by affirming the acts to be void by the Constitution and laws of the United States?

This is a question of salvage: and had the Territorial Court jurisdiction of salvage? If the cotton was not sold under the decree of a court competent to decide such a question, the property is not changed. Does the [*541 territorial act give the jurisdiction? The powers of courts formed under the territorial law, being limited to controversies not exceeding one hundred dollars, the limitation has been exceeded; and the provisions for the establishment of the court are therefore void.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship *Point a Petre*; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The *Point a Petre* was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court, consisting of a notary and five jurors, which was erected by an act of the territorial Legislature of Florida. The owners abandoned to the underwriters, who, having accepted the same, proceeded against the property; alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors, on the value of the property saved.

The district judge pronounced the decree of the Territorial Court a nullity, and awarded restitution to the libelants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

The libelants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs; on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libelants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made, has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial Legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently the sale is valid, if the territorial Legislature was competent to enact the law.

The course which the argument has taken, **542*** will require that, *in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly-created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories, which His Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress Peters 1.

"to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The [***543** right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an act for the establishment of a territorial government in Florida;" and, on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial Legislature enacted the law now under consideration.

The 5th section of the act of 1823 creates a territorial Legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and Constitution of the United States.

The 7th section enacts, "That the judicial power shall be vested in two Superior Courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish." After prescribing the place of session, and the jurisdictional limits of each court, the act proceeds to say: "Within its limits herein described, each court shall have jurisdiction in all criminal cases and exclusive jurisdiction in all capital offenses; and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory, now in force therein, or which may, at any time, be enacted by the legislative council thereof."

The 8th section enacts, "That each of the said Superior Courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September, 1789, and an act in addition to the act, entitled an act to establish the judicial courts of the United States, approved the 2d of March, 1793, was vested in the court of Kentucky District."

The powers of the territorial Legislature extend to all rightful objects of legislation, subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the act is valid, unless it can be brought within the restriction.

The counsel for the libelants contend, that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory act of March, 1823. It vests, they say, in an inferior tribunal, a jurisdiction, which is, by those acts, vested exclusively in the Superior Courts of the territory.

*This argument requires an attentive [***544** consideration of the sections which define the jurisdiction of the Superior Court.

The 7th section of the act of 1823 vests the whole judicial power of the territory "in two Superior Courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish." This general grant is common to the Superior and Inferior Courts, and their jurisdiction is concurrent, except so far as it may be made exclusive in either, by other provisions of the statute. The jurisdiction of the Superior Courts is declared to be exclusive over capital offenses; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects, are "all civil cases arising under and cognizable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States. Congress recognizes this principle, by using the words "laws of the territory now in force therein." No laws could then have been in force, but those enacted by the Spanish government. If, among these, a law existed on the subject of salvage—and it is scarcely possible there should not have been such a law—jurisdiction over cases arising under it was conferred on the Superior Courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the Superior Courts, in terms which admit of more doubt. The words are, "That each of the said Superior Courts, shall moreover have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, was vested in the court of the Kentucky District."

The 11th section of the act declares, "That the laws of the United States, relating to the revenue and its collection, and all other public acts of the United States, not inconsistent or repugnant to this act, shall extend to, and have full force and effect, in the territory aforesaid."

The laws which are extended to the territory by this section, were either for the punishment **545*** of crime, or for civil *purposes. Jurisdiction is given in all criminal cases, by the 7th section, but in civil cases, that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory; consequently, all civil cases arising under the laws which are extended to the territory by the 11th section, are cognizable in the territorial courts, by virtue of the 8th section; and, in those cases, the Superior Courts may exercise the same jurisdiction as is exercised by the court for the Kentucky District.

The question suggested by this view of the subject, on which the case under consideration must depend, is this:

Is the admiralty jurisdiction of the District

Courts of the United States vested in the Superior Courts of Florida under the words of the 8th section, declaring that each of the said courts "shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the courts of the Kentucky District?

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky District, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are therefore to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases, and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so—if this were a point open to inquiry—it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are *as old as navigation itself; and the law, [***546**] admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish." Hence it has been argued, that Congress cannot vest admiralty jurisdiction in courts created by the territorial Legislature.

We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the Superior Courts of Florida hold their offices for four years. These courts, then, are

Peters 1.

not Constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State government.

We think, then, that the act of the territorial Legislature, erecting the court by whose decree the cargo of the Point a Petre was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

S. C., 3 Pet., 307.

Cited—12 Pet., 76; 14 Pet., 374, 376, 389, 391, 398, 404, 407, 409, 414, 538; 9 How., 240, 244; 15 How., 466; 10 How., 194; 17 How., 295, 308, 534; 19 How., 442, 501, 540, 611, 613; 20 How., 481; 1 Wall., 77; 11 Wall., 507; 13 Wall., 447; 16 Wall., 434; 17 Wall., 247, 250; 8 Otto, 15, 154; 11 Otto, 458; McAll., 192, 396; 1 Wood. & M., 434, 501; Blatchf. & H., 251, 252; Oleott, 82; 1 Abb., U. S. 43; 5 Dill., 409.

547*] *THE UNITED STATES

v.

422 CASKS OF WINE.

HAZARD & WILLIAMS, Claimants.

Stare decisis—parties to suits in rem—practice.

It is not the habit of this court to consider points again open for discussion which have been once deliberately decided, and have furnished the groundwork of the judgment already rendered in the same cause in a former stage of its proceedings. [549]

In suits *in rem*, and in the exchequer side of the District Courts of the United States, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy. This alone gives him a *persona standi in iudicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. [549]

If the claim be made through an agent, the agent must make oath as to his belief of the verity of the claim, and if necessary produce proof of his authority, before he can be admitted to put in the claim. [549]

Allegations and pleadings to the merits are a waiver of the preliminary inquiry as to proprietary interest, and admission that the party is rightly in court, and capable of contesting the merits. [550]

If after proceeding in a cause the court find the claimant has no property, or that it is in another not represented, the court will retain the *res*, until the real owner shall appear, claim and receive it from the court. [550]

Upon a writ of error in an exchequer proceeding, which has been tried by a jury, the evidence given

at the time of the trial is not in a strict sense before this court. [550]

ERROR to the District Court of East Louisiana.

This case was before this court at February term, 1823, and is reported in 8 Wheat., 391, under the name of *The Sarah*. The cause having been sent back, the libel was changed into an information, charging the seizure to have been made on land, according to the leave given by the decree of the court in that case.

The information charges the wine to have been in reality Malaga wine, falsely exported from New York under the name of sherry, for the benefit of the drawback. To this information a claim and answer was given and filed by Benjamin Story, as agent for Hazard & Williams, and on the oath of the said Story, claiming the wine as the property of the said Hazard & Williams, making no answer to the specific fact charged by the information, that the wine was Malaga wine, exported under the name of sherry, for the benefit of drawback; but denying generally the allegations of the information, or that anything had been done to forfeit the wine under the revenue laws of the United States, and claiming the restoration of the wine to Hazard & Williams. The record set forth the evidence on the question *whether the wines were Malaga [*548 or sherry. The verdict of the jury was for the claimants. The district-attorney moved for a new trial, which was overruled; on which he brought this writ of error, and made the following assignment of errors:

1. That on the 18th of December, 1819, this case was tried by jury, and verdict and judgment rendered for the United States.

2. The proceedings under this libel were regular, as the amendment related to matter of form merely, and not of substance; and by the 17th section of the act of Congress of 24th September, 1789, the courts of the United States may establish all necessary rules for conducting the business of the court; and the 22d section of the same act provides that "there shall be no reversal for error in ruling any plea in abatement," &c. The proceedings in this case were in conformity with the rules of the court in which they were instituted.

No answer and claim was filed and sworn to by or in the name and behalf of Charles Hall, the real owner of the said 422 casks of wine, at the time of the seizure and forfeiture thereof to the United States.

Mr. Wirt, Attorney-General, on the part of the United States, submitted the case, on the errors assigned by the district-attorney.

Mr. Ogden and Mr. Hull, on the part of the claimants, made the following points:

1. That there is no error upon the record for the causes assigned by the attorney for the United States, the same points having been already before this court, and after due consideration conclusively settled, upon the first trial of this cause. (See 8 Wheat., 391, *The Sarah*.)

2. That there was no necessity for the said Charles Hall to file a claim and answer in his own name, since his title to said wine (if proved) accrued after the seizure thereof, and after a claim and answer had been duly filed by

Hazard & Williams, the parties having the legal title to said property.

3. That the objection "that no answer and claim hath been filed and sworn to by or in the name and behalf of Charles Hall, the real owner of said 422 casks of wine," were it valid, cannot now prevail: because the same should have been taken when the claim was filed, or at all events at the time of the trial of the cause in the court below.

4. That from the whole record it appears that judgment ought not to be for the United States, of condemnation of said wine; but ought, of right, to be for the claimants.

5. "That from the whole of the evidence apparent upon the record, and taken for the purpose of review," &c., it is manifest that restitution of said wine ought to be decreed to the claimants.

549*] *Mr. Justice Story* delivered the opinion of the court:

This is the same cause which came before this court at February term, 1823, and is reported in 8 Wheat. 391. The cause having been remanded to the District Court of Louisiana for further proceedings, the libel or information was there amended, so as to become, technically, an exchequer information of seizure; and the parties being at issue upon the question of forfeiture, the jury returned a verdict for the claimants, upon which judgment was rendered in their favor. Upon the writ of error now brought up on this last judgment, two grounds for reversal have been asserted in the assignment of errors spread upon the record, and the Attorney-General has now submitted them, after a brief exposition, to the consideration of the court.

The first is in substance the same question which was decided by this court upon the former appeal, and is presented in the shape of a re-argument by the district-attorney. Upon this it is unnecessary to say more than that we adhere to the opinion formerly expressed, and can perceive no reason for changing it. It is not the habit of this court to consider points again open for discussion which have been once deliberately decided, and have furnished the groundwork of the judgment already rendered in the same cause in a former stage of its presentation here.

The second ground is that Messrs. Hazard & Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution.

This objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party, *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required in the

first instance to put in his claim, upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority, before he *can be admitted to put in the claim. [*550

If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement, to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court, and capable of contesting the merits. If, indeed, it should afterwards appear, upon the trial, even after the merits have been disposed of in favor of the claimants, that the claimant had in reality no title to the property, but that the same was the property of a third person who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its own custody, until the true owner might have an opportunity to interpose a claim, and receive it from the court. But such cases can rarely occur; and are applications to the discretion of the court, for the furtherance of justice; and, in no shape, matters which the original *promovent* could have a right to require at its hands.

From this review of the practice as to claims in proceedings *in rem*, it is obvious that the objection now relied on, however apparent it might be from the evidence disclosed upon the record, could not be insisted on as matter of error. In a strict sense, however, this being a writ of error upon an exchequer information tried by a jury, the evidence given at the trial is not properly before us; and as a common law proceeding, the affidavit of Mr. Henner constitutes no part of the record. But, even if that affidavit were admissible, and the objection were now open, it is by no means clear that it would be available. The property was by the consent of Hall sold and conveyed to Messrs. Hazard & Williams, in trust for himself. If that conveyance was fraudulent as to creditors, it was not absolutely void, and only voidable by them. And, at all events, we cannot but see that they had full authority to interpose this claim, by the consent of the real owner; and the irregularity, if any, prejudices no adverse right, and interferes with no rule of justice.

The judgment of the District Court must therefore be affirmed. But a certificate of probable cause of seizure will be granted, *as such probable cause is not denied to [*551

exist, and, indeed, is apparent from the verdict of the first jury.

This cause came on, &c. On consideration whereof, it is considered and adjudged by this court, that there is no error in the judgment of the said District Court of Louisiana in the premises, and that the same, be and hereby is affirmed. And it is further ordered and adjudged, that there was a reasonable cause of seizure of the wines, and promises set forth in the information, and that a certificate thereof be entered of record accordingly; and that the cause be remanded with directions to the District Court of Louisiana to make restitution to the claimants, and otherwise proceed in the premises, according to law.

See, S. C., 8 Wheat., 391.

Cited—7 How., 865; 18 Wall., 249; 20 Wall., 223; 1 Sawy., 718; 4 Ben., 276; 1 Brown, 487; 1 Bond, 590.

552*] *ROBERT STEELE'S LESSEE,
Plaintiff in Error,

v.

JESSE SPENCER ET AL., *Defendants*
in Error.

Ejectment—state courts—construction of Ohio registry act—deeds.

A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land should, within six months, make a deed, &c., with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c., "that then, and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner as if the same had been conveyed to him." The decree of the Supreme Court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree as it would do if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. [558]

The registry act of Ohio directs that all deeds made within the state shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the county where the land lies within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser for a valuable consideration without notice of such deed. [559]

In the construction of the registry act of Ohio, the term, "purchasers," is usually taken in its limited legal sense. It means a complete purchaser; or in other words, a purchaser clothed with a legal title. [559]

It is not necessary that a deed made to a subsequent *bona fide* purchaser without notice shall be recorded to give it operation against a prior unrecorded deed, as by the provisions of the registry acts the prior deed is declared in itself absolutely void as against such purchaser. [560]

Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the court. [560]

The construction of words belongs to the court, and the materiality of an alteration in a deed, is a question of construction. [561]

THIS was a writ of error to the Circuit Court of the United States for the District of Ohio, to reverse the judgment of that court in favor of the defendant in error, in an action of ejectment instituted by the plaintiff in error, Peters 1.

to recover a tract of land in Perry county, in the State of Ohio.

The title claimed and exhibited by the plaintiff in the ejectment, was originally derived under a patent from the United States to Jesse Spencer, dated November 15th, 1811; who, with George Spencer and others, were the heirs-at-law of Thomas Spencer, deceased; and in order to show the title acquired by the patent, he offered in evidence a deed from Jesse Spencer, the patentee, and Catherine, his wife, to William Steele, purporting *to [*553 bear date the 20th of January, 1818, and which appeared on that day, by the certificate on the deed, to have been acknowledged before a justice of the peace. "William Fulton, one of the subscribing witnesses, proved that he attested the deed in the office of Jesse Spencer, but could not state when; that William Steele was not present; that he knew nothing of the purchase of the land by William Steele from Jesse Spencer; and that he saw no more of the deed, until about one year ago, when Spencer and Steele were together, and Spencer produced the deed to see if the witness would recognize his signature." Wherever the name of William Steele appeared, either in the body of the deed or the label thereon, it manifestly appeared to have been written on an erasure, and with ink of a different color, as did the words "Ross" and "Ohio," in describing the place of residence of said Steele. The alterations on the face of the deed were not accounted for by any testimony. This deed was not recorded in the county where the land lies, or elsewhere. The plaintiff further offered in evidence, a deed from William Steele, and Sarah, his wife, to Robert Steele, the lessor of the plaintiff, bearing date the 7th of July, A. D. 1821. Also, the deposition of John Daragh, to prove the execution of said deed; which deed and the certificate and acknowledgment thereon, and also the deposition of John Daragh, were also not recorded.

The defendants in the ejectment were in possession of the land, and they claimed to hold it under a decree of the Supreme Court of the State of Ohio, for Ross county, sitting in chancery, rendered on the 3d of January, 1820, in a proceeding by a bill filed in Perry county, and, under advisement in Ross county, by the heirs of Thomas Spencer, deceased, against Jesse Spencer and others, by which decree Jesse Spencer was ordered to convey the land in controversy to certain of the parties in the said bill, upon their full compliance with the terms and conditions stated in the said decree. The decree also proceeds as follows: "It is further ordered and decreed, that if the complainants shall, within the time specified, deposit and pay to the clerk of Perry county aforesaid, the several sums of money aforesaid, and interest thereon, as aforesaid, and the defendant, Jesse Spencer, shall fail to make out, execute, and deliver to said clerk, a deed for nine-tenths of the land aforesaid, within the times aforesaid, in manner aforesaid, that then, and in that case, the heirs-at-law aforesaid, to whom the land aforesaid is decreed to be conveyed, in manner aforesaid, shall hold, possess and enjoy, nine-tenths of the half section aforesaid, to them, their heirs, and assigns

forever, in as full and ample a manner as though the same were conveyed to them by the said Jesse Spencer, defendant, in manner aforesaid." It is further ordered, that Jesse **554***] Spencer, *the defendant, pay the cost of the suit in seven months from the date of this decree; and if he fail so to do, that then execution or executions issue in the same manner as executions issue on judgments at law. It is further ordered and decreed, that the bill as to the other two defendants, to wit, William Spencer and James Spencer, is dismissed without costs, and that the clerk of the Supreme Court for Ross county, enter this decree of record in the said Supreme Court of Ross county, and that he transmit a copy of this decree to the clerk of the Supreme Court of Perry county, it being in the same county from which this cause was removed here for decision, and that the same be entered of record in the Supreme Court of the said county of Perry, in the same manner as if the cause had been there heard and decreed. It is further ordered and decreed, that if the money is not paid and deposited in manner aforesaid, and within the time aforesaid, that then these complainants shall pay all the costs of the suit."

The defendants also exhibited evidence of their having fully complied with all the requisites of the said decree, by the payment of the sum of \$524, the amount decreed to be paid; and also that the decree was duly recorded in the proper office for recording of deeds of the county of Perry, on the 24th July, 1822.

After the evidence was closed, the court, on the motion of the counsel for the defendants, instructed the jury as follows:

1. That the decree of the Supreme Court of the State of Ohio, given in evidence in this cause by the defendants, vested in them such a legal title to the land in question as would have been conveyed by deed of equal date from Jesse Spencer, the patentee, and that the registry act of Ohio applies as well to the title of the defendants under the said decree as it would do if they held under a *bona fide* deed, of the same date, from the said patentee.

2. That if the elder deed be not recorded within the time specified by the registry act of Ohio, it is wholly void, as to subsequent *bona fide* purchasers, without notice of the existence of such deed.

3. That if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested, and acknowledged, such alterations absolutely avoid the deed, and it can convey no title to the lessor of the plaintiff. The counsel of the defendant objected to those parts of the instructions contained in the first and second specifications. They submitted to this court the following points:

1. The court below erred in charging the jury that the registry act of Ohio applies as **555***] well to the title of the defendants, *under the decree set forth in the bill of exceptions, as if they held under a *bona fide* deed of the same date.

2. The court below erred in charging the jury, that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed, and

it can convey no title to the lessor of the plaintiff. Because—

1. Such an alteration, if made without the consent of the grantee, would not avoid the deed, and divest the estate vested, by the execution of the deed, in the grantee.

2. An alteration of the deed, made with the consent of the grantee, could not divest the estate conveyed by the deed, and re-vest the same in the grantor.

The case was argued by *Mr. Leonard* for the plaintiff in error, and by *Mr. Ewing* for the defendants.

For the plaintiff, it was insisted that the registry act of Ohio applies exclusively to purchasers by deed, and does not include and protect those who hold in virtue of decrees in chancery. Under the statute regulating proceedings in chancery, a suit may be instituted to obtain a conveyance, either in the county in which the land is situated, or where the defendant may be found.

The action and the counts in the declaration are *in rem vel personam*, and jurisdiction is acquired by the possession and control of the subject-matter, or of the person. As the registry act does not require decrees made in the courts of one county to be recorded in the county where the land is situate, neither does it extend its protection to purchasers under such decrees; or if it embraces other purchasers than those by deed, it protects all subsequent purchasers and subsequent purchasers alone.

Those cannot be considered subsequent purchasers who were before the execution of unrecorded deeds vested with equitable titles, which afterwards were enforced by suits in chancery. Such purchasers by decree do not come within the mischief of the registry act. Such a construction would be forced, and inconvenient; as the purchaser by deed, on recording his deed, or by giving notice, *pendente lite*, in chancery; and even after decree rendered, and before the expiration of the time limited for the execution of the conveyance, although after the lapse of six months, would bring his deed within the protection of the act, and defeat purchasers by decree. If the chancery suit had been instituted against Steele as well as Spencer, the complainants could not have obtained a decree. A party might in this way obtain a good title, by his omission to embrace proper parties in his bill in equity. A defective title might thus be made good during the progress of the suit, and, indeed, a title invalid *at the rendition of the decree, [**556** valid in a month after—*vires acquirit eundo*.

This construction would make the statute penal; punishing the party for his *laches*, in omitting to record his deed, instead of simply a protection of the rights of others. All the mischief to be guarded against by the statute, was effected by the execution of the deed; and the omissions, seasonably to record the deed, could not injure one who had a good equitable title, which is subsequently enforced by a bill in equity.

It was also insisted, that the court erred in charging the jury that a material alteration in the deed from Spencer to Steele, after its execution, could defeat the title thereby vested in Steele. It was apparent, on the plaintiff's bill of exceptions, the court erred in thus charging the

jury, and the court could not look to the bill of exceptions of the defendants in error for any purpose; or if they could, the error was not rectified by a comparison of the facts there stated with the charge. (Cited, *Marshal v. Fisk*, 6 Mass. Rep., 32.)

Mr. Ewing, for the defendants.

The registry act of Ohio protects subsequent *bona fide* purchasers against unregistered deeds. A party entitled under a decree of a Court of Chancery, is a purchaser in the legal signification of the term, and is therefore within the letter of the statute. There can be no reason to except him from its operation. He is as much injured by the concealment of a prior deed as any other purchaser. Whenever a party is entitled in equity to a specific performance of a contract, if the defendant had put it out of his power to perform it, it is important that the fact should be made known to the party interested, that he may seek other and more effectual relief. A purchaser under such a decree, is therefore within the spirit as well as the letter of the act.

The court did not err in charging the jury that the defendant's title took effect from the date of the decree.

Courts of Equity in Ohio, in settling the title to real property, proceed *in rem*, not *in personam*. It is true, they direct the party to execute a deed, but they do not compel him by attachment to do so. If he refuses, the decree operates as a deed, and the *res sita* gives jurisdiction to the court. The decree of the court fixes the title to the property. The time allowed for the conveyance, relates merely to the transfer of the evidences of title, and the possession and the deed, if made pursuant to the decree, relate to the date of the decree itself. If no deed be made, the title by the decree relates. Thus, if the party against whom a decree is rendered should die, or being a *feme sole* should marry before the period fixed for the 557*] *execution of a title, it is believed that the decree would operate without further proceeding to vest the title.

2. Deeds for the conveyance of real estate in Ohio, derive their validity solely from statutory provisions. No common law mode of transferring real estate, except by operation of law, is recognized. (*Linley v. Coates*, 1 Ham. Rep.)

Neither is the statute of uses, which in England gives validity to the deed of bargain and sale, in force in Ohio. Deeds, therefore, to be valid, must be executed according to the provisions of the statute of that State; and if they are deficient in any of the requisites pointed out by that statute, they create no legal title.

That act (22d vol. Ohio Laws, p. 218) requires the grantor to seal and acknowledge the deed in the presence of two witnesses, who subscribe their names, and also his solemn acknowledgment before a judicial officer. The deed in question was not proved to have ever been executed with all these formalities. But if, after this due execution, it were altered in a material part, no matter by whom, or with whose consent, it was no longer the same deed. (*Pigot's case*, 11 Rep., 27.)

Mr. Justice TRIMBLE delivered the opinion of the court:

This writ of error is prosecuted to reverse a Peters 1.

judgment of the Circuit Court for the District of Ohio, rendered in favor of the defendants, in an action of ejectment instituted by the plaintiff in error against the defendants in the court below, to recover a tract of land in Perry county.

On the trial of the general issue, which was joined between the parties, the plaintiff gave in evidence a patent from the President of the United States to Jesse Spencer, dated the 15th of November, 1811, for the land in controversy; a deed of conveyance for the land from Jesse Spencer to William Steele, purporting to bear date the 20th of January, 1818, and also a deed from William Steele to Robert Steele, dated the 7th of July, 1821, prior to the institution of the suit.

It appeared, from a certificate on the deed from Jesse Spencer to William Steele, that it had been acknowledged on the day of its date before a justice of the peace, and it was attested by two subscribing witnesses.

The deed from Jesse Spencer to Steele had never been recorded, either in the county where the land lies, or elsewhere. Wherever the name of William Steele appeared in the body of the deed, or in the label thereon, it appeared to have been written over an erasure, and with ink of a different color, as did the words "Ross" and "Ohio," in describing the place of residence of Steele. This was unaccounted for by any testimony in the cause.

*The defendants gave in evidence a [*558 record and decree of the Supreme Court of the State of Ohio, in a cause in which the heirs of Thomas Spencer and the defendants in this cause were complainants, and Jesse Spencer, the patentee of the land, was defendant.

This decree was rendered by the Supreme Court on the 3d of January, 1820, while sitting in Ross county, having heard the cause in Perry county, where the suit was instituted, and where the land lies; and having held it under an advisement, as is the practice in Ohio, the decree was pronounced in the cause at Ross county, and was certified from thence to Perry county, to be there entered on record in the suit, in the same manner as if rendered while the Supreme Court was sitting in Perry county; and it was so entered on record accordingly.

The decree was also recorded in the office of the recorder of deeds, on the 24th of July, 1822, in Perry county.

The decree, *inter alia*, ordered Jesse Spencer, the patentee of the land, "within six months from the date of the decree to make out a deed with covenants of general warranty, conveying to the complainants in that cause, and defendants in this, an undivided nine parts out of ten, or nine-tenths of the tract of land in controversy, and to deposit said deed, duly executed, acknowledged and attested, with the clerk of the Supreme Court of the county of Perry, within the said term of six months; and by the clerk to be delivered to the complainants upon their paying and depositing with the clerk, within the said term of six months, certain sums of money, with interest, as specified within the decree; and that, upon the failure of the said Jesse Spencer to make out and deposit a deed, as above directed, within the said term of six months, that then and in that case the com-

plainants shall hold, possess and enjoy nine-tenths of the said tract of land in as full and ample a manner as if the same were conveyed to them by the said Jesse Spencer."

The defendants paid and deposited with the clerk the money required by the decree, within the six months, and took his receipt for the same.

It appears by a bill of exceptions tendered by the plaintiff's counsel, that after the evidence was closed, the counsel of the defendants moved the court to instruct the jury, (1st) that the decree of the Supreme Court of the State of Ohio, given in evidence by the defendants, vested in them such a legal title to the land in question as would have been vested by a conveyance from Jesse Spencer of equal date; and that the registry act of Ohio applies as well to the title of the defendants, under said decree, as it would do if they held under a *bona fide* deed, of the same date, from the patentee.

559* 2d. That if the elder deed be not recorded within the time specified by the registry act of Ohio, it is wholly void as to subsequent *bona fide* purchasers, without notice of the existence of such deed.

3d. That if the deed from Jesse Spencer to William Steele was altered in a material point after it was sealed, attested and acknowledged, such alteration absolutely avoids the deed; and it can convey no title to the lessor of the plaintiff; which instructions the court gave, and the plaintiff excepted.

The counsel for the plaintiff relies on the following points for a reversal of the judgment:

1. The court below erred in charging the jury that the registry act of Ohio applies as well to the title of the defendants, under the decree set forth in the bill of exceptions, as if they held under a *bona fide* deed of the same date.

2. That the court below erred in charging the jury that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested and acknowledged, such alteration absolutely avoids the deed, and it can pass no title to the lessor of the plaintiff.

The propriety of the first instruction given by the court to the jury admits not of a doubt. The statute of Ohio, entitled "An act directing the mode of proceeding in chancery," declares "that where a decree shall be made for a conveyance, release or acquittance, &c., and the party against whom the decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such decree." (Land Laws for Ohio, p. 296.)

The registry act of Ohio directs that all deeds made within the State shall be recorded "within six months from the actual time of signing or executing of such deeds;" and declares that if any such deed shall not be recorded in the county where the land lies within the time allowed by the act, "the same shall be deemed fraudulent against any subsequent *bona fide* purchaser, for valuable consideration, without notice of such deed."

In the construction of registry acts, the term "purchaser" is usually taken in its technical.

legal sense. It means a complete purchaser, or, in other words, a purchaser clothed with the legal title. The meaning of the statute is, that an unrecorded deed shall, after the expiration of the time limited by the statute, be deemed fraudulent and void, as against all subsequent purchasers who may have obtained the legal title, for valuable consideration, without notice. The case of the defendants *is then within the terms of the registry [***560** act. They obtained their decree, and paid the purchase money directed by the decree, without notice; and the decree had obtained, by operation of the statute, all the attributes of a perfect legal title.

The argument for the plaintiff on this branch of the case was founded on a supposition that, to bring the defendants' case within the terms of the registry act, it must be shown that their title has been recorded, as a deed, and their title being not a deed, but a decree, it is insisted they are not within the terms of the statute. This is a mistake. The plaintiff's deed not being recorded, the statute avoids it in terms, as against all subsequent purchasers for valuable consideration, without notice, whether their titles be recorded or not. If the defendants had held under a conveyance executed by Jesse Spencer, in obedience to the decree, their title deed, although not recorded, would, by the terms of the statute, prevail against the plaintiff's prior unrecorded deed. A deed not being recorded, avoids it as against subsequent, but not as against prior purchasers. By the laws of the State of Ohio, the decree obtained by the defendants clothes them with the legal title in as ample a manner as a deed. They are purchasers for valuable consideration, without notice; and are therefore not only within the words but also within the spirit and intention of the statute.

This reasoning has been indulged upon a supposition that the title of the defendants has not been sufficiently recorded, which is not admitted. The decree, which is their title, is of record in the chancery suit in the proper county where the land lies, and it was recorded in the office of the recorder of deeds. Whether this last mode of recording the decree is usually practiced in Ohio or not, we are not informed. But we suppose the defendants had done all they could do to commit their title to record in the proper county.

The third instruction given by the court to the jury, which forms the second ground relied on by the plaintiff's counsel for a reversal of the judgment, cannot be sustained. Although the proposition may be true that a material erasure or alteration in a deed, after its execution, may avoid the deed, yet the instruction ought not to have been given in the terms used by the court. Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether the erasures and alterations were material or not, was a question of law which ought to have been decided by the court. The instruction given refers the question of materiality to the jury, as well as the fact of alteration and erasure.

*If the name of William Steele was inserted in the deed as grantee after its full execution and attestation, instead of the name of some

other grantee which was stricken out, no doubt the alteration was very material, and nothing could in that case pass by the deed to William Steele. The two other alterations, supposed, in the words "Ross" and "Ohio," in the description of the grantee's residence, may have been either material or immaterial, as, upon a sound construction of the whole instrument they would or would not alter or change its operation and effect.

The court ought to have decided the question of materiality in each instance, leaving the fact of alteration to the jury for their decision. The instruction given, was calculated to mislead the jury by impressing on them the belief that they were warranted in finding either of the supposed alterations to be material, however it may have been in point of law. The construction of deeds belongs to the province of the court; the materiality of an alteration in a deed, is a question of construction; and in this case the court committed an error by giving an instruction to the jury which imposed on them a difficult question of construction, upon which the jury ought to have been enlightened by the decision of the court.

The judgment of the Circuit Court must be reversed, and the cause remanded, with instructions to award a venire facias de novo.

562*J *WILLIAM S. NICHOLLS ET AL.,
Appellants,

v.

THOMAS HODGES, Executor of THOMAS C. HODGES, Deceased.

Orphans' Court of Maryland—appeal to Supreme Court—practice—executors and administrators.

The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is not to be under five per cent., nor exceeding ten per cent. on the amount of the inventory. [565]

If the executor has a claim on the estate of the deceased, it shall stand on an equal footing with other claims of the same nature. [565]

On a plenary proceeding, if either party shall require it, the court will direct an issue or issues to be made up, and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery, or to a court of law; and in Maryland, the decision of the court to which the appeal is made is final. [565]

The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court, through the Circuit Court for the county of Washington, by virtue of the Act of Congress of February 13, 1801; and by the Act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of \$1,000 in order to entitle the party to an appeal. [565]

The commission to be allowed to the executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances, and it was obviously the intention of the Legislature, that the decision of the Orphans' Court should be final and conclusive. [565]

The court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim. [566]

Peters 1.

A PPEAL from the Circuit Court of Washington county in the District of Columbia.

The defendant obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed his accounts in the Orphans' Court of Washington county, in which he was allowed 10 per cent. commission on the inventory of the deceased's estate, amounting to \$2,358.70, and \$1,200 for services rendered by him to the deceased.

The testamentary law of Maryland, under which this commission was allowed, is in these words:

"His commission, which shall be at the discretion of the court, not under five per cent. nor exceeding ten per cent. on the amount of the inventory." (Act of Maryland, ch. 101, sub. ch. 10, sec. 2.)

*The appellants, creditors of the deceased's estate, filed their petition in the Orphans' Court objecting to the allowance of these claims; and upon the answer of the appellee and the testimony taken in the cause, the judge of the Orphans' Court decided in favor of the appellee, and allowed these claims. From this decision an appeal was prayed to the Circuit Court for Washington county, where the judgment of the Orphans' Court was affirmed.

From this decision this appeal was made.

The deposition of William W. Corcoran, Philip T. Berry, John S. Harc, James A. Magruder and Isaac S. Nicholls were taken, and were sent up with this record. These depositions were intended to prove, that the board and expenses of Thomas C. Hodges were paid by the deceased, by whom he was employed in his store as an assistant. That when the executor was spoken to about the account he had raised against the estate of the testator, he stated, he was sorry he had brought forward the account, and that he should not have done so but by the advice of another. That he had said, that his uncle, the testator, did not agree to give him wages, but a share of the property was promised, but no agreement was made.

The depositions also stated, that some six months before the death of the testator, the defendant applied for wages, which were refused, and he was told to take money from the drawer, and goods from the store, and if not satisfied he might return to his father. That it was understood the appellee was in the store of the testator as a clerk. The testator observed at the time of making his will, that he had given the defendant, his nephew, a legacy, as a consideration for his services; he had always intended to give him something; he gave him the legacy for his services because he had not been paid for them. It was also testified that the executor had a good deal of trouble in settling the estate.

The counsel for the appellants endeavored to maintain,

1. That the claims of the executor had been improperly allowed by the court below.

2. That the evidence shows the commission allowed is unjust and unreasonable.

3. The appellee had no legal claim for services rendered to the deceased.

Mr. Key, for the appellant.

The evidence does not establish any claim to the compensation claimed by the appellee. On the contrary, he himself acknowledged he had

no claim. But if any debt was due to him, the amount thereof could not be ascertained by the course adopted in this case. It must become the subject of proof like all other demands on the estate.

564*] *It is contended that no appeal is allowed in this case, because the provisions of the law of Maryland leave to "the discretion" of the court, the determination of the amount of commissions. What is the meaning of the assertion that no appeal can be maintained in such a case? It is only when the exercise of discretion by the court is matter of favor or indulgence, that the rule applies; but when there are legal rights, the discretion of the court applies to those rights, and its exercise is a matter of law, and like all others, when exercised is examinable.

Mr. Coxe, for the appellee.

This is an application to have an examination of an account which has been passed upon by the Orphans' Court. It is denied that a matter to be determined by the discretion of the court can be the subject of appeal. The party must point out an error in law, and if the allowance by the court is not beyond the percentage authorized by the statute, there cannot be such error.

These accounts having been passed by the Orphans' Court, before whom were all the facts, the only remedy which remains is upon the bond given by the executor; and in such an action all the matters are open for examination.

Mr. Justice DUVALL delivered the opinion of the court:

The appellee in this case obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed accounts in the Orphans' Court for Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to \$2,358.70, and \$1,200 for services rendered to the deceased in his life-time. The appellants, creditors of the deceased, finding that the estate would probably be insufficient to pay the full amount of their claims, filed their petition in the Orphans' Court, objecting to the allowance of the claims of the executor, alleging that the property of the deceased consisted only of a store of goods in Georgetown, and a few debts due to him; and that the settlement of the estate was made without much labor or expense. Upon the answer of the executor, and the testimony taken in the cause, the judge of the Orphans' Court decided in favor of the executor, and decreed that both claims be allowed. From this decree an appeal was prayed and granted to the Circuit Court for Washington county, in which the judgment of the Orphans' Court was affirmed. From this decision the cause is brought up, by appeal, to this court for final hearing and decree.

Several questions have been raised in arguing this cause. On the part of the appellants, it is **565*]** contended, first, that the allowance of ten per cent. on the inventory, circumstanced as this case appears to be, is unjust and unreasonable; second, that there is no foundation for the claim of \$1,200, made by the executor for services rendered the testator in his life-time.

The counsel for the appellee contends, first, that the whole allowance made by the Orphans' Court was no more than a moderate compensation for the attention and prompt settlement of the accounts of the deceased by the executor, and for his services for several years as a clerk in the store of the deceased; and second, that the decision of the Orphans' Court was final and conclusive, and from which there ought to have been no appeal.

The power and authority of the Orphans' Court is derived from the testamentary laws of Maryland. The last general act upon the subject is that passed in the year 1798, ch. 101. The Orphans' Court has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. On a plenary proceeding, if either party shall require, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery, or to a Court of Law. And in Maryland, the decision of the court to which the appeal is made is final and conclusive. But in the case under consideration, this court has jurisdiction by virtue of the act of Congress of February, 1801, by which the Circuit Court for the District of Columbia was created, which provides that "any final judgment, order or decree, in the said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of \$100, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal." By an act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of \$1,000 in order to entitle the party to an appeal.

With respect to the commission to be allowed to the executor or administrator, it is submitted by law to the discretion of the court, not less than five, nor more than ten per cent. They may allow the lowest or highest rate, or any intermediate proportion between the minimum and maximum, to which, in their discretion, they may adjudge the party to be entitled *upon a consideration of all circumstances, according to the services rendered, and the trouble and expense in completing the administration. Upon a just construction of this act, it was obviously the intention of the Legislature that the decision of the Orphans' Court should be final and conclusive, and such is the opinion of this court.

The claim of \$1,200, for services rendered in the life-time of the testator, rests upon different ground. The law places it "on an equal footing with other claims of the same nature." The legality and equity of the claim must be examined in the same manner as the claim of any other creditor. Of course, it is a claim, on the trial of which either party might have required a trial by jury in the manner prescribed by law. But this was not asked, and the claim

was submitted in gross to the decision of the Orphans' Court, and was decided on in like manner by the Circuit Court; and it is now brought in the same shape before this court.

To support a claim of this nature, it is incumbent on the party making it to prove some contract, promise, or agreement, expressed or implied, in relation to it. The testimony contained in the record may be summed up in a few words. It is admitted by the appellee that there was no agreement to pay him wages. It is in proof that he lived with his uncle three or four years in the capacity of a clerk, and that for more than half the time he was the only clerk in the store, his uncle having great confidence in him. That it was distinctly understood between them, that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally; that it was customary among merchants to take young men, of a certain age, for their board and clothes; that the uncle had said that at a future day he intended to take him into partnership with him; and it was proved that the testator, at the time of making his will, observed that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his expenses. On this testimony the claim rests. The evidence is too defective to require comment. It is the opinion of this court that it is too loose and indeterminate to sanction the claim, and it cannot be allowed.

The decree of the Circuit Court, affirming the decree of the Orphans' Court, as to this claim, is reversed; in all other respects it is affirmed.

See S. C., 2 Cranch, C. C., 582.

Cited—8 How., 412; 5 Cranch, C. C., 314.

567*] *THE BANK OF COLUMBIA

v.

GEORGE SWEENEY.

Mandamus.

The court refused to issue a *mandamus* to the Circuit Court of the county of Washington, commanding that court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an act of the Legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia.

MESSRS. JONES and KEY moved the court for a *mandamus* to be directed to the Circuit Court of the United States, for the county of Washington, in the District of Columbia, commanding them to have a certain issue joined, which issue had been tendered in a proceeding in that court against George Sweeney, and in which the Bank of Columbia were plaintiffs. George Sweeney being indebted to the Bank of Columbia, upon a promissory note, the president of the bank, in conformity with the provisions of

the statute of Maryland incorporating the bank, passed in 1793 (Acts of 1793, Vol. XX.), instituted proceedings in the Circuit Court, under which, by virtue of a *capias ad respondendum*, he was arrested by the marshal; and he applied to the court to be allowed, under the authority of the 14th section of the act incorporating the bank, to "dispute" the debt claimed by the bank.

The court thereupon ordered an issue to be joined, and the attorney of the bank being directed to draw a declaration, offered one tendering an issue upon the allegation that the debt mentioned in the execution was due. To this issue the attorney for the defendant objected, and he claimed the right to put in issue the plea of the statute of limitations. The Circuit Court held that the defendant was entitled to avail himself of the statute, and that the attorney of the bank should file a declaration, in the common form on the promissory note mentioned in the execution, to which the defendant might plead the statute of limitations, as running from the time of payment mentioned in the note; and that the bank should reply, so as to make up the issue under the statute of limitations. The court refused to make up the issue offered by the bank, or to make up the issue in any other way than as stated.

The plaintiffs claimed, and by this motion sought to maintain their claim, to have an issue joined as offered by the bank, upon the debts being due; as provided in the statute.

The following are the provisions of the 14th section of the charter, upon which the proceedings were had, and by which the plaintiffs insisted they had a right to [*568 the proceedings they had adopted:

"And, whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them. Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same becomes due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the General Court, or of the county in which the said delinquent or delinquents may reside, or did at the time he or they contracted the debt reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a *capias ad satisfaciendum, fieri facias*, or attachment, by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the General Court, and the clerks of the several County Courts, are hereby respectively required to issue such execution or

NOTE.—As to *Mandamus*, see note to M'Cluny v. Silliman, 2 Wheatt., 369.

executions, which shall be made returnable to the court whose clerk shall issue the same, which shall first set after the issuing thereof, and shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issue on judgment regularly obtained, in the ordinary course of proceeding in the said court; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor; provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this State to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner."

569*] *The case was argued by *Mr. Jones* and *Mr. Key* for the plaintiffs at great length, upon the meaning and objects of the section, and that it authorized the demand made by the bank to exclude the plea of the statute of limitations; and *contra* by *Mr. Swann* and the *Attorney-General* for the defendant. The court, in their decision, did not take notice of the arguments of counsel, as they considered the case not such as entitled it to the summary proceeding demanded.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This case arose under the provision of the act of the Legislature of Maryland incorporating the Bank of Columbia, which authorizes summary process for the collection of debts due to the bank. That act allows an execution against the person of the debtor, to issue in the first instance, upon the application of the president of the bank; but it also authorizes the court, if upon the return of the execution the defendant "dispute the debt," to order an issue to be made up, &c., to try the action.

In the present case, the Circuit Court did not refuse to direct such an issue to be made up; which had they refused to do, a *mandamus* would have been the proper process to compel that to be done, which the act requires. But the Circuit Court did direct an issue, and allow a plea of the statute of limitations.

The application now is, that the Circuit Court be ordered to withdraw that issue, and to direct a different issue to be made up, according to what the counsel for the bank supposes to be the proper construction of the act.

We think this is not a proper case for a *mandamus*. It does not differ in principle from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case there is no doubt that the revising power of this court could be exercised only by a writ of error.

If this motion could now prevail, it would be a plain evasion of the provision of the act of

Congress, that final judgments only should be brought before this court for re-examination. This case might still be brought before this court by a writ of error, notwithstanding any opinion expressed upon the *mandamus*, and the same question again be discussed upon the final judgment. The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times before there would be a final judgment.

The court is therefore of opinion that this is not a case for a mandamus, and the motion is denied.

*STEPHEN WARING, *Plaintiff in Error*,

v.

JAMES JACKSON, *ex dem.* MEDCEF EDEN *ET AL.*, *Defendants in Error.*

The Same v. The Same.

Will—real property—laws of New York.

The testator devised to his son Joseph Eden certain portions of his estate in New York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators forever. In like manner he devised to his son, Medcef, his heirs, and assigns, certain other portions of his property; and adds the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, I give all the property aforesaid to my brother John Eden, of Lofters, in Cleveland, in York-shire, and my sister Hannah Johnson, of Whitby, in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden, on the death of his brother, Joseph Eden, became seized of an estate in fee-simple absolute. [571]

Adverse possession taken and held under a sheriff's sale by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the Courts of New York, prevent the operation of a devise by another, in whom the title to the estate was vested by the death of the defendant in the executions. [571]

It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the State tribunals in like cases. [571]

MR. JUSTICE JOHNSON delivered the opinion of the court:

These cases come up from the Circuit Court of the United States for the Southern District of New York, upon writs of error. The question in the court below, turned upon the construction of the will of Medcef Eden, the elder, bearing date the 29th August, 1798, by which the testator devised to his son Joseph certain portions of his estate, among which were the premises in question in this cause.

NOTE.—That the law of real estate, and title of land by devise, as settled or governed by the decisions, or statutes, of the state where the land is situated, is obligatory upon the Courts of the United States. See note to *Clark v. Graham*, 6 Wheat., 577; and note to *Elmendorf v. Taylor*, 10 Wheat., 152; and note to *Darby v. Mayer*, 10 Wheat., 465; and note to *Jackson v. Chew*, 12 Wheat., 153; *McCormick v. Sullivan*, 10 Wheat., 192; *D'Wolf v. Rabaud*, *ante*, 476; *Davis v. Mason*, *ante*, 503.

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"To him, his heirs, executors, and administrators forever." In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property, and adds the following clause: "Item. It is my will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire; and my sister Hannah Johnson, of Whitby, in Yorshire, and their heirs."

571*] *The case of *Jackson v. Chew* (12 Wheat., 153), decided at the last term, brought under the consideration of this court the construction of this same clause in the will, and the records in the present cases have been submitted to the court without argument, to see whether the decision in that case will govern the cases now before us. The facts disclosed in the case of *Jackson v. Chew*, did not require of the court to decide any other question, than whether Joseph Eden took under the will an estate tail, which by operation of the statute of New York, abolishing entails, would be converted into a fee-simple absolute. The court decided that he did not take an estate tail, but an estate in fee, defeasible in the event of his dying without issue in the life-time of his brother (which event happened), and thereupon his interest in the land became extinct, and the limitation over to his brother Medcef was good as an executory devise.

In the cases now before the court, it appears that Medcef Eden has died without issue, having by his last will and testament devised his estate to his widow, and certain other devisees therein named; which has given rise to two other questions, viz., whether John Eden and the heirs of Hannah Johnson (she being dead) took any estate in the premises, under this clause in the will, on the death of Medcef Eden without issue.

And whether the possession taken and held under the sheriff's sale, by virtue of the judgments and executions against Joseph Eden, was such an adverse holding as to prevent the operation of the will of Medcef Eden, the younger.

In deciding the case of *Jackson v. Chew*, we did not enter into an examination of the construction of this clause in the will, considered as an open question, but adopted the construction, which appears to be well settled in the two highest courts of law in the State of New York, not only upon this very clause, but in numerous other analogous cases; and has thereby become a fixed rule of landed property in that State.

And this was in conformity with what has been the uniform course of this court, with respect to the titles to real property, to apply the same rule that we find applied by the State tribunals in like cases.

The additional questions presented in the cases now before us, have likewise undergone a very full examination in that State, and been decided both by the Supreme Court, and the Court for the Correction of Errors. In the case of *Wilkes v. Lion* (2 Cowan, 333), the decision turned upon these very points, and Peters 1.

the Court of Errors affirming the decision of the Supreme Court, held, with only one dissenting voice, that nothing passed under the ulterior devise over to John Eden and Hannah Johnson, but that Medcef Eden had become seized of an estate in fee-simple *abso- [*572 lute. No opinion appears to have been directly expressed by the court, with respect to the effects of the adverse possession upon the operation of the devise in the will of Medcef Eden, the younger.

But this was a question necessarily involved in the result. And the decisions of the courts in that State are very satisfactory to show that such an adverse possession will not there prevent the operation of a devise.

The doctrine in the case of *Doe v. Thompson* (5 Cowan, 374) warrants this conclusion. And it is understood that this precise question, arising on the construction of the statute of wills in that State, has recently been decided in the Supreme Court, in a case, the report of which is not to be found here.

We are accordingly of opinion that the judgments of the Circuit Court in these cases must be affirmed.

Cited.—3 Pet., 175; 2 Curt., 186.

*THE UNITED STATES, *Plaintiffs* [*573
in Error,
v.

NICHOLAS STANSBURY AND EDWARD
MORGAN.

Surcties—release—discharge of debtor.

The discharge, by the Secretary of the Treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for the amount due upon the judgment, and unpaid. [575]

At common law, the release of a debtor whose person is in execution, is a release of the judgment itself. The law will not permit proceedings by a creditor at the same time against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. [575]

ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of debt, brought in the Circuit Court of the United States for the District of Maryland at May term, 1825, to recover \$3,067, being the debt, damages, costs, and charges, contained in a certain judgment between the same parties, recovered by the United States in the District Court of Maryland, at March term, 1819. The original judgment was rendered upon a joint and several bond of these defendants, given for duties on an importation by Sheppard, and was rendered for \$3,050 debt, and seventeen dollars damages, costs, and charges. The declaration in this case was in the usual form, containing averments that the said judgment still remains in full force and effect, not in anywise annulled, reversed or vacated; that the said United States have not obtained any satisfaction of or upon the said judgment, and that the said de-

defendants have not yet paid the sum of \$3,067, or any part thereof; but to pay the same or any part thereof, they have and each of them hath hitherto wholly refused, &c.

The writ in this case was served upon Stansbury and Morgan only, and not upon Sheppard. The two former appeared, and pleaded in bar of this action that they were sureties for Sheppard in the bond upon which the said judgment was recovered. That after the said judgment was recovered, and before this suit was commenced, Sheppard was taken and imprisoned by virtue of a *capias ad satisfaciendum*, issued upon said judgment, and discharged from prison by order of the Secretary of the Treasury, under the act of Congress, passed on the 6th June, 1798, on condition that he should pay the costs, and assign and convey, to the use of the United States, all his property, real, personal and mixed, by an instrument approved by the 574*] then District-Attorney of the United States for that district; which order of the secretary is set forth literally in the plea. The plea then avers that the said Sheppard did assign and convey all his estate, &c., by an instrument approved by the district-attorney, and did pay the costs according to the conditions imposed by the secretary, and was thereupon voluntarily released and discharged from the said execution, by the said secretary; without the consent and against the will of them, the said Stansbury and Morgan. Therefore they pray judgment, &c. To this plea there was a general demurrer and joinder, and judgment was rendered for the defendants, *pro forma*, in the Circuit Court, upon which judgment the United States have brought a writ of error to this court.

For the United States it was contended that the judgment ought to be reversed, and judgment rendered for the United States.

The defendants in error claimed—

1. That the discharge of Sheppard from the execution of the plaintiff operated as a * release to all the defendants.

2. That the defendants, as sureties, were exonerated by the compromise made with the principal without their concurrence.

3. That, at all events, the plaintiff cannot have judgment upon the pleadings in this cause, as the demand embraces the whole amount of the judgment in the District Court.

The case was argued by Mr. Wirt, Attorney-General for the United States, no counsel attending on the part of the defendants in error.

The following cases were cited by Mr. Wirt in the course of his argument: *Dean v. Newhall*, 8 T. R., 168; *Rowley v. Stoddard*, 7 John. 206; 5 Co. Rep., 86, b.; *Foster v. Jackson*, *Ibid.*, 52; *Vejus v. Aldwick*, 4 Burr., 2482; *Jacques v. Withy*, 1 T. R., 557; *Tanner v. Hague*, 7 T. R., 420; *Blackburn v. Stupert*, 2 East, 243; *Clark v. Clement*, 6 T. R., 526; *M'Lean v. Whiting*, 8 John. Rep., 339; *Hayling v. Mulhall*, 2 Bl Rep., 1235; 2 Shower, 394; 2 Ld. Ray., 1072; 5 East, 147; *Hurst v. The United States*, 1 Gal., 32; 1 Saund., 330; 1 Chitty, 107, 108.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

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This was an action of debt on a judgment which had been rendered in favor of the United States, against Thomas Sheppard and the two defendants in error. The marshal returned, as to Sheppard, *non est inventus*. The other two defendants pleaded that they were sureties to Sheppard in the bond on which the former judgment was rendered; that the United States took out a *ca.* [*575 *sa.* on that judgment against Sheppard, by virtue of which he was imprisoned; whereupon William H. Crawford, the Secretary of the Treasury of the United States, released the said Sheppard from execution on his paying costs, and conveying all his property, real, personal and mixed, to the United States; with which condition, it is admitted, Sheppard complied. The United States demurred, and the Circuit Court gave judgment on the demurrer, *pro forma*, for the defendants; which judgment is now before this court on a writ of error.

It is not denied that at common law the release of a debtor, whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor.

This being the positive operation of the common law, it may unquestionably be changed by statute.

The United States contend that it is changed by the act providing for the relief of persons imprisoned for debts due to the United States. That act authorizes the Secretary of the Treasury, on receiving a conveyance of the estate of a debtor confined in jail at the suit of the United States, or any collateral security to the use of the United States, to discharge such debtor from his imprisonment under such execution; and he shall not be again imprisoned for the said debt; “but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor.”

The sole duty of the court is to construe this statute according to its words and the intent of the Legislature. Did Congress design to discharge the sureties or to release the judgment?

The act is “for the relief of persons imprisoned for debts due to the United States,” not for the relief of their sureties, and does not contain a single expression conducing to the opinion that the mind of the Legislature was directed towards the sureties, or contemplated their discharge. The only motive for the act being to relieve debtors who surrender all their property from the then useless punishment of imprisonment, there can be no motive for converting this act of mere humanity into the discharge of other debtors, whose condition it does not in any measure deteriorate. If the act produces this effect, it is [*576 an effect contrary to its intention, occasioned by a technical rule, originating in remote ages,

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which has never been applied to a statutory discharge of the person.

But the language of the statute has guarded against this result. It has expressly declared that the judgment shall remain good and sufficient in law. How can this court say that it is not good, and is not sufficient? If it be good and sufficient, for what purpose is it so? Certainly for the purposes for which it was rendered—to enable the United States to proceed regularly upon it, as upon other judgments, with the single exception made by the act itself. The voluntary discharge of a debtor by his creditor is a release of the judgment, because such is the law. But in this case the Legislature has altered the law. It has declared that the discharge of a debtor in the forms prescribed shall amount solely to a liberation of the person, not to a release of the judgment. That shall remain good and sufficient. Were courts to say that, notwithstanding this provision, the judgment is released, it would amount to a declaration that a technical rule in the common law, founded in a presumption growing out of the simplicity of ancient times, and not always consistent with the fact, is paramount to the legislative power. It would, in fact, be to repeal the statute. It would unquestionably be to defeat the object of the Legislature, since it would be no very hardy assertion to say that, if the discharge of the person in custody discharged the other obligors, the imprisoned debtor would never be released while the debt remained unpaid, unless the insolvency extended to all the obligors.

The second point made by the counsel for the defendants, that the sureties are exonerated by the compromise made with the principal without their concurrence, is the same in principle with that which has been considered. No compromise of the debt has been made. The course prescribed by the law has been pursued. The whole property of the imprisoned debtor has been surrendered, and on receiving it, his person has been discharged. The act of Congress declares, that the judgment shall still remain in force. If the creditor had entered into a compromise not prescribed by law, or had given any discharge not directed by statute, the question might have been open for argument. But, while the whole transaction is within the precise limits marked out by law, it cannot produce a result directly opposite to that intended by the statute. The only doubt which can be suggested respecting the intent of the Legislature, is created by the last words of the sentence, declaring, that the judgment shall remain good and sufficient in law. They are, “and may be satisfied out of any estate which may then, or at any time afterwards belong to the debtor.” These **577*** words are certainly *useless, and may be supposed to indicate an idea that it could be satisfied out of the estate of the debtor only. That as they are not required to render that estate liable, they may be understood to limit the right of the creditor to obtain satisfaction from the estate of any other person. We do not, however, think this the correct construction. The words are considered as mere surplusage, not as limiting the rights of the United States to proceed against all those who are bound by the judgment.

We think, then, that the Circuit Court ought Peters 1.

to have sustained the demurrer; and that the judgment which overrules it ought to be reversed. But considering the plea, and the manner in which the cause has been brought up, the court will not direct an absolute judgment to be entered for the United States; but will reverse the judgment and remand the same for further proceedings, that the Circuit Court may give leave to the defendants to plead.

This cause came on, &c. On consideration whereof, it is adjudged and ordered, that the judgment of said Circuit Court in this cause be, and the same is hereby reversed and annulled, and that the cause be remanded, that the said Circuit Court may give leave to the defendants to plead.

Cited—5 Pet., 186; 15 How., 301; 5 Mason, 65; 5 Cranch, C. C., 678.

***THE BANK OF COLUMBIA, USE [*578
OF THE BANK OF THE UNITED STATES**

v.

JOHN LAWRENCE.

Promissory note—notice of non-payment—diligence.

A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the county of Alexandria within the District of Columbia, and having, what was alleged to be, a place of business in the city of Washington; and the notice of the non-payment of the note, inclosed in a letter and superscribed with his name, was put into the postoffice at Georgetown, addressed to him at that place. Held, that this notice was sufficient. [582]

In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it, but this case is not one which required such a duty. [582]

If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows that service at his place of residence in another place would not be equally good. Parties may be, and frequently are, so situated that notice may well be given at either of several places. [582]

That is not properly a place of business in the commercial understanding of the terms, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business. [582]

The general rule is that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. [582]

It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. [583]

The rules relative to diligence ought to be reasonable and founded in general convenience, and with a view to elog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. [583]

When a person has a dwelling-house, and a counting-room in the same city or town, a notice sent to

NOTE.—As to notice of dishonor, and how served on indorser, see note to Fenwick v. Sears, 1 Cranch, 259; and note to Bussard v. Levering, 6 Wheat., 102. As to waiver of notice, see note to Thornton v. Wynn, 12 Wheat., 183.

either place is sufficient; if parties live in different post towns, notice through the postoffice is sufficient. Notice, to a party living at another place than the holder, sent by mail to the nearest postoffice, is good under common circumstances, and in such cases where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. [583]

Some countenance has lately been given in England to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He may employ a special messenger if he pleases, but it has not been decided that he must. To compel the holder to the expense of a special messenger would be unreasonable. [584]

579*] **E**RROR to the Circuit Court of the United States for the county of Washington.

The plaintiffs in error instituted a suit on a promissory note against the defendant in error, who was the indorser thereon, and which was discounted at the Bank of Columbia, and protested for non-payment. The note was dated at Georgetown, where the banking house of the plaintiff at that time was located, and was payable at the Bank of Columbia. The evidence on the part of the plaintiffs established all the facts relative to the note, which were proper to be proved, except the notice of non-payment to the defendant, the indorser; and the bill of exceptions tendered by the plaintiffs, presented the evidence at length, upon which the question arose, whether due notice of the dishonor of the note had been given, and due diligence had been used by the plaintiffs to convey such notice to the defendants.

The opinion of the court as delivered by *Mr. Justice THOMPSON*, contains a full exhibition of all the evidence, from which the conclusions of the court were drawn.

The case was argued by *Mr. Key* and *Mr. Dunlop* for the plaintiffs, and by *Mr. Jones* and *Mr. Taylor* for the defendant.

For the plaintiffs it was urged, that the distance of the actual residence of the defendant from Georgetown created a difficulty in giving him a personal notice; and it is not incumbent on the holder of a note to follow the indorser, or to resort to other than the ordinary modes of conveyance; the postoffice has always been deemed this mode, and it was the usage of this bank, as well as of all other banks in the District of Columbia, to proceed in this manner. It was claimed that the defendant knew of this usage. This usage, therefore, became a part of the contract; and that an agreement to comply with the usage is binding, has been decided at the present session of this court, in *Brent's Executors v. The Bank of the Metropolis* (ante, p. 89); *Renner v. The Bank of Columbia* (9 Wheat., 590); *Mills v. The Bank of the United States*, (11 Wheat., 431). These cases show that a departure from the general law relative to a demand of payment, when according to established custom, was sustained.

The evidence showing that the defendant transacted business at his former residence in Washington, does not establish that as his established place of business, and if it did, the bank was not obliged to give a notice there, as it was not in the place where the note was dated, and where the note was payable. Objections of

equal, perhaps of greater validity, would have been made had any other mode been employed; and therefore the notice through the postoffice, which gave the opportunity to find it where the defendant was accustomed to receive his letters, was the most proper. The reasonableness of notice is a question to be decided by the court—the time of giving notice and the place where, are questions of law. (*Tindall v. Brown*, 1 T. R., 167; *Chitty on Bills*, 292.) Where the holder and indorser reside in the same town, the rule is, that the notice must be personal, or left at the indorser's residence, or place of business. When the indorser's residence or place of business is in a different town, the holder is not bound to follow him there, but may give notice through the postoffice. (*Chitty on Bills*, 288; *Ireland v. Kipp*, 10 John. Rep., 490; *Same v. Same*, 11 John., 231.)

What constitutes a place of business is a question of law, although the facts in reference thereto may be for the decision of the jury, and in this case, the court below had the right to say, and should have said, the evidence was not sufficient, supposing it uncontradicted, to make the house of the former residence of the defendant his place of business. (Cited, *Chitty on Bills*, 285, 286; *Bank of Utica v. Smith*, 18 John., 230; 16 John. Rep., 218, *Reed v. Payne*.)

Mr. Jones and *Mr. Taylor*, for the defendant.

The claim to maintain the rights of the plaintiffs, by showing a usage relative to notice of the dishonor of notes or bills may, if it shall be admitted, establish a principle of great danger in reference to the subject-matter. The usage will operate in favor of an indorser, who by residence or other circumstances, may be supposed to be acquainted with it, and another, a distant indorser, will not be within its influence. A waiver of the regular mode of giving notice of the dishonor of a bill cannot be implied, it must be proved to have been expressly declared. (*Chitty*, 308.)

2. The notice should have been sent to the place of the defendant's business, and this was in Washington; and the holder of a bill, must adopt the usual means to convey or give the notice. (11 John., 490.) The nearest postoffice may not always be the proper postoffice; as cases may exist in which, for convenience, a party is in the practice of going to and using a more distant postoffice. (10 John., 411.) Nor is a postoffice the proper place to leave a notice not intended to be conveyed from it, as postoffices are places from which letters are to be forwarded, and it is not their duty to receive, or are they responsible for letters which are to be left in them.

The expense of sending a special messenger is to be paid by the party to whom he is sent, and as the defendant was not a resident of Georgetown, such a messenger should have been employed to give the notice. (*Chitty on Bills*, 276, 278.)

Mr. Justice THOMPSON delivered the opinion of the court:

This case comes before the court upon a writ of error to the Circuit Court of the District of Columbia.

*The defendant was sued as indorser [*581] of a promissory note for \$5,000, made by Joseph Mulligan, bearing date the 15th of July, 1819, Peters 1.

and payable sixty days after date, at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was given to the indorser, no objection being made to the sufficiency of the notice in point of time.

The material facts before the court upon this part of the case, as shown by the bill of exceptions, were, that the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due the defendant had lived in the city of Washington, and carried on the business of a morocco leather dresser, keeping a shop and living in a house of his own, in the said city. That about the year 1818, he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm, in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office was the nearest postoffice to his place of residence, and the one at which he usually received his letters.

The notice of non-payment was put into the postoffice, at Georgetown, addressed to the defendant at that place. It was proved, on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in question fell due, he continued to be the owner of the house in Washington where he formerly lived, and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came frequently and regularly every week; and as often as two or three times a week, to this house; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself, was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington, less than a quarter of a mile from Georgetown.

There was also some evidence given, on the part of the plaintiffs, tending to show that the usage of the bank in serving notices in similar cases was conformably to the one here pursued, and that the defendant was apprized of such **582*** usage. But *that* testimony may be hid out of view, as this court does not found its opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the postoffice in Georgetown; which instructions the court refused to give, but instructed the jury that their verdict must be governed accord-
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ing to their opinion and finding on the subject of usage which had been given in evidence.

The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant, when he indorsed the note, lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown postoffice addressed to the defendant at that place, by which it is understood that the notice was either inclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence, in a different place, would not be equally good. Parties may be, and frequently are, so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case the inquiry is narrowed down to the single point, whether notice through the postoffice at Georgetown was good; the defendant residing in the country two or three miles distant from that place, in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the **usual and ordinary mode* [***583** of conveyance, and whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed on uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject, have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling and place

of business be within the district of a letter-carrier, a letter containing such notice addressed to the party, and left at the postoffice, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So, when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason that the mail being a usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the postoffice nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the postoffice within which the party must reside, in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule that the notice must be sent to the postoffice nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant postoffice, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it **584*** is distance alone or the usual *course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the postoffice in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And, as the letter was there to be delivered to the defendant, and not to be forwarded to any other postoffice, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the court which have suggested any limits to the distance from the postoffice within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred where the distance was much greater than in the one now before the court, and the notice held sufficient. (16 John., 218.) In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such

cases can arise, but they will seldom, if ever, occur, and at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of *Pearson v. Crallan* (2 Smith's Rep., 404; Chitty, 222, note), is one of this description. But in that case the court did not say that it was necessary to send a special messenger, and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger, if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper, on the party bound to pay, is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury.

Judgment reversed, and a venire facias de novo awarded.

Rev'g, 2 Cranch, C. C., 510.

Cited—2 Pet., 551; 9 Pet., 46; 10 Pet., 581; 2 How., 481; 4 How., 219, 220, 279, 286, 345, 348; 18 How., 519.

*JOHN ARCHER AND JOHN W. **[*585]**
STUMP, Executors of JOHN STUMP, *Complainants and Appellants,*
v.

MARY DENEALE, Widow and Executrix
of GEORGE DENEALE, deceased, CHARLES
T. STUART AND ANN LUCRETIA, HIS
WIFE, MARY CATHARINE AND NANCY
P. DENEALE, Children and Representa-
tives of the said GEORGE DENEALE, *Defendants and Appellees.*

Wills—construction of word “estate”—laws of Virginia.

The testator, residing and owning real and personal estate in the County of Alexandria, District of Columbia, by his will gave “all his estate, real and personal, to his wife during her life, for the use and purpose of raising and educating his children,” each child at the age of twenty-one to be entitled to an equal portion of his estate, real and personal; subject each to a deduction of one-third for the maintenance of his wife. He recommends his wife to sell the negroes for a term of years, and directs “an appraisement” only of “his estate” shall be made, that no sale of the furniture shall be made; and then states that he is indebted to no one, and proposes to continue so; that he is surety for his brother, for which he holds a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his “estate shall not be sold to pay these debts, until the property so divided shall be sold,” when his “estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it.” This will does not charge the real estate of the testator with his debts. [588]

The word “estate” is sufficiently comprehensive to embrace property of every description, and will

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charge lands with debts if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation. [589]

Under the laws of Virginia, relative to the estate of deceased persons, lands are never appraised. [589]

THIS was an appeal by the complainants, in a bill filed in the Circuit Court for the County of Alexandria, upon which a decree was rendered in favor of the defendants, appellees in this court.

The complainants, by their bill, sought to make the real estate of George Deneale liable for the payment of their debt. They set forth that they have a subsisting judgment against the executrix of George Deneale for the sum of \$7,957.58, besides interest and costs. That this judgment was founded on a contract between James Deneale and George Deneale, and the testator of the complainants. That \$2,913.65 of this judgment was satisfied by a sale of the property of James Deneale, the principal, leaving a balance due on the judgment of \$5,000.

The bill charges that George Deneale left a considerable estate, real and personal. That the personal estate has been exhausted in the payment of the debts of the said George Deneale, in a regular course of administration, 586*] and that there is *nothing left to pay their debt but the real estate, which the bill alleges is expressly charged by his will with the payment of it in a certain event; which event it is alleged has happened, to wit, that the property of James Deneale has been sold, and the deficiency of it to pay the debt ascertained.

The bill prays an account of the personal estate and of the balance due to the complainants on their said judgment, and that so much of the real estate of the said George Deneale as will be necessary to pay what is due them, may be decreed in pursuance to his will, to be sold, and the proceeds applied to pay that balance, and for general relief.

Mary Deneale, the executrix, in her answer admits the judgment against the testator as security for James Deneale: That the said James Deneale had reduced the claim considerably below what is demanded by the bill. That her testator died possessed of a large personal estate, consisting principally of bank and other stocks, standing in his name, which have been claimed by Conway Whittle and others as specifically belonging to them by a suit depending in the court of Alexandria county. She states, if the bank and other stock claimed as before stated shall be decided to belong to the estate of her testator, there will be personal estate sufficient to pay his debts. If they should be decided to belong to the said Whittle and others, then there will not be a sufficiency of personal estate to pay all his debts, if his estate is bound to pay this demand of the complainants.

She denies that the real estate of her testator is charged in any event with the payment of

the debt due to the complainants. That he never intended to make any such charge upon it—and that upon a fair construction of the will no such charge is authorized by it.

The defendant Nancy P. Deneale, by her guardian, *ad litem*, answers substantially as the executrix has. To their answers is a general replication and issue.

The other defendants being non-residents, there is an order of publication against them, and the bill taken for confessed.

The commissioner made his report, which shows that he has charged the executrix with the appraised value of the personal estate, including the stocks, instead of the actual value as proved by the sale of all the personal estate, except the stocks, which are claimed by others. It will appear from the circumstances detailed by the commissioner, if the stocks are excluded, that the executrix has paid more than the value of the personal estate, including debts due to her testator, and received by her.

The will, which is made an exhibit, is dated 13th of February, 1815, and is admitted to record 11th July, 1818.

By his will the testator gives to his wife "all his estate, real *and personal, during [*587 her life, for the use and purpose of raising and educating his children until they, respectively, are twenty-one." He directs that each child shall, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one-third of the same" to be retained for the support and maintenance of his wife. He recommends to his wife to sell the negroes for a term of years. He directs that an appraisement only of his "estate" shall be made; that no sale of furniture shall take place. He then states that he is indebted to "no one, and proposes to continue so." He states that he is security for his brother James for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his "estate shall not be sold to pay these debts until the property so deeded shall be sold," when his "estate must be charged with any deficiency." He directs that his executrix and executor should not give security, alleging that his own debts did not require it. He closes his will by giving a gold ring of fifty dollars' value to a friend, and a bank share to the Masonic Lodge.

After a hearing on the bill, answer, the will of George Deneale, and the report of the commissioners, the Circuit Court dismissed the bill with costs.

The only question for the decision of the Supreme Court was, whether George Deneale had, by his will, charged his real estate with the payment of the debt due to the complainants below, the appellants in this court.

Mr. Swann, for the appellants.

The testator charges his estate with the residue of the debt which may remain due to the executor of Stump. The words are:

NOTE.—As to when debts and legacies are chargeable on lands, see note to *Wright v. Denn* 10 Wheat., 204.

The words "after my debts and funeral charges are paid, I devise and bequeath as follows," &c., amount to a charge upon the real estate of the testator.

tator for payment of his debts. The word "after" implies, as strongly as any word can, that the payment of debts is a condition precedent to the absoluteness of any entire devise in the will. *Fenwick v. Chapman*, 9 Pet., 461; *Wright v. West*, 1 Cranch, C. C., 303; *McCulloch v. McLain*, 1 Cranch, C. C., 304.

"I direct that my estate shall not be sold to pay these debts until the property so deeded shall be sold, when my estate must be charged with any deficiency."

The term "estate," includes real as well as personal property, and where there is nothing to qualify the word "estate," it will carry real as well as personal property. (8 Ves., Jun., 608.)

Having, then, said his "estate" must be charged, we must look into the will, and see whether there is anything there to qualify the term.

The testator devises to his wife "all his estate," both real and personal, during her life. The reversionary interest is left to take its legal course.

He then directs "that an appraisement only of my estate be made, and that no sale of furniture shall take place."

The meaning of this would depend upon extraneous circumstances. Estate here was intended to be the personal estate.

Then comes the clause, "my estate must be **588**"] charged with *the deficiency." What was his meaning? The term estate is competent to effect this intent. In making a construction the court will make a man do what is morally just. (3 Ves., 551.) Whenever a testator wills that his debts shall be paid, that rides over every disposition, whether against heir or devisee. (3 Ves., 379.)

Mr. Lee, for the appellees.

The first question is, what was the real intention of the testator? That intention must prevail. 2d. It is alleged that the direction, that on a certain contingency his "estate must be charged with any deficiency," was to pay the particular debt of the plaintiff; and that the word "estate" included his real estate.

It is true that there are many cases in which the word "estate" in a will has been held to convey "real estate," even in fee-simple, but these words, and every form of expression whereby a testator declares his will in respect to the disposition of his property, must submit to the rule which requires a will to be construed agreeably to the intention of the testator where it can be collected from the whole will. (2 Roper on Wills, 619.)

The case of *Woolman v. Kenworthy* (9 Ves., 137) is very analogous to the present case. The general principle decided in that case, was, that under the general word "estate" in a will, real estate will pass, unless restrained, as was in that instance, by the intention collected from the whole will.

Then construe the will of Mr. Deneale by this rule and by these cases, it is plain that he has not charged his real estate, in any event, with the payment of this debt. (Cited, also, *Shaw v. Bull*, 12 Mod. Reports.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was brought in the Circuit Court for the District of Columbia, sitting in the county of Alexandria, to subject the lands of George Deneale to the payment of a debt for which he was surety. The sole question arises on the construction of his will. The complainants contend, that it charges his lands with his debts.

By his will the testator gives to his wife "all his estate, real and personal, during her life, for the use and purpose of raising and educating his children until they, respectively, are twenty-one." He directs that each child shall, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommends to his wife to sell the negroes for a term of years.* He directs that an appraisement only of his *es- [**589** tate "shall be made, that no sale of furniture shall take place." He then states that he is indebted to no one, and purposes to continue so. He states that he is surety for his brother James, for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his estate shall not be sold to pay these debts until the property so deeded shall be sold, when his estate must be charged with any deficiency. He directs that his executor and executrix should not give security, as his own debts did not require it.

That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. As little is it to be denied, that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect.

In the will under consideration, the testator alludes in two instances to his property, generally; in both he uses the words "estate," both "real and personal." In the next instance, the word estate is introduced alone, in the clause which follows: "Item—I do hereby direct, that an appraisement only of my estate be made, and that no sale of furniture shall take place."

In Virginia, lands are never appraised, and the law directs a sale of all perishable articles. When, therefore, the testator directs that an appraisement only of his estate be made, and that no sale of furniture shall take place, he obviously applies the term, exclusively, to that kind of property, the appraisement of which is directed by law, and is usual; and, by adding the word "only," restrains his executors from selling that property which is directed by law to be sold. In this clause, the word estate is plainly confined to personalty. He then speaks of the debts for which he is surety for his brother James, and directs that his "estate" shall not be sold to pay these debts, until the property conveyed to him in trust shall be exhausted. This direction is obviously restrictive. It restrains the executors from using a power they possess under the law. That power is to sell the personal estate for the payment of debts, but it does not extend to the sale of lands; consequently, the word estate, in this place, also designates only personal estate. After this prohibition to sell his estate, until the trust property should be all applied to the object, he adds, "when my estate must be charged with any deficiency."

There is no foundation for the opinion that the testator has used the word estate, in this part of the sentence, in a different sense from

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that in which it was used in the same sentence 590*] immediately *before, while treating of the same subject. The same estate, the sale of which he had just forbidden until a particular event should take place, must, he says, be sold when that event shall take place. He means only his personal estate.

It would, we think, be an entire perversion on the language used by the testator, to construe these words a charge upon his estate. He does not intend to create any liability which the law had not created. When the trust property shall be exhausted, his estate, he says, "must be charged with the deficiency." He can no longer prevent its sale.

We think there is no error in the decree, which declares that the will of George Deneale does not charge his real estate with his debts, and that the bill of the complainants be dismissed with costs, and that the said decree be affirmed.

591*] *JOHN TAYLOR, *Plaintiff in Error*,
v.

ELISHA RIGGS, *Defendant in Error*.

evidence—contracts—party as witness—proof of contents of lost contract

The rule of law is, that the best evidence must be shown, of which the nature of the thing is capable; is, that no evidence shall be received which supposes greater evidence behind in the party's possession of power. The withholding of that evidence raises a presumption that, if produced, it might not operate in favor of the party called upon for it. For this reason, a party in possession of an original paper, is not permitted to give a copy in evidence or to prove its loss. [596]

An affidavit of a party to the cause, of the loss of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be made, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be compelled to give up his rights, at least in a court of law. [596]

It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue, to be tried by the jury, the affidavit of the party is received. [596]

The testimony which establishes the loss of a paper, is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause. [597]

This action being upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time,

but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper, stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. [598]

When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. [600.]

When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon *uncertain and vague [*592] impressions, made by a conversation antecedent to the reduction of the agreement. [600]

WRIT of error to the Circuit Court for the county of Washington.

This suit was instituted by the defendant in error in the Circuit Court for the county of Washington, for the recovery of a sum paid by him to the plaintiff in error, on a purchase of 7,462 shares of stock in the Central Bank of Georgetown and Washington, the plaintiff in the suit alleging that he had paid to the extent of three per centum on the said stock, upon a contract, that if the bank should not declare a dividend which would repay him the said three per cent., that the same should be refunded to him. The contract had been reduced to writing, and had afterwards been lost, mislaid or destroyed by the plaintiff.

The declaration contained three counts: 1. Stating a conversation between the plaintiff and the defendant, concerning the sale of the stock, held by the defendant in the bank; and that in the conversation it was agreed that the defendant should sell to the plaintiff the shares held by him at par; that the defendant represented that a dividend would be made on the same, of four per cent., and stated that the plaintiff should advance and pay to the defendant so much of the dividend as had then been earned by the bank; and that confiding in the said representations, and believing the dividend would be made, he, the plaintiff, agreed to advance the supposed earnings of the stock, which, according to a calculation, amounted to three per cent., and a memorandum in writing of the agreement was then made; the stock was then transferred to the plaintiff, and he paid the defendant the par price of the same, and advanced or paid to him the sum of \$1,902, being the supposed earnings of the bank at the time of the contract; that at the time of the contract, the bank had made no profits on which a dividend could be declared, nor did the bank, on the regular day of declaring the dividend, make any dividend upon the said stock, by means of which the defendant became bound to refund the sum so advanced for the supposed earnings of the bank. 2. Count *indebitatus assumpsit*, for money had and received. 3. Count *indebitatus assumpsit*, for money laid out, &c.

On the trial of the cause, William Hebb was offered and examined, subject to exceptions to his testimony as a witness on the part of the defendant in error, in relation to the contract

NOTE.—Loss of paper, secondary evidence. See note to Bouldin v. Massie, 7 Wheat., 122; see also Riggs v. Taylor, 9 Wheat., 483; Lebre v. Dorr, 9 Wheat., 553; Renner v. Bank of Columbia, 9 Wheat., 581.

between the parties. This evidence is fully stated in the opinion of the court.

The defendant below requested of the court certain instructions which were refused, and a bill of exceptions to this refusal was allowed by the court. A verdict and judgment having **593*** been given for the plaintiff below, the case was brought by writ of error from this court.

Mr. Charles Carter Lee and *Mr. Jones*, for the plaintiff in error.

1. The plaintiff below had not laid a sufficient ground for the introduction of the secondary evidence, which he afterwards produced. The written contract described in his affidavit, is not that proved by the parol evidence, but differs from it essentially. As the contract described was an executed contract, that proved by parol testimony was executory.

2. The contract described in the affidavit, was one upon which an action for tort might be sustained, and that proved was in contract.

3. If the secondary evidence was admissible, William Hebb was not competent to prove the contract; he does not recollect the terms of the contract, and is not, therefore, a witness to prove it. (*For's Lessee v. Pulmer*, 2 Dal., 214.)

He had not read it, but had heard it read, which, as has been decided, was equivalent only to reading a copy. (1 Camp., 193; 1 Stark. Rep., 167.) This uncertainty as to the contents of the contract, and that there was within the process of the court a witness who had made out a copy, are also objections to his testimony. Nor does the evidence show, with any distinctness, an agreement to do what was claimed by the plaintiff below.

4. The evidence was not admissible upon either count of the declaration, as the testimony given varied from the *allegata* in both; and the effect of the evidence would be to explain a written contract, which cannot be done by parol. This evidence can only be given to explain an ambiguity. (*Cope v. Atkins*, 1 Price, 143, and also 404 in the same volume.)

That evidence also showed the contract to be executory, and not a contract to refund or pay the dividend, for breach of which *indebitatus assumpsit* will not lie. (*Cutler v. Porcell*, 6 T. R., 320; 2 Petersdoff, 418; *Cook v. Munstone*, 4 Bos. & Pull., 351; *Leeds v. Burrows*, 12 East, 1.)

Nor does the declaration allege a contract to refund the dividend, nor any consideration sufficient to raise such a contract. The judgment being general, if any one count was bad, the judgment must be arrested. (6 T. Rep., 691.) A sale of the supposed profits of a bank does not, *ex vi termini*, include an agreement to refund them, if no profits are made; nor are representations of the prospects of dividends the subjects of an action.

Mr. Swann and *Mr. Key*, for the defendant in error.

After the decision of the court below, the only question in the case is, what was the agreement of the parties? It was a sale of stock at par, and of the dividends; and the defendant **594*** did not get the dividends which he had advanced to the plaintiff in error, and there was an implication that they should be repaid. The evidence was contradictory, and was proper for the jury.

As to the admission of parol testimony to explain written evidence, it is an established principle, that the acts of the parties at the time of the making of the contract may be proved by parol. Many cases might be cited to establish this principle.

As to the breach of the contract, and the liability of the plaintiff in error, the books of the bank show that at the time of the sale of the stock no profits were made; the plaintiff in error having been president of the bank, knew this, and he knew that the three per cent. beyond the par value of the stock was an advance, and must be repaid, and this may be recovered by *indebitatus assumpsit*.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This action was brought in the Circuit Court for the District of Columbia, by Elisha Riggs, the defendant in error, to recover back a sum of money paid on a contract for the purchase of stock.

The declaration contained two counts; the first on the contract, which was in writing; the second for money had and received by the defendant, to the use of the plaintiff.

At the trial, the plaintiff in the Circuit Court offered testimony to prove the contents of the contract, having first given notice to the defendant to produce the duplicate copy which had been delivered to him, when it was executed, and made an affidavit that the copy which had been retained by him was either destroyed or lost.

The secondary evidence was admitted, the defendant in the Circuit Court reserving all objections, both to its admissibility and competency.

The first count in the declaration states a conversation between the parties on the 15th of May, 1818, concerning the sale of the stock, which the said John Tayloe held in the Central Bank of Georgetown; and alleges, that it was then and there agreed, that the said John should sell to the said Elisha, the stock which he held in the said bank, amounting to 7,642 shares, at par; and further, that the said John represented that a dividend of four per cent. would be made on the said stock at the ensuing first Monday in July, and insisted that the said Elisha should advance to him, in addition to the par value, so much of the said dividend as the said stock had already earned, which, according to a calculation then made, amounted *to three per cent. The declaration [***595**] further alleges, that the said Elisha, confiding in the representations of the said John, did agree to advance the supposed earnings of the said stock. The agreement was then reduced to writing, and signed by the parties. It was further agreed, that the said Elisha might confirm or annul the contract in — days. The declaration further states, that, confiding entirely to the representations of the said John, the said Elisha did agree to confirm the said agreement, and did agree to buy the said stock, at par price, and to advance to the defendant the profits, which the stock was supposed to have earned.

The declaration then charges, that the stock was transferred, its par value paid, and the additional sum of three per cent., its supposed

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earnings, amounting to \$1,902, paid. The declaration further charges, that at the time of the contract, the bank had made no profit on which a dividend could be declared; and that it was not competent for the said bank, on the said first Monday in July, then next following, to declare any dividend; and, that in fact the bank did not declare any dividend on the said stock, of which the said defendant had notice; by means whereof he became liable and bound to refund the money so advanced, for the supposed earnings of the said stock, and being so liable, he, in consideration thereof, assumed, &c.

William Hebb, a witness produced by the plaintiff below, deposed, that he came into a room in which the parties were sitting, when the said Tayloe informed him that the said Riggs was about to purchase his stock, and he requested the witness to take a seat and be an evidence to the contract. The said Riggs then asked the said Tayloe what were his terms. He answered that he would take par, with the dividend which would be declared at the next periodical term, which he thought would be four per cent. Mr. Riggs said he supposed Mr. Tayloe meant only the interest which had accrued at that time, to which Mr. Tayloe assented; a calculation was then made, and the supposed profit estimated at three per cent. The plaintiff asked time to consult his friends, and said he would take the stock on the terms offered. The plaintiff, at the request of the defendant, drew up a memorandum of the agreement, which was read over hastily in the presence and hearing of the witness. It was copied, signed, and attested by the witness, and each party took one.

He understood, a day or two afterwards, that the contract was affirmed. On being cross-examined, the witness said that he did not recollect whether the written contract expressed that par was to be paid for the stock, nor that any advance upon the stock was specified; nor **596***] does he recollect how the contract *was expressed. But his impression and belief is, that the understanding of the parties was that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

The counsel for the defendant below objected both to the admissibility and competency of this testimony; but the court overruled his objections, and permitted it to go to the jury. To this opinion he excepted.

The first question to be considered is, whether parol testimony could, in this case, be let in to prove the written contract.

The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence, raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents.

When, therefore, the plaintiff below offered to prove the contents of the written contract on which this suit was instituted, the defendant

might very properly require the contract itself. It was itself superior evidence of its contents, to anything depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description generally remain in possession of the party himself, and their loss can be known in most instances only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take his deposition, or an affidavit of his inability to attend, *is usually made by the party, [***597** and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show, that on many incidental questions which are addressed to the court, and do not affect the issue to be tried by the jury, the affidavit of the party is received.

The testimony which establishes the loss of a paper is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it.

In the courts of common law of England, we find some cases in which the affidavit of a party has been received, respecting collateral facts which occur in the progress of a cause; and in Courts of Equity, it is usual when a bill is filed to set up a written instrument which is lost, to annex an affidavit to the bill, that the instrument is lost. In *Forbes v. Wale* (1 Sir W. Black. Rep., 532), the plaintiff offered a bond in evidence, attested by two witnesses, on proving the death of one of them; but being himself examined, acknowledged the other to be living. He was nonsuited. It cannot be doubted, that had he sworn the other subscribing witness was dead, he would have been allowed to prove the bond. In *Morrow v. Saunders* (3 Moore's Rep., 671), the plaintiff was permitted to have access to a paper in the possession of the opposite party, on his own affidavit that there was no copy or counterpart in his possession, nor had there ever been one between the parties, except that in possession of the defendant. In *Jackson v. Frier* (16 John.,

193), the Supreme Court of New York indicated the opinion, that secondary evidence might be admitted to prove the contents of a paper, on the affidavit of the party to its loss. *Mr. Chief Justice Spencer*, in delivering the opinion of the court, quoted *Godbolt*, 193, in which the court refused to permit the depositions of witnesses, taken in a suit between the same parties, to be read, unless affidavit be made that the witnesses, were dead; and also *Godbolt*, 326, in which the court said, that if the party cannot find a witness, he is, as it were, dead unto him; and his deposition, in an English court, in a cause between the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavor to find the witness, but that he could not.

In the former decisions in this cause (9 Wheat., 483), this question was, we think, substantially, though not expressly, determined.

When we compare the mischief to be apprehended from the admission of secondary proof, on the affidavit of the party, where there is reason to believe that other testimony to that fact cannot be adduced, with the mischief to arise from the absolute exclusion of such an affidavit, we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the court, to be weighed with the other circumstances of the case. In the case before the court, it is not probable that any other testimony of the loss of the paper was attainable; and we think the affidavit of the party laid a proper foundation for the admission of secondary evidence. Secondary evidence having been properly admitted, and the transfer of the stock and the payment of the purchase money proved, the next inquiry is into its competency, to establish the contract stated in the declaration.

This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Discarding the representation made by the vendor of the profits of his stock, we are to inquire what was the actual agreement. The declaration states a parol agreement to sell and purchase the stock at par. But this agreement appears not to have been definitive since a sale of the stock would pass it in its then condition, comprehending the dividends to be thereafter declared upon it. The parties therefore proceed to a consideration of that part of the subject which respects the profits, and after concurring in the opinion that the stock was worth par, independent of the next ensuing dividend, which they supposed would be

four per cent., calculate how much of this sum was already earned. They found that three per cent. was the proportion of this estimated profit, which had accrued at the date of the sale. The whole contract, thus completed, was reduced to writing and signed by the parties. It is a contract to sell all the bank stock of the vendor, rating the stock itself at par, and the dividends which had already accrued thereon, at three per cent. No stipulation was made to return this sum of three per cent., or a part of it, if no dividend or a less dividend than four per cent. should be declared, nor to add to the sum, if a larger dividend should be declared than was estimated by the parties.

Does the testimony offered by the plaintiff in the Circuit Court prove this contract?

A conversation was in its progress between the parties respecting the sale and purchase of the stock when the witness came into the room, and was requested to notice their agreement. Mr. Riggs then asked Mr. Tayloe what were his terms. Mr. Tayloe answered that he would take par, with the dividends which would be declared at the next periodical term, which he supposed would be four per cent. Four per cent. was assumed as the dividend which would be declared, and three per cent. was estimated as the portion of that dividend which had already accrued. This proposition was accepted, and the agreement reduced to writing.

If the declaration counts on one entire contract for the sale of the stock, including the dividend upon an estimate of the stock, at par, and the approaching dividend at four per cent., the testimony supports it; if the declaration counts on two distinct contracts, entirely independent of each other, this part of the testimony does not support it. The witness describes a single contract, consisting, it is true, of two distinct items, but both are comprehended in the same agreement.

On being cross-examined, the witness shows a very imperfect recollection of the contract he is endeavoring to describe. He does not recollect that par was to be paid, nor that any advance on the stock was specified in the contract. But his impression and belief is that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

This part of the testimony shows, that what the witness had previously said, was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself. He does not remember the terms in which the written contract was expressed; nor that par was to be paid for the stock; nor that any advance was specified. He believes that the written contract conformed to the verbal agreement, and on this belief is founded his impression that the three per cent. was to be paid on a contingency that the next dividend should amount to four per cent. Yet, when we refer to his description of the conversation which constituted the verbal agreement, no part of the consideration money is stipulated to be paid on a contingency.

The declaration does not state a contingent

contract; nor is any inference to be drawn that it was contingent, from any part of the declaration, unless it be from the use of the word **600*** "advance," *which word, or any other equivalent to it, the witness does not remember.

When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them, would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement.

A part of the testimony came out on the cross examination, which serves to show on what uncertain ground the belief of the witness was founded, that the three per cent. depended on the contingency that the next dividend should amount to four per cent. He was asked whether the writing was, as deposed by another witness, in these terms, or in terms to this effect: "I bind myself to receive at any time within three days, three per cent. advance upon my stock in the Central Bank of Georgetown and Washington." He answered that the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing described by him bound the defendant to transfer the stock. This answer would indicate that the written contract bound the vendor to transfer his stock, at any time within three days, at three per cent. advance.

Upon the most attentive comparison we can make of the testimony given by Hebb, with the contract stated in the declaration, we think that his evidence does not support the contract as laid, and was therefore not competent to sustain the first count.

The second count, for money had and received, is not supported by any express promise to refund the money supposed to be advanced on account of the dividend, if less than four per cent. should be declared, or if no dividend should be made. It rests on the promise which the law implies, where the consideration totally fails. If the written contract comprehended the dividend, with the stock itself, so that an advance of three per cent. was given for the whole, the circumstance that this entire agreement was founded on a calculation of the separate value of the distinct parts, which were the subject of it, would not entitle the purchaser to recover upon this count, because the consideration would not totally fail. Could the contract for the dividends be considered as **601*** entirely distinct from *that for the stock itself? The court is not prepared to say that a mere speculative bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimate, or may be nothing—where the pur-

chaser knows that he buys a chance, as a lottery ticket—is a bargain on which the law will raise a promise to refund the purchase money, if the consideration should fail. It is therefore the opinion of the court, that the testimony does not show a contract which supports the second count.

The defendant in the Circuit Court then gave evidence to the jury, tending to prove that the contract was a mere purchase of stock, at an advance of three per cent.; and then moved the court to instruct the jury, "that the evidence given by the plaintiff, either taken by itself or in connection with that of the defendant, is not competent and sufficient to be left to the jury, as evidence that the said written contract continued to be executory after the transfer of the stock by the defendant to the plaintiff, and the payment therefor by the plaintiff, as stated by the plaintiff's evidence; nor, that it contained any stipulation or condition that the three per cent. advance on the said stock was paid or agreed to be paid by the plaintiff, on a contingency that the next dividend amounted to four per cent.; or that the defendant should refund, to the plaintiff, the three per cent. advance upon the par value of the stock paid by the plaintiff, as aforesaid, in the event of there being no dividend declared upon such stock, at the then next ensuing regular period for declaring such dividend. The court refused to give this instruction, as prayed, being of opinion, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day."

It is probable that the Circuit Court might not have intended to express an opinion respecting the effect of the testimony laid before the jury, but we think such an opinion is expressed. The court declares that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as it regarded the implied *assumpsit* of the defendant to refund, &c.

These words, we think, determine that the testimony established this implied *assumpsit*. On the question whether such a contract was proved as did raise this *assumpsit*, there was, undoubtedly, much conflicting testimony, and the court erred, as we think, in declaring that opinion to the jury.

After several proceedings in court, which it is unnecessary *to mention, as they do [**602** not materially affect the merits of the cause, the plaintiff prayed the court to instruct the jury, that if from the whole evidence the jury should be of opinion that the defendant, in his written contract, did agree to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend, which he stated and represented would be declared at the next dividend day; and if the jury should be farther of the opinion, that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief created by the defendant that such dividend would be made, that then the plaintiff would be entitled to recover back the

money so paid under such mistaken impression, if the jury should find from the evidence that there was no such dividend declared; and that the said stock had not, at the time of the said contract, earned any such supposed interest or dividend.

This instruction was ultimately given by the court. In discussing its correctness it is necessary to recollect that this is an action on a written contract, not for deceit or misrepresentation in making that contract. The inquiry then is, what was the contract? not how it was obtained. The representation, then, of the seller respecting the next dividend, and the belief of the purchaser, may be discarded from the case; and our attention must be confined to the contract as stated in the prayer of counsel. The jury were instructed to find for the plaintiff, if they were satisfied from the evidence that the defendant in his written contract agreed to sell his stock at par; and to take the earnings which the said stock had made in lieu of the dividend to be declared at the next dividend day; and if they should also be satisfied that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief that such dividend would be made. This instruction, when given on the naked contract stripped of that alleged misrepresentation which forms no part of it, cannot, we think, be supported.

We are therefore of opinion that there is error in the proceedings of the Circuit Court, and that the judgment ought to be reversed, and the cause remanded to the Circuit Court, with directions to set aside the verdict and award a *venire facias de novo*.

This cause came on, &c. On consideration whereof, this court is of opinion that there is error in the several instructions given by the Circuit Court to the jury, in this, that the said court instructed the jury that the evidence given by the plaintiff in that court was competent to support both the first and second counts in the declaration; and also in this, that **603***] the said *court instructed the jury, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day; and also in this, that the said court instructed the jury to find for the plaintiff, if they should be satisfied from the evidence that the defendant in his written contract agreed to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend to be declared at the next dividend day, and that in fact no dividends were made. Wherefore it is considered and adjudged by this court, that the said judgment be, and the same is hereby reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to award a *venire facias de novo*, and to take other proceedings according to law.

Cited—5 How., 291; 14 How., 263, 265; Hemp., 560, 624; 2 Wood. & M., 5, 131, 132.

HUMPHREY FULLERTON, JOHN** [604**
CARLISLE, AND JOHN WADDLE,
Plaintiffs in Error,

v.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES,
Defendants in Error.

Practice—Ohio courts—federal courts—promissory note—proof of demand of payment—notice—application of proceeds of note.

The State of Ohio, not having been admitted into the Union until 1802, the act of Congress passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the State courts into the courts of the United States, could have no operation in that State; but the District Court of the United States, established in that State in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government. The District Court of Ohio did not create a system for itself, but finding one established in the State, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the State courts, and by a single rule adopted the State system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit, found the practice of the State adopted, in fact, into the Circuit Court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued without any positive rule upon the subject. [612]

The act of 18th February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and the suits have in many instances been prosecuted under it. [613]

It will not be contended that the practice of a court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court through the course of years, is to be surprised and turned out of court, upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the State practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. [613]

The course of prudence and duty in judicial proceedings in the United States, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the Constitution, to conform as nearly as possible to the administration of justice in the courts of the several States. [614]

Although the act of the Legislature of Ohio regulating the mode of proceeding in actions on promissory notes, was passed after the making of the *note upon which this action was brought, [***605** yet the Circuit Court of the United States for the District of Ohio, having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to

NOTE.—As to demand of payment of notes and bills, see note to *Fenwick v. Sears*, 1 Cranch, 259; note to *Brown v. Barry*, 3 Dall., 365; note to *Bus-sand v. Levering*, 6 Wheat., 102; note to *Bank of United States v. Smith*, 11 Wheat., 171.

adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted. [615]

Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the Circuit Court, in this case, were more favorable to the parties to the note. where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. [616]

THIS was a writ of error brought to reverse a judgment rendered in the Circuit Court of the United States for the District of Ohio, in favor of the Bank of the United States, the present defendants in error. The declaration contains a common count for money lent and advanced. The plea is *non assumpsit*. There is another plea of *non assumpsit*, filed by H. Fullerton alone, and under it, a notice, that he will offset a large sum of money, \$3,957.33½, due by the bank to the said Fullerton, being the avails of a certain note (the note on which the action was brought) which was discounted by the said Fullerton at the office of discount and deposit in Cincinnati, and the proceeds of which he had never checked out. There is another notice of offset by all the defendants—that the plaintiffs are indebted to the defendant, Fullerton, in a large sum of money, \$5,000—being the avails of a certain promissory note (the note on which plaintiff's action is founded) which has never been paid by the bank to Fullerton, or received by him, but retained by the plaintiffs; and Fullerton applies the same, by way of discharge and set-off to the said note made to plaintiffs. The cause was tried by a jury, and, on the trial, the plaintiff exhibited in evidence a certain note, a copy of which follows:

\$4,000. CINCINNATI, February 1, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States at Cincinnati, \$4,000, for value received.

(Signed) ISAAC COOK.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton.

Isaac Cook, the drawer of the note, died pending the suit, and before the trial. To the introduction of this note in evidence the defendants objected, as evidence of a several contract of the drawers and each one of the **606** indorsers, and not of any *joint undertaking or liability of the defendants. This objection was overruled by the court, and the note permitted to be read in evidence, under the eighth section of the Act of the General Assembly of Ohio, entitled, "An act to regulate judicial proceedings, where banks and bankers are parties, and prohibit the issuing bank bills of a certain description," passed 18th February, 1820; to which decision of the court the defendants excepted.

The eighth section of the act provides, "That when any sum of money due and owing to any bank or banker shall be secured by indorsements on the bill, note, or obligation for the same, it shall be lawful for such bank or banker to bring a joint action against all the drawers or indorsers, in which action the plaintiff or plaintiffs may declare against the defendants Peters 1.

jointly for money lent and advanced, and may obtain a joint judgment and execution for the amount found to be due; and each defendant may make the same separate defense against such action, either by plea or upon trial, that he could have made against a separate action; and if, in the case herein provided for, the bank or banker shall institute separate action against drawers and indorsers, such bank or bankers shall recover no costs. Provided always, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, or under them in any way for their use or benefit, the sheriff, upon any execution in his hands in favor of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes of such bank or banker, from the defendant, in discharge of the judgment, and if such bank or banker, their or his assignee or other person suing in trust for the use of such bank or banker, shall refuse to receive such note from the sheriff, the sheriff shall not be liable to any proceedings whatever at the suit, or upon the complaint of the bank or banker, their or his assignee as aforesaid."

The facts of the case, so far as they were considered as important to the decision of the court, are fully stated in the opinion delivered by *Mr. Justice Johnson*.

The case was argued for the plaintiffs in error by *Mr. Leonard*, and by *Mr. Sergeant* for the defendants.

The counsel for the plaintiff made the following points:

The Circuit Court erred in admitting the note in evidence under the money counts in the declaration, for if the statute of Ohio could be used as authority for the form of action, the death of one of the parties, during the suit, determined the right to proceed under that statute.

2. The statute of Ohio, regulating the practice of the State, is not obligatory as to the practice of the courts of the *United **[607]** States, and the statute of 18th February, 1820, was passed after the making of the note on which this action is founded.

3. There was no proof of demand of payment of the note, and the indorsers on the note were discharged by this omission; and by the course the bank adopted in reference to the note after its non-payment by the drawer.

The notice of the non-payment was not given in time to the indorsers.

Leonard insisted the court erred in admitting the note in evidence, under the money counts. The statute of Ohio authorizes joint actions against "all the drawers, or indorsers." (22d vol. Ohio Laws, p. 361.) This action was instituted against the drawers and indorsers, and the drawer died before trial. Although disjunctives are sometimes construed conjunctively, yet no case could be cited, in which it had been held that a disjunctive might be construed conjunctively, at one time, and, at another, agreeably to its literal signification. The statute being in derogation of the principles of the common law, authorizing a joint action against several persons, on several distinct and dissimilar contracts, was *strictissimi juris*, and, after the death of the drawer, no suit could be instituted or prosecuted under it. This construction was fortified by another law of Ohio, requiring the property of the principal to be

exhausted before that of the security is made liable, which was held to apply as between drawers and indorsers on accommodation notes.

2. The bill of exceptions distinctly raises the question, whether the statutes of Ohio regulating the State practice, are obligatory, *vi propria*, on the United States courts. There is no evidence in the record, that the State practice was ever adopted by the court, and "the note was permitted to be read in evidence, under the act of Ohio." (See *Wayman et al. v. Southard et al.*, 10 Wheat., 1.) Admitting the Circuit Court might, under the authority to establish its practice, adopt by written rules, or otherwise, the practice in existence at the time of the act of adoption in the State Courts, the court was not empowered to incorporate into its practice by one act of prospective regulation, whatever might be the future practice of the State courts. This would be not to exercise the judicial functions intrusted to the court, but to transfer them to the State authorities. An Act of Congress adopting the State practice, in existence at the time of its passage, is valid; but an act prescribing such rules of practice as the State Legislatures might in future enact, would be unconstitutional, as it would transfer to the States the powers vested by the Constitution in Congress. If, then, the court could not, in the active exercise of its **608** powers, establish the future State practice, much less could the passive acquiescence of the court, in laws and rules of practice enacted from time to time by the State, establish it as a fundamental and constitutional rule that future State regulations should thereby become a part of the Circuit Court practice. In the present instance, the statute had never received the express sanction of the court, was introduced and followed up by the United States Bank alone, had never been contested, and always used *sub silentio*.

The act of Ohio was not passed until after the note was discounted. The act established a rule of property, construction or evidence, rather than a rule of practice, and therefore could not be applied to a contract entered into before its passage. It was such a rule as is referred to in 34 sect. Jud. Act United States, chap. 20.

In general, a demand is necessary on the drawer to charge the indorser. It may be dispensed with when the note is payable at the holders, and its place supplied by proof, that the holder was present, ready to receive payment, and the account of the drawer inspected, and no credit found in his favor. (*United States Bank v. Smith*, and the cases their cited; 11 Wheat., 171.) This is the English rule (2 H. Black., 509), and this court has strongly intimated an opinion in favor of its correctness. No case—not the cases in Mass. Rep., cited 11 Wheat., 171, go the length to waive proof that the holder was present at the time and place ready to receive payment. The charge of the court did not come up to the rule. "If the jury were satisfied, from the evidence, the note was in bank, and not paid when it came to maturity," the record purports to contain all the evidence in the case, and none was exhibited of the non-payment of the note. Agreeably to the charge, it would be sufficient for the plaintiffs to prove the note in bank, at its ma-

turity, without any proof that it was then unpaid; because there was no proof of the non-payment of the note in the case, and besides, proof ought not to be required of a negative, that the note was unpaid. Indeed, it is impossible to give positive proof of non-payment. In this case, as in all other cases whatsoever, the jury must be satisfied that the note was unpaid, when it came to maturity, or render a verdict for the defendant. Of this they would be satisfied, without positive proof. Non-payment is presumed until payment is proven. If, therefore, the jury were satisfied the note was in bank, unpaid, when it came to maturity, a verdict should not have been passed for the plaintiffs, unless they were also satisfied a demand had been made or excused, or dispensed with. The non-payment might have grown out of the absence of the holder, at the time and place limited for the payment. To charge an indorser, affirmative proof must be **609** exhibited of a demand, or of facts sufficient to excuse or dispense with it. All the books say this, and none assert that proof of a note's being in bank, and unpaid at its maturity, is such excuse or dispensation; much less that the presumption of non-payment, from the absence of proof of payment, supersedes its necessity, and supplies its place. The doctrine of the charge, when analyzed to its last result, and applied to the evidence in the case, is, that proof the note was in bank when it came to maturity will charge the indorser; and this without a demand, or the evidence of any facts supplying or excusing its want.

The jury should have been instructed, they must be satisfied by affirmative proof the notice was put in the postoffice, on the day after the demand, in season to go by the mail next succeeding the day of demand. Proof barely that it was put in the postoffice on that day, without affirmative proof it was there in season to go by the next post, was insufficient. (*Lenox v. Roberts*, 2 Wheat., 373.) In *Darbyshire v. Parker* (6 East, 3), Lord Ellenborough says the rule as laid down originally in *Marius*, is, the notice must be sent by the next post. In one word, it is the next post, and not the next day. Due diligence consists in placing the notice in the office before the post next after the last day of grace leaves town, and not in placing it there on the day next after the last day of grace. This, although on the next day, might not be in time for the next mail; and due diligence must be proven, affirmatively, by the plaintiffs. The record shows the plaintiffs did prove the notice was put in the office on the next day, but not whether in season for the next mail; the record likewise shows they did not attempt to prove this, as it professes to contain all the evidence exhibited on the trial.

He then went into a minute examination of the instructions asked, and charge given, comparing them with the testimony, to show the court erred in the instructions refused, and those given, relative to the discount of the note, and the application of its proceeds, if a discount was made.

For the defendants in error, it was argued by *Mr. Sergeant*, upon the first bill of exceptions, that the provision of the act of the State of Ohio must be regarded either as a "law of the State," furnishing a "rule of decision" under

the 34th section of the judiciary act of 1789, or as a mere rule of practice. He would not say it was of the former description, though that position would perhaps be supported by the authority of 3 Dall., 344, and 3 Dall., 425. It might be deemed in effect an enactment, that *quoad hoc* the contract should be considered a joint contract, for the purpose of remedy. In Pennsylvania, where there is no Court of Chancery, ejectment may be maintained upon an **610***equitable title. Not that an equitable title is a legal title, in general, but only that it is a legal title for the purpose of maintaining the action. This has been in part adopted in the Federal Court in that district, as the law of the State. Upon the same principle, the law of Ohio would seem to be a rule of decision. If so, it would be obligatory upon the Circuit Court. But this it was not necessary to affirm; for, if it was a "rule of practice," the court had power to adopt it, and it is quite clear that it had been adopted, though there was no written rule on the subject. So that, either way, it was properly applicable to the case, and there was no error in applying it. As a beneficial, remedial law, it was well worthy of adoption.

Upon the construction of the Act, it was argued, that taking the whole of the section together, it was the obvious intention of the Legislature to give one action against the drawer and indorsers. The latter part of the section was irreconcilable with any other intention. Besides, it is necessary to make sense of the first part of the section itself. Otherwise construed, that is, disjunctively, the effect would be to give a joint action against drawees. But a joint action might be maintained against drawees without the aid of an Act of the Legislature. The court would not incline to impute needless legislation.

If this was the true construction, and the Act gave a joint action, or, *quoad* the remedy, considered the contract as joint, it would leave the action, when brought, upon the same footing and subject to the same rules as all other actions upon joint contracts, unless otherwise provided by the act. Does a joint action abate by the death of one of the defendants? Certainly not. Is there anything in the act which declares that this action shall abate in that event? It is clear that there is no such provision; such a provision would have been inconsistent with the obvious design of the Act; for how would the multiplication of suits be avoided by declaring that the action should abate upon a contingency of no importance to the merits, and the plaintiff in that case be compelled to bring several suits? It would be derogatory to the intelligence of the Legislature to impute such an intention. There was nothing to warrant it, either in the words or spirit of the Act.

Upon the second bill of exceptions it was argued, 1. That the nature of the case was apparent from the record, and the effort of the defense appeared to have been, to give it a technical complexion different from the reality. From a list in the record it would be seen that the note in question was one (the last) of a series of notes, beginning in the year 1817, with the same name, but not always in the same order, discounted by the office of the Bank of the United States, at Cincinnati. This note was put into bank as a renewal, for the precise purpose,

*manifestly known to all the parties, of [**611** applying the proceeds to the payment of the next preceding note. It was discounted on that condition, and on no other. The defendants below were interested in the condition, for their names were all upon the prior note, which must have been protested but for the payment by means of this discount. Of the fourteen instructions required (most of them now abandoned), it will be seen that the greater part, in some shape or other, aimed to work out a conclusion (contrary to the truth of the case) that the proceeds of the discount were to be placed to the credit of the last indorser, and the preceding note to remain unpaid. Upon that subject the charge of the court was clear and satisfactory, and to the full as favorable to the defendants as they could reasonably ask, leaving it to the jury as a matter of fact to decide, whether, from the evidence in the case, it was not proved that the application of the proceeds was made with the consent of the last indorser. The fact of his consent, the jury have, therefore, found. For this, the counsel referred to the charge.

2. As to proof of demand, the charge of the court (though there seems to have been no dispute on that point below) was in these words: "The jury ought to be satisfied that the note had been discounted by and became the property of the bank; that it was in bank and not paid when it came to maturity." The note being payable at the bank, and the jury having found that it was in bank, and not paid when it came to maturity, nothing more could be necessary.

3. Upon the point of notice, the charge of the court was, as it was understood, in precise conformity with what the counsel for the plaintiff in error required. This was the natural, and the grammatical interpretation of the language used by the learned judge—"succeeding" referred, as its antecedent, to "the last day of grace." Thus understood—and if there had been ambiguity, it was the duty of the counsel below to ask for a more precise instruction at the time—the charge is, that the notice was to be in the postoffice in time to go by the mail following the last day of grace; and this the plaintiff in error insists it ought to be. As to the fact, whether there was a mail on the following day, and at what hour, there was no evidence.

It is unnecessary to state the arguments more at large, as the opinion of the court goes so fully into the case.

Mr. Justice JOHNSON delivered the opinion of the court:

This cause comes up from the Circuit Court of Ohio, on a writ of error. The record exhibits a judgment recovered by the defendants here, against the plaintiffs, in an action for money lent *and advanced. The plea [**612** was *non assumpsit*, with notice of a discount, and a verdict for plaintiff below.

The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words: "The plaintiff, in support of his action, offered in evidence the following promissory note drawn by Isaac Cook, and indorsed by Humphrey Fullerton, John Waddle and John Carlisle:"

"\$4,000. CINCINNATI, February 1st, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States at Cincinnati, four thousand dollars, for value received.

(Signed) ISAAC COOK.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton."

"To the introduction of this evidence the defendant by his counsel objected, as evidence of a several contract of the drawer and each of the indorsers on the note, and not of any joint undertaking or liability of the defendants, which objection was overruled by the court, and the note permitted to be read in evidence, under the act of the General Assembly of Ohio, entitled, 'An Act to regulate judicial proceedings, where banks and bankers are parties, and to prohibit the issuing of bank bills of certain descriptions,' passed 18th of February, 1820, to which decision the counsel excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants.

In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark, that the State of Ohio was not received into the Union until 1802; so that the Process Act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the State courts into the courts of the United States, could have no operation in that State. But the District Court of the United States, established in the State in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government.

The District Court of Ohio, it appears, did not create a system for itself, but finding one established in the State, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the State courts; or in effect adopted by a **613***] single rule, the State system*of practice, in the same mode in which this court, at an early period, adopted the practice of the King's Bench in England. So that when the seventh circuit was established, in the year 1807, the judge of this court, who was assigned to that circuit, found the practice of the State Courts adopted in fact into the Circuit Court of the United States.

It has not been deemed necessary to make any material alterations since; but as far as it was found practicable and convenient, the State practice has, by an uniform understanding, been pursued by that court without having passed any positive rules upon the subject. The Act of the 18th February, 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses; its salutary effects produced its immediate adoption into the practice of the Circuit Court of the United States; and from that time to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice (properly so called) produced

by the operation of this Act, was very inconsiderable, since it only requires notice to be given of the cause of action by indorsing it on the writ and filing it with the declaration, after which the defendants were at liberty to manage their defense, as if the note had been formally declared upon in the usual manner.

It is not contended that a practice, as such, can only be sustained by written rules; such must be the extent to which the argument goes, or certainly it would not be supposed that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the court, through the course of eight years, is now to be surprised and turned out of court, upon a ground which has no bearing upon the merits.

But we are decidedly of opinion, the objection cannot be maintained. Written rules are unquestionably to be preferred, 'because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a court by long acquiescence has established it to be the law of that court, that the State practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such, we understand, has been the course of the United States Court in Ohio, for twenty-five years past. The practice may have begun and probably did begin in a mistaken construction of the process act, and then it partakes of the authority of adjudication. But there was a higher motive for adopting the provisions of this law into the practice of that court; and this bill of exceptions brings up one of those difficult questions, which must often occur in a court in which *the remedy is pre- [**614** scribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose the State of Ohio had declared that the undertaking of the drawer and indorser of a note, shall be joint and not several, or contingent; and that such note shall be good evidence to maintain an action for money lent and advanced; would not this become a law of the contract? Where, then, would be the objection to its being acted upon in the courts of the United States? Would it have been prudent or respectful, or even legal, to have excluded from all operation in the courts of the United States, an act which had so important a bearing upon the law of contracts as that now under consideration? An Act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the State courts would not have been called upon otherwise than as a law of the particular contract; a law which, as to promissory notes, introduced an exception into the law of evidence, and of actions. It is true, the Act in some of its provisions, has inseparably connected the mode of proceeding, with the right of recovery. But what is the course of prudence and duty, where these cases of difficult distribution as to power and right present themselves? It is to yield rather than encroach; the duty is reciprocal, and will no doubt be met

in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principle, and the administration of justice according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the true spirit of the Constitution and laws of the United States to conform, as nearly as practicable, to the administration of justice in the courts of the State.

In the present instance, the act was conceived in the true spirit of distributive justice; violated no principle; was easily introduced into the practice of the courts of the United States; has been there acted upon through a period of eight years; and has been properly treated as a part of the law of that court. But, it is contended that it was improperly applied to the present case, because the note bears date prior to the passage of the law; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts.

But what right is violated, what hardship or **615** injury produced, *by the operation of this act? It was passed for the relief of the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the costs of a single suit if he should elect to bring several actions against drawer and indorser. Nor does it subject the defendants to any inconvenience, from a joint action, since it secures to each defendant every privilege of pleading and defense of which he could avail himself if severally sued. The Circuit Court has incorporated the action with all its incidents into its course of practice; and having full power by law to adopt it, we see no legal objection to its doing so, in the prosecution of that system, upon which it has always acted. It cannot be contended that the liabilities of the defendants under their contract have been increased, or even varied; and as to change in the mere form of the remedy, the doctrine cannot be maintained that this is forbidden to the legislative power or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be so called, of the prayers asked of the court by the defendant's counsel; the whole making out this case. It appears that in December, 1817, Isaac Cook's note, with these indorsers upon it, was discounted at the Bank of Cincinnati, and renewed every sixty days down to February 1st, 1820. It commenced at \$6,000, and in September, 1818, was reduced to \$4,000, for which amount it was renewed uniformly down to the last date. In its origin, one McLaughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last indorser, until March, 1819, when Cook was uniformly the last indorser down to the date of the present note. The proceeds of the successive renewals were of course credited to him, and passed to the payment of the preceding note.

But on this note Fullerton stands as the last indorser, and the proceeds were credited to him, Peters 1.

and Cook's note of the preceding date was charged to Fullerton's account without his check; thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was of course not protested, and thus Fullerton and his co-indorsers escaped payment of that note; and now they propose to escape the payment of this, by insisting that without a check from Fullerton, authorizing the application of the proceeds as credited to him to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defense, and one which no court of justice can feel disposed to sustain. To repel it, the plaintiffs introduced witnesses to prove that this note was expressly discounted in order *that [**616** the proceeds might be applied to the previous note, and would not have been discounted otherwise; and contend that the bank, having the fund in hand to pay itself, had a right so to apply it without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition, that Fullerton, as last indorser, was entitled to credit for the proceeds of this note, and is still entitled, if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit, the 13th, 14th, and 15th, raise a question on the sufficiency of the demand on the drawer, and of the notice of non-payment to the indorser, and the proof introduced to establish both facts.

The entry in the record on the subject of the charge to the jury, is in these terms: "But the court, instead of the foregoing instructions as asked, charged and instructed the jury that, to enable the plaintiffs to recover, the jury ought to be satisfied from the evidence that the note had been discounted by and become the property of the bank; that it was in the bank and not paid when it came to maturity; that due notice of the protest and non-payment had been given to the parties, and that such notice had been put into the postoffice the day after the last day of grace in time to go by the succeeding mail; that every note discounted in bank was *prima facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds of the note should be carried to the credit of the last indorser, and paid to his check; that the printed and published rules of the bank ought, in the absence of other testimony, to be considered as regulating the course of business of the bank; but that if the jury were satisfied from the evidence that a practice and course of business in the office of discount and deposit in Cincinnati had prevailed and was known to defendants, and that the note in question had been discounted and treated in all respects according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note contrary to the understanding and directions of the last indorser, or to any other use than the use of the last indorser, without his consent; but that if the jury were satisfied from the evidence that according to the custom and practice of the bank in the case when a

new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last indorser was sometimes required and sometimes dispensed with, and that in the latter case it was the practice to file away the old note as a check; and that if the note sued upon had been discounted* and treated in the latter manner, with the consent of the parties to it, the plaintiffs had a right to recover, and that such consent may be inferred and found by the jury from the facts and circumstances given in evidence, without direct or positive proof, if in the opinion of the jury the facts and circumstances proved warrant such inference. That if the jury find the same was not discounted

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part of the instruction, insisted much on the obligation on the plaintiff to establish definitively and positively, that the notice given was in time to go by the next mail; but has not adverted to his own omission, in not putting into the case evidence that there was a mail established from Cincinnati to the place of the defendant's residence. Yet, if the jury might be left on this point, to take that fact upon notoriety, or personal knowledge, it would be difficult to maintain that they might not, on the same grounds, find the minor fact, that the notice deposited in any part of the business house that day, would be

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in the form in which they were propounded to the jury. And the question is, whether the instruction given covered the whole ground of the instructions prayed for, and were legally correct, in the form in which they were rendered.

We are of opinion they cover the whole ground taken by the defendants, or at least as far as they had a right to require. This will be obvious from a simple analysis of the charge. The propositions which it imports will be examined in their order. The first is upon the sufficiency of the demand, and the law laid down on this point is, "that on a note made payable at a particular bank, it is sufficient to show that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity."

Nothing more than this could have been required of the court; for the positive proof that the bill was not paid, will certainly imply that there were no funds of the drawer there to pay it. The fact could not have been made more positive by inspection of the books. The charge is perhaps too favorable to the defendants, since modern decisions go to establish that if the note be at the place on the day it is payable, this throws the *onus* of proof of payment upon the defendant. (4 Johns., 188.) This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

The next instruction is, in the language of the court, "that notice of the non-payment and protests should have been given to the indorser through the medium of the postoffice, the day **618*** after the last day of grace, in time to go by the succeeding mail."

The defendant's counsel, in arguing on this

application of the proceeds of the previous note without the indorser; and this also, we think, the defendants asked, and is as favorable as the law would sanction. It admits, that this should be regarded as a business note, that the proceeds should have been passed to the credit of the last indorser, and should not have been applied otherwise than by his assent; but it then goes on to assert, what surely could not be controverted, that with the assent of the last indorser, the money, instead of being passed to his credit might be otherwise applied; that with his consent it might be applied to the satisfaction of another note, for which he was indorser, without his checking for the amount; and that his consent may be implied from circumstances, as all other facts may be.

The jury have found, then, that with his consent it was so applied, and the evidence fully bore them out in their finding; if competent, it was all the law requires.

It may be proper to observe that every discount is in the nature of a cross action, and if the discount filed in this case were thrown into the form of an action, it would be for **[*619]** money had and received to defendant's use.

The merits of this defense need only be tested by the law which governs that action, to make it clear that the evidence would not sustain it. It goes in fact to show, that in what are called renewals of bank loans, the lending is qualified and not absolute; that when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit

Peters 1.

and intent, must be binding upon all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch, as although it admits the note to be a business note, as it is called, and therefore to be passed to the credit of the last indorser, it permits it to be treated as an accommodation note, in allowing it to be passed to the credit of the drawer. But if this were strictly the fact, what defense does it afford to the action, if such were the agreement, and the real understanding of the parties? In strictness, however, it was not passed to the credit of the drawer alone, for in the progress of the ruinous systems of loans, which prevails over the country, the note discounted as the renewal of an accommodation note, cannot be called a business note, nor can it in correctness be predicated of such a note, that it is passed to the credit of the drawer alone, when the last indorser has in effect an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument, by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note, under the rules of the bank, because not secured by a deposit of stock.

No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here to suppose that he intended to raise it.

Judgment affirmed with costs.

Cited—2 Pet., 106, 549; 5 Pet., 210; 11 Pet., 396, 398, 399, 413; 8 Wall., 648; Bald., 411, 491; 1 Abb., U. S. 601; 2 Paine, 255; 2 Blatcht., 214.

620*] *JAMES M'DONALD, *Appellant*,

v.

FREEMAN SMALLEY ET AL. (in all, forty.)

Equity—questions arising on appeal—jurisdiction—chancery practice.

Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees were willing to submit, upon argument, the whole case to the final decision of the court; but it appeared that the Circuit Court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the court, the counsel were directed by this court to argue the point of jurisdiction only. [621]

It cannot be alleged, that a citizen of one State, having title to lands in another State, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie. [623]

M., a citizen of Ohio, apprehensive his title to lands in that State could not be maintained in the State Court, and being indebted to the plaintiff, a

citizen of Alabama, to the amount of \$1,100, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the State. The property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving \$1,000; held, that the title acquired by the purchaser, gave jurisdiction to the courts of the United States. [623]

The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity. A court cannot enter into the consideration of those motives, when deciding on its jurisdiction. [624]

In a contract between a mortgagee and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment may be brought in a court of the mortgagee residing.

The rules which govern the courts in chancery, this court; and ought to be.

THIS was an appeal from the Circuit Court of Ohio, by the complainant, on a bill filed in the chancery, the object of which was, through the Circuit Court, to obtain a conveyance of a tract of land situated in the State of Ohio.

The complainant, a citizen of the State of Alabama, derived title under a conveyance from Duncau M'Arthur, a citizen of Ohio; the only point decided in the Circuit Court was upon the question of jurisdiction. The Circuit Court dismissed the bill, for want of jurisdiction; and the complainant appealed to this court.

*Before the argument commenced, [*621] the counsel for both parties asked instructions of the court upon the question, whether, as the record contained the whole of the proceedings in the cause, and exhibited all the matters either party required for a final disposition of the case, in this court, upon all the points in controversy, this court would permit the argument to go to the whole case, so that a decree could be given here upon the whole case; or, whether an opinion upon the jurisdiction only having been given in the Circuit Court, the argument should be confined to that question. The court having advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken.

In the Circuit Court of Ohio, the defendant suggested that M'Donald, the complainant in the bill, was not a citizen of Ohio; and according to a practice in the courts of the State of Ohio, under the authority of a law of that State, interrogatories were exhibited to the complainant, to which answers were given. This law was passed subsequent to the Act of Congress, establishing the judiciary system, and was admitted not to be authority in the courts of the United States. The facts stated by the complainant, in answer to those inter-

NOTE.—*Jurisdiction; Colorable conveyance to enable suit to be brought; coupons; residence of assignor.* Where, in ejectment in the Circuit Court, it appears that the conveyance to the lessor of the plaintiff was made without consideration, and merely to enable the suit to be brought in the Circuit Court, the court will not take jurisdiction. *Maxwell v. Levy*, 2 Dall., 381.

Peters 1.

In what cases the Federal Courts will refuse to take jurisdiction if an action founded upon a conveyance of land to the plaintiff, on the ground that such conveyance being merely with a view to give jurisdiction to the court, is void. *Briggs v. French*, 2 Sumn., 251.

A, a citizen of New York, being one of numerous tenants in common of lands in Pennsylvania, of

rogatories, with other testimony, furnished the ground taken against the jurisdiction of the court.

On the 14th November, 1823, Duncan M'Arthur conveyed, by deed of indenture, the land in controversy, to the complainant; the consideration expressed in the deed being \$1,100, the amount of a debt he owed to the complainant for land purchased from him. In reply to the interrogatory "whether he was the beneficial owner, or was prosecuting the suit for the benefit of some resident in Ohio, and whether he is the real prosecutor of the suit, and was so at its commencement, or whether his name was used for the benefit of a citizen of the State of Ohio," the complainant answered, by referring to a letter from Duncan M'Arthur to him, dated July 18th, 1823. In that letter, Duncan M'Arthur offers to give the land in question, 1.266 acres, alleged to be worth five dollars per acre, to pay a debt of \$1,100; suggests that the title is good, if prosecuted in the Federal Court; "but State judges do not understand land causes, and a claimant in the military district might as well toss up heads and tails as sue in a State Court." It contains also this suggestion: "Should you accept this offer, and not wish to prosecute the claim yourself, you can make something handsome, I have no doubt, by selling it to some of your neighbors;" and it concludes with offering "any assistance in 622*] my power, should a suit be brought for recovery of the land in the Circuit Court."

He also stated, in his answer, that the deed under which he claimed was executed for the purpose of giving jurisdiction to the Court of the United States; because he believed that court safer than any other in the State of Ohio; that the contract was made by letter, of which he had not retained a copy; and, that at the time the deed was "written," there was no special agreement between him and M'Arthur, but, perhaps, propositions by letter. "I give my bonds to a third party for a quit-claim title to said lands, on condition of their paying me \$1,100."

The complainant insisted, that the deed from M'Arthur conveys to M'Donald such a title as will enable him to sustain the suit in a Federal Court; that it is sufficient, if he has any interest; that by accepting the deed, M'Donald has

been paid his debt, and though he may be only mortgagee, he may sue in this court.

The respondents contended, that the answer of M'Donald shows that he is not the owner of the land; and his manner of answering leaves no doubt but that the owner is a citizen of Ohio, and that the jurisdiction of the court, therefore, cannot be maintained.

Mr. Baldwin and *Mr. Dodridge*, for the complainant.

It is evident that the complainant held the land, and it was not material how he held it. He had an interest in the land, and was a citizen of Alabama. It is not necessary that a party to sue in the courts of the United States shall be the sole owner, if he is beneficial owner of a part of the land; if he has any interest in the lands, it is sufficient. The class of cases decided in the Circuit Court of Pennsylvania, by *Mr. Justice Washington*, has established the principle. (*Robert Brown's Lessee v. Brown*, 1 Wash. Rep., 429.) Here the interest in the land is certainly to the extent of the debt; and the court will sustain the jurisdiction, although the interest may not be commensurate with the whole of the land. It is important and necessary, and it was in the view of the framers of the Constitution of the United States that their tribunals should be opened to those whom prejudice, or unjust and unconstitutional legislation in the States, might prevent from maintaining their rights in the courts of the States, and the courts of the United States should favor such appeals. Titles may, and are sometimes bad in a State, before a State Court, which are perfect under the decisions of the national courts. (*Huideköper's Lessee v. Douglas*, 1 Circuit Court Rep., 258.) *Mr. Dodridge* also referred to cases, similar in principle, decided in the courts of Virginia.

**Mr. Hammond*, for the appellees. [*623

The inference to be drawn from the decisions of the courts of Pennsylvania, is different from that which the complainant's counsel deduces. The interference of the courts of the United States in relation to titles to lands, so as to regulate them differently from the laws of the State, is to be deprecated; such property should be held according to the decisions of the courts of the State.

The complainant has nothing but a mortgage

which State the other tenants in common were citizens, took a conveyance in severalty from the trustees, also citizens of Pennsylvania, in whom the whole interest had been vested, and covenanted in the deed to institute suits for the recovery of the lands so conveyed to him, and to re-convey them to the trustees, on their repaying to him his expenses, &c. Held, that the deed was not colorable to vest jurisdiction in the United States Courts, but valid, and A might, upon this title, sue in the Circuit Court. *Browne v. Browne*, 1 Wash. C. C., 429; *Browne v. Arbuckle*, 1 Wash. C. C., 484.

If a mortgage be actually sold and assigned so as to make the complainant the real owner thereof, he may sue in a Circuit Court of the United States, though one inducement to sell and assign was to vest the title in one able to bring a suit in that Court. Otherwise, if the assignor continues the real owner. *Smith v. Kemochen*, 7 How., 198.

The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record, but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwith-

standing the conveyances; and if both parties are citizens of the same State, jurisdiction, of course, cannot be upheld. *Smith v. Krumochen*, 7 How., 198; *Maxfield v. Levy*, 4 Dall., 330; 1 Wash. C. C., 70, 80.

The legal title of coupons of town bonds being in the plaintiff, the motive of the transaction, as that he purchased to bring suit, is not material. *Perrine v. Town of Thompson*, 8 Reporter, 329.

The holder of a coupon payable to bearer is not an assignee of the cause of action within sec. 1, of the act of March 3, 1875. 18 U. S. Stat. at L., 470; *Cooper v. Town of Thompson*, 13 Blatchf. 434; *Varner v. West*, 1 Woods, 493.

A Circuit Court has no jurisdiction to entertain an action brought by an indorsee of a promissory note, where both the maker and payee and indorser are citizens of the same State. As the payee could not have sued the maker, his assignee or indorsee cannot do so, under sec. 11 of the judiciary act of Sept. 24, 1789. So held, notwithstanding the note was not negotiable in its terms. *Shuford v. Cain*, 1 Abb. U. S., 302.

The Circuit Court has not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgageor and mortgagee are citizens of the same State. *Hill v. Winire*, 1 Biss., 275.

interest in the land, and such an interest cannot give jurisdiction to the courts of the United States.

The engagement to give a quit-claim deed, coupled with the absence of proof to show that the deed to be made was to another person than M'Arthur, authorizes the assertion that the whole arrangement was one intended only to aid M'Arthur in bringing his title before a court of the United States; and such a proceeding cannot be sustained.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was instituted in the Circuit Court of the United States for the Seventh Circuit, and District of Ohio, to obtain a conveyance of a tract of land, lying in what is termed "the military district;" claimed by the complainant under a patent, younger than that under which it is held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan M'Arthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the court; and after hearing the parties upon this point, the court dismissed the bill, being of opinion that its jurisdiction could not be sustained. From this decree the complainant has appealed, and the cause is now before this court on the question of jurisdiction.

The bill states the complainant to be a citizen and resident of the State of Alabama, and the defendants to be citizens and residents of the State of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one State, having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie; consequently, the single inquiry must be, whether the conveyance from M'Arthur to M'Donald was real or fictitious.

The transaction, as laid before the court, appears to be this: M'Arthur was apprehensive that his title could not be sustained in the courts of the State, in which alone he could sue; and being indebted to M'Donald in the sum of \$1,100, offered to sell and convey to him the land in controversy, in payment of **624** *this debt. The letter in which this offer was made, expresses the opinion that his title was good, and would most probably be established in the courts of the United States, but would fail in the courts of the State. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests, that if M'Donald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors, who might be disposed to emigrate to Ohio; and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the courts of the United States.

The contract was concluded by a letter, written in answer to that which has been stated, of which the said M'Donald retained no copy. There was no special agreement between the plaintiff and M'Arthur when the deed was written, but perhaps some proposition by letter.

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He gave his bond to a third party for making a quit-claim title to the land, on condition of receiving from him \$1,100.

This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. M'Donald could not have maintained an action for his debt, nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them, when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different States.

The only part of the testimony which can inspire doubt, respecting its being an absolute sale, is the admission that the plaintiff gave his bond to a third party for a quit-claim title to the land, on paying him \$1,100. We are not informed who this third party was, nor do we suppose it to be material. The title of M'Arthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist, that it was for M'Arthur. The court cannot act upon this suspicion.

But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not effect the question. In a contest between the mortgageor and mortgagee, being citizens of different States, it cannot be doubted that an ejectment, or a bill *to foreclose, may be brought by the [**625** mortgagee, residing in a different State, in a court of the United States. Why, then, may he not sustain a suit in the same court, against any other person being a citizen of the same State with the mortgageor. We can perceive no reason why he should not. The case depends, we think, on the question whether the transaction between M'Arthur and M'Donald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

A question has been made, whether the Circuit Court ought to have noticed the testimony on the conveyance under which the plaintiff claims, because it was brought irregularly before them.

By a law of the State, interrogatories may be propounded by the defendant in his answer, which the plaintiff is compelled to answer as if they had been propounded in a cross bill.

Although this point has become unimportant in this cause, the court thinks it proper to say, that the rules which govern the practice of the circuit courts in chancery, have been prescribed by this court, and ought to be observed.

We think there is error in the decree of the Circuit Court dismissing the complainant's bill, and that the same ought to be reversed, and the cause remanded for further proceedings according to law.

This case came on, &c., and was argued on the point of jurisdiction. On consideration

whereof, this court is of opinion, that there is error in the decree of the said Circuit Court dismissing the complainant's bill. It is therefore decreed, and ordered by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed and annulled. And it is further ordered, that the cause be remanded to the said Circuit Court for further proceedings to be had therein according to law and justice.

S. C., 6 Pet., 261.

Cited. —12 Pet., 298; 7 How., 216, 268, 270; 19 How., 73; 3 Wall., 423; 6 Wall., 288; 9 Wall., 123; 1 Sumn., 584; 12 Blatchf., 290.

626*] *DUNCAN M'ARTHUR, *Plaintiff in Error*,
v.

WESLEY S. PORTER'S LESSEE.

A special verdict was found by the jury, upon which judgment was to be entered according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof. A deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record. The court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it.

THIS case came up by writ of error to the the Circuit Court of the District of Ohio, and was argued by *Mr. Baldwin* for the plaintiff in error, and by *Mr. Ewing* for the defendant in error. The cause was remanded to the Circuit Court in consequence of a defect in the record, and no opinion having been given by the court upon the points presented and discussed by the counsel, they are omitted.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This was an ejectment in the Court for the Seventh Circuit and District of Ohio, in which the jury found a verdict in the following words: "We, the jury, find the defendant guilty of the trespass and ejectment, in the declaration mentioned, and assess the plaintiff's damages to six cents, which verdict is thus rendered, subject to the opinion of the court on the question reserved by consent of parties, as to so much of the land in controversy as is contained in the deed of the sheriff of Ross county to the said defendant, bearing date the — day of —, 1802, and upon that part of the land included in said deed. If the opinion of the court on the question so reserved by consent, shall be with the plaintiff, that the said deed is not valid to pass the land therein described, then we, the jury, find the defendant guilty of the trespass and ejectment in the declaration mentioned, accordingly, for that part also; and if the opinion of the court thereon shall be in favor of the defendant, that said deed, with the other evidences exhibited as part of said title, is valid to pass the fee to the defendant; then the jury find the defendant not guilty of the trespass and ejectment in the said declaration mentioned, as to that part of the lands and premises in controversy."

This conditional verdict is for the plaintiff,

or defendant, according *to the opinion [*627 of the court on the validity of a deed, with the other evidences exhibited as part of said title. But this deed, and these other evidences of title are not exhibited to the court in such manner as to enable us to notice them. A deed does, indeed, form a part of a bill of exception taken to the opinion of the court, on a motion subsequently made for a new trial. But the court cannot know, judicially, that this is the same deed which is referred to in the verdict, or what are the other evidences of title which are connected with it. The verdict is too imperfect to enable the court to render judgment on it.

The judgment of the Circuit Court is therefore reversed, and the cause remanded to the Circuit Court, with directions to set aside the verdict, and to award a *venire facias de novo*.

This cause came on, &c. In consideration whereof, it is the opinion of this court, that the judgment of the said Circuit Court in this cause is erroneous, because the verdict is imperfect. It is therefore considered and adjudged by this court, that the said judgment be, and the same is hereby reversed and annulled. And it is further ordered, that this cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

*JAMES JACKSON, ex dem. LAZY [*628
ANDERSON,
v.

JOHN CLARK AND ROBERT ELLISON.

Military land warrants—Construction of statute—Virginia law of cession.

Construction of the Act of Congress, passed March 2d, 1807, entitled, "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated. [634]

The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States as a common fund for those States, who were or might become members of the Union, to be disposed of for that purpose. [635]

Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected by prescribing the time in which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. [635]

If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. [635]

If it be conceded that the proviso in the act of 2d March, 1807, was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be deputed to the proviso, it becomes itself a nullity. [635]

Lands surveyed are under the law as completely withdrawn from the common mass as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. [638]

ERROR to the Circuit Court of the United States for the District of Ohio.

The plaintiff brought an action of ejectment, in the Circuit Court of Ohio, to recover a tract of land situate in Adams county, in the Virginia military district, and State of Ohio. On the trial of the cause, a bill of exceptions was tendered by the plaintiff, to the opinion of the court, upon the admissibility of certain testimony, which was offered by the plaintiff, and which was rejected by the court.

The facts of the case, with the matters which [629*] were the subject of the plaintiff's exceptions, appear in the opinion of the court.

The case was argued by *Mr. Leonard* and *Mr. Hammond* for the plaintiff in error, and by *Mr. Creighton* and *Mr. Ewing* for the defendants.

The argument of the counsel of the plaintiff in error was principally upon these points:

1. Congress could not rightfully limit the time within which military warrants should be located and surveyed.

2. The Act of Congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

Mr. Leonard and *Mr. Hammond* insisted the proviso of the Act of 2d March, 1807, was simply designed to protect voidable surveys, not those absolutely void. Before the statute, surveys made in defective locations, or not executed in conformity, were voidable, but might be carried into grant, and the grants issued thereon were, without the aid of the act, appropriations of the land.

These were the principal evils in the country demanding legislative interference, and led to the enactment of the statute. And this places all voidable surveys, which might be patented, on the same footing as if they were patented, so far as to prevent subsequent appropriation, but does not cover with its protection surveys on which grants can never issue.

The authority of the surveyor to make a survey is derived solely from the warrant; and surveys executed without warrants are void. This is apparent from all the laws of Virginia relative to the subject, and from the common practice and universal understanding of those laws and the decisions of the courts. By the Act of 9th June, 1794, now in force, no patent can issue on the defendant's survey.

On the construction of defendants, the proviso will operate as a virtual repeal of that act, and give such validity to these surveys as to remove the necessity of obtaining grants, or, otherwise, by preventing subsequent locations, vest the land in the United States. The latter construction would be an infringement of the compact between Virginia and the United States, and a refusal to execute it in good faith.

If Congress can limit the time within which Peters 1.

locations may be made, they are bound to execute the power with the utmost honor, and not apply a limitation to one part of the district without extending it to all. Much less are they authorized, under color of limiting the time, to appropriate the land to their own use. None will presume such ill faith in Congress. The Virginia troops acquired a right, and at the price of blood, to *compensation in land by the express stipulation of that State. Virginia did not cede the north-west territory to the Union until the United States engaged to make good the compensation out of the reservation. The faith of two sovereigns has pledged the military district to these troops.

The whole course of the legislation of Congress evinces that it was not their design to authorize locations or surveys without military warrants, or for more land than is embraced in them. It cannot be supposed that it was the design of the proviso to protect surveys wholly unauthorized, on which grants can never issue, but to protect surveys that are irregular, defective, voidable, and which might be patented. The act of Virginia, protecting old military surveys, is as strongly expressed as the proviso, but has always been held to apply only to those founded upon warrants.

A sale of land by title bond, and location afterwards made, does not vest the purchaser with title in the warrant or entry. The purchaser reposes confidence in the vendor, and if this confidence is misplaced, the purchaser, and not the government, must sustain the loss. The purchaser can look to his bond for indemnity. Massie was then the proprietor, and had the right to elect either of these locations, and by recording a survey of the earlier he bound himself, and abandoned the latter. The taking out the warrant, and the plots of survey, as on a satisfied warrant, is a solemn act of abandonment. The recorded survey, and not the survey executed on the ground, is protected by the proviso. The recording a survey after the satisfied warrant with the plots of survey are taken from the office is a void act. A new entry cannot be held a withdrawal of one prior, or, if so, it cannot be held a withdrawal of a survey recorded when the plot is taken from the office, and especially when not returned; and thus a survey of 553 acres, made on only 403 acres of located warrant, the residue of the 553 acres being surveyed, recorded, the plots taken out of the office, and not returned, is not shielded by the proviso.

He cited, among other cases, *Taylor's Lessee v. Myers* (7 Wheat., 23); *Kerr v. Watts* (6 Wheat., 550); *Mathie v. Potts* (6 Cranch); *Taylor et al. v. Brown* (5 Cranch); *Wilson v. Mason* (1 Cranch); *Hickman v. Hoffman*, and *Estill's Heirs v. Haret's Heirs* (Hardin's Reports, pp. 81, 82 of Sneed's printed Kentucky Decisions); *Johnson v. Buffington* (2 Wash. Rep.); *Holt's Heirs v. Hemphile's Heirs* (3d vol. Ohio Reports), and referred to Swan's Collection of Ohio Land Laws, under the head of Virginia Military Lands.

Mr. Creighton and *Mr. Ewing*, for the defendants in error, contended:

In the case presented by the record and bill of exceptions the counsel for the de- [631] fendants insist that they are protected by the

proviso of the Act of Congress of the 2d March, 1807, entitled an act to extend the time for locating Virginia military warrants, for returning surveys, &c.; and subsequent acts of Congress on the same subject, containing the same proviso; and that the patent obtained by the plaintiff is "null and void."

The United States, under the deed of cession of 1784, from Virginia, held the Virginia military district in trust, for the Virginia claimants. The surplus, subject to sale, as other lands belonging to the United States.

In the execution of these trusts, the Congress of the United States, on the 23d of March, 1804, passed an Act limiting locations in the Virginia military district to three years, and five years to execute and return surveys.

The holders of warrants asked an extension of the time. When the Act of the 2d March, 1807, was passed, extending the period for making locations and returning surveys, the proviso on which the defendants rely, was introduced, and has been retained in all the subsequent Acts of Congress on that subject.

The power of Congress to limit the period for making locations and surveys in this district (exercised since the year 1804), heretofore has never been questioned. In the exercise of an undoubted power, the object and policy of the national Legislature in the introduction of the proviso cannot be mistaken, in excluding from location "land for which patents had previously been issued, or which had been previously surveyed." The survey claimed by the defendants, is a subsisting survey, which has never been abandoned or withdrawn, and comes expressly within the doctrine laid down by the court in the case of *Taylor's Lessee v. Myers* (7 Wheat., 23). "The proviso in the act of March 2d, 1807, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed." The act places surveys on the same footing with patents, for all the purposes of defense in trials at law. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. (*Hoofnagle et al. v. Anderson*, 7 Wheat., 212). In the action of ejectment in Ohio, the parties are never permitted to go behind the patent. The same rule applies under this act to surveys.

The class of cases referred to, and relied on by the plaintiff's counsel, are cases in chancery, where it is the appropriate duty of the court to go behind the patent or survey.

Whether a patent can be obtained by the defendants on their survey, will be a question between them and the government whenever the **632*** government shall make provision to inquire into the claim. It can never be a question between the plaintiff and defendants. It is sufficient for the defendants in this controversy, that they have a subsisting survey, claimed by them, and that the patent obtained by the plaintiff has been procured in contravention of the positive provisions of the act, and is "null and void."

If it were admissible to go into the inquiry desired by the plaintiff, it will be seen, that when Nathaniel Massie sold the land in question to the defendants, and at the time he made the entry and survey, he owned 403 acres, part

of Leven Powell's warrant, and 150 acres, part of Thomas Goodwin's warrant, making 553 acres, the precise quantity in the entry and survey.

If the objection to the defendants' title exists, as suggested by the plaintiff's counsel, the facts disclosed in the evidence offered by him, present a case where a Court of Equity would give to the defendants ample relief.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is an ejectment brought by the plaintiff in error, in the Court of the United States for the Seventh Circuit and District of Ohio, to recover a tract of land lying in the military district.

The plaintiff offered, as his title, a patent from the government of the United States, bearing date the 10th of November, 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia military district; the survey purporting to have been made on the 10th of October, 1796, and recorded on the 15th of April, 1812, founded on an entry, bearing date the 19th day of July, 1796, for 553 acres of land in the name of Nathaniel Massie, assignee, numbered 2744, and founded upon Leven Powell's warrant for 2,000 acres, No. 3398, and Thomas Goodwin's warrant for 200 acres, No. 1930. It was admitted that the defendants were purchasers from Massie, prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him before the year 1812. It was also admitted that the plaintiff's entry was made on the 10th of June, 1824, and his survey on the 20th of the same month.

The defendant relied on this survey, and on the proviso of the Act passed the 2d of March, 1807, entitled, "An Act to extend the time for locating Virginia military warrants, &c." This act annexes the following proviso to the permission it grants to obtain warrants ***633** for military service, and to make locations within the military district: "Provided, that no locations as aforesaid, within the aforesaid mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may, nevertheless, be obtained for land, located contrary to the provisions of this section shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the Act of Congress, the plaintiff offered to prove that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence two entries, amounting to 1,597 acres, on Powell's warrant, made in Powell's name the 30th of December, 1791, surveyed by Massie on the 3d of January, 1792, the survey recorded on the 10th of the same month; plots and certificates taken from the office by Massie the 11th of July, 1795, and a patent issued to him on the 19th September, 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on the 27th of January, 1795,

surveyed on the 27th December, 1796, the survey recorded on the 9th of June, 1797; the plot and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie, on the 14th of June, 1797, and a patent issued to his heirs on the 3d of December, 1814.

He also offered in evidence, an entry for fifty acres made on Thomas Goodwin's warrant, in the name of John Walker, assignee, the 17th of September, 1795, surveyed the 30th of March, 1820, and patented on the 19th of November, 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16th of June, 1795, in the name of the said Massie, surveyed on the 1st of July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie on the 15th of February, 1800.

The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed, that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him, ignorantly and improperly, to record; and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds, that he had refused to grant a plot, and certificate of survey, being of opinion that the whole of the warrants had been previously satisfied.

The defendants moved the court to reject the authenticated copies, and testimony aforesaid, as inadmissible evidence; which motion was granted by the court, upon the ground that the Act of Congress confirmed the survey of the defendants, *and annulled the plaintiff's patent. An exception was taken to this opinion. A verdict and judgment having been given for the defendants, the plaintiff has brought the cause into this court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend:

1. That Congress could not, rightfully, limit the time within which military warrants should be located and surveyed.

2. That the Act of Congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

The first point to be considered is the objection to the limitation of time prescribed by Congress, within which the military warrants granted by Virginia should be located. The plaintiff contends that no limitation can be fixed.

In the October session of 1783, the Legislature of Virginia passed an Act ceding to Congress the territory claimed by that State, lying north-west of the river Ohio, under certain reservations and conditions in the act mentioned. One of these was: "That in case the quantity of good land on the south-east side of the Ohio, upon the waters of the Cumberland River, and between the Green River and Tennessee, which has been reserved by law for the Virginia troops, on the continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops in good lands to

be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion that it will not be very considerable. Subsequent resolutions of the Virginia Legislature have added very much to the amount of these bounties. The residue of the lands are ceded to the United States, for the benefit of the said States, "to be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure; *and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever."

The government of the United States, then, received this territory in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation; and this trust is to be executed "by a faithful and *bona fide*" disposition of the land for that purpose.

We cannot take a retrospective view of the then situation of the United States without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government; and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was also of vital interest. This was to be effected only by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time might be prescribed, the other purposes of the trust would be totally defeated, and the surplus land remain a wilderness.

This reasonable, and, we think, necessary construction, has met with general acquiescence. Congress has acted upon it, and has acted in such a manner as not to excite complaints, either in the State of Virginia or the holders of military warrants.

If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. The condition annexed by Congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants, by securing titles

previously acquired. We are to inquire whether the case of the defendants is within it.

2. It has been contended that the prohibition in the Act of the 2d of March, 1807, to make locations on lands which had been previously surveyed, does not extend to the survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground, but requires that it should be made in virtue of a warrant for the purpose of appropriating land to which the holder of that warrant is entitled by law. The warrant can **636***] be an authority *for surveying and appropriating so much land only as it professes to grant; and this necessary limitation, could it require confirmation, is confirmed by the Act of the 9th of June, 1794, which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. That act contains a proviso, "that no letters patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded, previous to the entry of the plaintiff, no patent could at that time have been obtained by the defendants; and therefore the saving in the statute could not have been intended for their survey.

The court has felt the weight of this argument, and has bestowed upon it the most deliberate consideration.

The Act of the 23d of March, 1804, is the first act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That act requires that the locations shall be made within three years from its passage. On the 2d of March, 1807, the first act was passed giving a farther time of three years for making locations, and of five years for returning surveys. This act contains the proviso of which the defendants claim the benefit. In every act which has been since passed, prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March, 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws, to locate and survey military warrants.

If it be conceded that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must therefore inquire to which class the survey of the defendants belongs.

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2,000 acres, certainly of 403 acres—part thereof—when he made the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants, because he made an entry for 403 acres, part of Powell's warrant, in his own

name, on the 27th of January, 1795, and an entry for 150 acres, part of Goodwin's warrant, in his own name, on the 16th of June, 1795; both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to 553 acres, the *quantity for which the entry sold to ***637** the defendants was made. Being thus the proprietor of both these entries, and of the warrants on which they were founded, he makes an entry in his own name, on the 19th July, 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him nor allowed by the principal surveyor, unless those preceding entries were withdrawn. According to the usage of the office, as stated in *Taylor's Lessee v. Myers* (7 Wheat., 23), Massie had the power to withdraw them. Had he expressed to the Surveyor-General his wish to withdraw them, and to re-enter the warrants, his wish would not have been opposed. But, without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful if the two preceding entries were removed; unlawful if they stood. The officers of the government did their duty if this entry displaced the two which preceded it; but violated their duty if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed, unless accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the two last preceding entries, previous to the time of making this for the defendants, so that the contest was between purchasers, the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them; the contest, had one arisen, would not have been between purchasers, but between a purchaser and the wrong-doer himself. Can it be doubted how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry, and locate the warrants elsewhere, he does locate them elsewhere, and sells this location to a purchaser for a valuable consideration, without notice. It cannot, we think, be doubted that a court of equity would at any time, while Massie remained the owner of the prior entries, relieve such purchaser by annulling the entries which obstructed the title of the purchaser; or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plot and certificate of survey, with the accompanying vouchers required by law, been presented by the defendants previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey, then, was not an absolute nullity. It might have been supported in a *court ***638** of equity; and had the defendants, instead of trusting, as they probably did, to Massie for a title, been diligent in the pursuit of it them-

selves, they might, perhaps, have obtained one from the United States.

This was not a fictitious, but an actual survey, made as early as the year 1796 by a regular officer, for one owning the warrants on which the entry purports to be made, and having at the time full power to give complete validity both to the entry and survey. No circumstance attended them which could enable a purchaser to detect the latent defect. The survey having every appearance of fairness and validity given to it by the regular officers of the government, is sold, at least as early as the year 1796, to persons who take possession of it and have retained possession ever since. Why should not the proviso in the act of Congress apply to the case? The words taken literally certainly apply to it. "No locations shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey there is none. Lands surveyed are as completely withdrawn as lands patented from subsequent location.

It cannot be said that the prohibition was intended only for valid and regular surveys. They did not require legislative aid. It was known that the military district abounded with defective entries and surveys which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location, which he was not permitted to pass; which he was not at liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity as it is now supposed to be. Yet it is admitted, that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him.

We cannot draw the distinction between such a case and this. Congress does not appear to have drawn it. They are both surveys made by the regular officers on military warrants.

It may be that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say, that as **639*** we understand the act of Congress, it was not liable to location when the plaintiff's entry was made.

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plot we know not when; certainly after it was recorded, and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impro-

priety was in omitting to require that the previous entries made in the name of Massie should be withdrawn, expressly, when this entry was made.

This case is not, we think, like *Taylor's Lessee v. Myers*, reported in 7 Wheat., 23. In that case the owner had openly abandoned his location and survey, and had placed his warrant on other land. In such case the land was universally considered as returning to the mass of vacant land and becoming, like other vacant land, subject to appropriation. A person having no interest in the original survey, attempted to set it up against a subsequent locator under the proviso in the act of Congress which has been stated. The court said, "the proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned and in which no person has an interest." This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it.

We think there is no error in the decree, and that it ought to be affirmed.

Criticised—7 How., 262, 269, 270, 272.

Cited—6 Pet., 677; 12 Pet., 298, 299.

*ROBERT BARRY, Appellant, [*640
v.

GRIFFITH COOMBE, Appellee.

Maryland statute of frauds—evidence.

The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." [650]

A note or memorandum in writing of the agreement between parties is sufficient under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. [650]

An examination of the cases will show that Courts of Equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created. It is written evidence which the statute requires; and a note or letter, and even in one case a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute. [651]

Where, in an account stated by the parties, in

NOTE.—Statute of frauds, what is sufficient note or memorandum under.

An entry in defendant's books, not signed by anyone, is not a sufficient note in writing to take the case out of the statute of frauds. *Barry v. Law*, 1 Cranch, C. C., 77.

An auctioneer's memorandum or entry, in his sales-book, if in any case it could be sufficient to take the case out of the statute of frauds, is not so if it does not sufficiently describe the lands and the terms of sale. *Williams v. Threlkeld*, 2 Cranch, C. C., 307.

The memorandum required by the statute must

the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit: "By my purchase of your half, E. B. wharf and premises this day agreed upon between us, \$7,578.63;" it was held to be a sufficient memorandum in writing under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "your one-half E. B. wharf and premises." [651]

THIS was an appeal from a decree in equity of the Circuit Court for the county of Washington, against Robert Barry, the appellant, upon a bill filed by Griffith Coombe, for the specific execution of a contract for the sale of real estate in the city of Washington, and for the payment of the balance of an account, which, it was alleged, had been settled and agreed upon by the parties.

The material charges in the bill, and which were brought into the consideration of the court by the counsel in argument, were: that various transactions, commencing in 1815, had taken place between the complainant and the defendant, who then resided in Baltimore, together with a certain James D. Barry, of the city of Washington, as joint proprietors of a **641*** tan-yard, *in which the business of tanning and selling leather was carried on; in the course of which the concern became largely indebted to the complainant and to other persons; for the payment of which securities had been given. Afterwards, in 1821, the partnership between the defendant and James D. Barry was dissolved, and the whole of the stock in trade became the property of the defendant, who afterwards continued the business on his own account.

That about the 18th of May, 1818, the complainant and the defendant purchased an estate on the eastern branch of the Potomac, in the city of Washington, upon which were erected a dwelling-house, warehouse and wharf, and which were held by the complainant and the defendant as tenants in common. Large ex-

penditures were made by the complainant for the repairs of the property, and the defendant was considerably indebted to the complainant for his proportion and share of the same.

The bill further charged that about September, 1820, a settlement of all accounts took place between the parties, upon which the defendant was found in arrears, and admitted himself to be indebted to the complainant, a stated balance of \$9,078.33; and for the purpose of liquidating and discharging the balance so due by the defendant, a bargain was then concluded for the sale of the defendant's moiety of the said premises on the eastern branch so held by them in common; for which the complainant agreed to allow him the price of \$7,578.63, to be passed to his credit, in account against the stated balance; the balance of \$1,500 still remaining due, the defendant agreed to pay with interest in installments, in one, two and three years, and to give his promissory note for the same; in consideration for which agreement, on the part of the defendant, the complainant agreed to discharge the parties who had been concerned in the tan-yard, from the debt due to him, on account of certain indorsements; and to relinquish to the defendant his interest in, and lien upon, leather which he held. Whereupon the defendant immediately drew up in his own handwriting a statement of the said settlement, bargain and agreement, in the form of an account between himself as debtor and the complainant as creditor, signed at the beginning with the defendant's name in his own handwriting, and at the foot with the complainant's name in his handwriting; in which written statement are set down the heads of the several accounts upon which the said balance of \$9,078.63 was ascertained against the defendant as aforesaid; the credit and deduction of the purchase money agreed to be allowed the complainant for the defendant's moiety of the said estate and premises on the eastern branch as aforesaid, described in said statement as "your (meaning the defendant's) $\frac{1}{2}$ E. B. (meaning eastern branch) [***642** wharf and premises;" and expressly stated as

contain all the essential terms of the contract, expressed with such a degree of certainty as to render it unnecessary to resort to parol evidence to determine the intent of the parties thereto. *Hogan v. Domestic S. M. Co.*, 9 Hun. N. Y., 74.

The memorandum or note of the agreement should set forth the promise and the consideration, either by its own contents, or by reference to something extrinsic, by which it may be rendered certain; it should be signed by one of the parties; and the name of the other should appear on it. *Wain v. Walters*, 5 East, 10; *Stadt v. Lill*, 1 Camp., 242; 9 East, 348; *Saunders v. Wakefield*, 4 Barn. & Ald., 595; *Champion v. Plummer*, 4 Bos. & P., 252; *Wheeler v. Collier*, 1 Wood. & M., 123; *Jenkins v. Reynolds*, 2 Ball. & B., 14; *Mosley v. Boothby*, 3 Bing., 107; *Lees v. Whitcomb*, 5 Bing., 34; *Cole v. Dyer*, 1 Crompt. & Jerv., 461; *Newberry v. Armstrong*, 6 Bing., 201; *Bainbridge v. Wade*, 16 Q. B., 89; *Powers v. Fowler*, 4 Ell. & Bl., 571; *Sears v. Brink*, 3 John., 210; *Rogers v. Kneeland*, 13 Wend., 114; *Peltier v. Collins*, 3 Wend., 419; *Edgerton v. Matthews*, 6 East 308.

The memorandum need only contain the substance, and not a detail of all the particulars of the contract. *Ives v. Hazard*, 4 R. Island, 14; *McConnell v. Billhart*, 17 Ill., 354; *Chase v. Lowell*, 7 Gray., 33; *Hawkins v. Chase*, 19 Pick., 502; *Salmon Falls Man. Co. v. Goddard*, 14 How., 456; *Sarl v. Bourdillon*, 1 Com. B. N. S., 188.

It must mention the names of the contracting

parties. *Graham v. Wusson*, 5 Bing. N. C., 907; *S. C.*, 7 Scott, 769, 776; *Sarl v. Bourdillon*, 1 Com. B. N. S., 188; *Bateman v. Phillips*, 15 East, 272; *Sherburne v. Shaw*, 1 N. Hamp., 157; *Champion v. Plummer*, 4 Bos. & Pull., 252; *Webster v. Ela*, 5 N. Hamp., 540; *Sanborn v. Sanborn*, 7 Gray, 142; *Barry v. Law*, 1 Cranch, C. C., 77; *Nichols v. Johnson*, 10 Conn., 192.

It should show which is buyer and which is seller. *Salmon F. Mau. Co. v. Goddard*, 14 How., 446; *Bailey v. Ogden*, 3 John., 399; *Nichols v. Johnson*, 10 Conn., 198; *Osborn v. Phelps*, 19 Conn., 73.

It should state the contract and describe the subject-matter of it with reasonable certainty, either expressly or by reference. 3 John., 399; 14 How., 446; *Waterman v. Meigs*, 4 Cush., 497; *Nichols v. Johnson*, 10 Conn., 192; *Kay v. Curd*, 6 B. Mon., 100; *Morton v. Dean*, 13 Mete., 385; *Chitt. on Cont.* (ed. 1860) 70, 71, 412; *Story on Sales*, sec. 257; *DeBeil v. Thompson*, 3 Beavan, 469; *Tallman v. Franklin*, 4 Kern. N. Y., 584; *O'Donnell v. Leaman*, 43 Maine, 158; *Hawkins v. Chace*, 19 Pick., 502; *Sarl v. Bourdillon*, *supra*.

An omission of the particular mode or time of payment or even of the price itself, does not necessarily invalidate the contract. *Valpy v. Gibson*, 4 Com. B., 887, 864; *Hawkins v. Chace*, 19 Pick., 502; *Hoadley v. McLean*, 10 Bing., 482; *Accebal v. Levy*, 10 Bing., 382.

But if the price be agreed on it must be stated. *Ide v. Stanton*, 15 Vern., 691; *Smith v. Arnold*, 5 Mas., 414; *Elmore v. Kingscote*, 5 Barn. & C., 583;

Peters 1.

purchase by the complainant on the day of the date of said paper, with an express reference to the said agreement between the complainant and the defendant; and lastly, the said balance of \$1,500 remaining due after deducting the credit for the said purchase money as aforesaid, payable by installments as aforesaid.

The statement of the account alleged to have been so drawn up, was as follows.

| | | | |
|---|------------|------------|--|
| " WASHINGTON, 27th Sept. 1820. | | | |
| " Robert Barry, To G. Coombe, Dr. | | | |
| " To amount of J. D. Barry's notes taken up by me, and secured by him in tan yard stock, and leather, per bill dated 27th Dec., 1819, | \$4,209 00 | | |
| " Interest on do. to this day—9 mos. | 184 40 | | |
| | | \$4,393 40 | |
| " To bill of leather sent you in June, 1819 | \$2,846 50 | | |
| " Interest to this date—15 mos. | 216 65 | | |
| | | \$1,063 15 | |
| " To balance due on tan-yard books, (E. E.) | \$284 25 | | |
| " To cart of hay for tan-yard, | 37 37 | | |
| " To balance due for supplies to tan-yard per account furnished you, | 152 64 | \$474 26 | |
| " To $\frac{1}{2}$ expenses of repairs on house and wharf, E. Branch, | \$1,145 49 | \$7,930 81 | |
| " Interest, 9 mos. | 51 52 | 1,197 01 | |
| " Cr. | | \$9,127 82 | |
| " By $\frac{1}{2}$ rent and wharfage, &c., of sundrys, to this day on E. B. wharf, | | \$49 19 | |
| " By my purchase of your $\frac{1}{2}$ E. B. wharf and premises, this day, as agreed on between us. | | \$9,078 63 | |
| | | 7,578 63 | |

Hoadley v. McLean, 10 Bing., 482; Acebal v. Levy, 10 Bing., 376; Buck v. Pickwell, 1 Williams, Vt., 167; Adams v. McMillan, 7 Port., 73; Soles v. Hickman, 20 Penn. St., 180; Waul v. Kirman, 27 Miss., 823; Kay v. Curd, 6 B. Mon., 103; Story on Sales, sec. 222.

Terms of credit, if agreed on, and time of performance, if settled, should be stated in memorandum. Davis v. Shields, 26 Wend., 341; Salmon Falls M. Co. v. Goddard, 14 How., 446; O'Donnell v. Leeman, 43 Maine, 158.

Parol evidence cannot be received to supply anything which is deficient in the writing to make it the memorandum on which the parties rely. Salmon Falls M. Co. v. Goddard, 14 How., 446; O'Donnell v. Leeman, 43 Me., 158.

In Virginia, under its statute, the consideration need not be stated in writing. Violet v. Patton, 5 Cranch, 142; Taylor v. Ross, 3 Yerger, 330; Gilman v. Kibler, 5 Humph., 19; Wren v. Pearce, 4 Sm. & M., 91.

In New York, South Carolina, New Hampshire, and in other States, the English doctrine, that the consideration must be in the writing, obtains. Sears v. Brink, 3 John., 210; Leonard v. Vredenburg, 8 John., 29; Stephens v. Winn, 2 Nott. & McC., 372, (n); Neilson v. Samborne, 2 N. Hamp., 414; Henderson v. Johnson, 6 Ga., 390; Edelen v. Gough, 5 Gill., 103; Elliott v. Giese, 7 Harr. & J., 457; Bennett v. Pratt, 4 Den., 275; Hutton v. Padgett, 26 Md., 228.

In Massachusetts, New Jersey, and Maine, and some other states, the consideration need not be Peters 1.

" Balance due G. Coombe fifteen hundred dollars, payable in one, two, and three years, with interest, \$1,500 00
(Signed,) G. COOMBE.

The bill charged that this paper, each party having a copy, was for the purposes of mutual security, delivered to Daniel Carroll, Esq., of Duddington, who was a creditor of the partnership.

It was further alleged that the complainant went on to do and perform all that he had assumed and undertaken under *the [*643 agreement and settlement; that he took possession of the premises on the eastern branch, and has laid out and expended large sums of money in the repairs and improvement thereof; and that although he has repeatedly made efforts to obtain from the defendant a conveyance of the property so agreed to be conveyed to him by the defendant, it has not been made.

The bill then prays the specific relief to which the complainant alleges himself entitled in equity, under the contract; and the benefit of such a recovery as he might have at law, by attachment or otherwise, for the debt due to him as stated in the account.

Among the documents contained in the record is the following letter from the complainant to the defendant, and which, by the affidavit of John P. Ingle, was proved to have been delivered to the defendant on the 5th of April, 1822:

WASHINGTON CITY, March 26, 1822.
MR. ROBERT BARRY.

Sir—It is now time that I should have your final answer, whether you will execute the contract made between us in presence of Mr. Carroll, for the conveyance of your moiety of the house, wharf and premises on the eastern branch, and for the payment and security of the balance due me in money. For this purpose I have authorized Mr. John P. Ingle to call on you in my name and receive your conveyance, a form of which he will present you, which you will please execute and acknowledge in

stated. Packard v. Richardson, 17 Mass., 122; Buckley v. Beardsley, 2 South., 570; Levy v. Merrill, 4 Greenl., 180; Sage v. Wilcox, 6 Conn., 81; Miller v. Irvine, 1 Dev. & Bat., 103; Tufts v. Tufts, 3 Wood. & M., 456; Reed v. Evans, 17 Ohio., 128; Gilligan v. Boardman, 29 Me., 79; Adkins v. Watson, 12 Tex., 199; Hargraves v. Cook, 15 Ga., 321.

It is sufficient if it can be collected from the memorandum that there was a consideration, and what it was. Bainbridge v. Wade, 16 Q. B., 89; Steele v. Hoc, 14 Q. B., 431; Kennaway v. Treleavan, 5 Mees. & W., 498; Lysaht v. Walker, 5 Bligh. N. S., 1; Rogers v. Kneeland, 10 Wend., 218; S.C., 12 Wend., 114; Laing v. Lee, 1 Spencer, 337.

The words "value received" are sufficient to express a consideration. Watson v. McLaren, 19 Wend., 557; Douglass v. Howland, 24 Wend., 35; Day v. Elmore, 4 Wis.; Edelen v. Gough, 5 Gill., 103.

The mere circumstance of the name of a party being written by himself in the body of the memorandum of the agreement, will not itself constitute a signature. It must be inserted in such a manner as to authenticate the whole instrument, or the promise or undertaking. Caton v. Caton, L. R., 2 H. L. Cas., 127; 36 L. J. Chan., 886; 16 W. R. 1; see also Jones v. Victoria G. D. Co., L. R., Q. B. Div., 26; 46 L. J. Q. B., 219; 25 W. R., 348.

A signature by initials to a contract or a memorandum is sufficient. Palmer v. Stephens, 1 Denio, 471; State v. Bell, 16 No. Car., 313; Chichester v. Cobb, 14 L. T. (N. S.), 433.

due form, so as to make it affectual here. Please also pay to Mr. Ingle the installment of \$500, due in September last, with interest from 27th September, 1820. Please also to execute and deliver to Mr. Ingle your two notes for the other installments, drafts of which he will present you.

I also require of you the surrender of J. D. Barry's draft, indorsed by me for \$1,000, which had been discounted in the Bank of Washington, and which you promised to take up and release me from. I must notify you that if you persist in refusing to comply with the terms of your contract, according to your pledged faith in presence of the respectable witness above mentioned, I shall hold you accountable in money, for the whole balance due me according to our settlement, and shall merely hold the house, wharf, &c., which you were to have conveyed to me, as collateral security for the entire balance ascertained by that settlement, and for the expenses since laid out in repairs and improvements of the same, under the faith of your contract.

Respectfully, your obedient servant,

Griffith Coombe.

644*] *The defendant, Robert Barry, denies in his answer, the liabilities to which, by the bill of the complainant, he is said to have been under as connected with the tan-yard, and the concern with James D. Barry; and, after stating other matters, not necessary to be inserted, admits, in the language of the answer, that in the year 1820, he had a conversation with the complainant about settling their accounts, "including the debt alleged to have been secured by the pretended bill of sale aforesaid, and the complainant then proposed to purchase from this defendant, his undivided moiety of the lots and wharf aforesaid, and that the amount of purchase money should be considered as a payment to the complainant, in part of the amount which he then alleged was owing to him; and the defendant, at the request of the complainant, who alleged the badness of his handwriting as an excuse for making that request, copied from a written memorandum furnished by the complainant, the statement of the account referred to, in which the defendant's name was written by him, only for the purpose of stating him as debtor to the complainant, in compliance with his request, not as signing any contract or agreement. And that the said statement so written by him, at the instance and request of the complainant, being signed by him, was delivered to this defendant, for the purpose of considering whether, after due examination, he would assent to the terms therein proposed, and was not deposited in the hands of Daniel Carroll, as the complainant alleges. For this defendant declares that he did not then assent to the correctness of the several charges and estimates in the said statement, although he expressed his willingness to sell his undivided moiety of the said wharf and premises for the price proposed by the complainant, if this defendant should be satisfied, on examination, that he would actually receive a compensation fully equal in value to the said price; and therefore the said statement was delivered to this defendant, for the purpose of examination and consideration as aforesaid, and has always since been, and now is, in the possession of this defendant; and

in reference to the said verbal agreement, and explanatory of the condition on which this defendant was willing to carry the same into effect, this defendant, a few days after he received the said statement, having discovered a part of the representations made to him, as aforesaid, to be incorrect, wrote a letter to the complainant, representing the said conditions so far as they were affected by the discovery then made, a copy of which letter this defendant herewith exhibits, which he prays may be received as a part of this, his answer; which letter was, as this defendant believes, delivered to the complainant, and was read by him, and is probably in his possession, or in his power to produce; and this defendant prays that the said original letter may be here produced. The answer also states, *that upon subsequent [*645 examination, the account which was made out, and in which was the entry of "E. B. wharf, &c.," had been found erroneous in many particulars.

The answer submits to the decision of the court, whether the account set forth in the complainant's bill is "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed and prayed by the complainant."

The letter referred to in the defendant's answer is as follows:

BALTIMORE, 7th October, 1820.

MR. GRIFFITH COOMBE.

Sir—Having agreed to sell you my undivided half interest in the Eastern Branch wharf and premises, at Washington, lately deeded to you and to me by James D. Barry, I hereby bind myself to give you a good and sufficient conveyance of all my right and title in law and equity for the same, as soon as you send me, or that I receive, the stock of leather now working out at the tan-yard (the same being a part of the consideration for my right to said property), or otherwise place the proceeds thereof at my disposal, as far as you have, or can, or shall have, the right or power to do, or cause to be done, agreeably to the inventory lately given me by Mr. Edmund Rice, of said stock and materials, which inventory must embrace a quantity of finished leather, amounting to about eight hundred and six dollars, removed by him to his brother William's store; and as this lien to you is blended with a lien to others, I further engage, on receipt of said stock of leather, to provide likewise for the lien held thereon by Mr. Daniel Carroll, of Dud., for about eighteen hundred dollars, and also for the payment of a lien on said stock of leather, to secure the amount of a note due to Edmund Rice, or indorsed by him, at the Patriotic Bank, for about twelve hundred dollars; and, in other respects, to settle for any balance I may owe you on the account you have furnished me, agreeable to the principles of equity and justice.

I remain, &c., yours, respectfully.

P. S.—The effect of the paper signed by you, and deposited with Mr. Carroll, will, of course, remain suspended, subject to its conditions, for the purpose of carrying the foregoing into effect, and which will, by me, be complied with in good faith.

The evidence before the Circuit Court, consisting of the examinations of Mr. Pleasanton,

646*] Mr. Carroll, and others, and *what is contained in the record, are sufficiently stated in the opinion of the court.

The case was argued for the appellant by *Mr. Cox* and *Mr. Worthington*, and by *Mr. Jones* for the appellee.

The appellant contended:

1st. That there was no final agreement between the parties.

2d. If there was, it was void under the statute of frauds.

3d. Supposing an agreement fully concluded, it was obtained by misrepresentation, and fraudulent concealment.

4th. It was without consideration.

The counsel for the appellant cited the following authorities: 13 Ves., 76; Prec. in Chan., 560; 1 Atk., 12, 449; *Ib.*, 497; 2 Dessau., 145; 1 John. Ch., Rep., 149, 279, 283; 1 Cox, 222; 1 P. Williams, 771, *n*; Sugden on Vend., 71, 86, 91; 1 Equ., Cases Abr., 20; 4 Taunt., 754; Jones on Cont., 167; 1 Sch. & Lef., 22; 1 Ves., Jr., 226, 336; 2 Sch. & Lef., 7, 557; 3 Ves., 185, 379; 6 Ves., 39; 1 Edw., 516; 8 Com. Dig., 362; Sh., 705; L. Ray., 1410; 2 Camp., 308; 2 Atk., 488; 3 Camp., 493; 15 East, 7; 3 T. Rep., 757, 761; 2 P. Williams, 217; 3 Atk., 283, 6; 1 Dessau., 257; 2 Sch. & Lef., 554; 18 Ves., 10; 2 Ball & Beat., 369; 1 *Ib.*, 256; 2 Wheat., 336; 7 Ves., 341; 5 Serg. & Lowb., 485; 2 Caines' R., 241; 4 John., 251; 2 *Ib.*, 300; 16 *Ib.*, 54.

For the appellee it was argued:

1. That the original agreement was sufficiently certain and precise in its terms; and was ascertained by a sufficient memorandum in writing, under the statute of frauds.

2. That, if the original memorandum in writing were at all defective, the case is taken out of the statute by the answer; which fully admits the agreement charged in the bill, without pleading, or in any manner relying on the statute.

3. That the collateral matters of pretended equity, set up in the answer by way of avoidance, are, for the most part, utterly foreign to the merits of a specific execution of the agreement; and, in so far as they are at all material to any question between the parties to this cause, required substantive proof to support the answer; of not one of which has the appellant offered or pretended any manner of proof; but has turned his back on the most obvious means and ample opportunities, challenging him to the proof from accessible and unfailing sources of evidence, if there had been any truth in his averments; which, moreover, have been positively contradicted, in every material circumstance, and conclusively disproved by the evidence in the cause.

4. That the appellee is entitled to a specific execution of the agreement, upon principles wholly independent of all the solemnities required by the statute, in consequence of an equitable obligation, affecting the conscience of **647***] the appellant, beyond *the mere force of an express contract, and combining, in this case, all the equitable circumstances, any one of which was sufficient: or, giving a specific execution of the contract within the appropriate jurisdiction of equity to relieve against fraud. 1st. Because the appellant practiced *finesse* to evade the instantaneous execution of the agree-

ment, by promising that he would, in a few days, reduce it to the more solemn and consummate form of a regular conveyance for the land, and of promissory notes for the balance of account remaining due, after taking credit for the purchase money of the land; and, in the meantime, drew from the appellee, upon the faith of that promise, all the valuable equivalents of the agreement. 2d. Because the contract has been completely executed, on the part of the purchaser, by payment of all the purchase money, and, in part, executed on both sides by an exclusive, long-continued, and unquestioned possession in the purchaser, under the contract. 3d. Because the purchaser has made large expenditures in extensive and beneficial improvements of the property, upon the faith of the contract.

Mr. Justice JOHNSON delivered the opinion of the court:

This appeal brings up for revision a decree of the Circuit Court of this district, by which this appellant has been required to execute, specifically, an agreement for the sale of land. The bill sets up a certain written instrument, as a sufficient memorandum in writing; but not relying solely on that, goes on to make out one of those cases in which a Court of Equity exercises this branch of its jurisdiction, in order that the statute of frauds may not be made a cloak for fraud; that is a case of performance on the part of the complainant.

This has caused the question on the right to relief, in a case within the provisions of the statute, to be mixed up with a great deal of extraneous matter, which need not have been set out, had the claim to relief been confined to the one ground alone.

The memorandum set up is in the form of a stated account, wholly in the handwriting of the appellant, Barry, the defendant below, and acknowledged to be a copy made by him of another, also made out in his handwriting, actually signed by Coombe, the appellee, and now in the hands of Barry. So that Barry's name is in the caption, if it may be so called, and Coombe's at the foot of the memorandum. The item of the account which relates to the bargain or agreement for the sale of the land, is in these words, letters, and figures:

"By my purchase of your $\frac{1}{2}$ E. B. wharf and premises this day as agreed on between us;" and the credit is carried out in figures \$7,578.63, and deducted from the amount charged to Barry.

*Then follows this memorandum: [***648** "Balance due G. Coombe, fifteen hundred dollars, payable in one, two, and three years, with interest. G. COOMBE."

The defense set up in the answer is, that the transaction was not final; that it amounted to nothing more than a treaty in progress; that as far as it proceeded it was obtained by false and fraudulent suggestions on the part of complainant; and that the name of defendant was signed, if signed at all, only to state an account, not to acknowledge a contract; and the answer concludes with submitting to the court, whether it be "an agreement such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed, and prayed for by complainant."

It is under these words alone that the protection of the statute of frauds is set up by defendant. But in the view which this court will take of this subject, it is unnecessary to inquire whether the case required or admitted that it should be more formally pleaded, since we will dispose of the cause under the admission that he has entitled himself by his answer to the full benefit of the statute, if the facts of the case would maintain the defense.

And first, it is obvious that it would be idle to consider the form and effect of the instrument, if the treaty was never brought to a conclusion. On this fact the answer has put the complainant upon proof, and two witnesses have been examined to the point. Mr. Pleasanton, the first witness, swears, that in the year 1820 the defendant showed him a statement of accounts, which he believes was a copy of one exhibited by the complainant, and informed him that he had made a settlement of accounts with complainant; that the account so shown exhibited a balance against the defendant of \$500 or \$1,500; that it was in Barry's own handwriting, and that he stated, as an inducement to make it, that Coombe had made a sacrifice to obtain it.

The account so shown to Mr. Pleasanton could have been no other than the original of that which Coombe has exhibited, and the facts to which this witness testifies are strongly indicative of a final transaction.

The next witness, Mr. Carroll, is still more positive. He was present at the transaction, and, as he testifies, at the request of both parties, became the depository of several documents relating to it; and on the subject of the conclusive character of the transaction, his language is, "that he understood the settlement to be final and absolute."

But there were other facts to which Mr. Carroll was examined; and it is argued that his testimony as to those facts goes to prove that he was mistaken in the view which he took of the **649***] transactions; that they go to prove that there was something yet to be done, before the agreement should be closed. Coombe, it seems, insisted that Barry should give his note for the balance stated, and a deed for the property before he left Washington. This Barry resisted, and finally left Washington without doing either, and returned to his home at Baltimore.

It cannot be denied that this does conduce to prove an unfinished treaty, but the inference is repelled by various considerations.

And first, preparing the deed might require time, his business may have pressed for his return home, or he may have wished his own counsel or scrivener to draw up the deed.

2. As to the notes, giving them made no part of the agreement reduced to writing; the balance stated was to have been paid in one, two, and three years, but it does not express that notes are to be given for it, and he may have had his reasons for declining to give his notes, or for taking advice upon it. If there should prove to be errors in the stated accounts, upon more deliberate examination, these errors might more conveniently have been adjusted upon the stated balance, than upon notes, which might have found their way into several hands, and thus have multiplied litigation.

3. It does not appear from Mr. Carroll's tes-

timony that Barry refused generally to give either deed or notes, but only to give them before he went to Baltimore; on the contrary, he appears to have resented Coombe's seeming to act upon a doubt that he would then execute and send them, and to this Mr. Carroll bears positive testimony when he says "that he understood that the notes and deed were as certainly to be sent on from Baltimore as if executed on that day."

But what is conclusive in this part of the cause is, that the transaction was followed up by an act on the part of Barry, which no honest man could have done, otherwise than in the supposition that it was a finished transaction. It appears that Coombe, together with Mr. Carroll and Mr. Rice, held a mortgage of a quantity of leather to the value of \$7,000, given to secure to them certain sums advanced on behalf of one James D. Barry; that the defendant Robert Barry had assumed the debts of James D. Barry, and thereby acquired a resulting use, or equity of redemption, in this leather. That the sum for which Coombe held his lien on the leather, to wit, \$4,209, was one of the items of account in the exhibit upon which the complainant relies to obtain a decree for specific performance. But, as a balance of \$1,500 still remained due to Coombe upon the stated account, the leather was still pledged to him for that amount. This interest Coombe was induced to release to Barry, and which he accordingly did, by an indorsement upon the *instrument of writing by which the **650** lien was created. And Mr. Carroll testifies "that the defendant did receive at the tan-yard in Washington, all the leather mentioned in the bill of sale, in consequence of complainant's release."

It is true, an attempt was afterwards made in this suit to arrest the leather in the hands of Barry, but it was not on the ground that the treaty was *in fieri*, or the release not final; but to subject the leather to the debt, which would be due to the complainant, if he could not obtain the specific execution of the sale of the wharf, as well as the acknowledged balance. It is obvious, then, that in reducing the leather into possession, Mr. Barry must either have acted fairly, on the idea of a finished transaction, or unfairly, by entering upon the fruition a fraud practiced to obtain the release.

We will consider him as having acted fairly upon the ground of a treaty final and concluded, to be carried into execution according to its terms. But the statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. Is this such written evidence of a "contract or sale of lands" as satisfies the exigency of that statute? The words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party, to be charged therewith, or by some other person, by him thereunto lawfully authorized."

A note or memorandum in writing of the agreement, therefore, is sufficient, and there is no question that in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of

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the party or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incident to such an agreement; such as the ingredients of a complete transfer, usual covenants, &c.

At first view, this would seem to be an anomalous case, but it is only necessary to reduce it to its elements, in order to discover that it is one known to the adjudications of Courts of Equity on this statute. As to the balance stated, it is final and conclusive between these parties, and *insimul computassent*, might be maintained upon it, by Coombe, for the amount. And in an action by him, going to claim the whole amount charged to Barry, it would be good evidence in the hands of Barry, to reduce Coombe's demand down to the balance stated.

It is, then, equivalent to a mutual and reciprocal receipt between these parties; on the one hand, Coombe signs a receipt for the price of the premises in controversy, in account with **651*** Barry, and Barry, on the other, signs a receipt to Coombe, acknowledging that he has received the price stipulated, in full of the purchase money of the same.

This is the real purport and effect of the writing in evidence, and had the instrument, signed by the parties, been expressed in these terms, there could not have been a doubt of its sufficiency. (12 Ves., Jun., 466; 9 Ves., Jun., 234.) But it is argued that this was not the intent with which the writing was concocted. That it was to state an account, and not to note an agreement for the sale of property, that it was drawn up and signed. An examination of the cases on this subject, will show that Courts of Equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. It is written evidence, which the statute requires, and a note or letter, and even in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable (1 Atk., 12; 1 Sch. & Lef., 22), has been held to bring a case within the provisions of the statute. But, in the present instance, although not the sole object of creating the instrument, it really was an object, and an important one, inasmuch as the balance of account, the immediate object of the stated account, mainly depended upon the item for the sale of these premises. It could not be stated without acknowledging that the one had agreed to sell, and the other to purchase these premises, at a stated price. On this part of the cause, the case of *Stokes v. Moore* has been cited (1 Cox, 218), and insisted on as furnishing an argument, against the sufficiency of the signature of Barry in this cause. But in the case of *Stokes v. Moore*, it must be observed that both the judges who sat on that cause admit that this was not the principal question in the cause, and it was decided upon the ground that the memorandum was proved but to express the entire agreement between the parties. But, if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed, "that the name there was not a sufficient signature under the statute," in order to discover that it does not impugn the opinion entertained by this court in the present

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cause. The rule there laid down is, "that the signature is to have the effect of giving authenticity to the whole instrument;" and in this instance, we hold it to be in its proper place for that purpose. If so, the court there further observes, "that it does not signify much in what part of the instrument it is to be found." It remains to examine whether the memorandum is sufficiently full and explicit to admit of a decree for specific performance. The words are: "By my purchase of your one-half E. B. wharf and premises, this day, as agreed on between us, \$7,578.63." Brief as it is, this memorandum contains a condensed summary of all the essentials *to a complete con- [**652** tract. By the use of the present tense, it speaks of a thing final and concluded. By reference to the date at the head of the account, the use of the words "this day" gives a date to the transaction. By the use of the pronouns *your* and *us*, the parties are distinctly introduced. By carrying out the price, the consideration is expressed with absolute precision, and by deducting it from the sum acknowledged due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of a complete contract deficient, unless the description of the property contracted for, be insufficient. If that description be fatally ambiguous, it is certainly a sufficient ground to refuse relief. The ambiguity here, arises from the use of the capital letters E. B. in the description of the premises; and if those letters stood alone, and unconnected with anything that could give them a definitive signification, there would be much reason to doubt whether the defect would be curable. The words are, "Your one-half E. B. wharf and premises," and it is argued that this is one of those ambiguities, generally designated by the epithet "patent," and as such admitting of no explanation from extrinsic evidence.

Sir Francis Bacon, in his elements of common law (Regula, 23), is the author usually referred to on this distribution of ambiguities, into patent and latent; the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, "to be hidden by construction or election;" the latter raised by reference to extrinsic circumstances, and removable by the same means. It would perhaps be a more convenient, and certainly a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative, and mixed; the positive corresponding to the patent; and the relative to the latent ambiguities of the authors who treat of the subject. The mixed, would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class; within the second, because, for anything that appears on the face of the instrument, E. B. wharf may be as definitive a description of locality as F street, and then the ambiguity could only arise, if it be shown that the bargainor had more than one house in F street, like the two manors of sale, put by several authors.

Perhaps this case belongs more properly to the third class, since the description suggests several circumstances of identity, by reference to which, the premises in question are distinguishable from all others; first, it is a wharf; **653***] second, a wharf *the property of Barry; third, a wharf of which he owns a moiety; and connected with these descriptive circumstance, the letters E. B. became in fact the initials of the name of a place; and the case is analogous to that of a will, in which the devisee is designated as my son A, my nephew B C, or my uncle D E, in which the circumstance of relationship will let in evidence to fill up the names designated by the initials.

In fact, the cases on this point have gone much farther, and without committing ourselves on the correctness of the following two, it will be found by referring to them, such evidence has been let in to supply names, in cases where the identification was by no means as circumstantial as the present.

In the case of *Price v. Page* (4 Ves., Jun., 68), the entire Christian name was supplied on parol evidence without any initial, Price, the son of Price, being the only designation. In the case of *Abbot v. Massie* (3 Ves., Jun.), the devise was to A. G. and Mrs. G., and evidence ordered to be received to identify the legatees.

If ever extrinsic evidence may be admitted to carry out the initials of a name, it is impossible that a case can occur, to furnish evidence more full or unexceptionable in its character than the present. The bill alleges that the letters E. B. mean Eastern Branch, and the defendant not only admits in his answer that the treaty had relation to his moiety of a wharf and premises on the Eastern Branch of the Potomac, but voluntarily, although *altero intentu*, introduces a letter from himself to complainant, in which it is explicitly acknowledged. "Having agreed to sell you my individual half-interest in the Eastern Branch Wharf and premises," is his language in the letter. Besides which, the original deed is spread upon the record, by which it appears that the defendant held a moiety, as tenant in common with the plaintiff, of a wharf and premises on the Eastern Branch of the Potomac River, which is well known in common parlance as the Eastern Branch, without the addition of Potomac or river. We are therefore of opinion, that the ambiguity is fully removed, and legally, since it is by reference to a medium of explanation suggested on the face of the memorandum; and on evidence, which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds.

The only remaining question arises on the effects of Coombe's letter of the 26th of March, 1822, which the defendant insists amounted to a relinquishment of the contract of sale, and this appears to some of the court, to present the greatest difficulty in the cause. For it cannot be denied, that the letter is not confined in its import to a demand of a fulfillment of the contract. It does not intimate an intention to enforce the contract; *but on the contrary, concludes with a declaration, that if Barry does not comply with this contract on his part, the complainant will hold himself exonerated, and will resort to his original money contract,

as it stood prior to their entering into the contract for the sale of the premises.

Nothing, therefore, but the equivocal conduct of Barry on the receipt of that letter as proved in the deposition of Ingles, deprives him of the benefit of this defense. To have availed himself of it, he should have adopted the alternative offered him; and as the only unequivocal proof of it, should have tendered to Coombe the amount justly due to him, after extracting that item from the account. This he did not do, and it was too late after the bill filed to claim the benefit of a right thus gone by; at least, without paying unto Coombe the amount which would have been due to Coombe upon a mutual relinquishment of the bargain.

As to the ground of misrepresentation and fraudulent concealment, we have not thought it necessary to say more than that there is not the least evidence to support the charge set up in the answer.

Nor is it necessary to examine the case on the ground of part performance, since this court is fully satisfied on the sufficiency of the memorandum in writing to sustain the decree, so far as it requires Barry to make title to the moiety of the wharf, lot and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the court, until that balance be paid, we are induced to consider all objections to be waived.

Yet we mean not to express any doubts of its correctness, since the defendant has nowhere put his defense upon the ground of the remedy at law; but on the contrary, by his answer he impeaches the conclusiveness of the stated account, and raises an issue, in equity, upon the fairness and correctness of several items, which, if expunged, would leave a balance in his favor.

This defense he has failed to sustain by proof, and the court on that ground alone, independent of its connection with the principal subject of the bill, might legally decree payment of the stated balance, and the means of enforcing payment.

Decree affirmed with costs, and cause remitted for final proceedings.

Cited—5 Otto, 456.

*ALLISON ROSS, Plaintiff in Error, [**655** v.

JOHN DOE, on the demise of ADAM BARLAND, ET AL.

Jurisdiction—practice—construction of statute—land titles.

Both the plaintiff and defendants claimed title under the provisions of the act of Congress, passed 3d March, 1803, entitled, "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee;" and the decision of the Supreme Court of the State of Mississippi, was, upon the construction given to that act by the commissioners acting under its authority. This is a case which draws into question the construction of an act of Congress, and the Supreme Court of the United States has jurisdiction on a writ of error, by which

the decision of the court of the State of Mississippi is brought up for revision, under the 25th section of the judiciary act of 1789. [663]

Where, by the established practice of courts in particular States the courts in actions of ejectment look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation, such a practice will form the law of cases decided under the same in these States, and the Supreme Court of the United States regard those rules of decision in cases brought up from such States, provided that in so doing they do not suffer the provisions of any statute of the United States to be violated. [664]

Under the Act of Congress of March 3d, 1803, such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof. A right, therefore, to a particular tract of land derived from a donation certificate given under that law, is superior to the title of anyone who purchased the same land at the public sales, unless there is some fatal infirmity in the certificate, which renders it void. [665]

The Act of Congress requires no precise form for the donation certificate. It is sufficient if the proofs be exhibited to the court of commissioners, to satisfy them of the facts entitling the party to the certificate. It is sufficient if the consideration, to wit, the occupancy, and the quantity granted, appears. Nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent. [666]

The second section of the Act of Congress of March 3d, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the Legislature. [667]

The time when the territory over which this law operated was evacuated by the Spanish troops, was very important: as the law was intended to provide for those who were actually at that time inhabitants of, and cultivated the soil within it; but whether it was in 1797, or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the court are disposed to adopt the construction of the act, given by the commissioners west of Pearl River—that the evacuation took place on the 30th March, 1798, by which persons coming within the objects of the section were entitled to donation certificates. [667]

[656*] *Congress have treated as erroneous the construction given to the law by the commissioners to settle claims to lands east of Pearl River, who have decided that only those who were settled on the lands within the territory in the year 1797 were entitled to donation certificates, and who had granted to others pre-emption certificates. [668]

The commissioners appointed under the Act of Congress relative to claims to lands of the United States south of the State of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops; and to decide upon the fact. The law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity; and declared their deliberations shall be final. The court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them that the final evacuation of the territory by the Spanish troops took place on the 30th of March, 1798. [668]

ERROR to the Supreme Court of the State of Mississippi.

This action of ejectment was originally instituted by the lessee of the defendants in error, in the Circuit Court of the State of Mississippi, citizens of that State, against Allison Ross, the plaintiff in error, to recover a tract of land lying in that State. The plaintiff, in that court, obtained a verdict for the land, and on the trial of the cause a bill of exceptions was taken to the opinion of the Circuit Court, upon certain instructions which were refused to be given,

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when required by the counsel for the defendant below. From the decision of the State Circuit Court, the defendant in that court appealed to the Supreme Court of the State of Mississippi, and the judgment of the Circuit Court having been affirmed in that court, he prosecuted a writ of error to this court.

The bill of exceptions, sent up with the record, sets forth that the counsel for the plaintiff in error moved the Circuit Court to instruct the jury, that, if they should be of opinion that the defendant in the ejectment was in possession of the land in controversy, under a patent from the United States to Isaac Ross, dated 12th August, 1819, and assigned by him to the said defendant, the plaintiff in the ejectment could not recover. The patent to Isaac Ross was founded upon a certificate of the register of the land-office west of Pearl River, and was for the land in controversy; which had been sold at the sales of the lands of the United States, and purchased by Isaac Ross, who afterwards assigned the same to Allison Ross, the defendant below.

The patent was of older date than the patent held by the lessors of the plaintiff below; which patent was issued to Joseph White, on a certificate of the board of Commissioners west of Pearl River, granted in pursuance of an Act of Congress, passed the 3d of March, 1803, entitled, "An Act regulating the grants of land, [*657] and providing for the sales of lands of the United States, south of the State of Tennessee."

The instructions required, claimed that the elder patent of the defendant below should prevail in the action of ejectment, in a court of law, against the junior patent of the plaintiff, although the junior patent emanated from a prior certificate of the commissioners.

The court refused to give the instructions prayed for, but on the contrary instructed them that the junior patent of the plaintiff in the ejectment, emanating upon a certificate for a donation claim, prior in date to the patent under which the defendant claims, would overreach the elder patent of the defendant, and in point of law should prevail against it.

The plaintiff in error contended, that the court below erred in refusing the instructions prayed for, and in the instructions they gave to the jury in favor of the title of the plaintiff in the ejectment.

The case was argued for the plaintiff in error by *Mr. Wirt*, Attorney-General, and by *Mr. Core* for the defendants.

For the plaintiff in error:

The patent under which the defendants claim to hold the land, was granted under a donation certificate, issued by the board of commissioners, west of Pearl River. The land in question was sold at public sale, by the government of the United States, and was purchased by the assignor of the plaintiff in error, ignorant of any other title; the purchase money was paid; a patent issued to him, from the general land-office, and possession was taken. The holder of the donation certificate applied for a patent, and the land-office, not knowing of the prior patent, granted his request; and he holding a junior patent, brought this ejectment in the State Court of Mississippi. The question before that court was, whether, before a court of law, the junior patent could be given in evi-

dence. The court refused to instruct the jury that the senior patent was the better title, and gave instructions that the junior patent, in conformity with the donation certificate, gave the defendant in error the title to the land described in it.

The first question to be considered is, whether, in a court of law, the proceedings, behind the patent, can be looked at to ascertain the validity of such a patent.

Several references have been given by the opposite counsel, but they are all cases of chancery proceedings, and there is no doubt chancery can do this. The question now is, can a court of law do it? It has been decided here that this can be done; but this was only when the local law of the State in which the case arose authorized such an examination; but not upon **658**] *any principles of general law. (*Polk's Lessee v. Wendell et al.*, 9 Crauch, 87; 1 Wheat., 432; 5 Wheat., 293.)

The decisions of the courts of Virginia consider the prior patent conclusive, unless in case of fraud; and it is not known that any adjudications in the courts of Mississippi have established a different principle.

2. But if the court can go into the examination of circumstances which preceded the patent, still the instruction given to the jury was wrong, as the junior patent cannot prevail, unless it is warranted by the prior steps.

The certificate given by the commissioners is not a donation, but a pre-emption certificate. This is shown by a reference to the provisions of the Act of Congress. The Act of 3d March, 1803 (2 Story's Laws U. S., 893), is the foundation of the certificate.

The second section of that Act gives land to those who "actually inhabited and cultivated" the tract, on the day the Spanish troops actually evacuated the territory, on the 27th October, 1797.

The third section gives to persons inhabiting and cultivating a tract at the time of the passing of the law, a pre-emption certificate for such tract. The certificate under which the plaintiffs below applied for a patent, states the occupation of the tract by the patentee, on the 13th of March, 1798. This, therefore, could not be a donation certificate, which could only be granted to a person who "inhabited and cultivated" the land on the 27th of October, 1797; and it must have been given under the third section, which authorizes the issuing of pre-emption certificates.

The certificate granted to the holder of the junior patent, states, that he "occupied" the land, and this does not, *ex vi termini*, mean inhabit and cultivate.

It was the duty of the plaintiff to make out a good title, and if he does not show, that by the course of decisions in Mississippi you can look behind the patent, he has failed to do so.

The period at which the territory was actually evacuated by the Spanish troops, is not known to the court, otherwise than as stated in the Act of Congress; which affirms the same to have been on the 27th of October, 1797. Congress has legislated as to the lands east of Pearl River, but there has been no legislation as to those which lie west of the same. The court have here nothing to do but to decide whether this certificate is a donation certificate,

within the second section of the law; and to do this, they must decide upon facts which were for the jury alone.

Mr. Core, for the defendant in error.

1. This is not a case in which the Supreme Court can entertain jurisdiction. It is a writ of error directed to the highest *court [**659** of the State of Mississippi; and the 25th section of the judiciary act, furnishes the only rule by which to determine the question of jurisdiction.

The plaintiff in error has not produced the clause in the Constitution—the treaty or statute, under which he claims this proceeding; nor can he designate it. The court below being of opinion that the case of the defendant in error was within the provisions of the Act of Congress, decided the case upon general principles, and held that his title is, in law and equity, paramount to that of his opponent. Had the court decided differently, this court would have had jurisdiction; but the Constitution and judiciary act do not confer this jurisdiction in every case in which the plaintiff in error claims title under a patent from the United States; which is the only ground upon which it is pretended to exist here. Should this doctrine meet the sanction of the court, it will be difficult to conceive a case of ejectment that can be brought in any of our States, in which this court may not entertain jurisdiction; for nearly every title is derived from, or depends upon a patent from the United States.

Again, what question can this court decide, admitting it to possess jurisdiction? The same 25th section expressly declares, that no error shall be assigned, or regarded as a ground of reversal, but such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, &c. No such question is presented on this record. The construction of the 25th section has been frequently before this court, and may be considered as settled.

Inglee v. Coolidge (2 Wheat., 368) decides, that the error contemplated in the statute must be apparent on the record. (*Matthews v. Zane*, 7 Wheat., 164; *Martin v. Hunter*, 1 Wheat., 357; *Montgomery v. Hernandez*, 12 Wheat., 132; *Hickie et al. v. Starke et al.*, at this Term, *ante*, p. 94.)

The case is clear upon the merits, should the court examine them. The title of defendant in error is based upon the 2d section of the Act of March 3d, 1803, c. 340 (3 L. U. S., 546). To every person, &c., who did on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land, thus inhabited and cultivated, shall be granted. The objection is, that the certificate of the board of commissioners under which this title is derived, shows an occupancy on and before the 30th of March, 1798. It is admitted that this is, *prima facie*, erroneous, and that it is incumbent on the party claiming under such a donation certificate, to show that it is warranted by the fair construction of the statute.

The design of Congress in this section was to secure the *titles of actual occu- [**660** pants, who had taken possession under Spanish authorities; and the period up to which such

occupancy should be entitled to this protection is fixed by two circumstances: it must be on a day in the year 1797, and on the day when the Spanish troops finally evacuated this territory, the right to which had been so long contested between the two nations, and which was finally settled by the treaty of 1795.

It is certainly true that Congress at the date of this law were ignorant of the precise day when his evacuation occurred, and were mistaken as to the year. The Spanish troops finally evacuated the territory on the 30th of March, 1798, as is stated by an eye-witness of the fact. (Ellicott's Journ., 176.) Under the act of 1803, two boards of commissioners were created, the one for the lands east of Pearl River, the other for the lands west of the same stream. These boards were organized, and proceeded to business in the latter part of the same year. The board to the west of Pearl River discovered the incongruity in the statute. This board proceeded to execute their duties, and all their donation certificates, amounting in number to near 300, have reference to an occupancy on and before the 30th March, 1798. This construction of the law, it is apprehended, is not only correct in itself, but has received the implied sanction of the Legislature. In consequence of the diversity of opinion and of practice between the two boards, Congress passed another law on the 21st of April, 1806, c. 46; the 4th section of which enacts, that whenever it shall appear, to the satisfaction of the register and receiver of the district east of Pearl River, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March, 1798, they shall be authorized to grant to the party a donation certificate in lieu of such pre-emption. This was a legislative sanction given to the opinion of the board of commissioners west of Pearl River, who had, in the cases contemplated in this provision, considered the parties as within the 2d section of the act of 1803, and therefore entitled to a donation certificate; and a legislative repudiation of the construction given by the other board, who had considered such cases as coming within the 3d section of the Act of 1803, and the parties entitled only to a pre-emption title. On the 31st of March, 1808, Congress passed another law (c. 40), the 2d section of which re-enacts and extends the benefit of the 4th section of the Act of April 21st, 1806.

Independently, however, of these legislative provisions, it is the only fair interpretation of which, under the circumstances, the 2d section of the Act of 1803 is susceptible. A literal compliance with the Act is impossible, as there **661** was no day in the year 1797 in which the Spanish troops finally evacuated the Mississippi territory. Either some latitude of construction must be admitted, or this section must become a dead letter, and every title dependent upon its provisions annulled. The obvious meaning of the Act was to make the period of evacuation the *punctum temporis*, to which the occupancy should refer, and as the one incident or the other must yield in order to carry the whole design of the Legislature into operation, the expunging of the words "in the year 1797" involves the least sacrifice, and tends

more effectually than anything else to further the intentions of the Legislature.

In settling this question of construction, the practice of the government, and of its lawfully authorized agents, is entitled to much consideration. This construction has received the sanction of the board of commissioners, who were invested not only with ministerial, but judicial functions; and who throughout the whole period of their existence so interpreted the law. It has received the sanction of the land-office, and of the executive, for patents have invariably been granted on such certificates.

In *Edward's Lessee v. Darby* (12 Wheat., 210) this court seems to recognize the importance of recurring to such sources of information.

In order to arrive at the true construction of a statute, or even to enable it correctly to interpret the provisions of the Constitution, the court will refer to, and judicially notice the historical facts which are essential to their correct interpretation. This was done in the case of *Gibbons v. Ogden* (9 Wheat., 1).

If, then, this form of certificate be correct under the law, what is its operation? The 2d section says that the land thus occupied shall be granted to the occupant; this does look as if Congress designed some ulterior act to be done to vest the title. The language of the 8th section amounts, however, to a present legislative grant. It provides that so much of the five millions of acres, reserved for that purpose, as may be necessary to satisfy various classes of claims, enumerating particularly those which are embraced by the 2d section of the Act, "be, and the same is hereby appropriated." This language is more definite than that which this court, in *Sims v. Irvine* (3 Dall., 425), construed to confer a legal title as effectually as a patent. (Cited, also, 2 Wheat., 196.)

If this view of the case be correct, it follows that the title of the plaintiff in error is radically and intrinsically a nullity. The patent under which he claims cannot be valid even at law, if at the period of its emanation the United States had no title. (*Polk's Lessee v. Wendell*, 9 Cranch, 87, 94; *Patterson v. Winn*, 11 Wheat., 304.)

*Neither the language nor the policy [**662** of any law limits the time within which we were to call for the patent. No money was to be paid beyond the mere official fee for the paper. No person could be injured by the delay; and in this view, nearly all the patents emanating on donation certificates bear date about the same period of time.

The case is therefore relieved from the difficulties presented by the question whether the court will look behind the elder patent and investigate the prior rights of the parties. The various decisions on that question relate exclusively to cases in which no other than an equitable title existed before the patent, and where the patent itself properly issued. Even in such cases, this court has adopted the practice of the State Courts where the land was situated, and have decided either for or against the conclusiveness of the patent as to the legal title, according to the varying ideas of the State Courts. In this case it is incumbent on the plaintiff in error to show, affirmatively, that the State Court has erred. (*Kirk v. Smith*, 9 Wheat., 241.) And to do this, he must show that under the

law of Mississippi the patent is the only and conclusive evidence of the legal title. No authority to this point can, it is believed, be produced.

Mr. Justice TRIMBLE delivered the opinion of the court:

This was an action of ejectment, originally instituted in a Circuit Court of the State of Mississippi.

Upon the trial of the cause in the court of original jurisdiction, the defendant excepted to the opinion of the court, in overruling instructions moved on his part to be given to the jury, and also to the instructions given by the court at the trial of the cause.

In the bill of exceptions tendered by the plaintiff in error in the court below, are inserted the titles of the parties to the land in controversy, and the facts, upon which the questions of law arise, which were decided by the court. A verdict and judgment were rendered against the defendant, from which he appealed to the Supreme Court of the State, being the highest court of law therein, where the judgment was affirmed; and the case is now brought before this court, by writ of error to the Supreme Court of the State.

The material facts of the case are the following: The lessors of the plaintiffs in the action of ejectment, claimed the land in controversy under and by virtue of a patent from the United States, dated the 13th day of October, 1820, which was given in evidence. This patent emanated upon a certificate of the board of commissioners west of Pearl River, organized under the provisions of the Act of Congress of the 3d of March, 1803, entitled "An Act regulating the grants of land, and providing for **663**"] *the disposal of the lands of the United States, south of the State of Tennessee;" which certificate was also given in evidence, and bears date the 13th day of February, 1807. The important parts of the certificate are in the following words, to wit: "Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th day of March, in the year one thousand seven hundred and ninety-eight. We certify that the said Joseph White is entitled to a patent therefor, from the United States, by virtue of the recited Act."

The defendant claimed and held possession of the land under and by virtue of a patent from the United States, dated the 12th day of August, 1819, for 553 acres of land. This patent is founded upon a purchase at the general sale of the lands of the United States, at Washington, Mississippi; under the authority of the before-recited Act of Congress.

Upon this state of facts, the counsel for the defendant moved the court to instruct the jury: "That in such a case, the older patent of the defendant, under which he claimed possession, should prevail in the action of ejectment in a Court of Law, against the said junior patent of the plaintiff: although the said junior patent of the plaintiff emanated upon a prior certificate of the board of commissioners, west of Pearl River; but the court refused to give such instructions in point of law to the jury, but on

the contrary, instructed them that the junior patent of the said plaintiff, emanating upon a certificate of a donation claim, prior in date to the patent under which the defendant claims, would overreach the patent of the defendant, and in point of law should prevail against such prior patent of the defendant."

These opinions having been affirmed upon appeal to the Supreme Court of the State, the object of this writ of error is to have them reviewed in this court.

It has been objected that this court has not jurisdiction of the case. By the second section of the third article of the Constitution it is declared, "That the judicial power shall extend to all the cases arising under this Constitution, the laws of the United States and treaties made, or to be made under their authority, &c." By the 25th section of the judiciary act of 1789, made in pursuance of this provision of the Constitution, it is enacted, "That a final judgment or decree in any suit, in the highest Court of Law or Equity of a State in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, &c., specially set up or claimed by either party, &c., under such statute, &c., may be re-examined and reversed *or af- **664** firmed by the Supreme Court of the United States upon a writ of error."

In this case the titles of both parties are derived under an Act of Congress; the construction of the statute is drawn directly in question; and the decision of the highest Court of Law of the State, is against title and right of the party, specially set up in his defense under the statute. This case is not distinguishable from the case of *Matthews v. Zane* (4 Cranch, 382), in which the jurisdiction of this court was maintained.

For the plaintiff in error it is argued that the State Court erred in deciding that the elder grant should not prevail in the action of ejectment.

It is undoubtedly true that upon common law principles the legal title should prevail in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law. It is so held in those States in which the principles of the common law are carried into full effect, and the course of proceeding in the action of ejectment are according to those principles. In the States where these principles prevail, it is held that in a trial at law the courts will not look behind or beyond a grant, to the rights upon which it is founded; nor examine the progressive stages of the title antecedent to the grant.

But in other States the Courts of Law proceed upon other principles. In the action of ejectment they look beyond the grant, and examine the progressive stages of the title, from its incipient state, whether by warrant, survey, entry or certificate, until its final consummation by grant; and if found regular and according to law in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly.

This latter course seems to be the one adopted and pursued by the courts of Mississippi. It is enough for us to say that in so doing, and in applying their peculiar mode of proceeding to

titles derived through and under the laws of the United States, they violated no provisions of any statute of the United States.

The important question in the case is this: In applying its own principles and practice in the action of ejectment as might well be done to this case, has the court misconstrued the Act of Congress in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners, west of Pearl River, set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment?

This draws in question the construction of the Act of Congress of 1803, and gives this **665***) court jurisdiction of the case. *It is well known that prior to the treaty of San Lorenzo, of the 27th of October, 1795, controversies had long existed between the United States and His Catholic Majesty on the subject of the boundaries which separated the United States and the Spanish Provinces of East and West Florida. The second article of that treaty declares, "That the southern boundary of the United States, which divides their territory from the Spanish Colonies of East and West Florida, shall be designated by a line beginning on the Mississippi River at the northernmost part of the thirty-first degree of latitude, north of the equator, which, from thence shall be drawn due east to the middle of the river Apalachicola," &c. And it is agreed that if there should be any troops, garrisons or settlements of either party in the territory of the other, according to the above-mentioned boundaries, they should be withdrawn from the said territory within the term of six months after the ratification of this treaty, or sooner if it be possible.

It is matter of public history that there were Spanish troops, garrisons and settlements north of this boundary, and within the territory of the United States, which were not withdrawn till long after the time stipulated by the treaty.

By the second section of the before-recited Act of Congress of the 3d of March, 1803, it is enacted, "That to every person, or to the legal representative, or representatives of every person, who, either being the head of a family or of twenty-one years of age, did, on that day of the year 1797, when the Mississippi Territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land thus inhabited and cultivated shall be granted; provided, however, that not more than one tract shall be thus granted to any one person, and the same shall not contain more than 640 acres; and provided that this donation shall not be made to any person who claims any other tract of land in the said territory, by virtue of any British or Spanish grant, or order of survey."

The sixth section of the Act provides for the establishment of two boards of commissioners, one east and the other west of Pearl River, in said territory, "for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and State of Georgia, or of the three first sections of this Act. And each board, or a majority of each board, shall, in their respective districts, have power to hear

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and decide in a summary manner all matters respecting such claims; also to administer oaths and examine witnesses, and such other testimony as may be adduced, and to determine thereon, according to justice and equity; which determination, so far as relates to any rights *derived from the articles of [**666** agreement aforesaid, or from the three first sections of this Act, shall be final."

This eleventh section provides, "That the lands for which certificates of any description whatsoever shall have been granted by the commissioners, in pursuance of the provisions of this Act, shall, as soon as may be, be surveyed. And the said surveyor shall cause all the other lands of the United States, in the Mississippi territory, to be surveyed."

And the twelfth section provides, that all the lands aforesaid, not otherwise disposed of or excepted, by virtue of the provisions of the preceding sections of this Act, shall (with certain other reservations and exceptions) be offered for sale.

As such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners, in pursuance thereof, it follows, incontestably, that the right of the plaintiff in the ejectment, derived from a donation certificate, is superior to that of the defendant, derived from a purchase at the sales, unless there is some fatal infirmity in the certificate, which renders it void. This has not been contested.

But it is objected to this certificate:

1. That it is not a donation certificate.
2. That it is not sufficiently precise, and does not aver all the facts necessary to authorize the commissioners to grant a certificate.
3. The period of occupancy is alleged to be the 30th of March, 1798.

The answer to the first objection is, that the certificate is granted for 640 acres of land, the precise quantity for which a donation certificate was authorized.

This is sufficient evidence of the intention of the board of commissioners to grant a donation certificate. The period of occupancy, too, fits the case of a donation certificate, or none; and, if necessary, fortifies the conclusion of its being granted as a donation certificate.

To the second objection it may be answered, that the law requires no precise form in the certificate. It is sufficient, if the proofs be exhibited to the board of commissioners, to satisfy them of the facts entitling the party to the certificate. The facts need not be spread upon the record. It is sufficient, if the consideration, to wit, the occupancy, and the quantity granted, appear.

Nothing more is necessary to certify to the government of the party's right; or to enable him, after it is surveyed by the proper officer, to obtain a patent.

The objection, that the occupancy is stated to be on the 30th of March, 1798, produces more difficulty.

*The language of the second section [**667** of the Act of Congress, authorizing these donation claims, is, that the persons, who on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, &c.

This language is very peculiar, and shows plainly that, although Congress at the time of passing the law was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

The law was intended to confer a bounty on a numerous class of individuals; and in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the Legislature.

To interpret this section literally, that land should be granted to those, who, on the same day of the year 1797 occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it; if it should have happened, that the final evacuation of the territory, by the Spanish troops, took place on the first day of January, 1798, or on any subsequent day.

If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory any day of that year, but some day of the next year; and although the party continued to occupy the land until the day of the actual evacuation, still, he could not be entitled, according to the letter of the Act, because that day was not any day of the year 1797.

This could not be the intention of Congress. The country had been settled during the conflict on the subject of boundaries, between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States. The manifest general intent of the Act of Congress, is to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant.

If the fact be supposed, and it must be supposed for the sake of the argument, that the actual evacuation took place on the 30th of March, 1791, then something must be rejected in the construction and interpretation of the Act of Congress to make the provisions of the **668***] law effectual. Either the words *‘‘of the year 1797’’ must be rejected as inconsistent with the main scope and general intent of the law, or the claims to donations of all the inhabitants and cultivators, west of Pearl River, must be defeated. This would but defeat the manifest general intent of the law.

It was said at the bar, that all the donation certificates west of the Pearl River express to be for occupancy on the 30th day of March, 1798, and a certificate from the commissioners of the general land-office, to that effect, was produced. It is not necessary to decide whether we can, or cannot, notice this certificate as evidence of the fact that the evacuation took place on that day, or as evidence of the construction given by the board of commissioners west of Pearl

River. It is sufficient if they were authorized to give such construction to the Act, in the event supposed, that the event happened; or in other words, that the actual evacuation took place on the 30th of March, 1798, as supposed in the argument; and that the construction of the 2d section of the Act of Congress, which we are disposed to adopt, is the true construction in the estimation of Congress itself, we think, may fairly be inferred from the Act of Congress of the 21st of April, 1806. The 4th section of that Act provides, that ‘‘wherever it shall appear to the satisfaction of the register and the receiver of the district east of Pearl River, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March, 1798, they shall be authorized to grant to the party a donation certificate, in lieu of such pre-emption.’’

It appears from this section, that the commissioners east of Pearl River had adopted the construction of the Act of 1803, contended for by the plaintiff in error; and that, instead of granting donation certificates to the inhabitants and settlers, down to the period of the 30th of March, 1798, under the 2d section of the Act, they had granted pre-emption certificates, under the provisions of the third section. Congress treat this as a mistaken construction of the law, by directing donation certificates to be made out in lieu of the pre-emption certificates.

The Act of 1803 puts the settlers east and west of Pearl River on precisely the same footing, and it is inconceivable, that Congress could have any motive for giving those east of Pearl River any preference by the Act of 1806; or that the Act could have any other object than to continue upon the same footing the settlers east and west of Pearl River.

The certificate granted in the case before us, is sufficient evidence that the commissioners west of Pearl River adopted a more liberal construction; such as we think they were warranted *in adopting, and such as, we think, [**669** is manifestly sanctioned by Congress, in the Act of 1806.

It is the opinion of this court, that the commissioners were authorized to hear evidence as to the time of the actual evacuation of the territory by Spanish troops, and to decide upon the fact. The law gave them ‘‘power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and to equity,’’ and declares their determination shall be final.

We are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them; and the final evacuation of the territory by the Spanish troops took place on the 30th of March, 1798.

Upon the whole, it is the unanimous opinion of this court, that the Supreme Court of the State of Mississippi has not misconstrued the Act of Congress, from which the rights of the parties are derived; and that the judgment of the Supreme Court be affirmed.

This cause came on, &c. On consideration

whereof, it is the opinion of this court that the Supreme Court of the State of Mississippi has not misconstrued the Act of Congress on which the plaintiff below relies; and it is therefore adjudged and ordered by this court, that the judgment of said Supreme Court of the State of Mississippi be, and the same is, hereby affirmed, with costs.

Cited—13 Pet., 450, 456, 517; 16 Pet., 249; 3 How., 673; 4 How., 492; 18 How., 27; 19 How., 336; 21 How., 240.

670*] *ANN PRAY, Executrix, J. J. MAXWELL, AND GEORGE WATERS, Executors of JOHN PRAY, deceased, *Appellants*,

v.

GEORGE G. BELT, Trustee, AND JAMES P. HEATH, *PRO AMI*.

Wills—construction—power conferred on executors to decide contentions—parties in suit for a legacy.

The testator in his will says: "Whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors—my wife to have a voice as executrix—to decide in all cases, in case of any dispute or contention: Whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator. [679]

Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power so given in a will, one not foreseen, and which could not be intended by the testator, it has been considered as a case, in which the general power of

courts of justice to decide on the rights of parties, ought to be exercised. [680]

There cannot be such a construction given to such a clause in a testator's will as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice. A court must decide whether the construction of the will adopted by those who are named in the right construction, or the grossest injustice might be done. [680]

Where a legacy for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the court. The right of each individual depends on the number who are entitled, and this number is a fact which must be inquired into before the amount to which any one is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. [681]

A PPEAL from the Circuit Court of the United States for the District of South Carolina.

The appellees, complainants in the court below, on behalf of Jane Heath, the wife of James P. Heath, and of her children, filed a bill in the chancery side of the Circuit Court of the United States for the District of South Carolina, against Ann Pray, executrix, J. J. Maxwell, and George Waters, executors of the last will of John Pray, deceased, for the recovery of a legacy to which Jane Heath was entitled under the will.

The clauses of the will of John Pray, brought under the notice and consideration of the court, and exhibited by the record, were:

"* Item 51. Whereas I hold ten bonds, [*671 given by John J. Maxwell, payable by ten installments, the first on the 10th of January next, and the others on the tenth of January in each year after. It is my will, and I direct, that the bonds payable tenth of January, eighteen hundred and twenty, eighteen hundred and twenty-one, and eighteen hundred and twenty-two,

NOTE.—Wills; interpretation; intention of testator to govern.

A leading rule in the construction of wills, and one to which all others bend, is, that the court will carry into effect the declared intent of the testator, if it is clearly expressed, and is consistent with the general rules of law. *Lambert v. Paine*, 3 Cranch, 97; *Taylor v. Mason*, 9 Wheat., 325; *Smith v. Bell*, 6 Pet., 68; *Lippett v. Hopkins*, 1 Gall., 454; *Nightingale v. Sheldon*, 5 Mas., 336; *Blagge v. Miles*, 1 Story, C. C., 426; 4 Law R., 256; *Kip v. Kip*, 2 Paine, 366; *Smith v. Bell*, 6 Pet., 68; *Stanley v. Colt*, 5 Wall., 119; *Gardner v. Wagner*, Baldw., 454; *Ward v. Amory*, 1 Curt., C. C., 419; *Pennoyer v. Sheldon*, 4 Blatchf., 316; *Lorrings v. Marsh*, 6 Wall., 337; *Clarke v. Johnston*, 8 Blatchf., 597; *Coltman v. Moore*, 1 MacArthur, 197; *Given v. Hilton*, 5 Otto, 591; *Holmes v. Williams*, 1 Root., 332; *Lutz v. Lutz*, 2 Blackf., 72; *Finley v. King*, 3 Pet., 346; *Morton v. Perry*, 1 Met., 446; *Jarvis v. Buttrick*, 1 Met., 480; *Richardson v. Noyes*, 2 Mass., 57; *Davis v. Hayden*, 9 Mass., 514; *Homer v. Shelton*, 2 Met., 194; *Lamb v. Lamb*, 11 Pick., 371; *Crocker v. Crocker*, 11 Pick., 252; *Hayden v. Stoughton*, 5 Pick., 528; *Bowen v. Porter*, 4 Pick., 198; *Breckenridge v. Duncan*, 2 A. K. Marsh., 50; *Cheasman v. Wilt*, 1 Yeates, 411; *Plow.*, 162, 413, 522, 523, 540; 2 Leon., 42, 43; *Bosworth v. Forard*, Orl. Bridg., 158; *Davis v. Kemp*, Carter, 5; *Wiles*, 297; 2 Cow., 333.

The intention must be gathered from the words of the testator, and the words construed according to the letter and legal effect of them. The intent is to be collected (if possible) from the will itself, and not from extrinsic circumstances; and from the whole will, giving effect to every word and part. *Campbell v. Beaumont*, 12 N. Y. Week. Dig.,

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232; *Cole v. Robinson*, Salk., 235; *Collinton v. Pace*, Bridg. O., 413; *Stapleton v. Calwell*, *Ca. temp. Talb.*, 208; *Petty v. Goddard*, Orl. Bridg., 40; 4 Ves., 329; 5 Ves., 243, 818; 6 Ves., 100; 7 Ves., 522, 130; 8 Ves., 506; 11 Ves., 148; 15 Ves., 103; 1 Ball. & B., 460, 480; 4 Rand., 213; 8 Yerger, 4; 10 Yerg., 444; *McCord*, 411; 1 Mer., 503; 2 Mer., 204; *Ibbetson v. Beckwith*, *Ca. temp. Talb.*, 157 to 163; *Stephens v. Hide*, *Ca. temp. Talb.*, 29; *Holmes v. Meynel*, Jones, T., 172; *Ridout v. Dowdning*, 1 Atk., 419; *Falkland v. Bertie*, Holt, 232; *Cro. Jac.*, 62, 371, 416; *Jesson v. Wright*, 2 Blighs. P. R., 56; *Henceage v. Andover*, 10 Price, 316; *Gore v. Gore*, 10 Mod., 502, 523; 2 Mod., 223; *Lartigue v. Duhamel*, 4 Mart. N. S., 664; 11 John., 201; *Wescott v. Cady*, 5 John. Ch., 334; *Capal v. McMilan*, 8 Port. Ala., 197; 4 Hen. & Munf., 288; 1 Desauss., 189; 1 Bay., 87; 14 Wend., 265; *Mann v. Mann*, 14 John., 1; *Jackson v. Luzuere*, 5 Cow., 221; 4 Devereux, 381; *Theall v. Theall*, 7 La., 220; 3 Wend., 511; *Bradhurst v. Bradhurst*, 1 Paige, 331; *Arcularius v. Geisenhauer*, 3 Bradf. N. Y., 64; *Sweet v. Geisenhainer*, 3 Bradf., 114; *Covenhoven v. Schuyler*, 2 Paige, 122; *Rathborne v. Dykman*, 3 Paige., 9; *Crosby v. Wendell*, 6 Paige, 548; *Hone v. VanSlick*, 3 Barb. Ch., 488; *Wolf v. VanOstrand*, 2 Comst., 436; *Lynch v. Pendergast*, 67 Barb., 501; *Hoppock v. Tucker*, 59 N. Y., 202; S. C. 1 Hum., 132; 3 Thomp. & C., 653; *Ferrer v. Pine*, 81 N. Y., 28.

Parol or extrinsic evidence of intention, to vary words of will, inadmissible. *Avery v. Chappel*, 6 Conn., 270; 6 Watt's., 345; *Bunner v. Storm*, 1 Sand. Ch., 357; *Mann v. Mann*, 14 John., 1; *Champlin v. Champlin*, 1 Sheld., 355; S. C. 58 N. Y., 620; *Calak v. Jacobs*, 56 How. Pr. N. Y., 519; *Williams v. Freeman*, 12 N. Y. Week. Dig., 21; *Estate of Cassidy*, 20 Daily Reg. N. Y. No., 152; *Peters v. Porter*, 60 How. Pr. N. Y., 422.

say the three first, shall be applied in aid of the payment of my just debts, if any due, and in the payment of the legacies by me left. It is my request that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton; first to pay any debts, and then legacies, any heretofore left, or which I may hereafter leave to be paid. It is my will, and I do direct, that my executors do pay up the one-half of all the cash legacies by me left to my relations, out of the first funds they can command from my estate, except those I may have directed to be paid immediately; and after they have paid the one-half to my relations, thereafter it is my will that they do pay up in equal proportions, agreeably to sums left, to all my other legatees; and be it understood, and it is my will and intention, that after they have paid the one-half, to my relations, that they will continue to pay them the other half in equal proportions with my other legatees; my object and intention is, to place them on the same footing with my other legatees, after the payment of one-half to my said relations. It is my will and request, that my executors do pay all my debts and legacies as soon as possible after my death; but be it explicitly and plainly understood, that no interest whatever is to be allowed on any legacy by me left to any one of my legatees, as in all probability the resources and funds of my estate will be equal to the payment of my debts and legacies before the three bonds mentioned of John J. Maxwell may fall due and be collected. In case all debts and legacies can be paid before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected on the three aforesaid bonds, principal and interest, it is my will, that the same shall be equally divided as collected, between the following persons, share and share alike: To my executors in trust, for the use and benefit of my aunt Turpin, my uncle's present wife; it is my intention to keep it from being subject to my uncle's debts, that I leave it in trust; in case of no risk, my executors will pay it over to my aunt. My god-daughter, Mary Jane Pray Hines, wife of Lewis Hines. The children of Thomas Mann, by his present wife, as also Ann and Jane, now in New Providence. Any **672**]* part *which the children of Harriet Mann, Thomas Mann's wife, may be entitled to, is to be ascertained by the number she may have at the time these bonds are collected, and my executors are ready to pay over. In case all is not applied on my debts and legacies, and if Harriet hath any child after the payment, then such child to receive such proportion as the other children out of the part paid to such as she before had or has at the time the same is paid. My executors will be governed in the distribution, by the number of children Harriet has on the day they are ready to make a distribution. In case of any surplus left on said bonds, the said children's parts to be paid to their legal representatives, so it is not their father (I omitted the word Mann after the words Ann and Jane above), and to Richard

K. Heath, in trust for the benefit of Jane Heath, wife of James P. Heath, and such children as she may have when that surplus may be collected, in case of their being any."

"It is my will, and I direct, that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid, debts, if any, first, and as soon after as possible, to be disposed of as hereinafter directed."

"In case of accidents by fire, at any time before or after my executors pay my debts and legacies, it is my will that my wife receive the amount of insurance to aid in rebuilding; and in case of accidents by fire on lots in Nos. 6 and 7, before my debts and legacies are paid, it is my will, in such case, that my executors hold all my estate together, until they can add ten thousand dollars to what may be received on insurance; and they are requested to put on fire-proof buildings on said lots, to both these amounts, and if these sums are insufficient, they are authorized to raise any balance for erecting proper buildings, on the credit of my wife; this balance, if any required, be it understood, is to come out of my wife's portion of my estate left her.

"In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks. Whereas there is no doubt but there must be a considerable surplus fund of my estate by debts due, or crops on hand, or near made, after my executors have paid all my debts and legacies, which my wife will come in for; if my executors discover that by such surplus that the same will not be equal to ten thousand dollars, in that case it is my will, that they continue all my estate together, until they can make up ten thousand dollars; and it is my request, that they will, as soon as possible after raising the aforesaid sum, proceed to put up fire-proof buildings on the aforesaid lots.

"Whereas my will is lengthy, and it is possible I may have committed some error or errors. I do therefore authorize and *empower, [***673**] as fully as I could do myself, if living, a majority of my acting executors—my wife to have a voice as executrix—to decide in all cases, in case of any dispute or contention: whatever they may determine is my intention shall be final and conclusive, without any resort to a court of justice."

The defendants, John J. Maxwell and George M. Waters, in their separate answers allege, "That in the month of December, in the year eighteen hundred and nineteen, the defendants qualified as executors of the will of John Pray, and having ascertained that there was a sufficient sum of money to be raised from the crops which had been made that year, as also from debts due the estate of said John Pray, the testator, on bonds, notes, and other securities, which could soon thereafter be realized, to satisfy all the unpaid legacies of the said testator, commenced a delivery of some portions thereof to those claiming and entitled under the will. That, in the meantime, after they had commenced a division of the estate of said testator, and before its completion, to wit, on the tenth day of January, in the year eighteen hundred and twenty, the accident occurred, which had been guarded against by the sixty-first item of the

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will of said testator, as set forth in the complainant's bill; and the buildings on lots No. 6 and 7 were destroyed by fire; that, at the time when this event occurred, the debts of said testator, which were small, may have been, and as this defendant believes, were all paid and discharged, but the legacies remained partially unpaid and unsatisfied, although, as this defendant believes, at the time, and as previously stated in this answer, there was a sufficiency of funds to be realized from the means already pointed out, to discharge and pay the remaining unsatisfied legacies, and which the executors, when they commenced the division of the estate, as aforesaid, intended to apply to the payment of said unpaid legacies; that, previously, also, to the said conflagration, by which the said buildings on lots No. 6 and 7 were destroyed, the first bond of the said John J. Maxwell had been collected, and applied to the payment of the debts and legacies. That the funds, which were to be realized from the crops, bonds, and notes, as aforesaid, by the executors, and which had been deemed adequate to the payment of the unpaid legacies, were insufficient for that purpose, and the payment of the said ten thousand dollars bequeathed to the said Ann Pray in the said sixty-first item of said will, in the event of the destruction of the buildings on the said lots six and seven, which actually occurred: that the two remaining of the three bonds of the said John J. Maxwell, which were directed by the fifty-first item of the said will to be appropriated in aid of the payment of the said debts and legacies, were then resorted to by the executors, from which, in addition to the **674***] available effects *already specified, a fund was realized equal to the payment of the legacies, and the sum of ten thousand dollars, which was appropriated to the use of said Ann Pray, as directed, in sixty-first item of said will; that the said appropriation of the two remaining bonds of the said John J. Maxwell, was made after the division of the estate had commenced, as already shown, but before its completion."

"That if the estate of the said testator had been kept together, after the conflagration aforesaid, a sufficient time, funds may have been realized sufficient to pay all debts and legacies, and to meet the aid authorized and directed for the said Ann Pray; but this defendant declares that it would have required the estate to have been kept together four or five years for this purpose, without resorting to the said bonds: in the meantime the said bonds would have become due, and been realized; the one being due on the — day of January, eighteen hundred and twenty-one, and the other on the — day of January, eighteen hundred and twenty-two. That in and by the fifty-first item of the said will, the said bonds are expressly directed to be appropriated in aid of the payment of the debts and legacies, and only to be distributed among the legatees therein named, in the event of the debts and legacies being paid out of the funds, made subject by the will to that purpose, before the said bonds should become due or could be collected. That if the said estate of the said testator had been kept together until the necessary funds for the relief of the said Ann Pray, and the payment of the legacies had been raised from the annual

proceeds, the benefit arising to the said Jane Heath and her children, by receiving their proportion of the real estate of said testator devised to them, must have been delayed four or five years; whilst, by the early division of said estate, they were greatly benefited, having realized, at that time, from this means, three thousand five hundred dollars. And this defendant admits that the complainants have applied to the executors of said testator on the subject of the proportion of Jane Heath, in said bonds, and to which they supposed her entitled. That the division of the estate having been commenced, and a portion of the property delivered to the devisees and legatees, and a fund sufficient to pay the legacies, and which was to come into the hands of the executors, having been reserved for that purpose, they considered themselves bound in justice to the legatees and devisees, who had not received their proportion of the estate, to proceed in the completion of the division of the estate; and therefore conceived the estate, so far as regarded their power to continue it together until the ten thousand dollars could be raised to relieve the said Ann Pray, from the annual proceeds, as having been in effect divided."

*2. No answer to the bill of the ap- [***675** pelles was filed by Mrs. Pray.

The case was heard on the bills and answers, and the Circuit Court determined, that the executors had misapplied the proceeds of the bonds of J. J. Maxwell, on which the legacies claimed were charged; and that Mrs. Pray would have to refund to the value of the residue bequeathed to her, and, ratably, also, according to the interest and income of the property specifically bequeathed to her. An order of reference was made, and thereupon the master was ordered to make certain statements of the condition of the estate, and of other facts necessary to a final decree.

These reports having been afterwards made by the master, the Circuit Court, on the 9th of May, 1826, made the following decree:

"This cause came on to be heard on the master's report, pursuant to a reference at the last term on the following points: 1st. A statement of the debts due by the testator. 2d. A statement of the pecuniary and other legacies, and how and when paid. 3d. Of the funds applicable to the debts and legacies. 4th. Of the receipts and expenditures of the executrix and executors. 5th. Of the value of the residue bequeathed to Mrs. Pray. 6th. Of the value or amount of the income which the estate would have produced had it been kept together specifically. Of the several amounts claimed by these complainants, in behalf of those whom they represent as legatees, and his own views of the correctness of those claims, with reference to the principles on which they are calculated. And he, the said master, having duly made and submitted his report upon all the matters so referred to him, and it appearing from said report that the proportion of the funds of the said testator to which under his will the complainants are entitled, amounts to the sum of twelve thousand one hundred and eleven dollars, as by reference to said report of file in the registry of this court will more fully appear."

"It is ordered, adjudged and decreed, that

George M. Waters and Jno. J. Maxwell, executors, and Ann Pray, executrix, do pay to the said complainants the sum of twelve thousand one hundred and eleven dollars. And it is further ordered, decreed and adjudged, that the said sum, when collected by force and virtue of this decree, be paid into the hands of the clerk of this court, and on the receipt of the said sum he is hereby ordered and directed, so soon as the same can be perfected, to invest the said sum in the purchase of United States stock or bank stock of the United States Bank as may appear most advantageous to the complainants; and it is further ordered, adjudged and decreed, that the defendants do pay the **676*** costs of this suit and interest on the principal sum decreed, to be computed from the service of this decree.

"WILLIAM JOHNSON."

By agreement of counsel a part of the master's report was afterwards corrected, and the number of persons among whom the amount of John J. Maxwell's bonds were to be distributed, being accurately stated, the sum to which the complainants below were entitled according to the principles of the decree of the Circuit Court was found to be \$9,909 instead of \$12,111 as stated in the report.

The case was argued by *Mr. Berrien* for the appellants, and by *Mr. Key* for the appellees.

The following points were made by the appellants:

1. There is no sufficient evidence on which to found a decree for any specific sum.
2. The necessary parties were not before the Circuit Court.
3. The proceeds of the three bonds of John J. Maxwell were well applied to the payment of debts and legacies, and among others to the payment of the contingent legacy to Ann Pray.
4. The decision of the executors, is the will of the testator, by the express provision of the will; and cannot be questioned by the legatees.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was brought in the Circuit Court for the District of Georgia, by George G. Belt, the trustee for Jane Heath and her children, who are infants, and by James P. Heath, husband of the said Jane, and father of her children, against the executors of John Pray, deceased, and Ann Pray, his widow, to recover a legacy bequeathed to them and others by the said John Pray.

The executors resist the demand on the principle that the bonds for which the suit is instituted were required to pay the debts and legacies due from the testator and to raise the \$10,000 to replace the buildings on lots 6 and 7, which were consumed by fire. They also contend that their testator has submitted the construction of his will, absolutely, to their judgment, and that their decision against the claim of the legatees is final.

The Circuit Court established the claim of the plaintiffs, and decreed to them the proportion of the three bonds which was estimated to be their part.

From this decree the executors had appealed to this court.

In argument several formal objections have been taken to the decree, which will be considered. The question on the *merits [**677**] depends on the construction of the will. The will is very inartificially drawn. It is in some parts rendered more confused than it would otherwise be by a recurrence in different places to the same subject. In item 51 he says, in the first instance, that the three bonds which are the subject of controversy, "shall be applied in aid of the payment of his just debts, if any due, and in the payment of the legacies by him left." He adds: "It is my request that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies," &c.

The language of this part of the will in relation to these bonds shows an intention to apply them to debts and legacies, if necessary; but indicates, we think, the expectation that it would not be necessary. They are to be applied in aid of the payment of his just debts, and in the payment of legacies. They are then to aid another fund. That fund is afterwards described in terms, which show it to be a large one. There is some reason to suppose, from this part of the will, that these three bonds were not comprehended in it, because the testator introduces the enunciation of its items by saying "it is my request that my executors do also apply all funds, &c." Again, he assigns as a reason for withholding interest from his legatees, "that in all probability the resources and funds of his estate will be equal to the payment of his debts and legacies before the three bonds mentioned of John J. Maxwell may fall due and be collected."

This shows unequivocally the belief of the testator that these bonds would not be required for the debts and legacies. He then adds, "in case all debts and legacies can be paid before the three aforesaid bonds be collected, then, and in that case, whatever balance may remain to be collected, shall be equally divided between the following persons."

This request does not depend on the fact that the debts and legacies should be actually paid before these three bonds were collected, but on the sufficiency of the fund for the object. Should the fund be sufficient its application must be made; and whether made in fact or not, the right to the bonds vests in the legatees.

The testator then proceeds to say, "it is my will, and I direct that all my estate, both real and personal, shall be kept and continued together until all my just debts and legacies are paid."

This whole item, 51, shows the opinion that the profits of *his estate, including [**678**] dividends on his stock, added to the debts actually due at the time, were sufficient for the payment of debts and legacies. Yet his estate is to be kept together till they shall be paid. The profits are of course to be applied to that object. If this fund amounted, before the 10th day of January, 1820, when the first bond from J. J. Maxwell fell due, to a sufficient sum for

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the payment of debts and legacies, the right of the legatees to the three bonds then vested; if it was not sufficient on that day it may be doubted whether such part of the first bond as was necessary for this primary object might be brought to its aid immediately. We suppose it might. A codicil to the will is dated the 18th day of June, 1819, and the will and codicil were proved on the 27th of the succeeding month. The executors qualified in the month of December; having ascertained, they say in their answer, the adequacy of the fund provided for debts and legacies, they commenced the division of the estate.

So far as the will has been considered, it is obvious that the right of the legatees, to whom the two parts of the three first bonds due from Maxwell were bequeathed, was vested. Their right to the first bond may be more questionable. If part of the fund, which was applicable in the first instance to debts and legacies, could not be made available immediately, and the first bond or any part of it was substituted for debts which could not be collected, it cannot be doubted that those debts, when collected, ought to replace the bond so substituted. The testimony in the cause does not show, with sufficient certainty, how this fact stands. It is remarkable that this first bond was applied by the executors before the 10th of January, 1820, when it became due. They state this fact in their answer. But we are decidedly of opinion that this precipitate appropriation of the bond could not affect the rights of the parties. They must remain, as they would have stood had the bond remained uncollected, till it became payable.

The contest in this suit would either not have arisen, or would have been confined to the first bond, had things remained as they stood before the 10th day of January, 1820. But on that day the buildings on lots Nos. 6 and 7 were consumed by fire.

In that event, the testator had directed that his executors should, for the purpose of replacing the buildings, hold all his estate together until they can add \$10,000 to what may be received on insurance. He adds: "In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks." "Whereas there is no doubt but there must be a considerable surplus fund of my estate, by debts due **679***] or crops on hand, or near *made, after my executors have paid all my debts and legacies, which my wife will come in for; if my executors discover that by such surplus that the same will not be equal to \$10,000, in that case it is my will that they continue all my estate together until they can make up \$10,000."

Instead of conforming to this direction of the will; instead of keeping the estate together; the executors have applied the remaining two bonds payable the 10th of January, 1821, and the 10th of January, 1822, to this object.

They say, that having commenced the delivery of the estate before this event took place, they thought themselves bound to complete it; and considered themselves in the same situation as if it had been completed before the buildings were consumed.

Suppose this opinion to be correct, ought they not also to have considered the bonds as

delivered? This also was a specific legacy; and after being vested, stands, we conceive, on equal ground with other specific legacies.

These bonds do not constitute the fund on which the testator charges these \$10,000, in the unlooked-for event that the surplus of his estate should not be sufficient to raise it. He does not charge this sum on the principal, but on the profits of his estate; and the whole is to be kept together in order to raise it. It is obvious from the whole will, that these bonds do not constitute a part of that surplus, comprehending debts; and in this particular part of it, when he speaks of debts, it is of debts due. No one of these bonds was due at the date of the will, or of the death of the testator.

It is, then, we think, apparent, that the application of these bonds towards raising the sum of \$10,000 was a misapplication of assets.

If the estate had really been delivered when the event occurred, the executors ought to have retained their rights upon it, to satisfy this contingent claim, and we presume that the property would have been liable to it in the hands of devisees and legatees.

But the plaintiffs in error contend, that should they have misconstrued the will of their testator, still their misconstruction binds the legatees, because the testator says: "Whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself, if living, a majority of my acting executors—my wife to have a voice as executrix—to decide in all cases, in case of any dispute or contention; whatever they determine is my intention shall be final and conclusive without any resort to a court of justice."

Clauses of this description have always received such judicial *construction as [***680** would comport with the reasonable intention of the testator.

Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of the parties ought to be exercised.

This principle must be kept in view, in construing the clause now under consideration.

The acting executors, and executrix are empowered, in all cases of dispute or contention, to determine what is the intention of the testator; and their decision is declared to be final.

This power is given, in the apprehension that he may have committed error. It is to be exercised in order to ascertain his intent in such cases. It certainly does not include the power of altering the will. It cannot be contended that this clause would protect the executors in refusing to pay legacies altogether, or in paying to A a legacy bequeathed to B, or in any other plain deviation from the will. In such case, what would be the remedy of the injured party? Is he concluded by the decision of the executors, or may he resort to a court of jus-

tice? But one answer can be given to these questions. So gross a departure from the manifest intent of the testator cannot be the result of an honest endeavor to find that intent; and it must be considered as a fraudulent exercise of a power, given for the purpose of preserving peace, and preventing expensive and frivolous litigation.

But who is to determine what is a gross misconstruction of the will, if the party who conceives himself injured may not submit his case to a court of justice? And if his case may be brought before a court, must not that court construe the will rightly?

This is not the only objection which the plaintiffs in error must encounter, in supporting their construction of this clause. The executors have not, we think, this power, unaided by the executrix.

It is given to a majority of the acting executors, "his wife to have a voice as executrix." Her participating in the decision is indispensable to its validity.

If this power was given to her solely, in her character as executrix, it is seriously doubted whether it can be exercised till she assumes that character.

Even had she united with the executors, this **681** would certainly be a case which might well be considered as an exception from the general operation of the power. The bonds to which it was applied, are the bonds of one of the executors, and it was exercised by bestowing them on the executrix, instead of the persons to whom they were bequeathed by the testator.

In doing this, the executors have plainly misconstrued the will. The testator had not charged the \$10,000, which were to be raised in order to rebuild the houses that were destroyed by fire, on these bonds, but on a different fund. It is, therefore, the very case put, of paying to the executors the legacy bequeathed to other persons. It may also be observed, that neither of the executors, nor Mrs. Pray, say in their answer, that this diversion of these bonds to a different purpose from that directed by the testator, was made from a belief that it was his intention, in the event which had occurred. They refer to the clause and rely upon it, as if it had empowered them to do whatever they thought best, in the progress of their administration; instead of doing what, in their best judgment, they believed to be his intention.

But, however correctly the will of the testator may have been construed in the Circuit Court—and we think it was construed correctly at least so far as respects the two last bonds mentioned in item 51 of the will of John Pray, deceased—other objections have been taken to the proceedings in the Circuit Court, which seem to be well founded.

The legacy for which this suit is instituted, is given jointly to several persons in different families. The legatees take equally, and the numbers in neither family are ascertained by the will. Under such circumstances, we think all the claimants ought to be brought before the court. The rights of each individual depend upon the number who are entitled, and this number is a fact which must be inquired into before the amount to which anyone is entitled can be fixed. If this fact were to be

examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, that decree would not bind persons who were not parties. The case cannot be distinguished from the rule which is applied to residuary legatees.

The bill filed in this case, does not even state the number of persons belonging to the different families, nor to that family in whose behalf this suit is brought. Nor does it assign any reason for not making the proper parties. It does not allege that the other legatees refuse to join, as plaintiffs, or that they cannot be made defendants.

For this cause the decree must be reversed, and the case remanded to the Circuit Court, that the plaintiffs may amend their bill.

*The objections to the report are not [***682** entirely unfounded, and it is not quite satisfactory.

It does not, we think, show with sufficient clearness, whether the plaintiffs in that court were entitled to the first bond. But as the case must go back to amend the bill, a new report will of course be made; and if that shows that the funds of the estate were sufficient to pay the debts and legacies, without applying this bond to that purpose, the plaintiffs below will be entitled to that also.

This cause came on, &c. In consideration whereof, it is decreed and ordered by this court, that the decree of the Circuit Court in this cause be, and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said Circuit Court, for further proceedings to be had therein, and that the plaintiffs may amend their bill.

*WILLIAM B. ALEXANDER, [***683**
FRANCIS SWANN, AND THOMAS
SWANN, *Plaintiffs in Error*,

v.

ELISHA BROWN, *Defendant in Error*.

Execution—practice.

Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bond of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond; if the notice given to the obligors of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. [684]

ERROR for the Circuit Court of Alexandria.

This case was argued by *Mr. Swann* for the plaintiffs, and *Mr. Jones* for the defendant.

The material facts of the case appear in the opinion of the court.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

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This was a motion to the Circuit Court for the District of Columbia, sitting in Alexandria, for an award of execution upon a forthcoming bond, taken in pursuance of the execution law of Virginia. That law directs, that if the owner of any goods or chattels, which shall be taken by virtue of a writ of *fiери facias*, shall tender sufficient security to have the same goods and chattels forthcoming, at the day of sale; it shall be lawful for the sheriff or other officer, to take bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the money or tobacco forthcoming, at the day of sale appointed by such sheriff or other officer; and shall thereupon suffer the said goods and chattels to remain in the possession and at the risk of the debtor, until that time. And if the owner of such goods and chattels shall fail to deliver up the same, according to the condition of the bond, or pay the money or tobacco mentioned in the execution, such sheriff or other officer shall return the bond to the office of the clerk of the court from whence the execution issued, to be there safely kept, **684***] and to have the force *of a judgment; and thereupon it shall be lawful for the court, when such bond shall be lodged, upon the motion of the person to whom the same is payable his executors or administrators, to award execution for the money and tobacco therein mentioned, with interest thereon from the date of the bond, till payment, and costs; provided the obligors, their executors or administrators, or such of them against whom execution is awarded, have ten days' previous notice of such motion.

In this case, the condition of the bond recited a *fiери facias* against William B. Alexander and Richard B. Alexander, but was levied on the property of William B. Alexander only. The bond was executed by William B. Alexander, and his sureties. The notice of the motion to award execution on this bond, was addressed to the obligors, and imported that the motion was to award execution on their forthcoming bond, bearing date, &c., and taken by virtue of a writ of *fiери facias* issued, &c., "in my name, against William B. Alexander, &c.

On the motion, the forthcoming bond, and the execution on which it was taken, were shown to the court; and the proceedings were regular in all respects, except that the notice stated the bond to be taken by virtue of a writ of *fiери facias*, issued against William B. Alexander, whereas it was in fact issued against William B. Alexander and Richard B. Alexander. It was admitted that this was the execution on which the forthcoming bond was taken, and the only execution in which the said William B. Alexander was a party.

The counsel for the defendants took exceptions to the notice, but the court gave judgment on the motion; which judgment is brought before this court by a writ of error.

The Act of Assembly prescribes, that the forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice, than that it shall be served ten days before the motion. Its sole purpose is to inform the party that the Peters 1.

motion is to be made, thereby enabling him to show that the money has been paid; or, that for any other reasons, executions ought not to be awarded. If it gives him the information, which enables him to do this, it effects all the substantial purposes of justice. A false recital of the execution, would be fatal, because it might mislead the obligor; but in this case, the execution was against William B. Alexander, though not against him alone. He could not mistake the case in which the motion was to be made, because it is admitted that this was the execution on which the bond was taken, and the only execution in which the said William B. Alexander was a party.

After judgment has been rendered, an execution issued thereon and levied, the property restored to the debtor, on his bond *to **[*685** produce it on the day of sale, and his failure to do so, we do not think that nice and technical objections to the notice, where every purpose of substantial justice is effected, ought to be favored. The law only requires notice, and where the notice is sufficiently explicit, to render mistake impossible, we think it justifies the award of execution.

The judgment is affirmed with costs and damages at the rate of six per centum per annum.

*RICHARD BIDDLE, Administrator, **[*686**
&c., of JOHN WILKINS,

v.

JAMES C. WILKINS.

Pleading — letters of administration — administrators.

The plaintiff, as administrator of W., had brought a suit in the District Court of the United States for the Western District of Pennsylvania, and recovered a judgment; and upon this judgment, he instituted a suit in the District Court of the United States, of the State of Mississippi, against the defendant in the original suit. The defendant pleaded, that, by the Orphans' Court of Adams county, in the State of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity. Held, that the debt due upon the judgment obtained in Pennsylvania, by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial whether the defendant was or was not administrator of W., in the State of Mississippi. That would not, in any manner, affect the rights of the plaintiff; and the plea tenders an immaterial issue, and is bad on demurrer. **[691]**

Where the court in which judgment is rendered has not jurisdiction over the subject-matter of the suit, or where the judgment upon which suit is brought is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment. **[691]**

The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground that no matter of defense can be pleaded in such case to a suit on a judgment which existed anterior to the judgment. **[692]**

It has become a settled practice in declaring in an action upon a judgment, not, as formerly, to set out in the declaration the whole of the proceedings in the original suit, but only to allege, generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatum*. **[692]**

In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a profert of the letters of administration.

That it is not necessary in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make *profert* of the letters of administration; and when he does so name himself, it may be rejected as surplusage. [692]

After judgment recovered in a suit by an administrator, the debt is due to the plaintiff in his personal capacity, and he may declare that the debt is due to himself. [693]

ERROR to the District Court of the United States for the Mississippi District.

This was an action of debt brought in the court below, upon a judgment obtained by the plaintiff as administrator against the defendant, in the District Court of the United States for **687**] *the Western District of Pennsylvania. The declaration was in the common form, averring the recovery by plaintiff as administrator, &c.

The defendant pleaded three pleas in bar. 1. *Ne unques administrator*. 2. That in January, 1817, in the Orphans' Court of the county of Adams, in the State of Mississippi, the defendant was duly appointed sole administrator, and has continued to act in that capacity. 3. That the judgment was obtained *per fraudem*. The plaintiff replied to the third plea, on which issue was joined; and demurred specially to the first and second, assigning as causes of demurrer, 1. The said pleas set up matter which, if true, existed anterior to the judgment on which the suit was brought; and might have been urged, if effectual at all, against the original recovery. 2. The said matters should have been pleaded in abatement, and not in bar. 3. They contain averments against the record. 4. That the matters therein contained are immaterial, and could not be set up after judgment, to avoid its effect, in the State from which the record came. 5. They are in other respects uncertain, informal, and insufficient.

Joinder in demurrer. The judgment of the District Court was in favor of the defendant, sustaining both pleas as sufficient.

Mr. Cove, for the plaintiff in error, contended: 1. The first plea is clearly defective. The plaintiff, in his representative character, had sued in the State of Pennsylvania, and recovered a judgment. In this subsequent action brought upon that judgment, the demand is a personal one. He need not name himself administrator, but may sue and recover in his own name. (L. Ray., 1215; Dong., 4; 2 T. R., 126; 2 Phil. on Ev., 290.) He need not make *profert* of the letters of administration, and in this case no such *profert* is in fact made. Even in action for an escape out of execution, on a judgment obtained as administrator, he need not style himself administrator, nor make *profert*. (Hobart, 38.)

In such cases, if he do sue in the second action in his representative character, and so designate himself, it will be held mere surplusage, and can in no degree vary the relative rights of the parties. (1 Ver., 119; 16 Mass., 71; *Ib.*, 533.) It would be a bad plea, that plaintiff had not been appointed administrator in the State where the second action is brought (16 Mass., 533), for in such case, his right to sue is derived from the judgment which he has obtained, and is wholly independent of the letter of administration. (9 Cranch, 151.)

The judgment obtained in the District Court of Pennsylvania is conclusive evidence of the representative character of *the plaintiff. **[*688]** iff, as well as of the amount of the debt. At common-law, in action of debt on the judgment, or in *scire facias*, the defendant can plead nothing which existed anterior to the original judgment, or might have been pleaded in bar to the original recovery. (1 Chit. on Pl., 350; 8 Johns., 77; 2 L. Ray., 853; Cro. Eliz., 283; 6 Com. Dig., 306-7; Tit. Plead., 2 D.) 1. A judgment obtained in one of the courts of the Union, has the same validity in other federal courts, as a judgment in a State Court has at common law, within the same jurisdiction, or as it possesses under the Constitution and laws of the United States, in a sister State. (*Montford v. Hunt*, 3 Wash., C. C. Rep., 28; *Bryant v. Hunter, et al.*, *Ib.*, 48.)

The true test by which the validity of the plea is to be settled, is to ascertain whether it would have been held good in an action brought on the judgment, in the same court where the judgment was had. The cases already cited are decisive of that question.

2. The second plea is open to the same objections which exist against the first, and is otherwise informal and defective. It is argumentative; the mere fact that he was appointed administrator of James C. Wilkins by the Orphans' Court in Adams county, furnishes no exemption from suit. It leaves the whole substance of the defense set up to be made out by inference and argument, to wit, that plaintiff was not such administrator; which, however, is only thus inferentially denied.

This, if substantially a defense, should have been pleaded to the original action; and therefore cannot avail the party in the present stage of the proceedings. Even if treated now as a plea to the original demand, it is essentially defective, inasmuch as it does not aver that the defendant had obtained letters of administration prior to the institution of the suit in Pennsylvania. It would be a monstrous doctrine to introduce, that a party after a suit has been instituted against him in one jurisdiction, may defeat all the beneficial results of a judgment, by obtaining letters of administration in another State.

3. The first plea, which in terms traverses the fact that plaintiff is administrator, and the second, which argumentatively rests upon the same ground, are both bad as plea in bar. In the case of *Childress v. Emory, et al.* (8 Wheat., 642), this court recognized the doctrine that the objection that plaintiffs were not executors, must be taken advantage of by plea in abatement.

Mr. Baldwin and *Mr. Jones*, for defendant.

It will be admitted, that the first pleas is defective, and no effort will be made to sustain the judgment of the District Court in reference to that.

The second plea is, however, considered as furnishing a valid *defense, and its [*689] character and effects have been wholly misapprehended by the adverse counsel. The demurrer admits that defendant was sole administrator of Wilkins, from 1817 till the institution of this suit. Under the testamentary system of Mississippi, where he resided, a debt due to the deceased is assets in the hands of the

administrator, and is included in the inventory as so much money. The plaintiff sued as administrator, and defendant was at the time administrator within the jurisdiction in which the action was instituted. Every cause of action existing there, was necessarily embraced in the powers of the party, who was alone recognized there as the personal representative of the deceased. He was bound there to account for it—and to distribute it. He was prohibited by law from sending the assets out of the State. He could not legally pay any debt without the sanction of the court. That which he is prohibited from doing directly, he will not be compelled to do indirectly. If sued by creditors, and distributees, upon his official bond, he must be responsible to them for the whole amount of the inventory; and he cannot be discharged by showing payment to plaintiff.

There is no such thing as an auxiliary administration. (9 Mass., 355.) Each administrator is independent of the author; each derives his power from a competent authority, and each is independent of the other within his own sphere. The residence of the deceased may determine the rule of distribution, and the relative rights of those entitled to the estate; but the concession that final distribution is to be made according to the law of Pennsylvania, though the record is wholly silent as to the place of his residence, leaves the question before the court entirely open.

But the courts in Pennsylvania have no jurisdiction over the defendant. He derives his power from the Mississippi court. To it, and to it alone is he responsible. He cannot be cited to account, or to pay over to creditors, or distributees there; all this is to be done in Mississippi.

This debt, therefore, which the defendant is answerable for in his own State, and in the manner prescribed by the local law, cannot be assets in the hand of the Pennsylvania administrator.

The objection of the plaintiff that these matters existed anterior to the first judgment, and should have been pleaded in bar to the first action, is inapplicable. It is admitted that the record is conclusive upon all the matters which the judgment professes to decide. But if the Pennsylvania court had no cognizance of the subject-matter; if it belonged exclusively to another tribunal; if the alleged debt or claim **690*** was exclusively *within the jurisdiction of the Orphans' Court of Mississippi, or if defendant acted in such a capacity that no court of common law jurisdiction could decide between the parties upon the subject-matter of controversy, then the question presented is one of jurisdiction, and it is well settled that a court, when called upon to enforce the judgment of another tribunal, may examine into and decide upon the question of jurisdiction. (4 Cranch, 269.)

The District Court of Pennsylvania has admiralty jurisdiction; if this suit was brought on an admiralty decree, or on a stipulation, or on a bond to the marshal, and it should appear on the record that the admiralty had no jurisdiction over the original cause of action set forth in the libel, the objection might be urged anywhere and at any time. The whole proceedings would be a nullity. (3 Cranch, 331.)

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So, if the objection on this ground appeared incidentally, the effect would be the same. In this case, then, the plea discloses a case beyond the proper jurisdiction of the court in Pennsylvania, and this we are permitted to do with effect.

It is said these matters should have been pleaded in abatement, and not in bar. Pleas in abatement are such as go to the place where suit is brought to any personal privilege of defendant, or to the form or species of action. If the party fails to plead in abatement, it is a submission to the process, and admits the jurisdiction, so far as that he is rightfully before the court. But if the plaintiff cannot sue anywhere, if his cause of action is not cognizable in the court where he sues, even express consent cannot give jurisdiction. The objection is fatal, and wherever it is shown to exist.

Mr. Justice THOMPSON delivered the opinion of the court:

The case comes up from the District Court of the United States for the Mississippi District, upon a writ of error.

The action in the court below was founded upon a judgment obtained in the District Court of the United States for the Western District of Pennsylvania, in the term of October, in the year 1823, for the sum of \$32,957.34. The declaration is in the usual form of an action of debt on a judgment.

The defendant pleads in bar: 1. That the plaintiff is not, and never was, administrator of John Wilkins, deceased. 2. That at the January term, in the year 1817, of the Orphans' Court for the county of Adams and State (then territory) of Mississippi, he, the defendant, was duly appointed sole administrator of John Wilkins, deceased, and entered into bond with security, and took the oath prescribed in such case, according to the statute *in such case made and provided; and [**691** that he took upon himself the duty and office of administrator, and has continued to act as such administrator ever since. 3. That the judgment in the declaration mentioned was obtained by fraud.

To the two first pleas a special demurrer was interposed, and issue to the country taken upon the third, and judgment rendered for the defendant upon the demurrer; to reverse which the present writ of error has been brought.

The first plea of *ne unques administrator* has been abandoned as altogether untenable; and the counsel on the part of the defendant in error have rested their argument entirely on the validity of the second plea; and have treated this as a plea in bar to the jurisdiction of the court, in which the judgment was rendered. It is a little difficult to discover what is the true character of this plea. It can, in substance, amount to nothing more than an allegation that the plaintiff was not the lawful administrator of John Wilkins; and in that respect is but a repetition of the same matter set up in the first plea, and that, too, in a more exceptionable form. For, the conclusion is drawn argumentatively from the fact set up in the plea, that he, the defendant, was duly appointed sole administrator of John Wilkins, in the Orphans' Court of the county of Adams, in the State of Mississippi; and thence to infer

that the plaintiff could not be the lawful administrator in Pennsylvania. Such a plea will not stand the test of a special demurrer. If it was intended by this plea to set up that the defendant was the first and only rightful administrator of John Wilkins, and that the debt due from him thereby became assets in his hands; the plea is defective in not alleging when administration was granted to the plaintiff. The declaration alleges that John Wilkins died a citizen of Pennsylvania; and from anything that appears to the contrary, administration might have been granted to the plaintiff before it was to the defendant.

The simple fact that administration had been granted to the defendant in Mississippi, would not raise any question with respect to the jurisdiction of the court; and if it furnished any matter of defense on the merits against the recovery, on the ground that it was taking out of his hands assets, the administration of which belonged to him, it should have been set up in the original action. Nothing appears to invalidate the judgment upon which the present action is founded. The cause of action does not appear, and we cannot say that the subject-matter was not within the jurisdiction of the court when it was rendered, or that there was any disability in the plaintiff to sue in that court; or that the judgment was void for any cause whatever. When the court in which **692** the judgment is rendered *has not jurisdiction over the subject-matter of the suit, or when the judgment is absolutely void, this may be pleaded in bar, or may in some cases be given in evidence under the general issue. But the general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation. And it is upon this ground that no matter of defense can be pleaded in such case which existed anterior to the judgment. (*Chitty Plead.*, 481.) Hence, it has become a settled practice in declaring, in an action, upon a judgment, not (as formerly) to set out in the declaration the whole of the proceedings in the former suit, but only to allege generally that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein. (*Chitty*, 354.)

The original cause of action having passed, *in rem judicatam*, how far the circumstance, that the defendant had taken out letters of administration in Mississippi, would have availed as a defense against a recovery of the original judgment, cannot now be inquired into. It should have been set up in the former suit. But if the first administrator acquired a right to this debt as assets, and that matter was now open to inquiry, there is nothing appearing on this record to show that the defendant had acquired any such priority. When letters of administration were taken out by the plaintiff does not appear; nor was he bound to show that in his declaration. He was not bound to make proof of the letters of administration. This was so decided in the case of *Crawford, administrator of Hargrove, v. Whitall*. (*Doug.*, 4, note a.) It was an action of *indebitatus assumpsit*, upon a judgment recovered by the plaintiff, as administrator, against the defendant, in the Mayor's Court at Calcutta. And the declaration alleged that the defendant was

indebted to the plaintiff, as administrator, in the sum therein mentioned, which had been adjudged to him as administrator, &c. The defendant demurred specially, and showed for cause that there was no proof of letters of administration. But the court said this was unnecessary, because in this action (upon the judgment) the plaintiff had no occasion to describe himself as administrator. If, then, it was a fact, and of any importance in deciding the legal rights of the parties in this case, that administration had been first granted to the defendant in Mississippi, that should have been alleged in the plea, and no objection can be taken to the declaration as containing the first fault in pleading.

That it is not necessary, in cases like the present, for the plaintiff to name himself as administrator, follows as matter of course from his not being bound to make proof of his letters of administration, and that [**693** when he does so name himself, it may be rejected as surplusage, is well settled by numerous authorities. In the case of *Bonafous v. Walker* (2 Term Rep., 126), it was objected that the action ought to have been brought by the plaintiff as administratrix; because the judgment on which the party had been committed in execution had been obtained by her as administratrix of her husband. But the court said that was unnecessary, for the instant the plaintiff recovered the judgment it became a debt due her on record, and was assets in her hands, for which it was not necessary for her to declare as administratrix. (See also *Hob.*, 301, *L. Ray.*, 1215.) The case of *Tallmadge, administrator, &c., v. Chappell et al.* (16 Mass. Rep., 71), decided in the Supreme Judicial Court of Massachusetts, is very full and explicit on this point. The plaintiff declared as administrator, &c., in debt upon a judgment recovered by him as administrator, in a Court of Common Pleas, in the State of New York. The defendant pleaded in bar that the parties at the time of rendering the judgment were all inhabitants of the State of New York, and that the plaintiff was appointed administrator in that State, and had not been so appointed in Massachusetts. To which plea there was a demurrer and joinder, and the court held the plea bad. That the action, being on a judgment already recovered by the plaintiff, it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate, and it ought to be considered as so brought; his style of administrator being merely descriptive, and not essential to his right of recovery. That it was important to the purposes of justice that it should be so; for an administrator appointed in Massachusetts could not maintain an action upon this judgment, not being privy to it; nor could he maintain an action upon the original contract, for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is, in truth, due to the plaintiff in his personal capacity, and he may well declare that the debt is due to himself.

If in the case before us the judgment is considered a debt due to the plaintiff in his personal capacity, it is totally immaterial whether the defendant was or was not administrator of

John Wilkins, in the State of Mississippi. That could not in any manner affect the rights of the plaintiff. The plea therefore tenders an immaterial issue, and is bad on demurrer.

In whatever light, therefore, we consider this plea, whether as to the matter itself set up, or to the manner in which it is pleaded, it cannot be sustained as a bar to the present action.

We are accordingly of opinion that the **694***] judgment of the *court below must be reversed, and the cause sent back with directions to Peters 1.

tions to allow the defendant to plead *de novo*, if he shall elect so to do.

This cause came on, &c. On consideration whereof, it is adjudged and ordered by this court, that the judgment of the District Court in this cause be, and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said District Court, with directions to permit the defendant to plead *de novo*, if he elect so to do.

Cited—9 Blatchf., 277; 2 Paine, 223.



NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or Fed. Rep. refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and Am. St. Rep. will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

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| Atl. Atlantic Reporter, | So. Southern Reporter, |
| Pac. Pacific Reporter, | S. E. Southeastern Reporter, |
| N. E. Northeastern Reporter, | S. W. Southwestern Reporter, |
| N. W. Northwestern Reporter, | S. Ct. Supreme Court Reporter. |

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

I PETERS.

1 Pet. 1-17, 7 L. 27, HUNT v. ROUSMANIERE.

Power of attorney executed by a debtor to secure a loan authorizing the creditor to execute a bill of sale of an interest in vessels, and, in event of their being lost, to collect the insurance, although irrevocable in debtor's lifetime, expires on his death, p. 9.

Cited in *Mervin v. Murphy*, 35 Tex. 795, in illustration of distinction between a power coupled with an interest, and such a power only in the proceeds; *Michigan State Bank v. Leavenworth*, 28 Vt. 216, and *Huston v. Cantrell*, 11 Leigh (Va.), 167, on the point that letters of attorney were revoked by the death of the principal; *United States v. Cutts*, 1 Sumn. 140, 141, F. C. 14,912, construing an assignment of certain stock to secure a debt. See note to 68 Am. Dec. 763, discussing the continuing force of contracts as against decedents.

Mistake.—Where an instrument is executed which is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman as to fact or law, does not fulfill the manifest intention of the parties, equity will correct the mistake, p. 13.

The citations collect a large number of cases affirming and following this rule: *Rogers v. Atkinson*, 1 Ga. 25, where, through the mistake of a draftsman, an important provision in a contract was omitted; *Leitensdorfer v. Delphy*, 15 Mo. 166, 55 Am. Dec. 139, where a second deed drawn in place of a first failed to express the intent of the parties; *Lestrade v. Barth*, 19 Cal. 673, where there was a mistake in the description; *Adams v. Reed*, 11 Utah, 502, 40 Pac. 724, where a deed described land as being in the wrong section; *Stines v. Hays*, 36 N. J. Eq. 369, where a deed omitted to state a strip was for a road and to reserve a right to use it; *Brock v. O'Dell*, 44 S. C. 33, 21 S. E. 980, dissenting opinion, p. 45, 21 S. E. 985, where, in drawing a deed, the word "heirs" was omitted; *Norton v. Kellogg*, 41 Fed. 454, on the point that on a defect in executing a trust in the form of the deed and not in the purpose, equity would intervene; *Walden v. Skinner*, 101 U. S. 584, 25 L. 966, where a purchase was made on trusts which the trustee failed to have properly declared in the deed; *Wyche v. Greene*, 16 Ga. 60, where a deed of gift intended to convey a life estate conveyed an absolute title; *Larkins v. Biddle*, 21 Ala. 256, holding that a deed of gift which does not express the intention

may be reformed; *Green v. Morris, etc., Co.*, 12 N. J. Eq. 169, where a deed whose purpose was to effectuate an award of arbitrators did not accomplish the purpose; *Snyder v. May*, 19 Pa. St. 238, holding equity would relieve where a lessor made a mistake in the amount of the rent; *Ryder v. Ryder*, 19 R. I. 189, 32 Atl. 920, where a mortgage of fixtures and furniture, but designed to cover all personalty, was corrected; *Collier v. Lanier*, 1 Ga. 240, where a mortgage set out it was intended to secure a bond, whereas it was intended to secure notes; *Citizens' National Bank v. Judy*, 146 Ind. 340, 43 N. E. 264, where lands intended to be covered by a mortgage were omitted; *Cassidy v. Metcalf*, 66 Mo. 528, 530, where a contract for the sale of an interest by a partner transferred property not intended; *Allen v. Brown*, 6 R. I. 398, where a grant of a sea-weed privilege conveyed a greater privilege than designed; *Stafford v. Feters*, 55 Iowa, 487, 8 N. W. 324, where a note was transferred by simple assignment under an agreement that the transfer should be without recourse; *Lee v. Percival*, 85 Iowa, 642, 52 N. W. 544, where a note, intended to bind a corporation only, was drawn so as to bind the officers individually; *Gump's Appeal*, 65 Pa. St. 479, holding that a judgment note, which omitted the words "with interest," would be corrected; *Talley v. Courtney*, 1 Heisk. 718, where a note was reformed so as to read payable in current bank notes; *Miller v. Davis*, 10 Kan. 548, where in a mortgage the names of the parties were transposed by mistake; *Gayle v. Hudson*, 10 Ala. 127, where in a bond the name of an obligee was wrongly stated.

Other citing cases, which affirm and follow the rule, are: *Scales v. Ashbrook*, 1 Met. (Ky.) 361, where on a bill of exchange the lender was made the drawer, and the borrower payee and indorser; *German National Bank v. Butchers', etc., Co.*, 97 Ky. 42, 29 S. W. 884, where, on renewal of a note to a bank, the name of the bank was omitted; *Askew v. Odenheimer*, Bald. 387, F. C. 587, holding an assignment by one partner to indemnify his co-partner for frauds would be reformed so as to meet the intention; *Oliver v. Mut. Commercial M. I. Co.*, 2 Curt. 298, 299, F. C. 10,498, holding equity would reform a policy not correctly expressing a previously concluded agreement; *Hearn v. Equitable, etc., Ins. Co.*, 4 Cliff. 196, F. C. 6,300, where insurance policies, not allowing a vessel a port for loading a return cargo, was reformed; *Travellers' Ins. Co. v. Henderson*, 69 Fed. 767, 32 U. S. App. 536, where one attempted to reform an accident insurance policy by striking out an exception; *Dean v. Eq., etc., Co.*, 4 Cliff. 580, F. C. 3,705, where a mistake was not in writing the policy, but in allowing title to be changed without consent; *Pitcher v. Hennessey*, 48 N. Y. 423, where a contract to run plaintiff's boat was reformed so as to make the plaintiff assume the risk of navigation; *Nowlin v. Pyne*, 47 Iowa, 296, where a draftsman, drawing up a contract for the exchange of farms, un-

derstood the agreement, but failed to express it in correct terms; *Whitaker v. Gavitt*, 18 Conn. 526, where a bill was brought to reform an assignment by an insolvent so as to include property claimed to be omitted; *Moore v. Thomas*, 1 Or. 202, where a deed, attested by but one witness, was upheld; *Curtis v. Leavitt*, 15 N. Y. 163, where a contract not containing proper seals was reformed, and the proper seals affixed; *Glass v. Hulbert*, 102 Mass. 34, 3 Am. Rep. 426, holding that where an omitted term is within the statute of frauds it cannot be enforced; *Petes v. Hambach* 48 Wis. 447, 4 N. W. 567, holding a mortgage by a married man, supposed to cover a homestead, would not be reformed as against his wife after his death; *Olmstead v. Olmstead*, 38 Conn. 337, dissenting opinion, holding that a bond not expressing the agreement would be reformed, as well against the sureties as principal; *United States v. Cushman*, 2 Sumn. 435, F. C. 14,908, on the point that in the case of sureties, if the contract is in form joint, equity will not presume it to have been joint and several unless upon distinct proofs; *Holabird v. Burr*, 17 Conn. 559, holding a mistake in a draft of a deed may be corrected, not only as against the party, but as against others; *Park v. Blodgett*, 64 Conn. 36, 29 Atl. 135, where oral testimony was admitted to show that by mistake a contract did not embody the actual agreement; *Dennis v. Northern Pac. Ry. Co.*, 55 Pac. 212, reforming a deed failing to reserve a right of way, through the scrivener's error; *Wisconsin, etc., Bank v. Mann*, 76 N. W. 784, reforming a written guaranty to conform to the verbal understanding of the parties; *Dunham v. Chatham*, 21 Tex. 245, 73 Am. Dec. 231, holding parol evidence was admissible where property was granted to a husband and wife to show the husband's name was inserted by mistake; *The Perseverance*, Blatchf. & H. 388, 389, F. C. 11,017, holding admiralty could not change a written agreement or compel one to be executed according to equity and to the understanding of the parties. Cited in valuable note, 65 Am. St. Rep. 482, 485, 487, 491, 499, on reformation of contracts.

Mistake in an agreement, which is clearly proved to have been the result of ignorance of some material fact, will in general be relieved against in equity, p. 13.

Cited and followed in *Dennis v. Northern Pac. Ry. Co.*, 55 Pac. 212, reforming a deed which omitted an important reservation through the scrivener's negligence; *Hadlock v. Williams*, 10 Vt. 572, on the point that if the principal inducement were a mine or quarry, not found on the land contracted for, equity would relieve; *Marks v. Bradley*, 69 Miss. 17, 10 So. 926, on the point as to the effect of preferring a debt not due in an assignment through mistake of fact; *Peques v. Mosby*, 7 Smedes & M. 347, on the point that parol evidence of a mistake in a deed is admissible upon a bill to reform; *Shear v. Robinson*, 18 Fla. 453, holding that a release executed in ignorance of the facts, and induced by imposing upon

one's weakness and confidence, was of no effect. Cited generally in *Carpenter v. Providence, etc., Co.*, 4 How. 224, 11 L. 949, on the point that there must be satisfactory evidence of fraud before relief will be granted. Cited in exhaustive note, 65 Am. St. Rep. 482, on reformation of contracts.

Equity may compel parties to perform their agreement when fairly entered into according to their terms; but it has no power to make agreements for parties and then compel them to execute the same, p. 15.

Cited and followed in *Rison v. Newberry*, 90 Va. 521, 18 S. E. 919, holding that where there was no mistake, illegality or fraud, equity would not rescind a contract; *McKinstry v. Conly*, 12 Ala. 682, holding that where parties have entered into a contract, it cannot be shown by parol an entirely different contract was intended; *Ligon v. Rogers*, 12 Ga. 289, holding an omission would not be corrected where a party knew of it and relied upon the promise of an attorney to carry it into effect; *Crislip v. Cain*, 19 W. Va. 478, holding that on a sale of land in gross, equity would not allow for deficiency or excess; *Adams v. Henderson*, 168 U. S. 580, 42 L. 588, 18 S. Ct. 182, where, under a contract to purchase an indefeasible title, the defendants were not required to accept a deed with a right to pass over it and prospect for mineral; *Warner v. Brinton*, 29 Fed. Cas. 243, holding a will omitting to dispose of certain land could not be aided by a clause in the instructions; *Baltzer v. Raleigh, etc., R. R. Co.*, 115 U. S. 648, 29 L. 510, where a contention that a wrong name was inserted in a contract by fraud or mistake was not sustained; *Garrard v. Webb*, 4 Port. 82, where the court considered the power of chancery to compel parties to perfect original agreements against a subsequent lien.

Equity can only enforce the performance of an agreement according to its terms and to the intention of the parties, and cannot force upon them a different agreement, p. 15.

Cited to this effect in *Glass v. Hulbert*, 102 Mass. 44, 3 Am. Rep. 435, where a stipulation sought to be stricken out was in accordance with the actual agreement; see the authorities referred to under the prior head.

Mistake of law is not generally ground for reforming a deed founded on such mistake, p. 15.

A large number of authorities affirming and relying upon this holding are collated by the citations, as follows: *Marlin v. Hamlin*, 18 Mich. 364, 100 Am. Dec. 184, on the point that a mistake as to the legal effect of an instrument, the contents of which one knew, was purely a mistake of law for which there was no relief; *Williams v. Rhodes*, 81 Ill. 587, holding that as a general rule equity will not relieve because of ignorance of law

where the facts are known; *Marshall v. Rench*, 3 Del. Ch. 259, holding there was no remedy where a testator mistook the legal operation of conveyances; *Fuller v. Parrish*, 3 Mich. 231, dissenting opinion, and *Stover v. Poole*, 67 Me. 223, both holding a mistake of law is not ground for setting aside a voluntary conveyance; *Catlin v. Fletcher*, 9 Minn. 89, holding that misrepresentation as to the legal effect of a conveyance will not avoid it; *Ryan v. Goodwyn*, McMull. Eq. 456, and *Pierson v. Armstrong*, 1 Iowa, 286, 287, 290, 291, 63 Am. Dec. 442, 443, 446, 447, where in both cases a father who conveyed land to his daughter, sought relief on the ground that he intended her husband to have no interest; *Osburn v. Throckmorton*, 90 Va. 316, 18 S. E. 286, holding that ignorance of law does not invalidate a deed by a wife to a husband; *Gordere v. Downing*, 18 Ill. 493, where a complainant instructed a justice to prepare a quitclaim, and the justice executed a conveyance in fee; *Trigg v. Read*, 5 Humph. 533, 534, 42 Am. Dec. 451, 452, holding ignorance of law and a consequent mistake as to a title is no ground for rescission; *Lott v. Kaiser*, 61 Tex. 670, holding one executing a deed knowing its effect cannot show by parol he intended it to take effect at his death; *Butler v. Livingston*, 15 Ga. 568, holding that admissions as to title are presumed to be made, not only with a knowledge of the facts, but of legal rights; *Bank of United States v. Daniel*, 12 Pet. 55, 9 L. 998, where the parties were mistaken in their construction of a statute; *Leavitt v. Palmer*, 3 N. Y. 39, 51 Am. Dec. 339, holding that a trust deed issued by a bank to secure notes in violation of a statute cannot be reformed; *Hamblin v. Bishop*, 41 Fed. 82, where a person conveyed away her inheritance through an erroneous legal opinion, misinterpreting a statute; *Freeman v. Curtis*, 51 Me. 143, 81 Am. Dec. 567, where, under the circumstances of the case, a conveyance by heirs of their interests in ignorance of the statute of descents was set aside; *Root v. Stuyvesant*, 18 Wend. 299, holding that in construing a will the ignorance of law of the testator in reference to the statute of wills cannot be considered; *Good v. Herr*, 7 Watts & S. 256, 42 Am. Dec. 237, holding that mistake of law applicable to the settlement of estate with full knowledge of the facts is no ground for relief; *Wintermute v. Snyder*, 3 N. J. Eq. 499, 500, where an assignment was made of an interest in an estate in ignorance of the legal effect of the bequests; *Upton v. Tribilcock*, 91 U. S. 50, 23 L. 206, holding that representations by an agent of a corporation as to the nonassessability of stock is no defense; *Anderson v. Tydings*, 8 Md. 440, 442, 443, 63 Am. Dec. 710, 712, 713, holding equity will not deprive creditors of a legal advantage by reason of a mistake of law in drawing a deed; *Allen v. Gallo-way*, 30 Fed. 467, where a court refused to set aside a compromise because of mistake; *Lyons v. Sanders*, 23 Miss. 536, holding a mistake as to the legal effect of new notes in discharge of old,

was not ground of relief; *Harner v. Price*, 17 W. Va. 540, 542, where one confessed judgment on a note barred by the statute of limitations; *Kearney v. Saser*, 37 Md. 280, where an administrator sought relief from a judgment by confession on the ground of ignorance of its legal effect; *Maxwell, etc., Co. v. Thompson*, 1 N. Mex. 606, dissenting opinion, on the point that a mistake of law by the parties to a decree by consent is not ordinarily a ground for relief; *United States v. Ames*, 99 U. S. 46, 25 L. 301, where a bill averred that parties to a judicial proceeding understood its legal effect would be different from what it really was; *Woolworth v. McPherson*, 55 Fed. 560, where a party entered into an agreement, which, contrary to his intention, bound him as a partner; *United States v. Price*, 9 How. 92, 97, 98, 99, 102, 104, 13 L. 59, 61, 62, 64, *United States v. Archer*, 1 Wall. Jr. 185, F. C. 14,464, and *Pickersgill v. Lahens*, 15 Wall. 144, 21 L. 121, all holding that a surety discharged at law will not be held in equity; *Ellis v. Bibb*, 2 Stew. 72, where a surety entering into a compromise after he had been discharged by an alteration of the contract, in ignorance of the law, was relieved; *Rector v. Collins*, 46 Ark. 178, 55 Am. Rep. 574, where a note with a greater than legal rate of interest was not reformed by inserting the words "until paid;" *St. Louis v. Priest*, 88 Mo. 614, where a trustee under a deed of trust delegated his authority to an agent who executed a conveyance; *Johnson v. McGinness*, 1 Or. 294, and *Univ. of Ala. v. Keller*, 1 Ala. 410, both holding money voluntarily paid under ignorance of the law cannot be recovered.

Other authorities which affirm and follow the rule are: *Lamborn v. Co. Commrs.*, 97 U. S. 185, 24 L. 929, holding that taxes voluntarily paid under an act declared void could not be recovered; *Washington v. Barber*, 5 Cr. C. C. 161, 162, F. C. 17,224, holding that money paid under an illegal license could not be recovered; *Arnold v. Donaldson*, 46 Ohio St. 81, 18 N. E. 544, holding a purchaser at an executor's sale cannot recover money paid because of a mistake as to the dower rights; *McDaniel v. Bank of Rutland*, 29 Vt. 240, 70 Am. Dec. 413, where one accepted money in ignorance that it would operate as a satisfaction of a mortgage debt; *Peters v. Florence*, 38 Pa. St. 199, holding that a person paying a mortgage under a misapprehension as to his ownership would not be relieved; *In re Dunham*, 8 Fed. Cas. 39, holding that where a mortgage is satisfied by payment and receipt indorsed, parol evidence of any agreement contradicting the receipt is not admissible; *Magniac v. Thomson*, 2 Wall. Jr. 253, F. C. 8,957; *Bell v. Steel*, 2 Humph. 150, where in both cases one released an obligor in ignorance that it discharged a co-obligor; *Saudlin v. Ward*, 94 N. C. 496, where one executed a covenant not to sue one of the obligors of a bond; *Whitehill v. Dacus*, 49 S. C. 283, 27 S. E. 203, dissenting opinion, where a release by a creditor to an assignee of a debtor which was

filed too late was cancelled; *Bartlett v. Gregory*, 60 Ark. 460, 35 S. W. 1045, applying the doctrine to a bill of review; *Jordan v. Stevens*, 51 Me. 81, 81 Am. Dec. 559, holding that if the parties are not on equal terms and one misleads the other, equity will relieve; *Mellon v. Webster*, 5 Mo. App. 454, on the point that where one party with rights of which he is ignorant to one not acting in good faith, equity will relieve; *Lawrence v. Beaubien*, 2 Bail. 652, 23 Am. Dec. 163, holding a contract would be relieved against where neither had acquired rights or suffered loss; *Lorillard v. Keyport, etc., Co.*, 48 N. J. Eq. 300, 19 Atl. 383, on the point that where both parties are under a misapprehension and remain silent and inactive, neither can claim anything of the other because of such mistake; *Green v. Morris, etc., Co.*, 12 N. J. Eq. 168, holding the general rule did not apply where the mistake was mutual and was attributable to the agent of the party taking advantage of it; *Griffith v. Townley*, 69 Mo. 16, 33 Am. Rep. 478, holding that where an administrator conveyed lands, both parties supposing it conveyed a fee whereas it conveyed only an equity of redemption, equity would relieve the purchaser; *Snell v. Insurance Co.*, 98 U. S. 90, 25 L. 55, where a policy of insurance in the name of a member of a firm and represented to cover the interest of the firm was reformed; *Griswold v. Hazard*, 141 U. S. 292, 35 L. 692, 11 S. Ct. 1000, where a bond executed under a misapprehension of law was reformed; *Macknet v. Macknet*, 29 N. J. Eq. 59, holding a widow's election made under a mistake may be revoked; *Champlin v. Layton*, 6 Paige. 195, 1 Edw. Ch. 473, where a vendor sold under a misapprehension of his legal rights and it was held that vendee was entitled to relief; *Morgan v. Bell*, 3 Wash. 572, 573, 575, 28 Pac. 930, 931, 16 L. R. A. 621 and n., where a contract for the conveyance of land in another State induced by false representations and in ignorance of the community laws was relieved; *Champlin v. Laytin*, 18 Wend. 413, 416, 424, 31 Am. Dec. 385, 388, 394, holding mistake of fact caused by relying on representations which were themselves occasioned by a mistake of law is ground for relief; *Long v. Soule*, 15 Fed. Cas. 832, where donees of a power by mistake of law executed it imperfectly; *Campbell v. Lowe*, 9 Md. 508, 66 Am. Dec. 341, holding that in a controversy with strangers one cannot maintain that the instrument does not express the intention; *Deseret Nat. Bk. v. Burton*, 53 Pac. 220, refusing to reform a guaranty for a mistake claimed to be one of fact but really one of law.

See also note to *Bailey v. Am. Central. Ins. Co.*, 4 McCrary, 229, citing authorities on relief in equity against mistakes; note to 55 Am. St. Rep. 499, 514, discussing, at length, ignorance of one's rights as a ground of relief; notes to 10 Am. Dec. 326, 327, and 15 Am. Rep. 176, 177, 178, 179, discussing the subject of ignorance or mistake of law as a ground of relief in equity; note to 23 Am. Dec. 164, citing authorities to the effect that ignorance of law is

no excuse; 65 Am. St. Rep. 482, 485, 487, 491, 499, valuable note on reformation of contracts.

Distinguished in *Culbreath v. Culbreath*, 7 Ga. 74, 50 Am. Dec. 383, holding money paid by an administrator, with full knowledge of the facts, but under a mistake of law, may be recovered; *Harney v. Charles*, 45 Mo. 158, where a redemption statute was held void and a party allowed to redeem under the old statute; Ala., etc., *Ry. Co. v. Jones*, 73 Miss. 122, 55 Am. St. Rep. 493, 19 So. 106, holding that ignorance of one's personal private rights, under the law arising out of existing facts, does excuse.

Limited in *Felker v. Mowry*, 38 Atl. 727, allowing relief where by mistake of law the time of redemption from execution sale was allowed to expire, and holding equity will relieve from mistake of law, where otherwise an unconscionable advantage would be obtained.

Mistake.—Where parties upon deliberation and advice reject one species of security and agree to select another under a misapprehension of the law as to the nature of the security so selected, equity will not direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument agreed upon, p. 17.

Cited and rule followed in *Holmes v. Hall*, 8 Mich. 69, 77 Am. Dec. 445, holding that an instrument deliberately adopted by parties must stand as written although the parties have mistaken its legal intent; *Tilghman v. Tilghman*, Bald. 490, F. C. 14,045, holding that if a paper deliberately agreed upon fails to effect an object because of death, equity will not remedy by setting up a previous agreement; *Lanning v. Carpenter*, 48 N. Y. 413, holding that if parties adopt the security and the security fail, courts cannot substitute any other security; *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 133, holding one inducing another to give an instrument by false representations as to its legal effect cannot have different effect given to it; *Bassett v. Brown*, 61 N. H. 604, where there was a conveyance in consideration of a bond to support the grantor and on breach the grantor conveyed to a third person who sued to rescind; *Stoddard v. Hart*, 23 N. Y. 563, where, after a mortgage was recorded, a further advance was made and the amount inserted in the bond and the court held the mortgage would not cover it; *Hall v. Lafayette Co.*, 69 Miss. 540, 13 So. 39, holding that if in putting a contract into form it fails to express what the parties understood, equity will interfere. Cited in valuable note, 65 Am. St. Rep. 482, on reformation of contracts.

Miscellaneous.—Cited in *Johnson v. Wilson*, 1 Pinn. 67, on the point that a declaration not as formal as it might have been is sufficient after trial; *Romig v. Romig*, 2 Rawle, 248, on the point that declarations of one party made in the absence of the other are not evidence in favor of the party making them.

1 Pet. 18-24, 7 L. 34, *CARROLL v. PEAKE*.

Evidence in general.— Copy of a writing cannot be given in evidence if original be in possession of adverse party, unless timely previous notice has been given him to produce it at the trial, p. 21.

Evidence.— Copy of a writing in possession of defendant is admissible in favor of the plaintiff without notice to the defendant to produce the original where the copy is entirely in the defendant's own handwriting, p. 22.

Writings.— Copy of an agreement given by a defendant to a plaintiff may be regarded as an original for the purpose of charging the defendant by obligations therein, p. 22.

Appeals.— Supreme Court is bound to presume everything in favor of the correctness of the decision of the court below until the contrary appears, p. 22.

Cited in *United States v. King*, 7 How. 882, 12 L. 955, on the point that every matter of fact necessary to sustain a judgment will be presumed to have been proved; *Bagnell v. Broderick*, 13 Pet. 447, 10 L. 240, holding the presumption to be that the judgment of the Circuit Court is proper and it lies on the plaintiffs in error to show the contrary.

Appeals.— Where letters objected to in the court below are not transcribed into the record, their admission in evidence must be regarded as correct if there is any supportable case in which they were legitimate evidence, p. 22.

Cited in *United States v. Dunham*, 25 Fed. Cas. 939, where the facts were the same as in the principal case; *Harris v. Ferris*, 18 Fla. 100, holding that where testimony was lost, the court will presume the judgment was correct unless appellant shows no case could have existed, it being present; *Doe ex dem. v. Eslava*, 9 How. 444, 13 L. 209, on the point that on a writ of error, the court is confined to what appears on the record.

Surplusage in pleading does not in any case vitiate it after verdict, p. 23.

Cited and rule followed in *Conrad v. Griffey*, 11 How. 492, 13 L. 784, holding a variation in the name of a defendant could not be assigned as error after verdict and judgment; *Shulman v. Brantly*, 48 Ala. 194, holding any statement in a certificate of a clerk beyond that an appeal has been taken and when it was taken was surplusage; *Schweppe v. Wellauer*, 76 Wis. 21, 45 N. W. 18, holding the name of a garnishee appended to the title of a cause in the papers on appeal by defendants is surplusage; *Mosely v. Tuthill*, 45 Ala. 653, 6 Am. Rep. 719, holding that on a petition to sell realty of a decedent any grounds other than those mentioned in the statute are mere surplusage.

Pleadings.—Declaration for breach of an agreement to let a farm on a certain day, averring readiness to perform on that day, and a personal request of the defendant to perform, is sufficient without averring readiness on the last convenient hour of that day or a demand made on the land, p. 24.

Cited in *Wilder v. McCormick*, 2 Blatchf. 34, F. C. 17,650, holding that where a declaration on a patent though not formal embodies all that is essential, merely critical objections will not be encouraged.

Pleadings.—In declarations, general averments of readiness and request on the day have always been held sufficient, especially after verdict, p. 24.

1 Pet. 25-36, 7 L. 37, *BANK OF WASHINGTON v. TRIPLETT*.

Banks.—A bank which receives a draft on another place not for collection but for transmission to a bank in the latter place for collection, by transmitting the draft as directed performs its duty, and the whole responsibility of collection devolves on the bank receiving the draft, p. 30.

The following citing cases affirm and follow this rule: *Naser v. First Nat. Bk.*, 116 N. Y. 500, 22 N. E. 1079, *Bank of Orleans v. Smith*, 3 Hill, 563, and *Ætna Ins. Co. v. Alton*, 25 Ill. 224, 79 Am. Dec. 329, all holding a bank receiving a bill to be transmitted to another place discharges its duty by sending it in due season to a competent agent; *Allen v. Merchants' Bank*, 15 Wend. 487, holding that where the bill is deposited without any agreement for compensation, the only obligation is to forward the bill in due season to a bank or other suitable agent; *East Haddam Bk. v. Scoville*, 12 Conn. 314, *Guelich v. Nat. St. Bk.*, 56 Iowa, 436, 437, 41 Am. Rep. 111, 112, 9 N. W. 329, 330, *Fabens v. Mercantile Bk.*, 23 Pick. 332, 34 Am. Dec. 60, *Simpson v. Waldby*, 63 Mich. 448, 30 N. W. 204, and *Mechanics' Bk. v. Earp*, 4 Rawle, 386, all holding a bank is not liable for the laches, default or negligence of the bank to which the note is transmitted; *Daly v. Butchers' Bk.*, 56 Mo. 100, 17 Am. Rep. 667, holding a bank was not liable for the conversion by its correspondent; *Plymouth Co. Bk. v. Gilman*, 9 S. Dak. 284, 62 Am. St. Rep. 872, 68 N. W. 737, holding that a bank fulfills its duty where it places a note in the hands of an attorney reputed to be competent and reliable; *Titus v. Merchants' Nat. Bk.*, 35 N. J. L. 594, 595, holding that a bank must provide proper agents for the service; *Merchants' Nat. Bk. v. Goodman*, 109 Pa. St. 427, 58 Am. Rep. 731, 2 Atl. 690, holding a bank receiving for collection a check on a bank at another place and intrusting it directly to that bank for collection is liable for the loss; *Mechanics' Bk. v. Merchants' Bk.*, 6 Met. 21, holding that banks for collection are agents for reward and liable for the skill and fidelity of their

agents; *Power v. First Nat. Bk.*, 6 Mont. 256, 12 Pac. 599, 600, holding that a bank for collection is liable for the default of a correspondent for failing to pay over the proceeds; *Bailie v. Augusta Sav. Bk.* 95 Ga. 282, 51 Am. St. Rep. 77, 21 S. E. 719, holding a bank receiving a check from a customer is liable for any negligence whether of its own officers or of an agent or correspondent. See note to 34 Am. Dec. 315, discussing the liability of banks for collection for the negligence of notaries, correspondents, etc.

Distinguished in *Exchange Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 282, 28 L. 725, 5 S. Ct. 143, on the point as to the liability of a bank for the negligence of its correspondents; *Kent v. Dawson Bk.*, 13 Blatchf. 240, F. C. 7,714, discussing the liability of a receiving bank for the default of a subagent to which it transmits the paper; *Allen v. Merchants' Bk.*, 22 Wend. 234, 34 Am. Dec. 299, holding a bank is liable for the neglect of its correspondent in another State; *Montgomery Co. Bk. v. Albany City Bk.*, 7 N. Y. 462, holding that where one bank sends a bill to its correspondent, which sends it to a third, the first bank alone is answerable for any negligence in presenting the bill; dissenting opinion, *Irwin v. Reeves, etc., Co.*, 20 Ind. App. 123, 125, majority following syllabus rule.

Banks.—Where the holder of a bill deposits it in one bank to be transmitted for collection to another bank, the latter by receiving the bill for collection becomes the agent of the holder, p. 31.

Cited and principle applied in *Beach v. Moser*, 4 Kan. App. 72, 46 Pac. 203, holding that where a bank is authorized to employ another bank to collect, the second bank becomes the subagent of the customer; *Bk. of Lindsborg v. Ober*, 31 Kan. 604, 3 Pac. 327, holding the corresponding bank is responsible to the holder for any negligence whereby he suffers loss; *Blaine v. Bourne*, 11 R. I. 121, 23 Am. Rep. 431, holding that an action would lie against the collecting bank for the proceeds where it had credited them to the transmitting bank, which had failed; *Freeman's Nat. Bk. v. Nat. Tube Works Co.*, 151 Mass. 418, 21 Am. St. Rep. 464, 24 N. E. 779, 8 L. R. A. 46, and n., as to effect of an indorsement for collection in and rights of one advancing money on it. See note to 34 Am. Dec. 317, on the point that prima facie the amount of the debt is the measure of the loss for the negligence of a collecting bank; note to 35 Am. Rep. 695, citing cases on this subject; *Mayer v. McLure*, 36 Miss. 404, 72 Am. Dec. 194, holding that third persons treating with a subagent as having authority cannot set up that he is without.

Instruction to the jury that upon the whole evidence the plaintiff ought not to recover, should not be granted if any possible construction of the testimony would support the action, p. 31.

Cited to this point in *Diamond M. Co. v. Groesbeck Nat. Bk.*, 9 Tex. Civ. App. 34, 29 S. W. 170, holding in an action against a col-

lecting bank for negligence where there was evidence to support the charge, it was error to refuse to submit the issue to the jury; *Weightman v. Washington*, 1 Black, 49, 17 L. 57, where, in an action for damages against a city for a defective bridge, an instruction that upon the whole evidence the plaintiff could not recover was held error; *Perry v. Clarke*, 5 How. (Miss.) 500, holding that when the plaintiff has failed wholly to make out his case, and there is no conflicting testimony, the court may instruct the jury to find for the defendant.

Banks.—A bank for collection, by failing to demand payment on a bill in time, makes the bill its own and is liable to the owner for its amount, p. 31.

Cited and followed in *Capitol State Bk. v. Lane*, 52 Miss. 681, holding a bank for collection must use reasonable diligence in the demand, notice and protest; *Armington v. Gas L. & B. Co.*, 15 La. 416, 35 Am. Dec. 206, where a bank for collection failed to demand payment and to use ordinary diligence to secure the liability of the parties; *Lyson v. State Bk.*, 6 Blackf. 226, 38 Am. Dec. 140, holding a State bank taking a bill for collection was liable for failure to present for acceptance or payment; *Mechanics' Bk. v. Merchants' Bk.*, 6 Met. 18, 26, holding that the failure of a bank to allow grace would not charge it when at the time there was no usage and the law was unsettled.

Distinguished in *First Nat. Bk. v. Fourth Nat. Bk.*, 77 N. Y. 327, 33 Am. Rep. 622, where it was held a bank was liable because it failed to present a check in time; *Bk. of Mobile v. Huggins*, 3 Ala. 215, 216, 217, discussing the liability of an agent who, through his negligence, causes the discharge of a solvent party to a note.

Bills and notes.—Allowance of days of grace enters into every bill or note and a bill does not become due on the day mentioned on its face but on the last day of grace, p. 31.

Cited and relied upon in *Cook v. Darling*, 2 R. I. 389, holding that all negotiable notes whether payable at bank or not are entitled to grace unless there be a local usage to the contrary; *Bell v. First Nat. Bk.*, 115 U. S. 379, 29 L. 411, 6 S. Ct. 107, and *Donegan v. Wood*, 49 Ala. 252, 20 Am. Rep. 281, both holding that a protest of a bill before the last day of grace was premature; *Carey, etc., Co. v. First Nat. Bk.*, 86 Tex. 300, 24 S. W. 260, citing authorities and holding that the protest should be made on the last day of grace; *Jackson v. Henderson*, 3 Leigh, 213, holding that a refusal to charge that demand of payment must be on the third day of grace was error; *Walls v. Bailey*, 49 N. Y. 472, 10 Am. Rep. 412, discussing the effect of ignorance of a general usage.

Bills and notes.—A bill payable after date and not presented for acceptance falls due on the same day as if it had been accepted, p. 32.

Cited in *Strader v. Batchelor*, 8 B. Mon. 170, on the point that although a bill payable at a given time has never been presented for acceptance, the demand for payment must be made on the third day of grace.

Bills and notes.—The usage of the place on which the bill is drawn or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed, p. 34.

Cited in *Jackson v. Henderson*, 3 Leigh (Va.), 211, on the point that all parties are bound by the local usages of the place where the bill is payable whether they know them or not; *Lee v. Chillicothe Bk.*, 1 Biss. 331, F. C. 8,187, on the point that courts will take notice of a usage in transmitting bills for collection, especially where the forms of indorsements are influenced by the usage. Cited generally in *Dacosta v. Davis*, 24 N. J. L. 332, discussing the law governing contracts relating to personalty.

Banks.—Holder of a bill who places it by his agent in a bank for collection, submits his bill to their established usage, p. 34.

This holding is affirmed and followed by a number of citing cases: *Fowler v. Brantly*, 14 Pet. 320, 10 L. 475, holding that the known customs of a bank enter into the contracts of those giving notes to be discounted at the bank, whether known by them or not; *Davis v. First Nat. Bk.*, 118 Cal. 603, 50 Pac. 667, holding that one who gives a draft to a bank to collect, is held to have an implied knowledge of its usage so far as such usage does not contravene any rule of law; *Sahlein v. Bank*, 90 Tenn. 226, 16 S. W. 374, holding in an action against a bank for negligence, it was competent to prove the usages of the banks of the particular locality; *Haddock v. Citizens' Nat. Bk.*, 53 Iowa, 546, 5 N. W. 769, holding that a collecting bank sued for not allowing grace on a certificate of deposit may show a custom to treat such certificates as payable without grace; *Dorchester, etc., Bk. v. New England Bk.*, 1 Cush. 188, where a party giving a bank drafts, was held bound by the usage of transmitting and indorsing them; *Maine Bk. v. Smith*, 18 Me. 102, where a bank had the custom of retaining notes left for collection at the time demand of payment was made; *Portland Bk. v. Brown*, 22 Me. 297, where the messenger of a bank gave the maker of a note a written bank notice in the usual form, and did not have the note which was at the bank; *Howard v. Walker*, 92 Tenn. 456, 21 S. W. 898, holding the usages of banks in making settlements by credits was reasonable and binding upon one who left a draft for collection; *Planters' Bk. v. Markham*, 5 How. (Miss.) 405, 37 Am. Dec. 163, holding that where by the custom of a bank the maker of a note payable there has until the close of business hours to pay, a demand is not sufficient unless the note is left until close of business hours; *Moore v. Waitt*, 13 N. H. 420, holding that a drawee is not liable, unless presentment is made for payment, although the

draft was left at a bank where it was the custom not to make presentment; *Cookendorfer v. Preston*, 4 How. 326, 327, 11 L. 995, 996, where it was said that the usage proved in the principal case had been changed, and holding that it may be shown that a usage was subsequently changed; *United States v. Reindeer*, 27 Fed. Cas. 761, on the point that a usage violating an express law will not protect one. See note to 50 Am. Dec. 97, citing authorities on the customs of banks; note to 34 Am. Dec. 309, 310, and 7 Am. Rep. 493, on the point that the settled usage of a bank binds a depositor, whether he knew of it or not. See authorities under next head.

Distinguished in *Lewis v. Planters' Bk.*, 3 How. (Miss.) 271, 273, holding an indorser would not be held to have waived his right to a personal demand by submitting to the custom of a bank; not approved in *Dabney v. Campbell*, 9 Humph. 681, holding one dealing with a bank was not bound by its usages, unless he had notice of them or such previous dealings that knowledge would be inferred.

Banks.—Demand by a bank for collection of payment of a bill on the fourth day after it became due in accordance with their invariable usage is in time, p. 34.

Cited and relied upon in *Georgia Nat. Bk. v. Henderson*, 46 Ga. 505, on the point that the usage of a bank was admissible, even though a party was ignorant of it and it varied from the law so far as to admit of protest on the fourth day; *Jackson v. Henderson*, 3 Leigh (Va.) 205, holding such a usage was contrary to the general law merchant, and if no such usage appear, the general law merchant must govern; *Kilgore v. Bulkley*, 14 Conn. 389, citing authorities and holding evidence that by usage a certain species of negotiable paper was not entitled to grace and that if it falls due on Sunday, it is payable on Saturday, is admissible; *Carolina Nat. Bk. v. Wallace*, 13 S. C. 351, 36 Am. Rep. 697, holding a usage to give notice of protest to indorsers by mail, bound the indorsers; *Mechanics' Bk. v. Merchants' Bk.*, 6 Met. 24, holding that no usage will accelerate the time of payment.

Banks.—Failure of a bank for collection to give notice to the drawer of a bill, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharged the drawer from liability and entitles the holder to recover against the bank, p. 35.

Cited in *Exchange Nat. Bk. v. Third Nat. Bk.*, 112 U. S. 291, 28 L. 727, 5 S. Ct. 148, on the point that a drawer or indorser of a draft is not discharged by the neglect of the holder to present it for acceptance before it becomes due; *Irwin v. Reeves, etc., Co.*, 20 Ind. App. 115, collecting cases on point that bank accepting draft for collection is bound to exercise only ordinary diligence.

Bills and notes.— Bill need not be presented for acceptance, but if presented and acceptance is refused it is dishonored and notice must be given, p. 35.

Cited in *Walker v. Stetson*, 19 Ohio St. 404, 2 Am. Rep. 407, and *Hart v. Smith*, 15 Ala. 808, 50 Am. Dec. 161, both holding that a bill payable at a fixed time need not be presented for acceptance; *Evans v. Bridges*, 4 Port. 351; *Smith v. Roach*, 7 B. Mon. 19; *Glasgow v. Copeland*, 8 Mo. 271, and *Landman v. Trowbridge*, 2 Met. (Ky.) 283, all holding that a holder need not present a bill for acceptance, but if he does and the bill is dishonored, he must give notice to those he intends to hold bound; *Exchange Nat. Bk. v. Third Nat. Bk.*, 4 Fed. 22, holding that if an agent present a bill for acceptance and acceptance is refused, the agent is liable, if he fail to give notice; *Whiteford v. Burckmyer*, 1 Gill, 149, 39 Am. Dec. 652, holding an action lies on presentment and notice of non-acceptance of a bill against an indorser, without waiting for demand of payment at maturity.

Distinguished in *Blato v. Reynolds*, 27 N. Y. 590, holding that if a bill is presented for acceptance on the day it is due and acceptance is then refused, no further demand is necessary to charge the drawer or indorser.

Instructions to jury.— In a suit by the holder of a bill against a bank with which it was left for collection, the court is not bound to declare the law between the holder and the drawer, unless the liability of the bank was determined by the liability of the drawer, p. 36.

Banks.— Where a bill is given a bank for collection, and the bank calling upon the drawee for acceptance, finds he is away from the city, if the bank acts in conformity with its established usage in not noting the bill as dishonored for nonacceptance and giving notice thereof, it is not liable to the holder. p. 36.

Cited in *Neal v. Taylor*, 9 Bush, 387, holding a notary not liable for negligently failing to make proper protest, where the confused state of the law rendered it uncertain just what was required of him. Cited in 34 Am. Dec. 312, note, citing cases on the point of the duty as to notice of dishonor.

Miscellaneous.— Cited in *Turnbull v. Thomas*, 1 Hughes C. C. 176, F. C. 14,243, on the point as to who is a bona fide holder of negotiable paper; in *Smith v. Babcock*, 2 Wood. & M. 291, F. C. 13,009, as to the law governing notes when they are made and payable in a particular State.

1 Pet. 37-45, 7 L. 37, **GAITHER v. FARMERS' BANK.**

Parties.— Where an action is brought in Maryland to the use of another, the cestui que use is the real party to the suit, p. 42.

Cited in *Steward v. Baltimore, etc., R. R. Co.*, 168 U. S. 449, 42:

L. 539, 18 S. Ct. 106, on the point that in an action for negligence causing death the real party in interest is not the nominal plaintiff, but the party for whose benefit the recovery is sought.

Practice.—Where a bank sues on a note indorsed to it on its own interest, and declares on its own rights, it is too late when the cause is going to trial to assume a new character or interpose a new party, p. 43.

Usury.—If a note is free from usury in its origin, no subsequent usurious transactions respecting it can affect it with the taint of usury, p. 43.

Usury.—Where a note valid between the parties is indorsed and given as collateral to secure a usurious contract between the indorser and indorsee, no right of action on the note passes to the indorsee as against the maker, p. 44.

This holding is affirmed and its reasoning followed in the following citing cases: *Freeman v. Brittin*, 17 N. J. L. 212, holding an indorsee acquiring a note upon an usurious contract cannot recover against the maker or a prior indorser; *Grow v. Albee*, 19 Vt. 543, holding that where the usury is not connected with the original transaction it may be recovered back, although the defense of usury was not presented in a suit on the original transaction; *Hunt v. Acre*, 28 Ala. 597, where a note was discounted at an usurious rate of interest and a mortgage taken as security, and the note and mortgage were assigned; *Caswell v. Central R. R. & Bk. Co.*, 50 Ga. 73, holding that where notes of another are assigned as security for an usurious loan, the maker may plead payment to the original payees without notice of the assignment; *Buttrick v. Harris*, 1 Biss. 444, F. C. 2,256, holding that on a loan, any loss imposed in addition to the legal rate of interest is usury; *Cowles v. McVickar*, 3 Wis. 733, on the point that when one transfers a note for a less sum than its face value and interest, it is usurious; *Pratt v. Adams*, 7 Paige, 638, on the point that notes discounted upon an agreement to receive bills of exchange in payment at 2 or 3 per cent. above their cash value, is usurious; *Weatherhead v. Boyers*, 7 Yerg. 563, holding that a loan of bank notes which are at a large discount under an agreement to pay the face value in full was usurious; *Maury v. Ingraham*, 28 Miss. 185, dissenting opinion, on the same point; *Cram v. Hendricks*, 7 Wend. 578, and also in dissenting opinion, p. 619, holding the transfer by the payee of a valid note at a discount beyond the legal rate of interest, not usurious; *Ketchum v. Barber*, 4 Hill, 250, dissenting opinion, holding a sale of one's credit by way of guaranty for a compensation exceeding the legal rate of interest was usurious; *Newman v. Williams*, 29 Miss. 222, 223, also dissenting opinion, p. 231, where a transaction for forbearance and giving day of payment in consideration of a greater than legal rate of interest was held usurious; *Depau v.*

Humphreys, 8 Mart. (N. S.) 2, holding that interest may be stipulated for according to the law of the place where the note is made, although payable in another place, cited generally in *Commercial Bk. v. Nolan*, 7 How. (Miss.) 524, on the point that usury laws apply to corporations; and in *Nichols v. Thompson*, 1 Yerg. 156, on the effect of an indorsement without power to make it.

Distinguished in *Nichols v. Fearson*, 7 Pet. 108, 8 L. 625, holding that a note discounted by the indorsee for a sum beyond the legal rate of interest was not per se usurious; *Oates v. National Bk.*, 100 U. S. 249, 25 L. 584, where the facts were similar to those in the principal case, but the statute defining the punishment for usury was different; *Western Reserve Bk. v. Potter*, Clarke Ch. 441, 448, the court saying there was a distinction between the purchaser of choses in action under value and an usurious loan upon the credit of such choses; *Crane v. Hendricks*, 7 Wend. 645, ante, discussed and distinguished in *Tindall v. Childress*, 2 Stew. & P. 256, holding that a note lost by an assignee on a horse race, cannot be avoided in the hands of a subsequent innocent holder; not approved in *Campbell v. Read*, Mart. & Y. 395, where the court said the maker had no concern with a collateral undertaking on the part of the indorser.

Usury.— Where a note, valid between the parties, is indorsed and given as collateral to secure an usurious loan, the fact that the loan was paid does not remove the taint of usury from the indorsement, p. 44.

Miscellaneous.— Miscited in *Storm v. Waddell*, 2 Sandf. Ch. 527, on the priority of debts due the United States.

1 Pet. 46-88, 7 L. 47, *MINOR v. MECHANICS' BANK*.

"May."— The word "may," in a statute, is to be construed as meaning "must" in all cases where the legislature means to impose a positive and absolute duty and not merely to give a discretionary power, p. 64.

Cited and rule followed in *Gilmore v. Utica*, 121 N. Y. 569, 24 N. E. 1011, holding that permissive words conferring power upon public officers will be held mandatory where the act concerns the public interest or the rights of individuals; *Supervisors v. United States*, 4 Wall. 446, 18 L. 423, holding the words "may, if deemed advisable," were mandatory, where public or private rights required it; *Santa Cruz R. P. Co. v. Heaton*, 105 Cal. 165, 38 Pac. 694, holding that a statute that the city council may, by ordinance, prescribe rules directing the superintendent of streets, was not mandatory; *Atlantic City W. W. Co. v. Read*, 50 N. J. L. 671, 672, 15 Atl. 13, dissenting opinion, on the point that a municipal power in permissive words becomes mandatory whenever action is taken demanding the exercise of such power; *Ex parte Chase*, 43 Ala. 312, holding the

word "may," in a statute providing for change of venue, where a fair trial could not be had, was imperative; *Forbes v. Bethel*, 28 Me. 209, dissenting opinion, where a statute to the effect that the court "may" allow interest was held mandatory; *Blake v. Portsmouth*, etc., R. R. Co., 39 N. H. 437, where a statute to the effect that a corporation "may continue" for purposes of suit when its powers have expired was held mandatory; *United States v. Thoman*, 156 U. S. 359, 39 L. 452, 15 S. Ct. 380, holding a provision that revenue "may" be applied to debts of a previous year was not imperative; *Mason v. Fearson*, 9 How. 259, 13 L. 130, where an act empowering a sale for taxes of such as may appear expedient was construed. See also the authorities cited under the succeeding head.

"May."—In the construction of the word "may," in a statute that exposition ought to be adopted which carries into effect the true intent and object of the legislature; the ordinary meaning of the language must be adopted unless it would manifestly defeat the object of the provisions, p. 64.

Cited and principle affirmed and applied in *Board of Commissioners v. Davis*, 136 Ind. 507, 36 N. E. 143, 22 L. R. A. 516, "may," not construed "shall" where the act conferred discretionary powers, and it is not evident that the legislative direction is mandatory; *Eslinger v. Pratt*, 14 Utah, 117, 46 Pac. 766, holding "may" to be permissive in a statute giving a board power of suspension under such rules as they "may" establish; *King R. E. Assn. v. Portland*, 23 Or. 204, 31 Pac. 483, where a statute that a city council "may, in its discretion," etc., was held to be permissive merely; *Order of Select Friends v. Dey*, 58 Kan. 289, 49 Pac. 76, holding that a law of a benefit society that any claimant grieved may take an appeal is not mandatory; *County Commissioners v. Gibson*, 36 Md. 237, where a statute requiring road overseers to give bond which "may be put in suit," was held not mandatory; *Warner v. Beers*, 23 Wend. 156, where the expression that suits may be brought by and against a president was said not to be mandatory; *Kelly v. Morse*, 3 Neb. 228, where a statute providing that the "court may require actual notice," was held not to mean "must;" *Apperson v. Memphis*, 2 Flipp. 372, F. C. 497, applying rule in construing tax law; *Medbury v. Swan*, 46 N. Y. 203, holding a provision that a court may permit supplemental pleadings, permissive; *Budd v. Rutherford*, 4 Ind. App. 390, 30 N. E. 1112, holding an act that a court "may" remove the next friend of a minor, discretionary; *Sisters of Charity v. Detroit*, 9 Mich. 99, on the point that the letter of a statute may be enlarged or restricted according to the true intent; *Lane v. Missoula Co.*, 6 Mont. 475, 13 Pac. 137, on the point that this is a primary rule of construction of all statutes; *Henry v. Trustees*, 48 Ohio St. 676, 30 N. E. 1124, and *Gadsden v. Jones*, 1 Fla. 342, on the point that the intention of the makers is to govern, although such con-

struction seems contrary to the letter; *United States v. Reindeer*, 27 Fed. Cas. 760, on the point that a penal statute must be construed with reference to its spirit as well as its letter; *Wilson v. Rousseau*, 1 Blatchf. 84, F. C. 17,832, holding that courts are not at liberty to presume that the legislature intended what it has not expressed or expressed what it did not intend; *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 95, 24 U. S. App. 308, 26 L. R. A. 475, statute as to time and event upon which incorporation was perfected was held to be mandatory. Cited generally in *United States v. Dustin*, 25 Fed. Cas. 949, where the court construed a statute and held it to be a revenue law. See cases referred to under the preceding head; Opinion of the Judges, 46 Me. 592, in construction of personal liberty laws.

The word "may," in the provision in the act incorporating the Mechanics' Bank, to the effect that the capital stock of the corporation "may consist of \$500,000, divided into shares of \$10 each," is not to be construed "must" so as to require the subscription of the whole amount a condition precedent to putting the bank into operation, p. 64.

Cited in *Warwick R. R. Co. v. Cody*, 11 R. I. 138, holding that a contract of subscription was good, although the whole capital was not subscribed for; *Union Water Co. v. Kean*, 52 N. J. Eq. 139, 27 Atl. 1027, holding that subscription to the capital stock and paying in of cash were not necessary to the corporate existence. Cited generally, in *Warner v. Beers*, 23 Wend. 143, in discussing the meaning of the phrase "bodies politic and corporate."

Distinguished in *People ex rel. v. National Savings Bank*, 129 Ill. 626, 22 N. E. 289, holding that subscription to all the capital stock within the time prescribed was necessary under the statute granting the charter.

Corporations.—Fraud in the subscription to the capital stock of a bank, made with a view to evade the provisions of the charter, does not affect the corporate existence of the bank, but in such case the law will hold the parties bound by their subscriptions, p. 65.

Cited and relied upon in *Graff v. Pittsburgh, etc., R. R. Co.*, 31 Pa. St. 497, holding that a subscriber sued for the amount of his subscription cannot set up that the subscription was feigned and fraudulent; *Melvin v. Lamar Ins. Co.*, 80 Ill. 458, 22 Am. Rep. 208, holding that a private agreement with an individual subscriber is a fraud, and the subscriber will be held as a bona fide subscriber; *Savings, L. & T. Co. v. Lanier*, 5 Fla. 153, 58 Am. Dec. 454, on the point that a subscription was not illegal because cash on the first installment was not exacted; *Hayne v. Beauchamp*, 5 Smedes & M. 542, dissenting opinion, holding that where subscribers were to pay 10 per cent. in specie, a subscriber who executed his note was not a stockholder; *Aspinwall v. Butler*, 133 U. S. 608, 33 L. 783, 10 S. Ct. 421, holding on an increase of stock in a national bank, it is

not a condition to a subscription that the whole increase must be subscribed; *McGinty v. Athol Reservoir Co.*, 155 Mass. 184, 29 N. E. 510, holding a corporation was formed on the acceptance of the act and organization, although no shares of stock were issued. See also note to 9 Am. Dec. 99, discussing the liability of stockholders on their subscriptions.

Corporations.—A private fraud in the original subscription to the stock of a banking corporation cannot be set up to the injury of subsequent bona fide holders of the stock, p. 66.

Cited and doctrine followed in *Commercial Bank v. State*, 6 Smedes & M. 613, holding that bona fide subscribers cannot be affected by irregularities in the subscriptions preliminary to the organization; *McDougald v. Lane*, 18 Ga. 453, and *Wilbur v. Stockholders*, 18 N. B. R. 178, 29 Fed. Cas. 1192, both holding that irregularities in the organization are immaterial in proceedings by creditors against the stockholders; *Dettra v. Kestner*, 147 Pa. St. 574, holding fraud of an officer of a mutual insurance company cannot be set up as a defense to an action by a receiver.

Corporations.—In an action by a banking corporation, a plea in general terms that the capital stock was not filled up by any subscriptions in pursuance of the statute, without any certainty as to facts and circumstances, is not sufficient, p. 66.

Pleadings.—The law requires every issue to be founded upon some certain point; that the parties may come prepared with their evidence and not be taken by surprise, and the jury may not be misled, p. 67.

Pleadings.—The rule as to certainty in pleadings is framed for the benefit of the parties and may be waived by them, p. 67.

Cited in *Gear v. Shaw*, 1 Pinn. 614, holding that defects for want of certainty in pleadings were cured by verdict.

Pleadings.—A replication alleging a general breach of the condition of a bond instead of a special breach, though defective, is cured by verdict, p. 68.

Cited in *Hazel v. Waters*, 3 Cr. C. C. 683, F. C. 6,284, holding that a declaration setting out a bond and the condition and averring nonpayment, but not showing a breach, does not state a cause of action; *Schneider B. Co. v. American Ice Mach. Co.*, 77 Fed. 144, 40 U. S. App. 382, holding that when a defendant relies upon a condition precedent as an excuse for nonperformance, he must set out specifically the condition and the breach. See note to *Gay v. Joplin*, 4 McCrary, 464, citing cases on defects cured by verdict.

Banks.—If a cashier, in leaving a bank, fails to account for or pay over moneys, there is a presumption of waste or misapplication of funds, p. 68.

Bonds.—A condition in a bond “to well and truly execute the duties of the office,” includes not only honesty but reasonable skill, capacity and diligence, p. 69.

Cited and doctrine followed in *State v. Chadwick*, 10 Or. 468, holding that a bond for a “faithful” discharge was complied with when the officer acted honestly and diligently and with such skill as he possessed; *Atlantic, etc., Co. v. Cowles*, 69 N. C. 63, where a bond that one would “faithfully discharge” certain duties was construed; *Whitsett v. Womack*, 8 Ala. 481, on the point that courts may depart from the letter of the condition of a bond to carry into effect the intention; *State Bank v. Locke*, 4 Dev. 536, applying rule in construing bank cashier’s bond.

Banks.—The established usage and practice of a bank for a long period, known to the president and directors, affords a presumption of the approbation, assent and acquiescence of the president and directors as to such usage and practice, p. 70.

See authorities cited under next head.

Banks.—The officers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business; and their acts within that scope, in general, bind the bank in favor of third persons having no other knowledge, p. 70.

Cited and ruling affirmed and relied upon as follows: *Commercial, etc., Co. v. Un., etc., W. Co.*, 19 How. 323, 15 L. 638, holding that to show the authority of a president, evidence of the practice of the company was admissible; *Merchants’ Bank v. State Bank*, 10 Wall. 672, 19 L. 1027, dissenting opinion, holding that evidence of general usage of a bank is competent to prove authority of a cashier to certify a check; *Rich v. State Nat. Bank*, 7 Neb. 206, 29 Am. Rep. 384, on the point that officers of a bank are held out as having authority to act according to the usage and scope of business; *Morse v. Massachusetts Nat. Bank*, 1 Holmes, 211, F. C. 9,857, on the point that such acts generally bind the bank in favor of third persons with no other knowledge; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes, 405, F. C. 9,286, holding a cashier could sign a blank transfer on a certificate of deposit held as collateral and deliver it to the pledgor on payment of the loan; *Merchants’ Nat. Bank v. State Nat. Bank*, 3 Cliff. 207, F. C. 9,449, on the point that the certification of checks of third persons is not inherent in the office of cashier nor within the scope of his usual duties; *Bank of the State v. Wheeler*, 21 Ind. 95, note, holding that a cashier is deemed to have authority to transfer and indorse negotiable securities; *Faulk v. Dashiell*, 62 Tex. 648, 50 Am. Rep. 544, on the point that where the power is general to perform a particular object, a resort to the ordinary methods is within the power; *Case v. Bank*, 100 U. S. 454, 25 L. 698, holding the refusal of a cashier intrusted with the transfer of stock to permit a transfer, is the refusal of the

bank; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 287, 292, 19 Am. Rep. 185, 188, holding that a cashier cannot ordinarily receive property for safe-keeping; *North Star B. & T. Co. v. Stebbins*, 2 S. Dak. 81, 48 N. W. 834, holding a purchase of boots and shoes in the name of a bank by its cashier was not binding; *First Nat. Bank v. Drake*, 29 Kan. 321, 44 Am. Rep. 656, where a cashier committed wrongful acts which were entered in the books, but without the knowledge of the directors. See note to 12 Am. Rep. 75, citing cases on the authority of cashiers; note to 77 Am. Dec. 759, discussing the subject of the implied powers of cashiers; note to 19 Am. Dec. 66, discussing the subject of officers de facto.

Banks.—No act or vote of the board of directors in violation of their own duties and in fraud of the rights and interest of the stockholders of a bank amounts to a justification of the cashier, who was particeps criminis, p. 71.

This holding is affirmed and relied upon by the following citing cases: *National Bank v. Drake*, 29 Kan. 328; *McShane v. Howard Bank*, 73 Md. 152, 20 Atl. 779; 10 L. R. A. 556; *Frelinghuysen v. Baldwin*, 16 Fed. 453, and *Phillips v. Bossard*, 35 Fed. 100, all holding cashier or his sureties not relieved from liability because of the negligence or misconduct of the president and board of directors; *Amherst Bank v. Root*, 2 Met. 541, holding sureties were not exonerated because of the neglect of the directors to examine into affairs of the bank; *Sparks v. Farmers' Bank*, 3 Del. Ch. 303, holding that the neglect of the directors to supervise the accounts does not discharge the sureties; *State v. Atherton*, 40 Mo. 217, applying the rule to the sureties of a teller; *Chew v. Ellingwood*, 86 Mo. 272, 273, 56 Am. Rep. 434, 435, applying the rule to the sureties of a bookkeeper; *Frankfort Bank v. Johnson*, 24 Mc. 504, holding a bank to be liable for the fraudulent acts of its agents in the exercise of the power conferred; *Tapley v. Martin*, 116 Mass. 278, where a cashier committed frauds unknown to the directors, although they were guilty of gross negligence; *Lieberman v. First Nat. Bank*, 40 Atl. 384, holding cashier's bondsmen not discharged by failure of directors to examine his books; *United States v. Cutler*, 2 Curt. 625, F. C. 14,911, holding that a surety is not discharged because of the failure of the government agents to discharge their duty; *Commonwealth v. Philadelphia Co.*, 157 Pa. St. 573, holding that the right to a tax is not lost by the neglect or unfaithfulness of agents, but that this rule did not extend to penalties; *Percy v. Millaudon*, 3 La. 594, holding that directors are personally liable for damages resulting from their acts or neglect; *Robertson v. Buff. Co. Nat. Bank*, 40 Neb. 241, 58 N. W. 716, holding that a president of a bank could not subscribe to a fund for the erection of a mill. Cited also in *Jones v. Morrison*, 31 Minn. 147, 16 N. W. 858, on the point that the authority of directors must be exercised pursuant to the charter and for the benefit of the stockholders; *Bank of Tennessee v. Wood-*

son, 5 Cold. 181, where the court construed a charter of a bank to determine the authority of its officers.

Banks.— Usage and practice of a cashier of a bank under the sanction of the board of directors will not justify a known misapplication of the funds by the cashier, such as the allowance of overdrafts, p. 72.

Cited in *United States v. Robertson*, 5 Pet. 666, 8 L. 266, dissenting opinion, on the point that every illegal act of the officers of a bank, although sanctioned by usage, is void; *Oakland Bank of Savings v. Wilcox*, 60 Cal. 141, holding that a usage to allow customers to overdraw was no justification; *Bank of St. Marys v. Calder*, 3 Strob. L. 408, holding allowance of overdrafts by cashier irregular; *Market St. Bank v. Stumpe*, 2 Mo. App. 549, holding the mere fact that the directors knew of and sanctioned overdrafts, will not release sureties; *Reese v. Bank of Commerce*, 14 Md. 282, 74 Am. Dec. 539, on the point that a bank officer cannot pay overchecks without committing a breach of duty for which his bond is liable. Cited generally in *Marshall v. Ham*, 17 N. J. L. 431, on the point that one is bound if he acquiesces in the acts of his agent or fails to dissent.

Bond of a bank cashier covers defaults in duty, while he was acting as teller, p. 72.

Cited and doctrine followed in *United States v. Powell*, 14 Wall. 501, 20 L. 728, holding a distiller's bond to be prospective and to cover duties prescribed after its execution; *United States v. Cutter*, 2 Curt. 627, F. C. 14,911, holding sureties of a navy agent responsible for funds to pay navy pensions; *Mechanics' Savings Bank & T. Co. v. Guarantee Co.*, 68 Fed. 463, on the point that sureties are not released because a cashier performs the duties of bookkeeper; *Detroit Savings Bank v. Zeigler*, 49 Mich. 162, 13 N. W. 498, where a receiving teller in the savings department was assigned to do the work of the general teller; *Engler v. People's F. I. Co.*, 46 Md. 333, holding that a bond of a secretary of a corporation covered every department of his official functions; *Strawbridge v. Baltimore, etc., R. R. Co.*, 14 Md. 368, 74 Am. Dec. 544, holding sureties of a ticket agent are not absolved by changing the office from second to first class; *Lowndes v. Pinckney*, 1 Rich. Eq. 174, holding that whenever a master or commissioner takes charge of funds under an order of court, his sureties are liable; *State ex rel. v. Blakemore*, 7 Heisk. 656, holding the sureties of a clerk and master were not liable for the superadded duties of special commissioner of sales; *State v. Flinn*, 3 Blackf. 74, 23 Am. Dec. 382, holding that sureties on the bond of a justice that he shall faithfully perform the duties, are liable, if he acts corruptly; *Cumberland v. Pennell*, 69 Me. 371, 31 Am. Rep. 292, holding that a county treasurer and his sureties are not liable for money of which the principal was robbed.

Parties.—In an action on a bond the objection of nonjoinder of parties is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded is waived by pleading to the merits, p. 73.

Cited and principle followed in *Webber v. Libby*, 70 Me. 413, holding that in debt against two of three obligors on a joint and several bond the bond is admissible on the issue of non est factum; *Bargh v. Page*, 4 McLean, 11, F. C. 980, the court saying this was the rule of the common law, but the limited jurisdiction of the Circuit Court would not permit of the same rule.

Parties.—In a joint and several bond the plaintiff may sue each obligor severally or may bring a joint suit against all; but he cannot sue an intermediate number; he must sue all or one, p. 73.

Cited and principle applied in *Chandler v. Byrd*, Hemp. 223, F. C. 2,591b, holding same as the principal case; *United States v. Archer*, 1 Wall. Jr. 184, F. C. 14,464, holding that after suing jointly and obtaining judgment a several action cannot be maintained; *Palmer v. Crosby*, 1 Blackf. 143, note 2, holding that for an assault and battery plaintiff may sue one or all or any number of the parties. Cited generally in *Austin v. Feland*, 8 Mo. 311, holding that in actions ex contractu defendants may sever their pleas; and in *Walsh v. Smyth*, 3 Bland Ch. 26, as to necessity of joining parties plaintiff.

Nolle prosequi does not amount to a retraxit, but simply to an agreement not to proceed further in that suit as to the particular person or cause of action to which it was applied, p. 74.

Cited and relied upon in *United States v. Keen*, 1 McLean, 446, F. C. 15,510, holding that a nolle prosequi is a mere agreement to abandon the further prosecution of the particular action and is not a bar; *Beidman v. Vanderslice*, 2 Rawle, 335, holding a nolle prosequi as to one unless it be for a matter which may be pleaded as a personal discharge cannot be entered; *Coffman v. Brown*, 7 Smedes & M. 129, 45 Am. Dec. 300, holding a confession in court that plaintiff would not further prosecute his suit, and his withdrawal was a retraxit or bar; *Gibson v. Choteau*, 7 Mo. App. 4, where, on a judgment in ejectment for plaintiff, on condition that plaintiff enter a remittitur as to certain surveys, it was held such remittitur was not a retraxit; *Harris v. Preston*, 10 Ark. 209, holding a retraxit is a perpetual release and abatement of all right of action; *United States v. Parker*, 120 U. S. 95, 30 L. 604, 7 S. Ct. 458, holding a judgment of dismissal to be a judgment on the merits and a bar.

Nolle prosequi.—In an action on a joint and several bond against all the parties thereto, where the sureties severed in their pleas from the principal, the plaintiff may, after judgment given against the sureties, enter a nolle prosequi against the principal, p. 80.

A large number of citing cases affirm and follow this principle, as follows: *Steptoe v. Read*, 19 Gratt. 9, holding that at the common law in a joint action there can be but one final judgment which must be either for or against all; *Keithley v. May*, 29 Mo. 222, holding that in a joint suit on a note, the plaintiff could not dismiss as to one defendant and have default against the other; *Rowe v. Chandler*, 1 Cal. 171, holding, in a suit on a joint contract, judgment may be rendered in favor of or against one defendant; *Brown v. Pearson*, 8 Mo. 160, holding that in a suit on a joint note nolle prosequi may be entered as to one; *McAfee v. Doremus*, 5 How. 64, 12 L. 51, holding that on a joint action against drawers and an indorser, the plaintiff may discontinue as against the drawers; *McCool v. Mahoney*, 54 Cal. 493, where a court on a judgment for malicious arrest refused to nolle prosequi as to one, not being certain but that it would operate a discharge of both defendants; *Ferguson v. State Bank*, 11 Ark. 516; *Cate v. Pecker*, 6 N. H. 418, and *Allen v. Butler*, 9 Vt. 127, all holding that in a joint action if one defendant interposes a personal plea, a nolle prosequi may be entered as to him; *Willis v. Morrison*, 44 Tex. 33, holding that where two persons are sued on a joint contract, judgment can be had against one alone if the other proves nonliability; *Goodhue v. Luce*, 82 Me. 226, 19 Atl. 441, on the point that where defendants sever and one pleads a personal discharge, plaintiff may take judgment against the others; *Wilmer v. Gaither*, 68 Md. 348, 12 Atl. 11, on the point that in an action on a joint note of a husband and wife if the defendants sever, the plaintiff could enter a nolle prosequi as to the wife; *Reading v. Beardsley*, 41 Mich. 127, 1 N. W. 968, where in such an action the judge directed judgment in her favor for costs and against her husband for amount found due; *Burke v. Noble*, 48 Pa. St. 175, holding that a release of one of several joint debtors on payment of his proportion does not discharge the others if such was not the intention; *Deloach v. Dixon*, Hemp. 431, F. C. 3,775, and *Peyton v. Scott*, 2 How. (Miss.) 872, both holding that in a suit on a joint and several contract, a nolle prosequi may be entered as to one; *Amis v. Smith*, 16 Pet. 311, 10 L. 976, holding that on a joint and several contract, if the defendants sever, the plaintiff may discontinue as to one; *Tobey v. Clafin*, 3 Sumn. 383, F. C. 14,066, where the court was of opinion that a nolle prosequi could be entered, whether the defendants had united or severed in their pleas; *United States v. O'Fallon*, 15 Blatchf. 300, 301, F. C. 15,911, holding that in an action on a joint and several liability the fact that one who is not liable joined in a plea does not affect the question of discontinuance; *Hawes v. Marchant*, 1 Curt. 147, F. C. 6,240, on the point that an action on a bond may be discontinued as to one surety; *Forbes v. Davis*, 18 Tex. 274, holding, in an action against a master and unknown owners not served, a nolle prosequi may be entered as to the parties not served; *Austin v. Jordan*, 5

Tex. 135, holding whenever a defendant need not have been joined, a nolle prosequi may be granted; *Craft v. Smith*, 35 N. J. L. 305, holding that where a maker and indorser of a note were improperly joined, a nolle prosequi could be entered as to either; *Griffin v. Reynolds*, 17 How. 612, 15 L. 231, on the point that a misjoinder of parties may be obviated by a nolle prosequi; *Rohrer v. Morningstar*, 18 Ohio, 585, on the point that the plaintiff, on discovering the infancy of one of the defendants, may enter a nolle prosequi; *Roach v. Randall*, 45 Me. 444, holding an amendment of a writ by striking therefrom one or more of several plaintiffs should not be allowed; *United States v. Leffler*, 11 Pet. 96, 9 L. 646, holding a principal who had confessed judgment and who has been released by his co-obligors is a competent witness for one of the sureties; *Folger v. The Robert G. Shaw*, 2 Wood. & M. 533, F. C. 4,899, on the point that all nonsuits and dismissals imply merely a failure to prosecute and an unwillingness to proceed rather than a want of merits; *United States v. Peterson*, 1 Wood. & M. 321, F. C. 16,037, holding that if there be two counts in an indictment for offenses committed at the same time and place and of the same class, the district attorney may, before judgment, enter a nolle prosequi on one.

Distinguished in *Tuttle v. Cooper*, 10 Pick. 290, holding in an action against three, where two default, and verdict was rendered for the third on the issue that he did not contract jointly with the others, plaintiff cannot have judgment against the others; *Beebe v. Real Estate Bank*, 4 Ark. 553, holding that in a joint action a discontinuance as to one defendant served with process is a discontinuance as to all; *Ashley v. Hyde*, 6 Ark. 96, holding that if a plaintiff elects to treat a contract as joint and sues both parties, he cannot discontinue as to one.

Pleadings.—In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice, p. 80.

Cited in *Chadbourne v. Rackliffe*, 30 Me. 358, holding that a writ of entry may be amended by striking out the name of a defendant whose interest the tenant had purchased.

Miscellaneous.—Cited in *Woodworth v. Fulton*, 1 Cal. 314, and in *Sunol v. Hepburn*, 1 Cal. 286, as to the effect of the acquisition of California on the law of Mexico, relating to the rights of individuals; *State v. Gleason*, 12 Fla. 233, on the point as to the effect of acts of an officer de facto; *McDade v. Burch*, 7 Ga. 564, and *Stell v. Glass*, 1 Ga. 486, on the point that an order by a court of competent jurisdiction within the sphere of its authority cannot be attacked indirectly; *Williams v. Preston*, 3 J. J. Marsh. 604, as to the conclusiveness of judgments of sister States.

1 Pet. 89-93, 7 L. 89, BRENT'S EXRS. v. BANK OF THE METROPOLIS.

Bills and notes.—Where the place of demand is not expressed on the face of a note, parol evidence that it is payable at a certain bank and is to be demanded there, is admissible, p. 91.

Cited and followed in *Cox v. National Bank*, 100 U. S. 713, 25 L. 741, holding parol admissible, of agreement as to place of presentment; *Wittkowski v. Smith*, 84 N. C. 672, 37 Am. Rep. 633, on point that the place of payment may be shown by parol; *Kenner v. Creditors*, 8 Mart. (La.) (N. S.) 41, 44, holding parol evidence admissible to show date of acceptance; *Harmon v. Hale*, 1 Wash. Ter. 428, 34 Am. Rep. 821, holding a joint maker could be shown to be a surety by parol; *Meyer v. Hibsher*, 47 N. Y. 271, holding that all the parties may agree orally that the note shall be payable at a particular place; *Martin v. Cole*, 104 U. S. 39, 26 L. 651, holding evidence of a parol agreement that an indorsement was without recourse, inadmissible; *Woodward v. Foster*, 18 Gratt. 214, holding evidence of a parol agreement varying the legal liability of the indorser was inadmissible; *Myers v. Byington*, 34 Iowa, 206, where the court said the authorities were not in harmony, but did not decide the question. See note to 39 Am. Rep. 119, citing authorities on the admissibility of parol evidence to affect writings. Cited generally in *Manchester Bank v. White*, 30 N. H. 463, as to sufficiency of notice to an indorser.

Distinguished in *Barringer v. Sneed*, 3 Stew. 206, holding that an unambiguous contract where there is no fraud or mistake cannot be varied or explained by parol; *Doyle v. Teas*, 4 Scam. 257, holding that on a contract for the sale of land, parol evidence to fix the amount of the first payment was inadmissible.

Bills and notes.—In an action against indorsers, an instruction that if the jury should be satisfied that it was agreed that the payment should be demanded at a particular bank and that it was so demanded, then a personal demand on the maker is not necessary, is correct, p. 92.

Cited in *Clough v. Holder*, 115 Mo. 344, 37 Am. St. Rep. 397, 21 S. W. 1072, holding it sufficient to charge an indorser, if the note is presented at the place specified, within business hours; note to 50 Am. Dec. 97, citing authorities on effect of usages of banks.

Bills and notes.—A complaint against an indorser on a note which does not allege a personal demand on the maker, but avers a demand of the note "at the Bank of the Metropolis," where the note was payable, is sufficient after verdict to sustain a judgment, p. 93.

Cited in *Gay v. Joplin*, 4 McCrary, 464, note citing authorities on defects in pleadings, cured by verdict.

1 Pet. 94-99, 7 L. 67, HICKIE v. STARKE.

Federal courts.—Under twenty-fifth section of judiciary act, the treaty or act of congress under which the party claims, need not be specially set forth upon the record, but the record should show a complete title under the treaty or act, and that the judgment is in violation of it, p. 98.

Cited in *Hamilton v. Kneeland*, 1 Nev. 66, holding the record need not show a case within the twenty-fifth section by direct statement, but it must appear by necessary inference that some one of the questions was made; *Crowell v. Randell*, 10 Pet. 395, 9 L. 469, citing authorities and considering question at length. Cited, *arguendo*, in *McCullough v. Virginia*, 172 U. S. 118, considering right of review by Supreme Court, of State decisions impairing State contracts.

Treaty.—In order to claim protection under the compact of cession between the United States and Georgia, it is not sufficient for plaintiff to produce a grant legally and fully executed, but he must also prove that the ancestor or person under whom he claims was an actual settler on the 27th of October, 1795, p. 98.

Cited in *Guitard v. Stoddard*, 16 How. 512, 14 L. 1038, where the question was as to what a confirmee must show under the acts for the settlement of land claims in Missouri.

Public lands.—A settlement on land by another person who cultivated it for the proprietor would be sufficient to constitute one an actual settler, although the proprietor should not reside in person on the estate or within the territory, p. 98.

1 Pet. 100-104, 7 L. 69, UNITED STATES v. SALINE BANK.

Discovery.—A party is not bound to make any discovery which would expose him to penalties; and where it is apparent the facts required to be discovered would expose the parties to danger, a bill for a discovery will be dismissed, p. 104.

Cited erroneously, in *Watts v. Camors*, 10 Fed. 149, as to duty of Federal courts exercising admiralty jurisdiction.

1 Pet. 105-109, 7 L. 72, RHEA v. RHENNER.

Husband and wife.—Where a husband voluntarily abandons his wife, without furnishing her means of support and she, in his absence, trades and deals as a feme sole, she is liable for her debts, p. 108.

Cited and followed in *Hannon v. Madden*, 10 Bush (Ky.), 667, holding the common-law rule similar; *Love v. Moynehan*, 16 Ill. 280, 63 Am. Dec. 309, holding the same to be true where a husband compels a wife to live separate; *Phelps v. Walther*, 78 Mo. 323, 47 Am. Rep. 114, holding the same where a husband deserted his wife

and took up his abode in another State; *Buford v. Adair*, 43 W. Va. 215, 27 S. E. 262, holding that a wife permanently abandoned is restored to all the powers of a feme sole as to her separate estate; *Warr v. Honeck*, 8 Utah, 66, 29 Pac. 1118, where the possession by a wife of lands given her under a void decree of divorce was held adverse as to the husband; *Buford v. Adair*, 43 W. Va. 215, 64 Am. St. Rep. 858, sustaining a deserted wife's deed, executed as though she were a feme sole. See note to 36 Am. Rep. 765, 766, collecting cases; note to 37 Am. Dec. 711, 712, discussing question where a wife is regarded as a feme sole; valuable note, 64 Am. St. Rep. 864, 865, 869, on effect of desertion on wife's rights of property and to contract.

Marriage.—In Maryland a feme covert, abandoned by her husband, may not remarry with impunity, until her husband shall have been absent seven years and shall not have been heard of during that time, p. 108.

Cited in *Hiram v. Pierce*, 45 Me. 372, 71 Am. Dec. 558, holding if husband had deserted his wife and not been heard of for seven years, a second marriage was valid; note to 46 Am. Dec. 132, discussing effect of a marriage during continuance of a prior valid marriage. Cited in valuable note, 64 Am. St. Rep. 864, 865, 869, on effect of desertion on wife's right to contract, etc.

Husband and wife.—By Maryland law a deed executed by a feme covert, abandoned by her husband, joined in by a man with whom she lived and whom she married after her husband had been absent seven years, is void, p. 109.

Cited and relied upon as authority in *Thorndell v. Morrison*, 25 Pa. St. 330, and *Beckman v. Stanley*, 8 Nev. 262, holding a wife's deed or mortgage without the husband's joining is void, although he has abandoned her; *Cook v. Walling*, 117 Ind. 13, 10 Am. St. Rep. 20, 19 N. E. 534, 2 L. R. A. 770, and n., where a woman's husband was absent and she mortgaged her separate estate, and upon the husband's return the mortgage was set aside; *Danner v. Berthold*, 11 Mo. App. 355, holding under similar circumstances that the husband and wife could not sue the purchaser without tendering the price; *Albany F. I. Co. v. Bay*, 4 N. Y. 32, holding that in New York a married woman may convey without her husband joining; *Chase's Case*, 1 Bland Ch. 230, 17 Am. Dec. 296, where the question was as to the effect of the acknowledgment of a wife to a lease, on her dower rights. See note, 37 Am. Dec. 711, 712, discussing where a wife is treated as a feme sole.

Distinguished in *Hitz v. Jenks*, 123 U. S. 305, 31 L. 159, 8 S. Ct. 147, holding an acknowledgment of a married woman cannot be controlled by parol; not approved in *Wright v. Hays*, 10 Tex. 135, 60 Am. Dec. 204, holding that compliance with statutory formalities is unnecessary when the wife has been abandoned by the husband.

Appeals.-- Where a record is defective in that it does not contain sufficient matter for a decree, the Supreme Court will not make a final decision, but the cause will be remanded for further proceedings, p. 109.

1 Pet. 110-135, 7 L. 73, **GOVERNOR OF GEORGIA v. MADRAZO.**

A stipulation which is a mere substitute for the process of the court, cannot be resorted to where the process itself could not be issued according to law, p. 121.

Admiralty.-- The Circuit Court cannot exercise original jurisdiction in admiralty, p. 121.

Cited in *Braithwaite v. Jordan*, 5 N. Dak. 219, 65 N. W. 708, 31 L. R. A. 248, holding action on appeal bond in admiralty would lie in a State District Court.

Constitutional law.-- Previous to the adoption of the eleventh amendment to the Constitution, it was determined that the judicial power of the United States extended to a case in which a State was a party defendant, p. 122.

Cited in *United States v. Lee*, 106 U. S. 212, 217, 27 L. 179, 181, 1 S. Ct. 254, 258, and dissenting opinion, p. 245, 27 L. 190, 1 S. Ct. 281, holding that public officers may be sued by parties claiming the property, though title of United States is determined.

Where jurisdiction depends on the party, it is the party named on the record; and where the chief magistrate of a State is sued not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered as a party on the record, p. 123.

Cited, affirmed and applied as follows: *Kentucky v. Dennison*, 24 How. 97, 16 L. 726, holding a suit by or against a governor as such is a suit by or against the State; *In re Ayers*, 123 U. S. 488, 31 L. 224, 8 S. Ct. 174, holding an action against the officers and agents of a State as such was a suit against the State; *State ex rel. v. Doyle*, 40 Wis. 205, 209, 210, 211, 212, 214, 215, holding that in a suit against a State officer who has no personal interest, to affect a right of the State, the State is the real defendant; *Comer v. Bankhead*, 70 Ala. 496, holding a suit to enforce a contract for the hire of convicts against a State warden was against the State; *Ferguson v. Ross*, 38 Fed. 163, 3 L. R. A. 324, and n., action by shore inspector for penalty was in effect an action by the State; *State ex rel. v. Cramford*, 28 Fla. 509, 10 So. 128, 14 L. R. A. 263, governor proceeding to compel the secretary of state to seal and countersign a commission is acting for the State; *McCauley v. Kellogg*, 2 Woods, 22, F. C. 8,688, holding an action against executive officers to compel the levy of a tax to pay bonds is a suit against the State; *State ex rel. v. Burke*, 33 La. Ann. 505, 507, holding an injunction and mandamus to pre-

vent the treasurer and auditor from diverting the funds and to compel payment of coupons was virtually a proceeding against the State; *Chaffraix v. Board of Liquidation*, 11 Fed. 648, 649, 650, dissenting opinion, holding a Circuit Court could prevent the diverting a fund to pay bonds until the rights of the parties and of the State could be determined; *Western U. T. Co. v. Henderson*, 68 Fed. 590, holding a suit to restrain an auditor from acting under a statute claimed to be void was not against the State; *Tuchman v. Welsh*, 42 Fed. 550, holding a suit to restrain a county attorney from proceeding in contempt against one violating the liquor law, was not a suit against the State; *Ward v. Hubbard*, 62 Tex. 563, holding that a suit on an official bond could be maintained in the name of the governor for the use of the State; *McNutt v. Bland*, 2 How. 23, 24, 25, 27, 11 L. 165, 166, dissenting opinion, where a governor sued a sheriff on his bond for the use of citizens of another State; *Gill v. Stebbins*, 2 Paine, 419, F. C. 5,431, holding that where the jurisdiction of a court depends upon the party, it is the party named in the record; *Sharp's R. M. Co. v. Rowan*, 34 Conn. 333, 91 Am. Dec. 730, holding this to be so, although the respondent is a mere nominal party; *Florida v. Georgia*, 17 How. 500, 15 L. 197, dissenting opinion, holding that the United States by appearing in a suit between States respecting boundary, does not become a party and no judgment can be entered for or against it; *Huston, etc., R. R. Co. v. Kuechler*, 36 Tex. 412, holding mandamus would lie against the commissioner of the general land office to enforce the issuance of land certificates.

Parties.—Where a proceeding is not against the thing, but against the person, a person capable of appearing as defendant against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced, p. 124.

Governor.—Where slaves are seized as being illegally imported and are delivered to the governor of a State, who sells a part of them, a libel against the person of the governor for the slaves in his possession as governor and for the proceeds in the treasury of those which have been sold will not lie, p. 124.

Cited in *State ex rel. v. Bank of South Carolina*, 1 S. C. 73, on the point that a governor cannot in his official character be reached by process.

Admiralty.—Libel in admiralty in the District Court will not lie against a State, p. 124.

Admiralty.—Libel in admiralty in the District Court against the thing cannot be sustained where the thing is not in possession of the District Court, p. 124.

1 Pet. 136, 137, 7 L. 85, MANDEVILLE v. HOLEY.

Judgment.—Confession of, is in Virginia a release of errors, p. 137.

Not cited.

1 Pet. 138-150, 7 L. 85, GREENLEAF v. QUEEN.

Trusts.—Where a trust deed provides for sale at public auction, the trustee may not sell otherwise, even though believing it for the best, p. 145.

Cited and followed in *Foster v. Goree*, 5 Ala. 428, on the point that a trustee selling, must act in strict conformity with the power conferred; *Chambers v. Mauldin*, 4 Ala. 483, on the point that the directions of the deed as to the manner of sale must be pursued; *Everett v. Buchanan*, 2 Dak. Ter. 267, 8 N. W. 35, on the point that when a public sale is required by the instrument the trustee cannot make a private sale; *Sears v. Livermore*, 17 Iowa, 300, 85 Am. Dec. 566, holding that where a deed directed that a notice should be posted on a certain door, a posting near, but not on the door is not sufficient; *Beebe v. De Baun*, 8 Ark. 567, holding a maker of a trust deed cannot object that slaves were not present at the sale where they were absent, because of his act. See note to 19 Am. St. Rep. 281, discussing elaborately sales and conveyances by trustees.

Trusts.—Where lots wrongfully contracted to be sold at private sale by a trustee were afterwards properly sold at public auction in accordance with the trust, the first purchaser cannot claim that his contract is void because the lots were sold to him for a less sum than that which they were struck off to the purchasers at the public sale, p. 146.

Cited in *Buell v. Buckingham*, 16 Iowa, 293, 85 Am. Dec. 523, holding that no one, but one who had an interest in the property before the sale can object; *Shorter v. Frazer*, 64 Ala. 80, on the point that if an unauthorized sale is ratified by the beneficiary neither the trustee nor the purchaser can repudiate it.

Trusts.—Acts of a trustee in wrongfully selling property at private sale instead of public, are confirmed where the cestuis que trust unite to carry out and enforce the sale, p. 146.

Cited in *Foster v. Goree*, 5 Ala. 429, holding that an irregular sale by a trustee may be waived by the maker and the beneficiary and no one else can complain; *Lucas v. Bank of Darien*, 2 Stew. 301, on the point that an imperfect right or title or an invalid proceeding may be ratified by acquiescence.

Vendor and vendee.—It is no defense in an action against a purchaser that the title is incumbered with the claim of a third per-

son, where the claim is merely a nominal one and not such that equity would enforce it, p. 147.

Vendor and vendee.—It is no defense to an action against a purchaser from a trustee under a trust deed that the land is subject to a right of dower, where the purchaser knew he was purchasing from a trustee and might have known from the records of the dower right and there was no stipulation regarding it, p. 147.

Trusts — Pleading.—Where a trustee dies after suit filed and a new trustee has been appointed, the original suit must be prosecuted against the latter by supplemental bill in the nature of revivor; and the fact that the new trustee was administrator of the former, and suit had been revived against him as administrator, does not make him a party to the controversy as trustee, p. 148.

Cited in *Tappan v. Smith*, 5 Biss. 75, F. C. 13,748, holding that where a complainant has assigned, his assignee cannot be substituted, but must file an original bill in the nature of a supplemental bill; *Hazelton, etc., Co. v. Citizens' St. Ry. Co.*, 72 Fed. 329, holding that one purchasing, pending a suit in equity, may by obtaining leave file an original bill in the nature of a supplemental bill; *Birmingham v. Lesan*, 77 Me. 498, on the point that generally, matters occurring after the filing of the original bill may be introduced into the record by supplemental bill.

Judgment.—On a bill against a trustee, a decree which after directing the trustee to perform a number of acts proceeds to dismiss the bill, with costs, is erroneous, p. 149.

Parties.—A bill may be dismissed where the plaintiff when called upon to make proper parties, fails or refuses to do so; but to dismiss a bill without a demurrer, answer, or plea pointing out the persons who ought to be made parties, is erroneous, p. 149.

Cited in *Sheffield, etc., Co. v. Newman*, 77 Fed. 791, 41 U. S. App. 766, on the point that if a defect of parties appears on the face of the bill the objection must set up the defect by plea or answer; *Hutchinson v. Reed*, 1 Hoff. Ch. 320, holding that if an answer raises the objection of want of proper parties, it is within the discretion to dismiss or to allow an amendment; *Van Epps v. Van Deusen*, 4 Paige Ch. 75, 25 Am. Dec. 522, holding that if on objection for want of proper parties the complainant neglects to amend, the court may on the hearing permit the cause to stand over or dismiss.

Trusts.—Where a trustee of land dies after suit filed against him by a purchaser under a contract to convey, a decree against a substituted trustee which fails to require the heirs-at-law of the first trustee to release their title, is erroneous, p. 149.

Cited in *Bryan v. Stevens*, 4 Fed. Cas. 511, on the point that whenever the legal estate is vested in parties, they may sustain or defend actions without having the persons interested in the trust

brought in; *Abbott, Petitioner*, 55 Me. 593, holding that on the death of a trustee the legal estate passes to his heirs and will not pass to a new trustee until conveyance; *Learned v. Tretch*, 6 Colo. 442, on the point that on the death of a grantee of an absolute conveyance on trust, the widow of the trustee as sole heir and devisee takes the estate.

Miscellaneous.—Miscited in *Dudley's Case*, 7 Fed. Cas. 1154, in considering the effect of judgment as a lien.

1 Pet. 151-164. 7 L. 90, *BUCK v. CHESAPEAKE INS. CO.*

Instructions.—Courts are not bound to modify or fashion the instructions moved for by counsel so as to bring them within the rules of law, p. 159.

Cited in *Maryland, etc., Co. v. Bathurst*, 5 Gill & J. 225, holding a court may, in its discretion, content itself with a simple refusal of and prayer not sanctioned; *Haffin v. Mason*, 15 Wall. 674, 21 L. 197, holding one cannot assign as error the refusal of an instruction to which he has not the right to the full extent as stated.

Insurance.—An instruction that in policies “for whom it may concern,” there can be no undue concealment as to the parties interested in the property to be insured, is erroneous, p. 159.

Insurance is a contract of good faith, and is void whenever imposition is practiced, p. 160.

Insurance.—A policy “for whom it may concern,” will, in ordinary cases, cover belligerent property, pp. 160, 161.

Referred to in the note to 16 Am. Dec. 323, citing authorities on the phrase “for whom it may concern.” See authorities cited, post.

Insurance.—Previous representations will be sunk or absorbed or put out of the contract, where the policy is executed in obvious inconsistency with those representations, p. 160.

Marine insurance.—A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the cause and incidents of the trade on which they insure, and of the established import of the terms used in their contract, must necessarily be imputed to underwriters, p. 160.

Cited in *Grant v. Lexington Ins. Co.*, 5 Ind. 28, 61 Am. Dec. 79, holding that insurers are bound to know the usages of the trade to which the policy belongs; *Clark v. Manufacturers' Ins. Co.*, 8 How. 249, 12 L. 1067, on the point that it must be presumed that the insurer knows what is material in the course of any particular trade; *Maryland, etc., Co. v. Bathurst*, 5 Gill & J. 226, holding that knowledge of facts of universal notoriety in the commercial world relating to the course of trade upon a voyage is imputable to underwriters,

Insurance.—Where a neutral, professing himself the owner of a cargo, consisting of the produce of a hostile island, applies for a policy on the cargo “for whom it may concern,” if the company issues the policy without making any inquiries as to the cargo and receives an increased premium, it is no defense that part of the cargo is owned by a subject of the belligerent, p. 161.

Cited in *Hooper v. Robinson*, 98 U. S. 539, 25 L. 221, holding, that in a policy “for whom it may concern,” there is no concealment where the underwriters had a clear right to know for whom they insured; *Henshaw v. Mutual S. I. Co.*, 2 Blatchf. 103, F. C. 6,387, holding that a time policy for a succession of voyages on account of whom it may concern and payable to H., is valid and enforceable by H.; *The Sydney*, 27 Fed. 125, on the point that the phrase ordinarily applies only to those who are contemplated at time of insurance and who then had an insurable interest.

Insurance.—The word interest, as used in application to the right to insure, does not necessarily imply property in the subject of insurance, p. 163.

Cited in *Hooper v. Robinson*, 98 U. S. 538, 25 L. 221, on the point that a right of property in a thing is not indispensable to an insurable interest; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 140, F. C. 6,013, holding that a lien or an interest in the nature of a lien is an insurable interest; *Rohrbach v. Germania F. I. Co.*, 62 N. Y. 55, 20 Am. Rep. 456, holding that a husband to whom a wife was indebted had an insurable interest in her buildings; *Goodall v. New England F. I. Co.*, 25 N. H. 186; *Sturm v. Atlantic M. I. Co.*, 63 N. Y. 80, and *Page v. Western, etc., Ins. Co.*, 19 La. 52, all holding that a trustee or agent of property had an insurable interest; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 411, 10 S. E. 778, 7 L. R. A. 574, one chartering barge and in possession of it, has an insurable interest; *Warren v. Davenport F. I. Co.*, 31 Iowa, 468, 7 Am. Rep. 163, holding that the owner of stock in a corporation has an insurable interest in its property; *Durand v. Thouron*, 1 Port. 247, holding that one in possession of goods for another may insure for his benefit without authority, and the latter may adopt the policy.

Marine insurance.—The master of a vessel, agent of the owner to convey his goods from a hostile port to a market, and clothed with all the national documents which evidence an absolute property, had an insurable interest in the property, p. 163.

See cases cited under the preceding head.

Insurance.—If one applying for insurance was at the date of the policy the legal and equitable owner of part of the cargo insured, and the legal but not equitable owner of the residue, a policy “for whom it may concern” covers the entire cargo, p. 164.

Miscellaneous.—Miscited in *Insurance Co. v. Baring*, 20 Wall. 163, 22 L. 252.

1 Pet. 165-169, 7 L. 96, **WRIGHT v. LESSEE OF HOLLINGSWORTH.**

Judicial notice.— Courts are bound to take notice of the admission of a State as one of the United States without any express averment of the fact, p. 168.

Appeals.— The allowance and refusal of amendments, the granting or refusing new trials, and most other incidental orders made in the progress of a cause before trial are matters peculiarly addressed to the sound discretion of the trial courts, not reviewable on appeal, p. 168.

Cited and followed in *Holmes v. Jennison*, 14 Pet. 626, 10 L. 626, holding that no writ of error lies in any case upon a proceeding depending on the discretion; *McCourry v. Doremus*, 10 N. J. L. 249, holding refusal to continue cause after it was at issue not assignable error; *Crawford v. New Jersey R. R. Co.*, 28 N. J. L. 482, holding that the granting a motion to amend in a matter of substance is discretionary; *Gubbins v. Laughtenschlager*, 75 Fed. 619, where a court after a decision filed refused to permit an amendment; *Bruch v. Carter*, 32 N. J. L. 558, where a defendant applied on the trial to amend by adding to the general issue pleas of justification; *Skagit, etc., Co. v. Cole*, 2 Wash. 65, 25 Pac. 1079, where a court refused to permit defendant to amend after plaintiff had rested, by setting up another defense which would have necessitated a continuance; *Chapman v. Barney*, 129 U. S. 681, 32 L. 801, 9 S. Ct. 427, holding an amendment substituting a new sole plaintiff for the original sole plaintiff was discretionary; *Evans v. Adams*, 15 N. J. L. 377, holding an error in setting aside a judgment was not a matter of discretion; *Welch v. County Court*, 29 W. Va. 68, 1 S. E. 340, holding the rule that matters of discretion cannot be reviewed, must be confined to such cases as are purely matters of discretion or such as in their nature can do no injury.

Distinguished in *Gilliland v. Rappleyea*, 15 N. J. L. 143, holding that, where a verdict has been set aside at the instance of the plaintiff, it is erroneous to render judgment for defendant, although the plaintiff be not paid costs as directed.

Appeals.— The Supreme Court will not interfere, because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of an amendment, p. 169.

Amendments.— In ejectment, where plaintiff is allowed to amend by adding a new count, judgment in his favor is not erroneous, because a plea was not filed to the new count, p. 169.

Amendments.— Where a plaintiff is allowed to amend by pleading a new count, the defendant has a right to withdraw his former plea and plead anew, but he may, if he will, abide by his plea already pleaded and waive his right of pleading *de novo*, p. 169.

Cited in *Townsend v. Jemison*, 7 How. 718, 12 L. 885, holding that a defendant going to trial while a demurrer is undisposed of, cannot have the judgment set aside; *Walker v. Windsor Nat. Bank*, 56 Fed. 79, 5 U. S. App. 423, holding that on an amendment discontinuing as to a party, it was error to refuse to allow the defendant to plead anew or demur in respect to his nonjoinder.

1 Pet. 170-192, 7 L. 98, *McLANAHAN v. UNIVERSAL INS. CO.*

Practice.—A court is under no obligation to discuss or decide other points when the plaintiff's case was already shown to possess a fatal defect, p. 182.

Instructions.—The trial court may sum up the facts in the case to the jury, and submit them with the inferences of law deducible therefrom to their free judgment; but the law should be carefully separated from the facts, and the latter left in unéquivocal terms to the jury, p. 182.

Cited, affirmed and relied upon in *Starr v. United States*, 153 U. S. 625, 38 L. 845, 14 S. Ct. 923, holding same as principal case; *Hayes v. United States*, 32 Fed. 663, on the point that it is a settled rule of the Supreme Court that comments upon matters of fact in the charge furnish no ground of error; *Weiss v. Bethlehem Iron Co.*, 88 Fed. 37, reversing case where trial judge had, in his instructions, withdrawn a question of fact from the jury; *Insurance Co. v. Rodel*, 95 U. S. 238, 24 L. 434, holding a court should not instruct the jury to find for the defendant if there was any evidence in favor of the plaintiff; *Sparf v. United States*, 156 U. S. 179, 39 L. 388, 15 S. Ct. 322, dissenting opinion, holding that if there was no evidence upon which a defendant could be found guilty of a less, it was no error to instruct they could not find for a less offense; *Holder v. State*, 5 Ga. 446, holding an instruction that the jury must find the defendant guilty of murder, of voluntary manslaughter, or not guilty, was error; *Anderson v. State*, 2 Ga. 381, 382, where the court reviewed an instruction that the jury, under the facts, should allow interest to the plaintiff; *Mitchell v. Harmony*, 13 How. 131, 14 L. 82, holding that it was not error for the Circuit Court to express its opinion on the facts if that was the practice of the State courts; *State v. Heaton*, 23 W. Va. 789, holding an instruction that possession of stolen goods is presumption of guilt was unwarranted; *State v. Hodge*, 50 N. H. 520, where the court discussed whether it was the duty of the court or the jury to decide upon the effect of the possession of stolen articles. See note to 72 Am. Dec. 541, discussing the right of judges to comment upon the evidence.

New trial will be refused if, upon the whole case, justice has been done, although there may have been mistakes at the trial; but upon a writ of error, with bill of exceptions, the directions of the court must then stand or fall upon their own intrinsic soundness in law, p. 183.

Cited and rule followed in *Stanley v. Brunswick Hotel Corp.*, 13 Me. 59, 29 Am. Dec. 488, and *United States v. Martin*, 1 Hask. (Fox's Dec.) 172, F. C. 15,729, both holding new trial will not be granted where substantial justice has been done, although some errors occurred at the trial; *Hamblett v. Hamblett*, 6 N. H. 342, holding that if incompetent evidence is admitted and the jury are directed to disregard it, the admission is not ordinary ground for a new trial; *United States v. Jones*, 32 Fed. 570, holding that where a court errs in admitting incompetent testimony, the verdict will not be disturbed if it was immaterial or could not have affected the result; *Fearing v. De Wolf*, 3 Wood. & M. 189, F. C. 4,711, holding a verdict will not be set aside as against the weight of evidence, if same existed on both sides; *Colburn v. Groton*, 66 N. H. 154, 28 Atl. 96, 22 L. R. A. 765, a verdict will not be set aside as against the evidence unless the court is satisfied that substantial justice has not been done; *Fuller v. Fletcher*, 44 Fed. 38, holding an objection to an instruction dealing with subordinate points and not affecting the real merits is no ground for new trial; *Allen v. Blunt*, 2 Wood. & M. 154, F. C. 217, holding a new trial will not be granted where the objection was only technical; *Norman v. Manciette*, 1 Sawy. 488, F. C. 10,300, on the point that a new trial will not be granted merely to enable the plaintiff to recover nominal damages; *Rowe v. Matthews*, 18 Fed. 134, holding that it is only when the case has been submitted on the wrong theory or justice has not been done, or where new trial will produce a different result, that a verdict will be disturbed; *Pomeroy v. Bank of Indiana*, 1 Wall. 598, 17 L. 640; *State v. Verrill*, 54 Me. 581; *United States v. Moore*, 11 Fed. 249, and *Coleman v. Bell*, 3 N. Mex. 497, 4 N. Mex. 28 (47), 12 Pac. 658, all holding that a motion for a new trial is to be addressed to the discretion of the court; *Kearney v. Snodgrass*, 12 Or. 313, 7 Pac. 311, holding that no exception can be taken to an order on a motion for a new trial nor can such order be considered on appeal; *Kline v. Wynne*, 10 Ohio St. 230, holding that a court was not authorized to grant a new trial for error of law unless the decision was excepted to.

Marine insurance.—Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness and be navigated by a competent master and crew, p. 183.

Cited and relied on in *Lapene v. Sun M. I. Co.*, 8 La. Ann. 3, 58 Am. Dec. 670, holding warranty of seaworthiness during the whole voyage is the same whether insurance is on ship or goods; *The Bark Gentleman*, Olcott, 115, F. C. 5,324, holding it breach of warranty of seaworthiness for a vessel to leave a port with a crew inadequate; *Paddock v. Franklin Ins. Co.*, 11 Pick. 232, where the court discussed the degree of seaworthiness requisite; *Cobb v. N. E. M. M. I. Co.*, 6 Gray, 200, on the point that the requisites for seaworthiness depend upon the nature of the risk or service; *Higgle*

v. National Lloyds, 11 Biss. 401; S. C., 14 Fed. 148, where the court reviewed facts from which unseaworthiness would be presumed. Cited generally in **Mead v. Northwestern Ins. Co.**, 7 N. Y. 536, on the point that the contract is at an end the moment the warranty is broken and cannot be revived. See note to 58 Am. Dec. 672, 673, discussing the subject of the warranty of seaworthiness.

Admiralty.—Questions as to competent crew, when crew and master should be on board, and as to the pilot ground, are matters of fact for nautical testimony, and not for the court to decide, p. 184.

Cited to this point in **Schultz v. Pac. Ins. Co.**, 14 Fla. 118, holding questions of seaworthiness and care in navigation are questions of fact dependent upon nautical skill.

Shipping.—Whether a vessel's laying off and on near the port after her departure for the voyage, for several hours, waiting for the master to come on board, is a deviation, is a question of fact to be decided by a jury, p. 184.

Insurance.—If a party having secret information of a loss, procures insurance without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud, p. 185.

Cited in **Graham v. Gen. M. I. Co.**, 6 La. Ann. 436, where a party effecting insurance upon a vessel had heard a rumor that she was lost; **Equitable L. A. Co. v. McElroy**, 83 Fed. 637, 49 U. S. App. 548, 560, holding the intentional omission to disclose every fact material to the risk coming to his knowledge at any time before the contract is closed, is a fraud vitiating the contract. See authorities under next head.

Insurance.—Where a party ordering insurance afterwards receives intelligence material to the risk or knowledge of loss, he ought to communicate it to the agent for the purpose of countermanding the order or laying the circumstances before the underwriter, p. 185.

Cited in **Snow v. Mercantile Ins. Co.**, 61 N. Y. 164, holding one receiving notice of loss before his order is executed must transmit the intelligence or countermand the insurance by the earliest route; **Clark v. Manuf. Ins. Co.**, 2 Wood. & M. 489, 493, F. C. 2,829, holding that where a policy is renewed, if a material change happens in the mode of using the property, notice must be given.

Questions of fact.—What constitutes due and reasonable diligence is principally matter of fact for the consideration of a jury, p. 186.

Cited in **Snow v. Mercantile Ins. Co.**, 61 N. Y. 165, on the point that whether a particular mode of communication is a usual one is a matter of fact.

Insurance.— Concealment, to be fatal to the insurance, must be of facts material to the risk, p. 188.

Cited in *Clark v. Manuf. Ins. Co.*, 8 How. 248, 12 L. 1066, on the point that an insured must suppress nothing material to the risk and that a false representation avoids a policy.

Insurance.— Materiality of concealment is a question of fact for the jury, p. 188.

Cited in *Roth v. City Ins. Co.*, 6 McLean, 337, F. C. 12,084; *Hardman v. Firemen's Ins. Co.*, 20 Fed. 595, and *State Ins. Co. v. Du Bois*, 7 Colo. App. 224, 44 Pac. 759, all holding that it is generally for the jury to say whether concealments or misstatements were material; *Pennsylvania Mut. L. I. Co. v. Mechanics', etc., Sav., etc., Co.*, 72 Fed. 426, 37 U. S. App. 692, 38 L. R. A. 61, and *n.*, whether temporary ailments are diseases so that a concealment is material is a question of fact.

Insurance.— The question of the materiality of the time of the sailing of a ship to the risk is a question for the jury under the direction of the court, p. 191.

Cited in *Luce v. Dorchester Ins. Co.*, 105 Mass. 302, 7 Am. Rep. 525, and *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 108, *Cornish v. Farm Bldg. F. I. Co.*, 74 N. Y. 298, and *Traders' Ins. Co. v. Catlin*, 163 Ill. 268, 45 N. E. 259, 35 L. R. A. 598, all holding testimony of experts admissible upon question of materiality of circumstances affecting the risk.

Trials—Instructions to jury.— The court may aid the judgment of the jury by an exposition of the nature, bearing and pressure of the facts, but it has no right to supersede the exercise of that judgment and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law, p. 191.

1 Pet. 193-221, 7 L. 108, *COMEGYS v. VASSE*.

Treaties.— The decisions of the commissioners appointed under the Spanish treaty ceding Florida, who were to examine into claims against the United States, arising under that treaty, are final and conclusive within the scope of the authority conferred, p. 212.

Cited in *United States v. Flint*, 4 Sawy. 71, F. C. 15,121, holding the decisions of the tribunal to settle land claims in California were conclusive; *Frevall v. Bache*, 14 Pet. 97, 10 L. 370, holding the decisions of the commissioners under the treaty of indemnity with France were conclusive upon the rights; *University v. Cambreling*, 6 Yerg. 86, 87, 88, 89, 90, 91, 92, holding the adjudication of a board of commissioners to examine soldiers' claims was conclusive; *United States v. Scott*, 25 Fed. 472, holding on an indictment for withholding pension money, the question whether any one is a

pensioner cannot be retried; *Kinhead v. United States*, 150 U. S. 508, 37 L. 1161, 14 S. Ct. 181, dissenting opinion, on the proposition that the findings of the Alaskan commissioners were final as to the status of property; *Tucker v. Harris*, 13 Ga. 10, and *Campbell v. Ayers*, 18 Iowa, 255, applying the same principle to judgments of courts.

Distinguished in *Kinhead v. United States*, 150 U. S. 495, 37 L. 1157, 14 S. Ct. 176, holding that the commissioners for the transfer of Alaska could not vary the language of the treaty or determine questions of title.

Treaties.—An award to a claimant by the commissioners under the Florida treaty is no bar to an action by one entitled to the money against such claimant, p. 213.

Cited and doctrine affirmed and relied on in *Varet v. New York Ins. Co.*, 7 Paige, 561, 562, 563, 566, holding an award by commissioners for property seized under the Berlin and Milan decrees was not conclusive between the parties; *de Circe, Succession of*, 41 La. Ann. 509, 6 So. 812; *Lee v. Thorndike*, 2 Met. 316; *New York Ins. Co. v. Roulet*, 24 Wend. 509, 510, 511; *Ridgway v. Hays*, 5 Cr. C. C. 32, F. C. 11,817, and *Dutilh v. Coursault*, 5 Cr. C. C. 358, 360, F. C. 4,206, all holding that an award by the commissioners under the French convention of July 4, 1831, did not deprive a claimant from resorting to the courts; *Radcliff v. Coster*, 1 Hoff. Ch. 100, holding this to be so, although both parties appeared before them and litigated their claims; *Mercantile M. I. Co. v. Corcoran*, 1 Gray, 80, and *Judson v. Corcoran*, 17 How. 614, 15 L. 232, both holding an award of a claim against Mexico by the commissioners was not conclusive upon the claimants; *Pinson v. Ivey*, 1 Yerg. 305, 353, holding an adjudication of military warrants was not conclusive upon persons claiming the land; *Heard v. Sturgis*, 146 Mass. 547, 16 N. E. 440; *Manning v. Sprague*, 148 Mass. 21, 12 Am. St. Rep. 511, 18 N. E. 674, 1 L. R. A. 517, *Taft v. Marsily*, 120 N. Y. 477, 24 N. E. 926, and *Brooks v. Ahrens*, 68 Md. 221, 12 Atl. 21, all holding judgment of commissioners of Alabama claims did not prevent claimants of the money from resorting to the courts; *Knox v. Pulliam*, 14 La. Ann. 134; *Brundy v. Mayfield*, 15 Mont. 210, 38 Pac. 1070; *Kahn v. Old Tel. M. Co.*, 2 Utah, 208, and *Phillips v. George*, 17 Kan. 422, all holding courts will inquire into, control or reject patents for land; *Walsh v. Lalande*, 25 La. Ann. 189, holding that the courts will decide the rights of parties under the law without reference to the action of the officers of the land office; *Garland v. Wynn*, 20 How. 8, 15 L. 802, holding that the jurisdiction of courts is not ousted by the regulations of the commissioner of the general land office; *Chapman v. Quinn*, 56 Cal. 287, dissenting opinion, holding a commissioner of the general land office may make rules not inconsistent with law which, where

reasonable, would not be interfered with; *Lindsey v. Hawes*, 2 Black. 559, 17 L. 267, holding the Supreme Court will inquire into the facts of a disputed entry and set aside or correct a decision of a register, receiver or commissioner; *Marks v. Martin*, 27 La. Ann. 528, and *Copley v. Dinkgrave*, 25 La. Ann. 580, both holding that if the United States at the time of the adjudication by land officers had not title, the question is for the courts; *Maurv v. Lewis*, 10 Yerg. 117, holding the issuance of a certificate land warrant by commissioners to decide the validity of claims was not conclusive; *Gill v. Oliver*, 11 How. 551, 13 L. 808, on the point that commissioners merely decide the validity of the claim, and disputes between claimants are to be settled by the courts; *Turner v. Sawyer*, 150 U. S. 587, 37 L. 1191, 14 S. Ct. 195, holding that where several parties set up conflicting claims with which a special tribunal may deal, they may be litigated in the courts; *Fidelity T. Co. v. Gill Car Co.*, 25 Fed. 749, holding generally the jurisdiction of special tribunals is strictly confined and never excludes the courts; *Foot v. Knowles*, 4 Met. 391, applying the principle in the case of a pension; *Grant v. Ramsey*, 7 Ohio St. 164, on the point that a judgment of a court of concurrent jurisdiction directly upon the point is conclusive. See also 20 Am. Dec. 273, 274, note discussing the conclusiveness of actions of land officers.

Assignments.—In general, mere personal torts which die with the party are incapable of assignment; but vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property may pass by assignment, p. 213.

A number of citing cases affirm and follow this doctrine, as follows: *Edwards v. Varick*, 5 Den. 685, holding a mere naked possibility did not pass by assignment; *Bodenhamer v. Welch*, 89 N. C. 81, on the point that executory devises, contingent remainders, and other possibilities coupled with an interest may be assigned; *Knevals v. Blauvelt*, 82 Me. 462, 19 Atl. 819, holding a contingent debt founded on an existing contract assignable; *Taylor v. Galland*, 3 G. Greene 26, on the point that where the subject-matter consists of property susceptible of actual possession and value, it is assignable; *Munsell v. Lewis*, 4 Hill, 640, holding that a future voluntary donation or bounty from a government cannot be assigned; *Taft v. Marsily*, 120 N. Y. 478, 479, 24 N. E. 927, on the point that a right in a sum awarded by the government may be assigned before steps have been taken by the government; *Williamson v. Colcord*, 1 Hask. 622, F. C. 17,752, holding that a claim for a vessel destroyed by a Confederate cruiser is susceptible of a transfer; *Lee v. Hill*, 87 Va. 503, 24 Am. St. Rep. 671, 12 S. E. 1054, holding an action for a breach of contract of employment for personal services survives; *Traer v. Clews*, 115 U. S. 540, 29 L. 471, 6 S. Ct. 160, holding that where a corporation is in liquidation, a transfer by a stockholder of claims

on account of his stock is not void; *Grant v. Ludlow*, 8 Ohio St. 37, holding that a chose transmissible to an executor is assignable, but that personal torts which die with the owner are not; *People ex rel. v. Tioga C. P.*, 19 Wend. 76, 77, holding a chose in action for a tort merely personal is not assignable so as to protect the assignee from a fraudulent discharge of the damages; *Ware v. Brown*, 2 Bond, 270, F. C. 17,170, holding a right of action for a tort was not assignable by operation of law or otherwise; *Davis v. St. Louis, etc., Ry. Co.*, 25 Fed. 790, holding that under the Kansas statute an action for a tort to the estate is assignable; *Miller v. Newell*, 20 S. C. 140, 47 Am. Rep. 839, holding an action for slander not assignable; *Zabriskie v. Smith*, 13 N. Y. 335, 64 Am. Dec. 556, and *Tufts v. Matthews*, 10 Fed. 610, both holding the right of action for damages for deceit not assignable; *Hunt v. Conrad*, 47 Minn. 558, 50 N. W. 615, 14 L. R. A. 514, a right of action for false imprisonment not assignable; *Francis v. Burnett*, 84 Ky. 34, holding that a cause of action for malicious prosecution of an attachment did not pass to an assignee; *Patterson v. Crawford*, 12 Ind. 245, on the point that mere personal torts such as slander, assault and battery, and the like, are not assignable; *Final v. Backus*, 18 Mich. 231, holding that a claim for the conversion of logs obtained by a trespass is assignable; *Webber v. Quaw*, 46 Wis. 119, 49 N. W. 830, holding a cause of action for entering upon land and cutting and carrying away timber was assignable; *Whitaker v. Gavitt*, 18 Conn. 527, holding an action for maliciously mutilating a model was assignable; *Stewart v. Balderston*, 10 Kan. 142, 143, holding that a claim for money tortiously obtained may be assigned; *Central R. R., etc., Co. v. Brunswick, etc., Co.*, 87 Ga. 388, 13 S. E. 521, on the point that a cause of action for negligence was not assignable; *G. H. & S. A. R. R. Co. v. Freeman*, 57 Tex. 157, 158, holding a right of action for cattle run over by cars was assignable; *Gibson v. Gibson*, 43 Wis. 32, 28 Am. Rep. 531, on the point that ex delicto actions for personal injuries are assignable; *Norfolk, etc., Co. v. Read*, 87 Va. 189, 190, 12 S. E. 396, holding a right of action against a common carrier for injury to goods is assignable; *Cardington v. Fredericks*, 46 Ohio St. 448, 21 N. E. 768, holding an action for falling down an embankment was an action for a nuisance in Ohio, and abated at death; *Noble v. Hunter*, 2 Kan. App. 543, 43 Pac. 996, holding a claim for money found due by a verdict in an action for conversion is assignable; *Lawrence v. Martin*, 22 Cal. 177, holding that a cause of action and a verdict in malicious prosecution is not assignable; *Darcy v. Spivey*, 57 Miss. 529, in illustration of when the right to recover for torts passes to the assignee. See 54 Am. Dec. 367, note on assignment of judgments.

Distinguished in *Johnson v. Shields*, 32 Me. 428, discussing the effect of an assignment of a widow's right of dower. See also the authorities cited post, under the title of what passes to an assignee in bankruptcy.

Insurance.— No formal act of abandonment is necessary where it is accepted by the insurer, p. 214.

Cited in *Radeliff v. Coster*, 1 Hoff. Ch. 108, on the point that no assignment is necessary to pass title if an abandonment has been accepted; *Northwestern Tp. Co. v. Thames, etc., Co.*, 59 Mich. 229, 26 N. W. 342, on the point that an act of abandonment when accepted has all the effects of the most full and accurate assignment; *Insurance Co. v. Johnson*, 70 Fed. 796, 37 U. S. App. 413, on the point that all that is necessary is that the intention shall be clear enough to advise the underwriter that the vessel is turned over; *Copeland v. Phoenix Ins. Co.*, Woolw. 286, F. C. 3,210, holding that while no particular form of words or writing was necessary, it should be explicit, however made.

Insurance.— By abandonment the insured renounces to the underwriter all his right, title and claims to what may be saved, and leaves him to make the most of it for his own benefit, p. 214.

Cited in *Atlantic Ins. Co. v. Storrow*, 1 Edw. Ch. 626, holding underwriters are entitled to all the remedies of the assured against the master, and the assured could not defeat such remedies; *The Potomac*, 105 U. S. 634, 26 L. 1195, on the point that by payment, an insurer acquires a corresponding right in any damages to be recovered against a third person; *Phenix Ins. Co. v. Erie T. Co.*, 117 U. S. 321, 29 L. 878, 6 S. Ct. 754, holding that the right of subrogation is only that right which the assured had; *The Manistee*, 5 Biss. 385, F. C. 9,027, holding in case of loss by collision the insurer may sue where notice and proof of loss and demand of payment have been made, although without actual payment; *Fox v. The Lucy A. Blossom*, 9 Fed. Cas. 640, holding that where a vessel had been sunk through collision, and pending an action the assured abandons, the action proceeds for the benefit of the insurer; *Clark v. Wilcox*, 103 Mass. 222, 4 Am. Rep. 534, holding abandonment did not defeat an action for a tort already committed. See cases under next head.

Insurance.— The right to compensation by the United States under the treaty ceding Florida is assignable, and passes to an underwriter on an abandonment to him by the owner of the vessels insured, for which compensation was allowed, p. 215.

Cited and followed in *Radeliff v. Coster*, 1 Hoff. Ch. 109, holding that a right to indemnity under the treaty with France passes to an insurer on abandonment; *Rogers v. Hosack*, 18 Wend. 331, 332, holding an abandonment of a vessel lost by capture transfers as well the spes recuperandi as the interest in the vessel, although the loss has not been paid; *Briggs v. Walker*, 171 U. S. 472, holding executor of one to whom a claim from the government was due might collect same, and that the fund was liable to creditor's claims.

Admiralty — Indemnity.— The right to indemnity for an unjust capture, against the captors or the sovereign, is a right attached to the ownership of the property itself and passes by cession to the use of the ultimate sufferer, p. 215.

Cited in *Hall v. Emerson*, 11 La. 7, holding the right of indemnity accompanies the right of property, and that a claim against a government, allowed after death, is assets in the hands of the executors; *Bachman v. Lawson*, 109 U. S. 662, 663, 27 L. 1068, 3 S. Ct. 481, holding an agreement in 1871 to collect a claim for capture by a rebel cruiser for a commission, applies to an award under the act of 1874.

United States.— It is not universally a test of right that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced, although such debts are rights, p. 216.

Cited in *Stanley v. Schwalbey*, 147 U. S. 517, 37 L. 263, 13 S. Ct. 422, citing authorities on the exemption of statutes, and holding that the United States becoming a party would set up the statute of limitations.

Bankruptcy.— Rights accruing to an underwriter by abandonment, including a right against the United States, pass upon his insolvency to his assignees in insolvency, p. 218.

The following citing cases affirm and rely upon this holding: *May v. New Orleans, etc., Ry. Co.*, 44 La. Ann. 454, 10 So. 772, holding an assignment divests all title, and until a proper showing and order made, the title of the assignee must be respected; *Pindell v. Grooms*, 18 B. Mon. 505, on the point that all claims growing out of, and adhering to property, actions for damages ex contractu and interests in actions pending, may be assigned for creditors; *Belcher v. Burnett*, 126 Mass. 231, holding the interest of a child under a devise will pass by an assignment in bankruptcy; *Lewis v. Glenn*, 84 Va. 965, 6 S. E. 876, on the point that a general deed of assignment by a corporation embraced the uncalled subscriptions; *Kinzie v. Winston*, 56 Ill. 64, holding that a right of an owner to the fee in a street passed to an assignee in insolvency; *In re Gallagher*, 16 Blatchf. 417, F. C. 5,192, holding that a permit to occupy a stand in the market in New York city passed to an assignee; *In re McKenna*, 9 Fed. 32, where the question was as to whether an estate as tenant by courtesy passed; *Borden v. Bradshaw*, 68 Ala. 364, holding a claim for damages against the keeper of a ferry and sureties passes; *Whitaker v. Gavit*, 18 Conn. 527, holding an action for willfully mutilating a model would pass if included in the schedule; *Tufts v. Matthews*, 10 Fed. 610, holding a right of action for deceit did not pass; *United States v. Hunter*, 5 Mason, 64, F. C. 15,426, holding a claim for wrongs done under Spanish authority, and provided for

in the treaty of February 22, 1819, passed; *Mayer v. White*, 24 How. 322, 16 L. 659, holding a demand against Mexico, after it had assumed the debt, passes to an assignee; *Griffin v. Macaulay*, 7 Gratt. 512, holding that compensation allowed under the treaty between France and America passed to a trustee for creditors; *Phelps v. McDonald*, 99 U. S. 303, 307, 25 L. 474, 476, and dissenting opinion, p. 308, 25 L. 476, holding that a claim of a British subject against the United States, which was awarded, passed; *Erwin v. United States*, 97 U. S. 396, 24 L. 1067, holding the claim against the government for cotton captured and sold passes; *Leonard v. Nye*, 125 Mass. 457, 458, 460, 461, 464, 466, 467; *Heard v. Sturgis*, 146 Mass. 553, 558, 16 N. E. 443, 446, dissenting opinion; *Goreley v. Butler*, 147 Mass. 10, 16 N. E. 736; *Williamson v. Colcord*, 1 Hask. (Fox's Dec.) 622, F. C. 17,752, and *Williams v. Heard*, 140 U. S. 542, 543, 544, 545, 35 L. 555, 556, 11 S. Ct. 888, 889, all holding that a claim decided to be valid by the board of commissioners of Alabama claims, passes to an assignee in bankruptcy; *Jones v. Dexter*, 125 Mass. 471, on the same point; *Pierce v. Stidworthy*, 79 Me. 239, 240, 241, 9 Atl. 618, 619, holding that such a claim allowed and paid to an administrator passes under a residuary clause; *Grant v. Bodwell*, 78 Me. 464, 7 Atl. 14, holding that money received upon such an allowance by an administrator becomes assets to be distributed as part of the estate; *Taft v. Marsily*, 120 N. Y. 480, 24 N. E. 928; *Kingsbury v. Mattocks*, 81 Me. 315, 17 Atl. 127, 3 L. R. A. 462, and n., and *Brooks v. Ahrens*, 68 Md. 223, 224, 225, 12 Atl. 22, 23, all holding that allowance of war premiums by commissioners of Alabama claims did not pass to an assignee; *Calder v. Henderson*, 54 Fed. 804, 2 U. S. App. 627, holding that a claim to bounty earned by raising sugar passes; *Milnor v. Metz*, 16 Pet. 227, 10 L. 946, holding that an allowance for extra services, under an act of congress, passes; *Emerson v. Hall*, 14 La. 6, holding that a claim having no foundation in law, but depending entirely on the generosity of the government, could not be assigned, and is a pure donation; *Sibbald's Estate*, 18 Pa. St. 254, holding that a claim against the United States for preventing the owner from cutting and removing timber will not pass; *Doll v. Cooper*, 9 Lea, 582, holding that a bankrupt's right of action for wrongful suing out of an attachment passes; *Kinzie v. Winston*, 4 N. B. R. 84 (217), 14 Fed. Cas. 652, holding that alluvion was property and passed by an assignment.

Distinguished in *Seely v. State*, 12 Ohio, 525, holding that a right under a special act authorizing one to bring a suit as in chancery against the State, did not pass; *Emerson v. Hall*, 13 Pet. 413, 10 L. 225, holding a claim paid to heirs under an act of congress could not be claimed by a creditor of the decedent; *Blagge v. Balch*, 162 U. S. 457, 458, 459, 40 L. 1036, 16 S. Ct. 856, 857, on the point that congress in the French spoliation claims intended the next of kin to be the beneficiaries in every case.

Miscellaneous.—Cited but not in point in *Marks v. Nashville, etc.*, *Ins. Co.*, 6 La. Ann. 129, and *Roberts v. Beatty*, 2 Penr. & W. 65, 21 Am. Dec. 414. Cited in note to *Vasse v. Comegys*, 4 Wash. C. C. 577, F. C. 16,893, in stating that that decision was reversed by principal case.

1 Pet. 222-231, 7 L. 121, *KARTHAUS v. FERRER*.

Awards.—To impeach an award on the ground that only part of points submitted were decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them, p. 227.

Cited in *Ott v. Schroepel*, 5 N. Y. 486, and *Jones v. Welwood*, 71 N. Y. 215, on the point that an award will not be set aside for not including matters not brought to the attention of the arbitrators; *Brewer v. Bain*, 60 Ala. 162; *Shirley v. Shattuck*, 4 Cush. 473, and *Strong v. Strong*, 9 Cush. 567, all holding that when a submission is in the general terms and there is an award of a money balance, it is a full execution of the submission; *Leavitt v. Comer*, 5 Cush. 132, holding that if an arbitration included individual and firm matters an award concerning the latter only is valid unless it appear there were individual controversies; *Tomlinson v. Tomlinson*, 3 Iowa, 579, holding the burden is on one seeking to set aside an award, because matters submitted were not acted on to clearly satisfy the court.

Partnership.—A partner cannot by his submission bind his partners to an award, but may bind his own interest, p. 228.

Cited in *Walker v. Bean*, 34 Minn. 429, 26 N. W. 233; *Buchoz v. Grandjean*, 1 Mich. 369; *Hall v. Lanning*, 91 U. S. 170, 23 L. 275, all on the point that before dissolution one partner cannot confess judgment or submit to arbitration; *Becker v. Boon*, 61 N. Y. 323, dissenting opinion, holding a submission by one partner may be ratified by his co-partners; *Haywood v. Harmon*, 17 Ill. 480, on the point that separate signatures to a submission does not change the relation of co-partners; *Woody v. Pickard*, 8 Blackf. 56, holding that if one holder and one maker of a joint note submit its validity as to such maker, the award that it is not, will not bar a joint action by all against all the makers. See also note to 30 Am. Dec. 630, discussing who may submit to arbitration; note to 6 Am. Dec. 574, discussing partner's powers after dissolution.

Awards.—It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it, p. 228.

The citations collect a number of authorities affirming this rule as follows: *Slocum v. Damon*, 1 Pinn. 523, where the court said a sub-

mission was to receive such a construction as to give it full effect and to meet the intention; *Byrd v. Odem*, 9 Ala. 767, on the point that courts construe awards with great liberality and according to the intention as indicated by the entire instrument; *Tyler v. Dyer*, 13 Me. 49, where the court said it was bound to give a fair and liberal construction to awards as far as it could; *Russell v. Smith*, 87 Ind. 466, on the point that technical objections are to be disregarded and every intendment is to be made; *Sanborn v. Murphy*, 50 N. H. 71, where a motion was made to set aside an award because the arbitrators mistook the law; *Blood v. Shine*, 2 Fla. 133, where the objections did not appear on the face of the award, and there was no proof in the record to sustain them; *Merritt v. Merritt*, 11 Ill. 567, where the award seemed to pursue the submission and to be a full and complete adjustment; *Reynolds v. Reynolds*, 15 Ala. 403, holding that every reasonable presumption should be made in favor of awards, and if an award can be brought within the submission it will be sustained; *Root v. Renwick*, 15 Ill. 463, holding it will not be presumed the arbitrators acted fraudulently because they rejected evidence; *Haywood v. Harmon*, 17 Ill. 481, where the court said it would presume the arbitrators had satisfactory proof; *Ott v. Schroepel*, 5 N. Y. 489, holding that the court would not presume that matters were in dispute which were not passed on; *Hayes v. Forskell*, 31 Me. 116, on the point that the presumption is there were no claims not decided; *Tallman v. Tallman*, 5 Cush. 333, on the point that even though arbitrators award on one matter only when all matters are submitted, the court will not intend that anything further was in difference. See note to 14 Am. Dec. 754, on causes for which awards may be impeached.

Award.—A party against whom award has been made cannot complain because of an uncertainty, whose only effect would be that the other party might not be able to obtain all the benefits intended by the award, p. 230.

Award.—Mutuality is not essential to the validity of an award, p. 230.

Cited in *Fluharty v. Beatty*, 22 W. Va. 706, and *Blood v. Shine*, 2 Fla. 134, both holding an award of payment of a specific sum was sufficient without directing a release from the party to whom it is to be paid. See note to 6 Am. Rep. 498, on the essentials of awards.

Awards.—In an action on an arbitration bond where the award was that a firm should pay, it is a sufficient assignment of breach that the partner submitting the controversy to arbitration had not paid the award, p. 231.

1 Pet. 232-237, 7 L. 125, *HORSBURG v. BAKER*.

Forfeitures.—A court of chancery is not the proper tribunal for enforcing forfeitures, p. 236.

Cited in *Craig v. Hukill*, 37 W. Va. 523, 16 S. E. 364, holding equity will not enforce a forfeiture for the breach of a subsequent condition; *Watrous v. Allen*, 57 Mich. 367, 58 Am. Rep. 366, 24 N. W. 106, holding equity will not enforce a forfeiture for breach of a condition not to sell liquors; *Clarke v. Drake*, 3 Pinn. 233, where an ejectment by a vendee was not enjoined because the bill to restrain involved a forfeiture by the vendee; *Bucklen v. Hasterlik*, 155 Ill. 429, 40 N. E. 563, holding the rule that equity will not enforce a forfeiture will not prevent the awarding of earnest money to a vendor on breach of contract; *Conn. M. L. I. Co. v. Home Ins. Co.*, 17 Blatchf. 146, F. C. 3,107, holding that this rule is not applicable to the cancellation of a policy of insurance; *Smith v. Allen*, 1 N. J. Eq. 51, 21 Am. Dec. 37, holding the rule does not apply to a suit to reform a bond. See note to 68 Am. Dec. 86, on this point; note to 21 Am. St. Rep. 485. Cited generally in *Pierpont v. Fowle*, 2 Wood. & M. 29, F. C. 11,152, on the point that chancery will not relieve where the plaintiff has the same relief at law.

Discovery.—Where the grantee receives a life interest in a slave, an heir of the grantor is entitled, during the continuance of the life estate, to the discovery of the number and names of the descendants of the slave, p. 236.

Injunctions.—A life tenant of a slave may be enjoined from removing her out of the country, p. 236.

Discovery.—After answer and discovery the rule is that a suit brought merely for discovery cannot be revived by plaintiff's heirs, p. 236.

Cited and principle applied in *Peer v. Cookerow*, 14 N. J. Eq. 363, holding there can be no right to a bill of revivor to revive a decree for purposes of an appeal where the right of appeal is lost; *Buzard v. Houston*, 119 U. S. 354, 30 L. 454, 7 S. Ct. 253, holding that a bill showing ground for legal relief praying a discovery where the answer discloses nothing and the plaintiff supported his case by proof, must be dismissed without prejudice.

Dismissal.—A general decree for dismissal on the merits may be considered as a decree against the title, p. 237.

Followed in *Lacassagne v. Chapuis*, 144 U. S. 126, 36 L. 371, 12 S. Ct. 662, where a decree dismissing a suit not proper in equity absolutely was reversed so as to dismiss without prejudice; *Rogers v. Durant*, 106 U. S. 646, 27 L. 303, 1 S. Ct. 625, where a general decree dismissing a bill upon the merits was reversed with directions to dismiss without prejudice.

1 Pet. 238-240, 7 L. 127, *BREITHAUPT v. BANK OF GEORGIA*.

Federal courts.—A bill averring plaintiffs as citizens of one State but without averring that stockholders of defendant corporation were citizens of some other cannot support jurisdiction of Federal courts on account of diverse citizenship, p. 240.

Cited and principle followed in *Speigle v. Meredith*, 4 Biss. 126, F. C. 13,227, holding that the citizenship of each party must be stated positively; *Donaldson v. Hazen*, Hemp. 424, F. C. 3,984, holding that not only must it be shown that they are citizens of different States but that one of them is a citizen of the State where the suit is brought; *United States v. Woolsey*, 28 Fed. Cas. 767, holding that in the Federal courts the record must always show either that the subject-matter or the party is within the jurisdiction; *Bank of Cumberland v. Willis*, 3 Sumn. 473, F. C. 885, and case of the *Sewing M. Cos.*, 18 Wall. 575, 21 L. 919, both holding that all the incorporators must be citizens of a different State from the party sued to give jurisdiction to a Federal court; *Oakey v. Commercial, etc., Bank*, 14 La. 517, 518, holding that a corporation defendant may remove a cause on a petition alleging the incorporators are each and all citizens of other States or aliens. See note to 12 Am. Rep. 546, citing authorities on citizenship of corporations.

Distinguished in *Wood v. Mann*, 1 Sumn. 584, F. C. 17,952, holding that the exception to the jurisdiction of the Circuit Court must be taken by plea in abatement and not by any general answer; referred to in *Shaw v. Quincy Min. Co.*, 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, on the point that the rule of the principal case was in force for half a century but that it had been later adjudged it was sufficient if the corporation is created in a different State; *Marshall v. Balt., etc., R. R. Co.*, 16 How. 348, 350, 14 L. 968, 969, dissenting opinion, majority holding a citizen of Virginia may sue in the Circuit Court for Maryland and an averment that the defendants are a body corporate, created by the legislature of Maryland, is sufficient.

1 Pet. 241-247, 7 L. 128, *FINDLAY v. HINDE*.

Lost instruments.—When the loss of a deed or other instrument is the ground for coming into equity for relief, an affidavit of loss must be annexed to the bill; but the objection is waived if a party fail to demur, p. 244.

Cited in *Nesbitt v. Dallam*, 7 Gill & J. 510, 28 Am. Dec. 241, holding that proceeding to trial without raising question of want of affidavit to an answer is a waiver; *Hopkins v. Adams*, 20 Vt. 414, holding that the want of an affidavit is no ground for dismissing bill; *Temple v. Gove*, 8 Iowa, 513, 74 Am. Dec. 321, holding a bill to recover on a lost note cannot be maintained without proof of loss of the note; *Stafford v. Bartholomew*, 2 Ind. 154, on the point that a bill alleging a lost will was bad on demurrer where there

was no affidavit. Cited generally in *Frazier v. Miller*, 16 Ill. 49, where a bill was presented in equity on the ground that the bond sued on was lost or in the defendant's possession.

Lost instruments.—One claiming under a lost deed, which was not proved, acknowledged or recorded is entitled to a discovery against purchasers of the property upon the ground of notice, and if notice be brought home to them, to a decree quieting title, p. 245.

Cited in *Way v. Lyon*, 3 Blackf. 78, as to validity of deeds not acknowledged and recorded.

Lost instruments.—If bill alleges that complainant's grantor entered into an executory contract with them to convey and then executed a formal deed which was lost, and prayed relief against subsequent purchasers of the land, complainants may rely upon the contract to convey if they fail to prove the deed and a demurrer to the whole bill for want of an affidavit of loss cannot be sustained, p. 245.

Parties.—On a bill for discovery and relief filed by complainants, claiming under an executory contract to convey against subsequent purchasers from the same grantor, the grantor is a necessary party, p. 246.

Cited in *Bowman v. Wathen*, 2 McLean, 381, F. C. 1,740, holding one who can only set up an equity must make those from whom he claimed such equity parties; *Smith v. Shane*, 1 McLean, 31, F. C. 13,105, holding in a controversy respecting land in the United States military districts the patentee should be made a party although he had conveyed; *Crane v. Chic., etc., Ry. Co.*, 20 Fed. 406, on the point that a railroad company under lease is a necessary party in an action against the lessee corporation involving the construction of one of its contracts; *Chester v. Chester*, 7 Fed. 4, holding that in a bill to establish a resulting trust in land in possession of a mortgagor, both mortgagor and mortgagee are indispensable parties. Cited generally in *Paine v. French*, 4 Ohio, 327, dissenting opinion, as to the necessity of an assignor of a mortgage being made a party.

Distinguished in *Thomas v. Kennedy*, 24 Iowa, 403, 95 Am. Dec. 744, holding a wife was entitled to have title quieted in her where she stands against the plaintiff strictly on the defensive without making others parties; *Platt v. Vattier*, 1 McLean, 150, F. C. 11,117 holding that one claiming under an absolute conveyance need not make his grantor a party in an action against one claiming the property.

Appeals.—Where a decree is erroneous and awards costs generally against all of the defendants who have appealed and the irregularities in conducting the trial have been so great and so numerous that it seems impracticable that justice be done between

the parties without sending the cause back as to all the parties, the reversal should be general as to all the appellants, p. 247.

Distinguished in *Albright v. McTighe*, 49 Fed. 822, holding that in an action for a malicious prosecution against several defendants a recovery may be had against one or more.

Miscellaneous.—Cited but not in point in *Oliver v. Mutual, etc., Ins. Co.*, 2 Curt. 299, F. C. 10,498; *Peddle v. Hollingshead*, 9 Serg. & R. 284.

1 Pet. 248-249, 7 L. 131, *GRANT v. McKEE*.

Appeal and error.—An appeal by a defendant in ejectment will be dismissed where the value of the defendant's lot was less than \$2,000, although the value of the whole property recorded in the ejectment exceeded that, p. 248.

Cited in *Simon v. House*, 46 Fed. 318, where in a suit to set aside a conveyance the plaintiffs allege the land to be of greater value than \$2,000, but the undisputed testimony showed it to be much less; *Hartford F. I. Co. v. Bonner Merc. Co.*, 56 Fed. 383, 15 U. S. App. 134, and in *New England Mtg. Co. v. Gay*, 145 U. S. 130, 36 L. 648, 12 S. Ct. 816, both holding that the jurisdiction is determined by the amount involved in the particular case and not by any contingent loss; *Jones v. Rowley*, 73 Fed. 289, where the plaintiff sued for a large tract and the defendant was in possession of a small part and disclaimed as to the rest; *Elgin v. Marshall*, 106 U. S. 581, 27 L. 250, 1 S. Ct. 487, holding that where judgment was rendered for \$1,600 on interest coupons the Supreme Court had no jurisdiction, although the bonds were for a larger sum than \$5,000.

1 Pet. 250-263, 7 L. 132, *KONIG v. BAYARD*.

Practice.—A question decided at the trial cannot arise after verdict unless a motion for a new trial has been made, p. 261.

Bills and notes.—Drawee of a bill after its protest from non-acceptance may intervene through an agent for the honor of an indorser, p. 262.

Bills and notes.—Where one intervenes on a draft which was not accepted, for the honor of the indorser, at the request of and under a guaranty from the drawee, any defense available against the drawee would be available against the acceptors for honor in an action by them against the indorsers, p. 262.

Bills and notes.—One who intervenes and pays a draft for the honor of an indorser at the request of the drawee and under a guaranty from him, may recover the amount paid from the indorser, p. 262.

Cited in the note to 92 Am. Dec. 579, 580, citing cases on payment or acceptance to prevent dishonor.

1 Pet. 264-292, 7 L. 138, SCHIMMELPENNICH v. BAYARD.

Bills and notes.—An authority to draw, given to a special agent with limited powers, does not bind the principal to accept any bills in excess of those powers, p. 283.

Cited in Tallmadge v. Williams, 27 La. Ann. 655, dissenting opinion where parties were held liable for drafts drawn under a letter of credit; Franklin Bank v. Lynch, 52 Md. 279, 36 Am. Rep. 377, holding a telegram "you may draw on me for \$700" implies a promise to accept; Wildes v. Savage, 1 Story, 27, F. C. 17,653, remarking that the Supreme Court has shown a strong disinclination to enlarge the doctrine of the virtual acceptance of non-existing bills.

Distinguished in Merchants' Bank v. Griswold, 72 N. Y. 479, 28 Am. Rep. 163, holding an authority to an agent to draw drafts for the purchase of lumber was an unconditional engagement to pay.

Bills and notes.—A letter written within a reasonable time before or after the date of a bill of exchange, plainly describing it and promising to accept, is as to the person taking the bill on the credit of the letter, a virtual acceptance, p. 284.

Cited in Carrollton Bank v. Tayleur, 16 La. 499, 35 Am. Dec. 222, holding a promise to accept must contemplate specific bills; Carnegie v. Morrison, 2 Met. 406, where the undertaking was not such an agreement to accept a specified bill as to bring it within the rule; Exchange Bank v. Hubbard, 62 Fed. 115, 26 U. S. App. 133, on the point that a promise to accept drafts generally and not to accept any particular drafts did not bind one as acceptor; State Nat. Bank v. Young, 5 McCrary, 14, 14 Fed. 890, holding that a letter that the writer expected to pay drafts as heretofore was an acceptance; Kennedy v. Giddes, 8 Port. 268, 33 Am. Dec. 290, holding a promise to accept will amount to an acceptance if the bill is taken on the faith of it; Greele v. Parker, 5 Wend. 419, dissenting opinion, holding a letter "I have no objection to accepting for you on the terms you propose" was an acceptance; Bissell v. Lewis, 4 Mich. 459, holding a letter to an agent stating "You are at liberty to draw on us" to be an acceptance; Exchange Bank v. Rice, 98 Mass. 292, holding a promise to accept after the bill had been negotiated will not bind one as acceptor; Overman v. Hoboken City Bank, 30 N. J. L. 69, holding a promise to accept must be taken by the holder on the faith of such acceptance; Boyce v. Edwards, 4 Pet. 121, 7 L. 803, holding when holder seeks to charge one as acceptor upon some occasional or implied undertaking he must bring himself within this rule; Russell v. Wiggin, 2 Story, 237, F. C. 12,165, holding a promise in a letter of credit written by persons who are to be the drawees is an available promise; Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 651, 26 Am. St. Rep. 774, 16 S. W. 321, holding a telegram in reply to one of inquiry that a bank

would pay a check will support an action; *Nelson v. First Nat. Bank*, 48 Ill. 40, 95 Am. Dec. 513, holding a promise to pay a check relied on will support an action; *Morse v. Mass. Nat. Bank*, 1 Holmes, 215, F. C. 9,857, holding an agreement by a bank to pay a check on presentment was nudum pactum.

Bills and notes.— If the drawees of a bill, refusing to honor it, were bound to accept and pay as drawees, they can acquire no rights as holders of the bill by paying under protest for the honor of the indorsers, p. 285.

Referred to in the note to 92 Am. Dec. 579, citing authorities on payment or acceptance to prevent dishonor.

An agent is bound to act in conformity to the authority and instructions of his principal, p. 287.

Agency.— The fact that an agent agrees not to make any consignments to any other house than that of his principal does not impress on his consignments or on his bills drawn on those consignments a character different from that which would have belonged to them had the consignment been made from choice, p. 287.

Agency.— The usage of trade permits a draft to be made on a consignee on a shipment; and the consignee must pay the bills if the shipment places funds in his hands to pay them, p. 288.

Agency.— Money laid out in the purchase of articles by an agent on his own account cannot be regarded as advances on articles consigned to the principal, although the articles were purchased for the purpose of being consigned to the principal, p. 288.

Agency.— A principal is not bound to accept bills drawn by an agent on his own account as a merchant, p. 289.

Cited in *Jaques v. Todd*, 3 Wend. 91, holding that where there were mutual shipments between a city and a country merchant, the former could not purchase on credit for the latter.

Agency.— An agent with limited powers cannot bind his principal when he transcends his powers, p. 290.

Cited in *Robinson v. Burleigh*, 5 N. H. 228, holding an exchange made in excess of authority not binding; *Komorowski v. Krumdick*, 56 Wis. 28, 13 N. W. 883, holding in the absence of an express authority or usage an agent could not buy on credit; *Thew v. Porcelain Mfg. Co.*, 5 S. C. 421, holding that the president of a manufacturing corporation had no power to give a confession of judgment; *Chamberlain v. Darragh*, Walk. Ch. (Mich.) 151, holding an agent could not sell absolutely under a power to sell on approval; *Smith v. South Royalton Bank*, 32 Vt. 350, 76 Am. Dec. 183, where an agent who was to deliver a deed on certain conditions violated his instructions.

Agency.—If the principal has by declaration or conduct authorized the opinion that he had given more extensive powers to his agent than were in fact given, he cannot avail himself of the imposition and protest bills, the drawing of which his conduct has sanctioned, p. 290.

Cited in *Reitz v. Martin*, 12 Ind. 308, 74 Am. Dec. 217, holding it to be the duty of one purchasing from an agent to inquire into his authority; *Equitable L. A. Soc. v. Poe*, 53 Md. 35, holding that if an agent be acting under a special authority a party must at his peril inquire; *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 201, holding a purchaser at an unauthorized auction sale with notice of the agent's powers takes no title; *Murdock v. Mills*, 11 Met. 15, holding that where an agent exceeded authority in drawing bills the principal was not liable unless he had promised to accept; *Hatch v. Taylor*, 10 N. H. 547, 552, holding private instructions are not limitations upon authority; *Payson v. Coolidge*, 2 Gall. 239, F. C. 10,860, on the point that a right to recovery is not affected by the exceeding of private instructions; *Golding v. Merchant*, 43 Ala. 719, where an agent borrowed money and gave a note in his principal's name and it was contended he had ostensible authority; *Le Roy v. Beard*, 8 How. 468, 12 L. 1160, where a power of attorney to convey was construed and held to authorize the entry into of a covenant of seizin; *Lawrence v. Randall*, 47 Ala. 246, holding an agent's acts are not binding unless within the scope of the authority conferred; *Judkins v. Lancey*, 8 Me. 444, holding an agent was competent to prove the extent of his authority and that his agency was known.

Miscellaneous.—Cited in *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, as to the effect of a certificate of division and discontinuance on duties of appellate court; *Strong v. Hirst*, 61 Me. 14, on the point that the note or bill must in general be produced and cancelled before the creditor can recover on the original consideration; *Slack v. Jacob*, 8 W. Va. 662, not in point.

1 Pet. 293-298, 7 L. 150, **PARKER v. UNITED STATES.**

Army.—The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts as he may think just, having respect to the special circumstances of each post, p. 296.

Army.—An officer may be said to command at a separate post when he is out of the reach of the orders of the commander-in-chief or of a superior officer in command in the neighborhood, p. 297.

Army.—The president may issue the order himself for additional rations or it may be done by the secretary of war with his approbation, p. 297.

Cited in *Matter of Spangler*, 11 Mich. 322, and *United States v. Freeman*, 1 Wood. & M. 51, F. C. 15,163, on the point that an order from the proper department is to be presumed to have been issued by the direction of the president himself.

Army.—No officer is entitled to an additional allowance of rations unless he be a commandant at a separate post and then the claim must be sanctioned by the executive, p. 297.

Cited in *United States v. Freeman*, 1 Wood. & M. 50, F. C. 15,163, on the point that both a separate post and a direction of the executive are necessary to the right to double rations.

Army.—In the discharge of his ordinary duties the adjutant and inspector-general has no distinct command; his duties consist in details of service and not in active military command, p. 298.

Army.—The adjutant and inspector-general is not entitled to double rations where it does not appear that he was ever ordered to an independent or separate command, p. 298.

Miscellaneous.—Cited erroneously in *Parks v. Ingram*, 22 N. H. 292, 55 Am. Dec. 156.

1 Pet. 299-310, 7 L. 152, *MECHANICS' BANK v. SETON*.

Specific performance.—There are cases where specific performance of contracts relating to personalty have been enforced, although the remedy is generally restricted to contracts as to realty, p. 305.

The citations collect the following cases in point: *Kimball v. Morton*, 5 N. J. Eq. 29, 43 Am. Dec. 621, where transfer of stock in a bank was decreed; *Treasurer v. Commercial C. M. Co.*, 23 Cal. 392, holding equity will enforce an agreement for the transfer of stock of a peculiar and uncertain value; *Yulee v. Canova*, 11 Fla. 55, where a bill was filed to compel the performance of a contract for the sale of sugar forced under the impressment act; *Clark v. Flint*, 22 Pick. 238, 33 Am. Dec. 737, where a contract for the sale of an interest in a vessel was enforced; *Roundtree v. McLain*, Hemp. 246, F. C. 12,034a, where a parol agreement in the case of a chattel was not enforced; *Casey v. Holmes*, 10 Ala. 785, holding that equity will enforce a contract whenever the legal remedy is doubtful or inadequate, although it concerns personalty. Cited generally in *Herrick v. Throop*, 24 Fed. 535, on matters that were of equitable cognizance.

Equity.—Chancery has jurisdiction of a proceeding to compel a corporation to make a transfer of stock on its books, p. 305.

Cited and rule followed in *Feckheimer v. Nat. Exch. Bank*, 79 Va. 83, holding equity could compel a transfer of stock on the books and the issuance of new certificates; *Archer v. Am. Water W. Co.*, 50 N. J. Eq. 49, 24 Atl. 514, holding equity will compel the

transfer of stock to the equitable owner upon the books when fraudulently withheld; *Hill v. Rockingham Bank*, 44 N. H. 568, holding equity would compel the delivery of certificates to one who has the equitable title; *Treasurer v. Commercial C. M. Co.*, 23 Cal. 393, on the point that equity never hesitated to compel a transfer of stock held by a person in trust for another; *Kimball v. Morton*, 5 N. J. Eq. 29, 43 Am. Dec. 621, holding the same; *Spencer v. James*, 10 Tex. Civ. App. 332, 31 S. W. 542, holding equity would compel the transfer of stock against one holding as an implied trustee without showing the insolvency; *Merrill v. Merrill*, 53 Wis. 526, 10 N. W. 686, on the point that in cases of trust in particular chattels equity will enforce the trusts and compel a re-transfer.

Parties.— Although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal, except in very strong cases and when the court perceives that a necessary and indispensable party is wanting, p. 306.

Cited in *Potter v. Wilson*, 19 Fed. Cas. 1196, on the point that objections as to parties are not favored, where postponed to the final hearing; *Griffin v. Lovell*, 42 Miss. 404, holding that non-joinder not operating to the prejudice of parties before the court must be presented by plea; *Dunn v. Seymour*, 11 N. J. Eq. 221, on the point that in some cases the objection for want of parties will prevail on appeal; *Keller v. Ashford*, 133 U. S. 626, 33 L. 674, 10 S. Ct. 498, on the point that failure of a mortgagee suing a grantee of the mortgagor to make the latter a party is no ground for relief if no objection was made.

Parties.— All persons materially interested in the subject-matter of the suit ought to be made parties either plaintiff or defendant, in order to prevent multiplicity of suits and that there may be a complete and final decree, p. 306.

Cited in *Burrill v. Garst*, 19 R. I. 39, 31 Atl. 436, holding an executor and trustee who had conveyed is not a necessary party to a bill in equity against the purchaser; *Belding v. Gaines*, 37 Fed. 819, holding that where an heir sued a co-heir to obtain the legal title, the other heirs should be made parties; *Railroad Co. v. Orr*, 18 Wall. 474, 21 L. 811, holding that on a mortgage by a railroad to all its bondholders, no one bondholder can proceed alone against the company and ask a sale; *Treadway v. Schnauber*, 1 Dak. Ter. 284, 46 N. W. 477, dissenting opinion, on the point that in a complaint alleging the invalidity of a tax for bonds issued to a railroad company, the railroad company should be heard; *State v. Burke*, 33 La. Ann. 505, on the point that in a proceeding in rem no adjudication can be had in the absence of essential parties; *Wilson v. Castro*, 31 Cal. 427, holding that generally all persons interested in the subject-matter of a suit in equity should be made parties; *Batre*

v. Auze, 5 Ala. 179, on the point that an omission of an indispensable party will cause a reversal or rehearing; Colron v. Millandon, 19 How. 115, 15 L. 576, on the point that a Circuit Court could not make a decree in the absence of a necessary party; Lucas v. Bank of Darien, 2 Stew. 326, on the point that if essential parties were not before the court, the court could decree the bill to stand over for parties or dismiss without prejudice. Cited generally in Smith v. Ford, 48 Wis. 145, 2 N. W. 150, as to the necessity of making cestuis que trust parties to suits affecting the trust property.

Parties.—The general rule as to parties is established for the convenient administration of justice and is subject to exceptions and is more or less a matter of discretion in the court and ought to be restricted to parties whose interest is involved in the issue and to be affected by the decree, p. 306.

Cited in Walsh v. Smith, 3 Bland Ch. 26, on the point that persons who might be separately relieved without prejudice to the others are not necessary parties.

Parties.—No one need be made a party against whom, if brought to a hearing, the plaintiff can have no decree, p. 366.

Cited and principle applied in Society, etc. v. Hartland, 2 Paine, 542, F. C. 13,155, holding that where one was interested in the subject-matter, but nothing was asked from him by the bill, he was not a necessary party; Wilkins v. Wilkins, 4 Port. 248, holding a decree in chancery would not be reversed because the heirs of a mortgagor are not made parties; Harrison v. Urann, 1 Story, 66, F. C. 6,146, on the point that it was the practice of the Federal courts to dispense with parties, who if made parties would oust the court of jurisdiction; Lucas v. Bank of Darien, 2 Stew. 291, denying claim that other parties should have been joined.

Witnesses.—Cross-examination of a witness operates as a waiver to any irregularity in the reading of his deposition, p. 307.

Cited and followed in Williams v. Banks, 5 Md. 202, and Northern Pac. R. R. Co. v. Urlin, 158 U. S. 274, 39 L. 980, 15 S. Ct. 841, both holding that when a party's counsel at the time of taking a deposition takes part in the examination, it is a waiver of irregularities in taking it; Burtisch v. Hogge, Harr. Ch. (Mich.) 35, where a deposition was suppressed for irregularity, the defendant not being present and not cross-examining.

Depositions.—Irregularity in the admission of a deposition will not be considered where no objection was made to it in the court below, p. 307.

Cited in Howard v. Stidwell, etc., Mfg. Co., 139 U. S. 205, 35 L. 150, 11 S. Ct. 502, holding that the failure to note an objection to a deposition before the trial begins will be held a waiver.

Banks.—Where a bank has full knowledge that stock was not the property of one in whose name it stood on the books, but was held by him in trust for others, it cannot assert any lien upon the stock for the private debt of the one in whose name it stood, pp. 307, 309.

Cited in *Kenton Ins. Co. v. Bowman*, 84 Ky. 439, 1 S. W. 719, holding a corporation does not waive its lien on stock by taking a mortgage or security; *Bank of Attica v. Manuf., etc., Bank*, 20 N. Y. 511, dissenting opinion, holding a purchaser of stock without notice of a by-law providing a lien, had an equitable title free from any lien; *Wells v. Larrabee*, 36 Fed. 868, 2 L. R. A. 473, holding creditors' right to call upon stockholders cannot be defeated by a merely colorable transfer.

Words and phrases — Corporations.—The term "holder" as used in a statute in relation to the holder of stock is not necessarily restricted to the nominal holder, but will admit of a broader and more enlarged meaning, and may well be applied to the party really and beneficially interested in the stock, p. 308.

Trusts.—Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice, p. 309.

Cited in *Lawrence v. Dana*, 4 Cliff. 69, F. C. 8,136, on the point that an omission to inquire charges a person with all the knowledge that a proper inquiry might have shown. See authorities cited under next head.

Trusts.—All persons coming into possession of trust property with notice of the trust are considered as trustees and bound with respect to that special property to the execution of the trust, p. 309.

Cited in *Allen v. McCalla*, 25 Iowa, 480, 96 Am. Dec. 59, on the point that purchaser of chattel is subject to all the trusts and equities of which he had notice; *Peck v. Providence Gas. Co.*, 17 R. I. 286, 23 Atl. 969, 15 L. R. A. 648 and n., bill in equity to establish title to corporate stock or for compensation. Cited generally in *Miller v. Aldrich*, 31 Mich. 420, holding a stipulation to insure binds the mortgagor and others in his position.

Distinguished in *Thrall v. Spencer*, 16 Conn. 142, where party was held not a trustee; *Scudder v. Calais S. S. Co.*, 1 Cliff. 382, F. C. 12,565, holding a purchaser of a vessel from a person holding the same in trust, having notice, is in no better situation.

Agency.—Notice to an agent is notice to the principal, p. 309.

Cited in *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 165, holding notice to an attorney is notice to his client; *Calais S. S. Co. v. Scudder*, 2 Black, 389, 17 L. 290, dissenting opinion, where an agent in whose name a vessel was registered, sold her, and it was held the principals must prove notice; *Greer v. Higgins*, 8 Kan. 522, holding the notice

cannot be proved by proving the declarations of such agent after the transaction was closed.

Corporations.—Notice to the board of directors is notice to the bank, and no subsequent change of directors requires a new notice, p. 309.

Cited in *Dock v. Elizabethtown, etc., Co.*, 34 N. J. L. 317, on the point that notice to a board was notice to the corporation, but notice to an individual director was not; *Bank of the United States v. Davis*, 2 Hill, 461, holding notice to a bank director, while not acting officially, is not notice to the bank; *Leggett v. New Jersey, etc., B. Co.*, 1 N. J. Eq. 557, 23 Am. Dec. 737, on the point that corporations are open to the same implications and receive the benefit of the same presumptions as individuals. See note to 36 Am. Dec. 196, discussing notice to an officer or agent of a corporation as affecting the corporation.

Practice.—Courts are not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute, p. 310.

Cited in *Walsh v. Smyth*, 3 Bland Ch. 27, on the point that purchasers pending a suit must abide the event without being admitted as parties; *Waddell, Ex parte*, 28 Fed. Cas. 1314, on the point that a *lis pendens* is regarded as overriding all subsequent transactions and securing the same remedies as if the estate remained in the same condition.

Miscellaneous.—Cited in *Candee v. Clark*, 2 Mich. 257, on the point that a judgment on a note is a legal merger of the note.

1 Pet. 311-317, 7 L. 157, **BARRY v. FOYLES.**

Attachment.—Where an attachment is discharged by defendant's appearance and giving bail, a variance between plaintiff's declaration thereupon filed, and the attachment, as to plaintiff's claim, is immaterial; the cause stands as if brought in the usual manner and no reference can be had to the attachment proceedings, p. 315.

Cited in *Fox v. Mackenzie*, 1 N. Dak. 303, 306, 47 N. W. 388, 389, holding the giving of a bond to discharge an attachment destroys the writ, and a motion to dissolve will not be entertained; *Bates v. Killian*, 17 S. C. 556, holding the giving of a bond to discharge an attachment waived the right to have it discharged. Cited generally in *Smith v. Miln, Abb. Adm.* 381, F. C. 13,081, on the point that on foreign attachment a trustee or garnishee must be brought into court with notice of the claim and have full opportunity to oppose.

Distinguished in *McNulty v. Batty*, 2 Pinn. 56, holding that where one in his affidavit confined his claim to an amount due on a certain judgment he could not file counts for other causes of action; *Murphy v. Montandon*, 2 Idaho, 1053, 35 Am. St. Rep. 283, 29 Pac.

853, holding the obligors in a bond to release an attachment may resist an action by showing the falsity of the affidavit.

Agency.— One who is the manager of the whole concern for the proprietors, with power to buy and sell, has power to charge the proprietors for property bought in the course of the business, p. 315.

Cited in *Insurance Co. v. Woodruff*, 26 N. J. L. 560, dissenting opinion, holding the declarations of an agent referring to acts he is authorized to perform are binding; *Bank of Montgomery v. Plannett*, 37 Ala. 227, holding that where there is any evidence to establish agency its sufficiency is for the jury under the court's instructions.

Distinguished in *Spear v. Turpin*, 9 Rob. (La.) 296, holding an account rendered by a clerk or bookkeeper is not binding without other evidence of authority than that usually conferred on such officers.

Agency.— General certificates of the amounts due given by a general manager to a seller, from time to time, instead of one detailing the separate transactions of each day, have the same effect as if they were a detailed statement and are of the same obligation as if made by the proprietors, p. 316.

Variance.— Where a suit is brought on a partnership transaction against one of the partners and the declaration states simply a contract with the partner sued, evidence of a joint assumpsit will support such a declaration, p. 316.

Cited in *Hansel v. Morris*, 1 Blackf. 308, note, holding there was no variance where a declaration was of a bill drawn by the three persons sued and it was proved to have been accepted by four.

Partnership.— A contract made by co-partners is several as well as joint, and the assumpsit is made by all and by each; it is obligatory on all and on each of the partners, p. 317.

Variance.— Where a suit is brought on a partnership transaction against one of the partners, if the defendant fails to avail himself of the variance in abatement, when the form of the plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial, p. 317.

Cited in *Braithwaite v. Power*, 1 N. Dak. 468, 48 N. W. 359, on the point that the objection of nonjoinder must be taken by plea in abatement or is waived; *Moore v. Bank of the Metropolis*, 13 Pet. 311, 10 L. 177, on the point that nonjoinder cannot be taken advantage of on the general issue; *Wilson v. McCormick*, 86 Va. 997, 11 S. E. 976, holding that nonjoinder in assumpsit as well as in debt and covenant must be taken advantage of by plea in abatement; *Waterbury v. Mather*, 16 Wend. 615, and *Hapgood v. Watson*, 65 Me. 513, on the point that the nonjoinder of a co-promisor or co-

contractor must be pleaded in abatement; *Smith v. Cooke*, 31 Md. 179, 100 Am. Dec. 59, holding the omission to make partners parties can only be taken advantage of by plea in abatement; *Toland v. Sprague*, 12 Pet. 331, 9 L. 1106, on the point that after appearance and plea, the case stands as if the suit were brought in the usual manner; *St. Louis, etc., Ry. Co. v. McBride*, 141 U. S. 132, 35 L. 661, 11 S. Ct. 984, holding that a defendant sued in a Circuit Court, appearing and pleading, waives any objection to the jurisdiction; *Creagh v. Equitable L. A. Soc.*, 83 Fed. 850, holding the objection that a defendant sued by an alien is a resident of another Federal district is waived by a petition and bond for a removal; *The Williamette*, 70 Fed. 878, 44 U. S. App. 26, 31 L. R. A. 719, *Kansas, etc., R. R. v. Inter. L. Co.*, 37 Fed. 5, and *Southern Ex. Co. v. Todd*, 56 Fed. 107, 12 U. S. App. 351, all holding that requirement that the suit shall be in the district of the residence is a personal privilege, waived by general appearance or pleading the merits.

Distinguished in *Journey v. Dickerson*, 21 Iowa, 315, holding that where there was a misnomer in the original notice and the defendant was not personally served and had no actual notice, the defendant was not bound to take advantage of the misnomer by abatement.

Miscellaneous.—Cited, but not in point, in *Buckner v. Watt*, 19 La. 217, on the point that the validity of the contract is to be decided by the law of the place where it is made.

1 Pet. 318-327, 7 L. 160, *DOX v. POSTMASTER-GENERAL*.

Postmasters.—Act of congress regulating the post-office establishment does not, in terms, discharge the obligors on a deputy postmaster's bond from the direct claim of the United States, on the failure of the postmaster-general to commence suit against the defaulter within the time prescribed, p. 324.

Cited in *Jones v. United States*, 18 Wall. 663, 21 L. 868, where, after knowledge of embezzlement, one was permitted to remain in office. Cited generally in *United States v. De Visser*, 10 Fed. 648, on the point as to what statutes form a part of the contract with a surety.

Distinguished in *Hayden v. Agent of Auburn State Prison*, 1 Sandf. Ch. 198, holding the consequences of the laches of an officer are to be borne by the State in the same manner as individuals. See authorities cited under next head.

Suretyship.—The laches of the officers of the government, however gross, do not, of themselves, discharge the sureties in an appeal bond from the obligation it creates, p. 325.

The following citing cases affirm and variously apply this principle: *State v. Smith*, 16 Fla. 188, holding the neglect of the governor to suspend a collector at the request of the sureties was no

defense; *Minturn v. United States*, 106 U. S. 445, 27 L. 211, 1 S. Ct. 409, and *Boone Co. v. Jones*, 54 Iowa, 703, 2 N. W. 990, holding the negligence of officers was no defense to an action against the sureties; *Looney v. Hughes*, 26 N. Y. 519, 522, holding it is no defense that if a warrant had issued within the time prescribed by law, the amount might have been collected; *United States v. Potter*, 27 Fed. Cas. 604, where a disbursing officer was retained in office after he was known to be in default; *United States v. Wright*, 28 Fed. Cas. 796, holding that mere indulgence to a postmaster in default is no defense; *Albany Dutch Church v. Vedder*, 14 Wend. 171, and *Morris Canal v. Van Vorst*, 21 N. J. L. 117, both holding that by-laws or statutes that officers shall account, are for the security of the government and no part of the contract with the surety; *Detroit v. Weber*, 26 Mich. 290, on the point that a law for the periodical examination of accounts is one upon which the sureties have no right to rely; *Newark v. Stout*, 52 N. J. L. 49, 18 Atl. 948, on the point that provisions making it the duty of officers to supervise accounts are to protect the corporation or government, and not for the benefit of sureties; *Supervisors of Monroe County v. Otis*, 62 N. Y. 95, holding sureties of a treasurer not discharged by the neglect of supervisors; *Richmond, etc., R. R. Co. v. Kasey*, 30 Gratt. 230, holding sureties of a freight and ticket agent not released by the knowledge that he gave credit; *United States v. Cutter*, 2 Curt. 625, F. C. 14,911, holding sureties to be liable for misappropriations by a disbursing officer of money advanced to him contrary to statute; *United States v. Minturn*, 26 Fed. Cas. 1273, and *United States v. Hosmer*, 26 Fed. Cas. 377, both holding the sureties on a distiller's bond were not discharged because the goods were permitted to be withdrawn from the bonded warehouse; *Commonwealth v. Brice*, 22 Pa. St. 214, 60 Am. Dec. 80, holding that the general rule, stated in the principal case, applied as well to county as to State officers; *Boone Co. v. Burlington, etc., R. R. Co.*, 139 U. S. 693, 35 L. 323, 11 S. Ct. 690, where the court said the doctrine that laches did not affect the government, did not apply to counties; *United States v. Sowers*, 27 Fed. Cas. 1277, where the officials failed to appeal from the decision of a collector of the port; *Gibbons v. United States*, 8 Wall. 274, 275, 19 L. 454; *Murdock Grate Co. v. Com.*, 152 Mass. 32, 24 N. E. 856, 8 L. R. A. 402, and *n.*, and *U. S. v. Buchanan*, 8 How. 106, 12 L. 1006, all on the point that the government is not responsible for the misfeasance or wrongs or neglect of subordinate officers; *German Bank v. United States*, 148 U. S. 580, 37 L. 569, 13 S. Ct. 705, holding the United States is not liable for the amount of registered bonds cancelled without authority; *Schuylkill Co. v. Commonwealth*, 36 Pa. St. 536, holding the insufficiency of the bond taken from the county treasurer would not release the county from liability to the State; *Hoge v. Brookover*, 28 W. Va. 310, discussing whether a statute requiring judgment liens

to be docketed affected a judgment against the State; *Myers v. Miller*, 31 S. E. 983, but holding sheriff's sureties entitled to be subrogated to State's rights.

Bonds.—No presumption of payment of the bond of a deputy postmaster arises where but little more than five years elapses between the time when the sum due from the principal in the bond was ascertained and the institution of the suit, p. 326.

Cited in *United States v. Ganssen*, 2 Woods, 99, F. C. 15,192, holding that delay of the government in enforcing its rights cannot be set up as a defense; *United States v. Dalles Military Road Co.*, 140 U. S. 632, 35 L. 571, 11 S. Ct. 998, on the point that the defenses of laches and State claims cannot be set up against the government; *Commonwealth v. Baldwin*, 1 Watts, 55, 26 Am. Dec. 34, holding the commonwealth was not bound by a statute limiting liens unless named; *United States v. Adams*, 54 Fed. 116, holding that the failure to present a claim against the estate of a deceased marshal was no defense to an action against his sureties; *Crawn v. Commonwealth*, 84 Va. 287, 10 Am. St. Rep. 843, 4 S. E. 724, on the point that a lapse of five years will not create any presumption of payment or operate in favor of the sureties; *United States v. Barnes*, 24 Blatchf. 472, 31 Fed. 709, holding that the United States omitting to prove its claim in bankruptcy until after distribution, could proceed against the assignee personally; *United States v. City of Alexandria*, 4 Hughes, 549, 19 Fed. 612, holding that a neglect of officers for many years to call for a compliance with a contract could not make a case of laches; *Seymour v. Van Slyck*, 8 Wend. 422, holding that, where a note is received by an officer as collateral, omission to perform the duties ordinarily imposed is no defense.

Miscellaneous.—Cited, but not in point, in *Cross v. Huntley*, 13 Wend. 387.

1 Pet. 328-342, 7 L. 164, *ELLIOTT v. PEIRSOL*.

Another phase of this case is reported in 6 Pet. 95, 97, 8 L. 332, 333.

Evidence.—Letter on the subject of family pedigree, written by an aged member of the family, tracing back the pedigree and several branches of the family for seventy years, is admissible, p. 337.

Evidence.—In questions of pedigree the declarations of aged and deceased members of the family may be proved and given in evidence, p. 337.

Cited in *Blann v. Beal*, 5 Ala. 362, holding a memorandum by a father of the time of the birth of a child is admissible after his death, but not if he were alive; in the note to *Boudereau v. Montgomery*, 4 Wash. 190, F. C. 1,694, holding depositions between other parties on the same point may be used to prove pedigree.

Evidence.—A motion to exclude the whole evidence of the plaintiff, on the ground that it was incompetent, cannot be granted unless the whole was incompetent, p. 338.

Cited in *Rush v. French*, 1 Ariz. Ter. 125, and *Ward v. Wilms*, 16 Colo. 88, 27 Pac. 248, both holding that it is only where the testimony is inadmissible for any purpose that a general objection will suffice; *Glover v. Millings*, 2 Stew. & P. 41, holding that if a motion to exclude testimony must be so specific as to call attention with reasonable certainty to the parts objected to; *Houston v. Perry*, 5 Tex. 467, holding a general objection to all the plaintiff's testimony was properly overruled, unless the whole was incompetent; *Budd v. Brooke*, 3 Gill, 220, 43 Am. Dec. 325, holding that where objection is made to evidence offered there is no error in overruling it if part is admissible; *Levy v. Taylor*, 24 Md. 294; *Moore v. Leftwich*, 1 Stew. & P. 257, and *Keeler v. Mauney*, 89 N. C. 372, all holding that when competent and incompetent testimony is offered in a single proposition, error cannot be assigned for its entire rejection. See authorities cited under next head.

Practice.—Courts are not bound to do more than respond to a motion in the terms in which it is made; nor to modify the propositions submitted by counsel so as to make them fit the case; if they do not fit, that is enough to authorize their rejection, p. 338.

Cited in *Carmichael v. Brooks*, 9 Port. 334, holding that one asking the action of the court must be prepared to sustain the whole demand in the precise terms in which it is made; *Smith v. Brown*, 8 Kan. 619, on the point that on a motion to exclude the whole evidence a court may exclude the part which is incompetent, but is not bound to do so; *Smith v. Zaner*, 4 Ala. 105, holding that where legal and illegal testimony are offered as a whole, the court is not bound to separate the good from the bad, but may reject the whole; *Melton v. Troutman*, 15 Ala. 537, where part of a deposition was legal and part illegal evidence, and a party objected to it as a whole; *Sterling v. Ripley*, 3 Pinn. 163, on the point that where an instruction is good in part and bad in part a court need not modify, but may refuse it; *McGhee v. Wright*, 16 Ill. 558, on the point that it would be a useless ceremony to intimate an opinion upon a question which the court has no power to decide.

Acknowledgments.—The privy examination and acknowledgment of a deed by a feme covert, so as to pass or convey her estate, cannot be proved by parol testimony, p. 338.

Cited and principle affirmed in *McCormack v. Woods*, 14 Bush (Ky.), 84, holding that whether a deed has been properly executed by a married woman, must be proved by the record; *Chauvin v. Wagner*, 18 Mo. 544, holding a certificate must substantially comply with the statute and if defective cannot be aided in equity nor by

parol; *Lindley v. Smith*, 46 Ill. 528, holding a defective certificate cannot be corrected by the parol evidence of the officer making it; *Burnett v. Shackelford*, 6 J. J. Marsh. 534, 22 Am. Dec. 102, holding parol evidence inadmissible to prove the acknowledgment was different from the certificate; *O'Ferrall v. Simplot*, 4 G. Greene, 165, holding a material omission in a certificate cannot be supplied by parol; *Applegate v. Gracy*, 9 Dana, 217, 219; *McKellar v. Peck*, 2 Posey, 193, 194; *Miller v. Texas & P. Ry. Co.*, 132 U. S. 690, 33 L. 501, 10 S. Ct. 215, and *Willis v. Gattman*, 53 Miss. 731, all holding that it was not competent to show by parol that there had been a privy examination; *O'Ferrall v. Simplot*, 4 Iowa, 396, 397, and *First Nat. Bank v. Paul*, 75 Va. 602, 40 Am. Rep. 742, holding that parol evidence of an omission by mistake is inadmissible; *Leftwich v. Neal*, 7 W. Va. 576, where the words "she had willingly executed the same," were omitted; *Scott v. Simons*, 70 Ala. 357, where a certificate used the word "voluntarily," without saying "of her own free will." See note to 52 Am. Dec. 521, 522, discussing the power to amend certificates of acknowledgment.

Married women.—By the common law a married woman can, in general, do no act to bind her; her acts are not like those of infants and some other disabled persons, voidable only, but are in general void ab initio, p. 338.

Cited in *McDaniel v. Grace*, 15 Ark. 479, holding that as a married woman can only convey by virtue of a statute, a substantial deviation will avoid the deed; *Petesich v. Hambach*, 48 Wis. 449, 4 N. W. 568, holding a conveyance by a married woman cannot be reformed as against her unless by virtue of an express statute; *Whitworth v. Carter*, 43 Miss. 70, discussing the power of a married woman to contract debts; *T. T. Haydock Car Co. v. Pier*, 74 Wis. 586, 43 N. W. 504, discussing her power to be an assignee for creditors.

Records.—What the law requires to be done and appear of record, can only be done and made to appear by the record itself or an exemplification of the record, p. 340.

Cited in *Young v. Thompson*, 14 Ill. 381, on the point that a record must be complete in itself and if deficient cannot be aided by parol; *Vestal v. State*, 3 Tex. App. 655, holding that parol evidence is not admissible to contradict, vary or falsify a record; *Cent. Land Co. v. Laidley*, 32 W. Va. 141, 25 Am. St. Rep. 803, 9 S. E. 64, 3 L. R. A. 830, and n., where deed by married woman was void because defectively acknowledged, she cannot ratify it by acts in pais; *Sewall v. Haymaker*, 127 U. S. 727, 32 L. 302, 8 S. Ct. 1353, discussing the form required to pass her lands in Virginia; *Cook v. Burnley*, 11 Wall. 669, 20 L. 30, holding that in case of a deposition an omission in the certificate was fatal to the deposition.

Acknowledgments.—The fact that there has been an acknowledgment and privy examination of a feme covert executing a deed is unavailing if there be no record of it, p. 340.

Cited in *Wambole v. Foote*, 2 Dak. Ter. 19, 2 N. W. 244, holding that it is not the fact of privy examination alone but the recording or certifying of the fact which makes the deed effectual; *Lane v. Dolick*, 6 McLean, 204, F. C. 8,049, holding it is the acknowledgment that gives effect and that must substantially conform to the law; *Hitz v. Jenks*, 123 U. S. 304, 31 L. 159, 8 S. Ct. 147, holding a certificate cannot be controlled or avoided except for fraud, by extrinsic evidence; *Jefferson Co. B. A. v. Heil*, 81 Ky. 515, where a certificate was irregular and the recorder, who was not a deputy clerk, recorded a certificate in due form.

A certificate of acknowledgment and recording of the deed of a husband and wife is not sufficient in law to pass her estate where it shows no privy examination of the feme, p. 340.

Cited in *Morrison v. Wilson*, 13 Cal. 498, 73 Am. Dec. 596, and *Simms v. Hervey*, 19 Iowa, 286, both holding that a married woman can only convey in the form and manner prescribed by statute, whatever that may be; *Applegate v. Gracy*, 9 Dana (Ky.), 217, 219, 223, holding a certificate does not transfer title unless her privy examination and acknowledgment are certified in due form and recorded within the time prescribed; *Goodenough v. Warren*, 5 Sawy. 498, F. C. 5,534, on the point that, except in the case of married women, a deed at common law is valid, although not witnessed, acknowledged or recorded; *Fauntleroy v. Dunn*, 3 B. Mon. 613, where deeds certifying merely that a wife relinquished her right of dower was held void; *Moore v. Thomas*, 1 Or. 203, holding that without acknowledgment a married woman does not relinquish her dower by signing and sealing her husband's deed; *George v. Goldsby*, 23 Ala. 332, and *Pratt v. Battels*, 28 Vt. 689, both holding an acknowledgment should show on the face of the certificate that it was made separately from her husband; *Boykin v. Rain*, 28 Ala. 340, 65 Am. Dec. 351, where the certificate did not show she was "without any fear;" *James v. Fisk*, 9 Smedes & M. 152, 47 Am. Dec. 113, where the acknowledgment and privy examination were not made before the proper officer; *Dodge v. Hollingshead*, 6 Minn. 51, 80 Am. Dec. 439, holding that the certificate is not conclusive evidence of the facts certified, but rebuttable; *Woods v. Polhemus*, 8 Ind. 64, where an acknowledgment in New York was held void as to lands in Indiana, because not conforming to their laws; *Daviess v. Fairbairn*, 3 How. 648, 11 L. 766, on the point that the Virginia act of 1748, in regard to acknowledgments, was adopted in Kentucky and never repealed. See note to 41 Am. Dec. 180, citing authorities on the private examination of a wife.

Judgments.—Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment until reversed is regarded as binding in every other court, but if it act without authority, its judgments and orders are regarded as nullities, p. 340.

The citations collate a very large number of cases affirming and discussing this principle, and variously applying it: *Beauregard v. City of New Orleans*, 18 How. 503, 15 L. 472, on the point that if a court has jurisdiction, its decisions upon questions that arise regularly are binding upon all other courts, until reversed; *Tompkins v. Tompkins*, 1 Story, 553, F. C. 14,091, holding that decrees of courts having jurisdiction are conclusive upon all parties and not re-examinable in any court; *Holmes v. Jennison*, 14 Pet. 627, 628, 10 L. 627, on the point that where power is given to any tribunal, its decision is revisable only by a tribunal which has supervisory power; *Dorsey v. Garey*, 30 Md. 496, holding that where a discretion has been exercised in a case within the provisions of the code, it cannot be examined collaterally; *Hampson v. Ware*, 4 Iowa, 16, 66 Am. Dec. 118, on the point that a judgment of a court of competent jurisdiction cannot be inquired into and set aside on an injunction to stay execution; *Thompson v. Tolmie*, 2 Pet. 168, 7 L. 385; *Otis v. The Rio Grande*, 1 Woods, 281, F. C. 10,613; *United States v. Debs*, 64 Fed. 739; *Evans v. Percifull*, 5 Ark. 429; *Rodgers v. Evans*, 8 Ga. 145, 52 Am. Dec. 391; *Smith v. Knowlton*, 11 N. H. 198; *Miltimore v. Miltimore*, 40 Pa. St. 155, and *Derby v. Jacques*, 1 Cliff. 437, F. C. 3,817, all holding that if a court has jurisdiction, errors and irregularities must be corrected by some direct proceeding and are not ground of collateral attack; *Amory v. Amory*, 3 Biss. 271, F. C. 334, and *Elder v. Richmond G. & S. M. Co.*, 58 Fed. 539, 540, 19 U. S. App. 118, both holding that errors in the judgment of a State court having jurisdiction are reviewable only by the proper State tribunals and not by Federal courts; *Voorhees v. Bank of the United States*, 10 Pet. 478, 9 L. 501, holding that all defects in setting out a title or in the evidence to prove it, as well as irregularities, can be examined only on appeal; *Swiggart v. Harber*, 4 Scam. 371, 39 Am. Dec. 423, holding an irregularity in the issuing of a fieri facias cannot be inquired into collaterally; *Kittredge v. Emerson*, 15 N. H. 262, on the point that a judgment founded upon an erroneous construction of the bankrupt act, is binding until reversed; *Williams v. Saunders*, 5 Cold. 78, holding a decree of a register of wills of another State having jurisdiction, conclusive upon all persons until reversal; *Tucker v. Harris*, 13 Ga. 8, 58 Am. Dec. 492, holding a judgment of a court of ordinary to be binding until reversed and not attackable collaterally; *Holcombe v. Phelps*, 16 Conn. 131, 132, holding a decree of a Probate Court having jurisdiction granting administration was a complete protection to the administrator; *In re Warfield*, 22 Cal. 64, 83 Am. Dec. 51, on the

point that the admission by a Probate Court having jurisdiction of will to probate, is final, except upon reversal; *Yates v. Houston*, 3 Tex. 447, where the court considered the conclusiveness of a judgment of a Probate Court having jurisdiction awarding land; *Stell v. Glass*, 1 Ga. 486, holding that the action of a court of ordinary, having jurisdiction as to investments, cannot be set aside indirectly; *Palmer v. Oakley*, 2 Doug. 491, 47 Am. Dec. 68, holding that the failure of an administrator to give bond with two sufficient sureties does not invalidate the proceedings; *Lancaster v. Wilson*, 27 Gratt. 630, and *Bank of the United States v. Voorhees*, 1 McLean, 224, F. C. 939, both holding that errors in the proceedings do not affect the title of the purchaser under the judgment; *Burdett v. Silsbee*, 15 Tex. 618, holding that sale by a court of competent jurisdiction cannot be collaterally impeached unless for fraud; *Jackson ex dem. v. Astor*, 1 Pinn. 161, 39 Am. Dec. 294; *Wyman v. Campbell*, 6 Port. 241, 31 Am. Dec. 689, and *Price v. Winter*, 15 Fla. 106, all holding that if a court had jurisdiction to sell the property of a decedent, a purchaser was not affected by irregularities or errors; *Newcomb v. Smith*, 5 Ohio, 451, where a claim under an invalid sale of decedent's property was held insufficient to defeat ejectment; *Pensley v. Hayes*, 22 Iowa, 34, 92 Am. Dec. 368, holding that objections not jurisdictional, but relating to the regularity of the proceedings, cannot invalidate a title through a guardian's sale; *Cockey v. Cole*, 28 Md. 284, 92 Am. Dec. 686, holding that irregularities for which a sale in foreclosure could be set aside are no ground of collateral attack.

Elsewhere are the following cases which assert and rely upon the rule: *Ponder v. Moseley*, 2 Fla. 267, 48 Am. Dec. 201, considering the effect of a reversal on the title of a purchaser; *The Monte A*, 12 Fed. 336, holding that if, pending proceeding upon libel in rem, the property was sold as perishable, although the libel might be afterwards dismissed, the purchaser's title is not impaired; *Beattie v. Wilkinson*, 36 Fed. 650, holding that a petition by a court having jurisdiction protected a purchaser, although the person attacking the proceedings was not a party; *Buckmaster v. Carlin*, 3 Scam. 108, which held a title under a foreclosure sale not affected because the statute creating the bank was held unconstitutional; *Sutherland v. De Leon*, 1 Tex. 309, 46 Am. Dec. 107, where it was contended that a judgment was void because an act under which an attachment was sued out was unconstitutional; *Vanteburg v. Block*, 3 Mont. 468, holding a judgment against a married woman, though erroneous, was valid until reversed; *Bank of the United States v. Moss*, 6 How. 38, 12 L. 334, citing authorities and holding that a mere error of law is never justification for annulling a judgment at a subsequent term, summarily on motion; *Hollister v. Abbott*, 31 N. H. 448, 64 Am. Dec. 344, where a party neglected to plead a discharge in bankruptcy, obtained after suit commenced and judgment by default, and it was held he could not have the

default set aside; *Green v. Saulsbury*, 6 Del. Ch. 398, 33 Atl. 632, discussing whether, where a widow made an election, any other court could allow a revocation; *Greenup v. Crooks*, 50 Ind. 420, where a former judgment as to the priority of a mortgage over a mechanic's lien was held conclusive; *Deal v. Harris*, 8 Md. 43, 63 Am. Dec. 687, holding that under a judgment of an inferior court having jurisdiction the parties enforcing it are not trespassers, although it is erroneous; *Bell v. Ohio L. & T. Co.*, 1 Biss. 270, F. C. 1,260, holding that jurisdiction once attaching is conclusive, and thereafter any orders by another court are without authority; *Ex parte Bond*, 9 S. C. 81, 30 Am. Rep. 21, holding a wrongful sentence by a court having jurisdiction could only be remedied by appeal; *Matter of Executive Communication*, 14 Fla. 306, holding the senate has exclusive jurisdiction to try impeachments and courts could not interfere in such cases; *Poteet v. County Commissioners*, 30 W. Va. 84, 3 S. E. 112, on the point that when no mode of revising a decision of an officer is made, his decision is final; *Board of Commrs. of Clay Connty v. Markle*, 46 Ind. 110, where the court discussed the conclusiveness of the decisions of a board of commissioners to relocate county seats; *Buffalo, etc., R. R. Co. v. Supervisors of Erie County*, 48 N. Y. 99, holding the decisions of assessors, where they have jurisdiction, cannot be collaterally attacked; *Moch v. Virginia F. & M. I. Co.*, 10 Fed. 706, on the point that a judgment of a sister State has same effect as in State where rendered; *Turley v. Dreyfus*, 33 La. Ann. 888, holding a judgment of a sister State was subject to all the defenses which can be legally opposed to judgments; *Grignon v. Astor*, 2 How. 343, 11 L. 292, holding it was for the court to decide upon the existence of facts giving jurisdiction, and the exercise of the jurisdiction is presumptive that the facts were proved; *Decatur v. Pauding*, 14 Pet. 600, 602, 10 L. 609, 611, citing authorities and discussing the distinction between jurisdiction and its exercise; *Muncaster v. Bland*, 11 La. Ann. 508, on the point that the want of jurisdiction must be an original and radical want of jurisdiction; *Lucas v. Bank of Darien*, 2 Stew. 310, holding a judgment of a sister State without jurisdiction was void at law, and equity would not relieve; *Murray v. American Surety Co.*, 70 Fed. 346, 44 U. S. App. 43, holding the exercise in a purely statutory proceeding of a power not authorized was void; *Risley v. Phenix Bank*, 83 N. Y. 337, 38 Am. Rep. 433, holding that if a court is authorized to exercise jurisdiction in a particular case only, any other exercise is a nullity.

Other cases which affirm and follow the rule are: *Barkeloo v. Randall*, 4 Blackf. 478, 32 Am. Dec. 47, holding an inferior court entitled to issue process on certain prerequisites, acts without jurisdiction in issuing the process without those prerequisites; *Torrance v. Torrance*, 53 Pa. St. 510, on the point that a want of jurisdiction was as fatal to the acts of an Orphans' Court as to any other; *Hickey v. Stewart*, 3 How. 762, 11 L. 819, where a judg-

ment of the Court of Chancery of Mississippi, establishing a Spanish grant, was held to be void as without jurisdiction; *McGehee v. Wilkins*, 31 Fla. 86, 12 So. 229, holding that where a defendant was not before the court the judgment was *coram non judice*; *Bruce v. Strickland*, 47 Ala. 196, holding that to sustain a final decree of a Probate Court on final settlement, the record must affirmatively show notice; *State v. Kinmore*, 54 Minn. 140, 40 Am. St. Rep. 307, 55 N. W. 831, holding a Probate Court acquired no jurisdiction to proceed against a child, when the petition was wholly inadequate; *Eaton v. Badger*, 33 N. H. 238, holding a judgment against a non-resident without service or attachment is a nullity; *Hauswirth v. Sullivan*, 6 Mont. 210, 9 Pac. 802, holding a judgment based on a service of summons on Sunday was a nullity; *In re Eaton*, 51 Fed. 805, holding that in a Federal Circuit Court an injunction is not void because the necessary jurisdictional facts do not appear; *Dexter v. Sayward*, 84 Fed. 300, 302, where a judgment on a case removed to a Circuit Court was held not to be collaterally assailable, although the record did not show facts to warrant the removal; *In re Haynes*, 30 Fed. 770, holding that if the Circuit Court does not obtain jurisdiction, an order of arrest is void; *Fithian v. Monks*, 43 Mo. 521, holding a judgment in foreclosure against a mortgagor and his vendee who had agreed to pay off the incumbrance, was a nullity; *In re Mousseau*, 30 Minn. 205, 14 N. W. 888, holding that where a will had been regularly probated a re-probate was without jurisdiction; *Darden v. Lines*, 2 Fla. 573, holding the Supreme Court has no jurisdiction in a cause on an appeal from a decree *pro forma* entered in the court below by consent; *Horan v. Wahrenberger*, 9 Tex. 319, 58 Am. Dec. 146, holding a judgment of a Supreme Court on appeal in a case where the judgment of the District Court was without authority is void; *Lyles v. Bolles*, 8 S. C. 262, holding a judge cannot at chambers make an order for judgment in an action of trover; *Russell v. Perry*, 14 N. H. 155, holding a judgment by a justice of another State in a case in which he was interested was void; *Cary v. Dixon*, 51 Miss. 600, holding that a judgment against a married woman in a case unauthorized by law was a nullity; *People ex rel. v. Liscomb*, 60 N. Y. 568, 19 Am. Rep. 216, holding a statute excluding the right of habeas corpus to one detained under a final judgment, did not apply where the court had no jurisdiction; *Hall v. Wadsworth*, 30 W. Va. 57, 3 S. E. 30, on the point that a judgment without jurisdiction is not the less invalid because under an unconstitutional statute giving jurisdiction; *James v. Smith*, 2 S. C. 188, where a Circuit Court attached a sheriff for contempt in a proceeding in which it had no jurisdiction; *Tracy v. Tuffly*, 134 U. S. 220, 31 L. 409, 8 S. Ct. 493, holding a Circuit Court could not restrain the removal of a city officer and an injunction issued is absolutely void.

Aside from the foregoing, the syllabus principle is relied upon in *State ex rel. v. Tissot*, 40 La. Ann. 602, 4 So. 484, holding that

district judges are without jurisdiction to determine contested elections touching rights of legislators to seats; *Bowler v. Eldridge*, 18 Conn. 13, *Reed v. Wright*, 2 G. Greene, 37, and *Doe ex dem. v. Litherberry*, 4 McLean, 445, F. C. 13,251, all on the point that there must be jurisdiction to protect officers from liability as trespassers; *Lowry v. Erwin*, 6 Rob. (La.) 205, holding that if there is a want of jurisdiction a sale under the judgment passes no title; *Savacool v. Boughton*, 5 Wend. 179, 21 Am. Dec. 188, holding that process is void upon its face and does not justify an officer if it issue from a court without jurisdiction; *Campbell v. Webb*, 11 Md. 482, holding that an officer is responsible when he executes process issued by a tribunal with inferior limited jurisdiction; *Ex parte Holman*, 28 Iowa, 178, dissenting opinion, on the point that if a Circuit Court had no jurisdiction of an offense all persons concerned in executing the judgment would be trespassers; *Hooes v. Sherrill*, 16 Wend. 47, dissenting opinion, on the point that a justice exceeding his authority is liable as a trespasser; *Kissell v. St. Louis Public Schools*, 18 How. 25, on the point that the statutes conferring power on the surveyor-general are the limits of his powers and controversies were to be decided by the courts; *Pierce v. Frace*, 2 Wash. 94, 26 Pac. 195, where the question was as to the conclusiveness of findings of a register and receiver; *Bennett v. Farrar*, 2 Gilm. 602, holding decisions of registers and receivers and of a board to determine pre-emption claims will not be interfered with by the courts; *Wilcox v. Jackson*, 13 Pet. 511, 10 L. 270, holding that registers and receivers in granting pre-emptions in land in which they cannot be, are acting without their jurisdiction; *Stephenson v. Smith*, 7 Mo. 633, discussing the validity of patents and the power of courts to decree the land to the party to whom it belongs; *Rose v. Richmond M. Co.*, 17 Nev. 62, 27 Pac. 1112, holding that a District Court in a suit to determine conflicting mining claims can try every question, and the land department cannot take action until the controversy is determined; *Morrill v. Taylor*, 6 Neb. 246, holding a board of commissioners had no authority in taxation, unless the requirement as to oath of the assessor was complied with; *Arberry v. Beavers*, 6 Tex. 469, 55 Am. Dec. 796, holding the action of a chief justice in ordering an election under power given in a statute, cannot be controlled by mandamus; *Wightman v. Karsner*, 20 Ala. 454, 455, holding that a claim against a county allowed at an unauthorized term of the commissioners court created no liability; *Robertson v. State*, 109 Ind. 83, 10 N. E. 584, holding that where there is no jurisdiction the court will not express an opinion upon the merits. See note to 11 Am. Rep. 439, citing authorities on the power to attack judgments collaterally. Cited generally in *Fraser v. Willey*, 2 Fla. 120, discussing the meaning of the word "decision."

Distinguished in *Kyle v. Evans*, 3 Ala. 483, 37 Am. Dec. 706, holding a justice may, by ~~pat~~rol, authorize another to issue execu-

tion in his name. Not applied, *Smith v. Morrill*, 55 Pac. 825, enjoining a judgment regular on its face, but declared voidable for failure to serve summons on defendant.

Judgments.—Jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on, and brought before the latter by the one claiming the benefit of such proceedings, p. 341.

Upon this proposition also the citing cases are numerous and show many applications of the rule: *Williamson v. Berry*, 8 How. 541, 12 L. 1190, where the rule was applied, although it had been decided by the highest tribunal that the court had jurisdiction; *Burnham v. Webster*, 2 Ware (Dav.), 240, F. C. 2,178, holding there is no presumption in favor of the authority of foreign courts, but it must expressly appear; *Guthrie v. Lowry*, 84 Pa. St. 537, holding in an action on a judgment of a sister State, the record may be contradicted by impeaching the jurisdiction; *Pennywit v. Foote*, 27 Ohio St. 618, 22 Am. Rep. 351, on the point that it may be shown a court did not have jurisdiction, although the record recited that the facts conferring it existed; *Goodman v. Winter*, 64 Ala. 431, on the point that any court before which a judgment is produced as the foundation of a right can and must inquire whether it had jurisdiction; *Chemung Canal Co. v. Judson*, 8 N. Y. 259, holding that the jurisdiction of District Courts of the United States could be inquired into; *Craig v. Andes*, 93 N. Y. 410, holding the proceedings of a county judge under a statute in aid of a railroad may be questioned; *Epping v. Robinson*, 21 Fla. 48, on the point that where a court is of limited jurisdiction everything necessary to give the jurisdiction should appear; *Russell v. Perry*, 14 N. H. 156, where a judgment of a justice of the peace in another State was attacked; *Walker v. Myers*, 36 Tex. 252, on the point that judgments of courts of inferior jurisdiction cannot be aided by presumption; *Clark v. Holmes*, 1 Doug. (Mich.) 394, 399, holding the jurisdiction of inferior tribunals may be inquired into, even when it tends to contradict the minutes and dockets; *Ex parte O'Brien*, 127 Mo. 491, 30 S. W. 161, holding a person committed for contempt by an inferior court can show want of authority and attack the jurisdictional recitals in the commitment; *Pritchett v. Clark*, 5 Harr. 72, dissenting opinion, holding that if the jurisdiction of the court appear of record, it is conclusive; *Kittredge v. Emerson*, 15 N. H. 266, on the point that the jurisdiction of courts to issue injunctions may be inquired into; *Guaranty T. Co. v. Green Cove R. R. Co.*, 139 U. S. 147, 35 L. 120, 11 S. Ct. 516, holding a decree in foreclosure, based upon an insufficient publication of notice, was void; *Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 593, holding a judgment may be impeached by showing one was not served with process and did not appear; *Putnam v. Man*, 3 Wend. 205, 20 Am. Dec. 687, holding evidence to impeach a return of a sheriff

by showing that a summons was not personally served, was admissible; *Mastin v. Gray*, 19 Kan. 463, 465, 469, 27 Am. Rep. 152, 155, 158, where a title under sheriff's deed was impeached by showing that a return of service of summons was false; *Morrow v. Weed*, 4 Iowa, 89, and *Cooper v. Sunderland*, 3 Iowa, 129, 130, 134, 66 Am. Dec. 61, 62, 65, both holding that the sufficiency of a petition calling into action the power or jurisdiction of a court, cannot be questioned collaterally.

In addition to the foregoing, are the following which assert and rely upon the syllabus principle: *Greenvault v. Farmers & Mechanics' Bank*, 2 Doug. (Mich.) 507, where a court held a judgment void because a writ was issued without the affidavit required by statute; *Moore v. Edgefield*, 32 Fed. 501, holding that in an application for a mandamus for the levy of a tax to pay a judgment, it is competent to show that the judgment was obtained coram non iudice; *Polk v. Steamer J. W. French*, 5 Hughes, 432; S. C., sub nom. *The J. W. French*, 13 Fed. 919, holding a court may examine collaterally into the jurisdiction of another court to pass upon questions of title to property; *Adams v. Terrill*, 4 Woods, 341, 4 Fed. 800, where the proceedings of a bankruptcy court were attacked collaterally for a want of jurisdiction; *Thompson v. Whitman*, 18 Wall. 467, 21 L. 901, holding that whether an offense took place within the county where the prosecution took place, may be inquired into; *Holmes v. Oregon, etc., R. R. Co.*, 9 Fed. 245, declining to re-examine State court's decision, adjudging that a testator was a resident within its jurisdiction; *In re Tarble*, 25 Wis. 397, 3 Am. Rep. 88, holding State courts could inquire upon habeas corpus into the cause of detention of a prisoner held by a military officer; *United States v. Stowell*, 2 Curt. 156, F. C. 16,409, upon the necessity on an indictment for obstructing a marshal, of the facts necessary to the power to issue the process appearing; *In re Reynolds*, 20 Fed. Cas. 596, holding that the decision of a State court remanding a prisoner in habeas corpus is no bar to a writ by a Federal court; *Case of the Electoral College*, 1 Hughes, 587, F. C. 4,336, holding that where it clearly appears that a State court exceeded its authority in committing petitioners, they will be released in a Federal court; *Swift v. Meyers*, 37 Fed. 43, 13 Sawy. 591, 592, holding the judgment of a State court may be collaterally questioned in the national court in the same State for want of jurisdiction; *Kimball v. Merrick*, 20 Ark. 13, holding that if the transcript fails to show jurisdiction of the person, it cannot be aided by other evidence; *Mason v. Russell*, 1 Tex. 728, holding that where a commissioner for a certain colony issued a grant, parol evidence was admissible to show the land did not lie within the colony; *Doolan v. Carr*, 125 U. S. 627, 31 L. 847, 8 S. Ct. 1232, holding that want of power in an officer of the land office to issue a land patent may be shown in an action at law; *Walker v.*

Hendrick, 18 Ill. 571, on the point that the decision of a register and receiver as to his jurisdiction is open to attack; Ludeling v. Vester, 20 La. Ann. 436, holding that where conflicting patents have been issued, courts may pass upon their validity. Cited without special application of the rule, in Moch. v. Insurance Co., 4 Hughes, 119; S. C., 10 Fed. 706.

Acknowledgments.—Where the acknowledgment of a wife fails to show her privy examination, separate and apart from her husband, the County Court of Kentucky has no authority to order an after certificate of the wife to be made and recorded, p. 341.

Cited in Doe ex dem. Sprague v. Litherberry, 4 McLean, 446, F. C. 13,251, on the power to make amendments at the common law.

Acknowledgments.—A clerk has no authority to alter the record of his certificate of the acknowledgment of a deed at any time after the record was made, p. 341.

Cited in Munn v. Lewis, 2 Port. 28, on the point that when a certificate is made, the authority is exhausted and the act becomes fixed and unalterable; Bours v. Zachariah, 11 Cal. 295, 297, 70 Am. Dec. 784, 786, and Griffith v. Ventress, 91 Ala. 372, 24 Am. St. Rep. 923, 8 So. 314, 11 L. R. A. 195, and n., both holding officer cannot correct certificate at subsequent time, nor attach new and valid certificate; Jennings v. Dockham, 99 Mich. 258, 58 N. W. 68, holding that an attempted correction of the record of a deed by a marginal entry signed by a deputy register was not authorized; McMullen v. Eagan, 21 W. Va. 246; where an officer rewrote his certificate and signed the same, dating it as of the time of the first acknowledgment; Harback v. Tyrrell, 48 Neb. 519, 67 N. W. 487, 37 L. R. A. 437, on the point that act of officer in taking acknowledgment is a ministerial one. See note to 52 Am. Dec. 521, 522, discussing the power to amend certificates of acknowledgment.

Referred to in Jordan v. Corey, 2 Ind. 388, 52 Am. Dec. 519, holding that officers have a right and it is their duty to correct at any time any mistake in their certificates. And see note, 52 Am. Dec. 519, 520, showing conflict of authorities.

1 Pet. 343-350, 7 L. 171, SPRATT v. SPRATT.

Aliens.—The act of Maryland of December 19, 1791, providing that any foreigner may take, hold and convey land is an enabling act, and applies to those only who could not take without it, p. 349.

Cited in Kershaw v. Kelsey, 100 Mass. 574, 97 Am. Dec. 136, on the point that the title of aliens is left to the States, except so far as controlled by treaties.

Aliens.—A foreigner who becomes a citizen is no longer a foreigner within the view of the act of Maryland of December 19,

1791, providing that any foreigner may take, hold and convey land; his after-purchased lands vest in him as a citizen, not by virtue of this act, p. 349.

Cited in *Kennedy v. Wood*, 20 Wend. 232, on the point that after an alien becomes a citizen, from that time he holds as a citizen; *Dixon v. Walker*, 30 Fed. Cas. 1076, holding, that after a foreigner becomes a citizen, property acquired by him in the District of Columbia cannot be transmitted to foreign heirs; *Matthew v. Rae*, 3 Cr. C. C. 699, F. C. 9,284, holding an alien as such under the Maryland act of 1791, had a right to purchase and hold and transmit to his heirs. Cited generally in *Hogan v. Kurtz*, 94 U. S. 777, 24 L. 319, on the power of transmission and inheritance from aliens.

Aliens.—Where a lot is acquired by a foreigner, under Maryland act of 1791, enabling foreigners to take, hold and transmit to heirs, the power of transmission is not restricted to his character as a foreigner, but belongs to him as a person taking under the act, and is co-extensive with the power to take; this capacity is given absolutely by the act and is not affected by his becoming a citizen, pp. 349, 350.

Cited in *Geofroy v. Riggs*, 133 U. S. 266, 33 L. 644, 10 S. Ct. 296, holding that a citizen of France can take land in the District of Columbia by descent from a citizen of the United States; *Spratt v. Spratt*, 4 Pet. 409, 7 L. 902, holding the statute authorizing the descent to alien heirs of lands held by aliens did not apply to lands purchased, but for which no deed was executed before becoming a citizen.

Explained in *Colgan v. McKeon*, 24 N. J. L. 573, holding, under New Jersey law, alien could not devise property to an alien.

1 Pet. 351-375, 7 L. 174, *BELL v. MORRISON*.

Depositions.—The act of congress of 1789, permitting the taking of depositions, being in derogation of the common law, is strictly construed, and compliance with all the requisites of law must be shown before such testimony is admissible, p. 356.

A number of citing cases affirm this holding and follow and apply its principle, as follows: *United States v. Tilden*, 10 Ben. 574, F. C. 16,522, where the court said the statute was still to have a fair and reasonable construction with regard to its purpose; *Goodhue v. Grant*, 1 Pinn. 558, holding a certificate must plainly and satisfactorily show a compliance with the statute; *Bowman v. Sanborn*, 25 N. H. 103, holding unfairness or impropriety may be shown by evidence aliunde; *Allen v. Blunt*, 2 Wood. & M. 135, F. C. 217, where no notice was given to the party or counsel; *Patterson v. Fagan*, 38 Mo. 79, holding a deposition not showing statutory notice cannot be read; *Carrington v. Stimson*, 1 Curt. 438, F. C. 2,450, holding service of notice by leaving a copy at the place of abode insufficient; *Great*

Fall M. Co. v. Mathes, 5 N. H. 575, holding a notice of taking need not state the time when the court, where the action is pending, is to be holden; Pickard v. Polhemus, 3 Mich. 187, holding, that if the fact of due notice existed, such fact being proved in the court to which the deposition is returned, entitles it to be read; Lawrence v. Finch, 17 N. J. Eq. 241, and Western Union T. Co. v. Collins, 45 Kan. 94, 25 Pac. 189, 10 L. R. A. 518, and n., depositions suppressed because oath did not conform to the statute; Jones v. Smith, 6 Iowa, 234, holding a deposition will be suppressed where it was taken and returned by an officer not named; Thompson v. Wilson, 34 Ind. 96, where a deposition was suppressed because taken before an officer not authorized to take depositions in the State where it was to be read; In re Thomas, 35 Fed. 823, holding an irregularity in taking the testimony is waived by appearance and cross-examination; Voce v. Lawrence, 4 McLean, 205, F. C. 16,979, holding a mistake in the name of the plaintiff or defendant is no ground for rejecting a deposition; United States v. Julian, 162 U. S. 325, 40 L. 984, 16 S. Ct. 801, on the point that a certificate to depositions is required; The Cypress, 1 Blatchf. & H. 89, F. C. 3,530, where a deposition was not certified in conformity to the statute; Stewart v. Townsend, 41 Fed. 123, holding the omission of a notary to certify that he is not interested is not ground for suppression; Harris v. Wall, 7 How. 704, 12 L. 879, holding an omission in a certificate of the reasons for the taking could not be supplied; Travers v. Jennings, 39 S. C. 412, 17 S. B. 850, holding it was not a sufficient sealing to merely seal it in an envelope. Cited generally in Fowler v. Merrill, 11 How. 393, 13 L. 743, same opinion in Hemp. 615, F. C. 9,469, where objections to a deposition were overruled on the authority of the principal case; McGinnis v. Egbert, 8 Colo. 48, 5 Pac. 656, where it was contended that the rule as to strict construction of statutes applied to a statute relating to mining locations.

Distinguished in Union Pacific Co. v. Reese, 56 Fed. 290, 15 U. S. App. 92, holding a deposition would not be suppressed on the sole ground that it was taken during a term at which the case might be tried; Bird v. Halsy, 87 Fed. 677, holding law inapplicable to depositions in foreign country.

Depositions.—The certificate of the magistrate taking a deposition is good evidence of the facts stated therein so as to entitle the deposition to be read to the jury, if the necessary facts are there sufficiently disclosed, p. 356.

Cited in Patapsco Ins. Co. v. Southgate, 5 Pet. 618, 8 L. 249, and Merrill v. Dawson, Hemp. 592, F. C. 9,469, holding the statement in the certificate is sufficient evidence that the witness lived more than a hundred miles from the place of trial; Merrill v. Dawson, Hemp. 615, F. C. 9,469; same opinion, 11 How. 393, 13 L. 743, where objections to a deposition were overruled on the authority of the principal case.

Depositions.—The reducing of the deposition to writing in presence of the magistrate taking it, is a fact made material by the statute, and proof of it is a necessary preliminary to the right of introducing it at the trial, p. 356.

Cited in *Sayre v. Sayre*, 14 N. J. L. 490, 492, and *Blake v. Smith*, 3 Fed. Cas. 605, both holding a certificate that the deposition was reduced to writing by the one taking it or the witness in his presence is necessary.

Depositions.—In order to admit a deposition in evidence, something more than a mere presumption should exist that it was rightly taken; there ought to be direct proof that the requisitions of the statute have been fully complied with, p. 356.

Cited in *Randall v. Venable*, 17 Fed. 165, holding depositions, taken according to State statute, inadmissible in a Circuit Court where the Federal law conflicts.

Statutes.—Supreme Court will follow State construction of State statute of limitations, and not the settled construction of the English statute from which it was substantially taken, p. 360.

Statute of limitations is a wise and beneficial law not designed merely to raise a presumption of payment of a just debt from lapse of time but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of witnesses, p. 360.

This proposition has been indorsed by many subsequent citing cases, as follows: *Ten Eyck v. Wing*, 1 Mich. 46, holding that the statute is to be favored; *Williams v. Williams*, 5 Ohio, 445, on the point that such statutes should be construed according to the expressed intent; *Sanders v. Robertson*, 23 Miss. 391, on the point that a defense of the statute is uniformly regarded as meritorious; *Paschal v. Davis*, 3 Ga. 265, holding it was the duty of courts to so construe the statute as to prevent the mischief intended to be remedied and not to create exceptions; *Willison v. Watkins*, 3 Pet. 54, 7 L. 600, applying the doctrine of the principal case to the relation of landlord and tenant; *Southard v. Brady*, 36 Fed. 560, holding a claim in admiralty which would be barred at law is barred by analogy on the ground of laches; *Campbell v. Haverhill*, 155 U. S. 617, 39 L. 283, 15 S. Ct. 220, applying the statute to actions at law for the infringement of patent letters; *McLellan v. Crofton*, 6 Me. 347, construing the exception in the statute relating to merchant's accounts; *Gulick v. Princeton, etc., Tp. Co.*, 14 N. J. L. 548, where the question was whether mutual accounts were saved from the operation of the statute; *Savings Bank v. Ladd*, 40 N. H. 472, construing a section providing that actions upon notes secured by mortgage may be brought as long as suit may be brought on the mortgage; *Tate v. Hawkins*, 81 Ky. 581, 50 Am. Rep. 184, holding a vendee

cannot, by payments, extend the statute on a vendor's lien as against a remote vendee; *Johnson v. Wilson*, 29 Gratt. 388, where the court considered the effect of a devise for the payment of debts on the statute; *Merrill v. Monticello*, 66 Fed. 166, holding that in cases of implied or constructive trusts, lapse of time is as complete bar in equity as at law; *Hatfield v. Montgomery*, 2 Port. 77, holding that in case of fraud a party, after knowledge, must not delay unreasonably; *Adams v. Davis*, 47 Ga. 341, holding that where one sued within time, dismissed and then sued again he was not saved; *Snoddy v. Cage*, 5 Tex. 111, construing the exception of absence from the State; *Chambers v. Garland*, 3 G. Greene, 322, holding an offer to pay the debt in land was not a sufficient acknowledgment; *Crawford v. Childress*, 1 Ala. 494, where there was an acknowledgment before the statute had run; *Peck v. Mallamus*, 10 N. Y. 522, where the court said that a party asserting a State claim against bona fide purchasers is held to his strict rights; *Harrison v. Heflin*, 54 Ala. 560, holding that after twenty years, a claim against a surety of an administrator is presumed to have been discharged; *Broadway v. Pool*, 19 La. 262, holding a plea of prescription may be filed or amended at the trial as it is a plea that is favored; *Fain v. Garthright*, 5 Ga. 13, holding that a bond for title is color of title and possession under it is adverse. See note to 50 Am. Dec. 391, discussing the constitutionality of statutes of limitations.

Statute of limitations.—If bar of statute is sought to be removed by proof of a new promise, that promise ought to be proved in clear and explicit manner, and be in terms unequivocal and determinate; if conditions are annexed, they ought to be shown to be performed, p. 362.

The citations collate a large number of cases involving attempt to resuscitate barred claims by new promises. They show wide approval and indorsement of the foregoing doctrine. Among them are the following: *Smith v. Fly*, 24 Tex. 353, 76 Am. Dec. 113, holding an agreement containing no express promise nor an acknowledgment upon which the promise can be implied is insufficient; *Buckner v. Johnson*, 4 Mo. 101, holding there should either be an express promise to pay a particular sum or an acknowledgment of a real subsisting debt; *Crawford v. Childress*, 1 Ala. 489, on the point that if the expression be equivocal it ought not to be received; *Adams v. Tucker*, 6 Colo. App. 400, 40 Pac. 785, holding an implied promise is created by a clear and unqualified acknowledgment and a payment on account removes the bar; *Strickland v. Walker*, 37 Ala. 386, 387, holding that while the promise must be clear and explicit, the evidence of it need not be clear and explicit; *Davis v. Herring*, 6 Mo. 22, holding an unconditional promise to renew notes was sufficient; *Green v. Coos Bay W. R. Co.*, 10 Sawy. 629, 23 Fed. 70, holding that from an acknowledgment under circumstances in-

dicating a willingness to pay, the law will imply a promise; *Evans v. Carey*, 29 Ala. 107, construing expressions regarded as an express promise; *McNab v. Stewart*, 12 Minn. 409, and *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 606, both holding a conditional promise does not suffice unless performance of condition is shown; *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 173, where a defendant offered to pay certain sums at certain times; *Allcock v. Ewen*, 2 Hill L. 327, where a defendant said "his partner ought to have paid," and offered to pay the principal; *Hamilton v. Carnes*, 4 Cr. C. C. 53¹, F. C. 5,977, where there was an offer to plaintiff's agent upon terms the agent was not authorized to accept; *Chambers v. Garland*, 3 G. Greene, 325, holding an offer to pay the debt in land was insufficient; *Bates v. Bates*, 33 Ala. 105, where a debtor declared he had once offered to settle in lands and either would or could now if the administrator were authorized; *Aldrette v. Demitt*, 32 Tex. 578, where one did not acknowledge nor promise to pay except upon the failure to produce a receipt; *Norton v. Colby*, 52 Ill. 202, where a defendant said if his notes could be produced he would pay them, and on being produced walked away; *Allen v. Webster*, 15 Wend. 289, where defendant said he would pay anything found due on an arbitration, also saying he owed nothing, but money was owed him; *Ten Eyck v. Wing*, 1 Mich. 47, 48, holding a new promise would not be inferred from a stipulation to take and state an account; *Leigh v. Linthecum*, 30 Tex. 103, on the point that on a promise to pay anything found due on a settlement, a settlement is necessary; *Bell v. Crawford*, 8 Gratt. 117, 132, on the point that a mere promise to settle accounts in order to ascertain and pay what is due is not sufficient; *Quarrier v. Quarrier*, 36 W. Va. 317, 15 S. E. 156, holding a promise to pay an "agreed balance on your judgment," was not sufficient; *Pearson v. Darrington*, 32 Ala. 258, where a debtor said that when the notes were presented he would make a satisfactory arrangement and payment of the principal ought to be satisfactory; *Penley v. Waterhouse*, 3 Iowa, 439, holding an expression of inability to pay, coupled with an acknowledgment, would not destroy its effect; *Young v. Wetzell*, 3 Cr. C. C. 359, F. C. 18,176, where one declared that he would pay the debt if not arrested on other judgments and compelled to clear out under the insolvent act; *Fort Scott v. Hickman*, 112 U. S. 164, 28 L. 641, 5 S. Ct. 64, holding that an acknowledgment must be made not to a stranger but to the creditor or some one acting for him; *Trammel v. Salmon*, 2 Bail. L. 311, holding declarations to third persons, by an intestate, would not suffice; *Moore v. Bank of Columbia*, 6 Pet. 92, 94, 8 L. 331, 332, where a defendant said, in a general conversation, that he owed a certain sum which he could pay at any time; *Dinguid v. Schoolfield*, 32 Gratt. 807, where a deposition by a debtor in a case in which the obligee was not a party, was held sufficient; *Biddell v. Brizzolara*, 56 Cal. 382, where a purchaser assumed the mortgage debt

and the court considered its effect as a new promise on the part of the mortgagor.

Others, which cite and rely upon the rule, are: *Bloodgood v. Bruen*, 8 N. Y. 373, holding allegations of general admissions that the debt was due, insufficient; *Hanson v. Towle*, 19 Kan. 281, holding a mere reference to an indebtedness and implying no disposition to question its validity, insufficient; *Bridges v. Stephens*, 132 Mo. 537, 34 S. W. 558, on the point that the admission must be of such a present indebtedness that a promise to pay would irresistibly be implied; *Belles v. Belles*, 12 N. J. L. 347, on the point that if anything be said to repel the presumption of a promise to pay, it is insufficient; *Cadmus v. Polhemus*, 4 Fed. Cas. 983, and *Bradley v. Field*, 3 Wend. 273, both holding that if a defendant admits the debt, but protests against his liability, it is not sufficient; *Belote v. Wynne*, 7 Yerg. 542, 543, holding an admission that a debt is due, accompanied with a refusal to pay, is not sufficient; *Thurmond v. Trammell*, 28 Tex. 379, 91 Am. Dec. 325, where a defendant acknowledged plaintiff's title to personalty, but evidenced no intention to submit to it; *Kirk v. Williams*, 24 Fed. 446, where one gave an unsigned memorandum relating the facts, but without any promise to pay; *Stafford v. Richardson*, 15 Wend. 306, where an attorney expressed a determination to pay the demand if he had not paid it once but strenuously denied his liability; *Young v. Monpoe*, 2 Bail. L. 281, where an indorser said he had not been served with notice, but that if he had been he would have paid it; *Purdy v. Austin*, 3 Wend. 190, 192, where one said: "I owe him no such money," and used other similar expressions; *McLean v. Thorp*, 4 Mo. 259, holding an acknowledgment, by defendant, that plaintiff had not received his demand would not be sufficient; *Love v. Hackett*, 6 Ga. 490, where a surety promised the holder, if he would not sue until a bill to marshal the assets of the principal was determined, he would pay; *Braithwaite v. Harvey*, 14 Mont. 224, 226, 43 Am. St. Rep. 635, 636, 36 Pac. 42, 43, 27 L. R. A. 119, debtor wrote if he did hear he would tender the amount and was ready to pay when he could safely do so; *Stewart v. Reckless*, 24 N. J. L. 429, holding conversations, by one discharged in bankruptcy, declaring he intended to pay, were not sufficient; *Sears v. Hicklin*, 3 Colo. App. 334, 33 Pac. 138, and *Smith v. Moulton*, 12 Minn. 354, both holding a mere general acknowledgment, where plaintiff held several claims, was not sufficient; *Whitney v. Reese*, 11 Minn. 147, 148, where the court said the acknowledgment must be broad enough to include the particular debt; *Carr v. Hurlburt*, 41 Mo. 268, where letters contained general acknowledgments, but referred to no special or particular debt; *Keener v. Crull*, 19 Ill. 191, holding a new promise may arise out of such facts as identify the debt and show a willingness to pay; *Stansbury v. Stansbury*, 20 W. Va. 29, where the effect of a devise of a certain sum in the value of land for services rendered

was considered; *Smith v. Talbot*, 11 Ark. 670, where the defendant made out an account against plaintiff, credited him with the note sued on and struck a balance; *Hidden v. Cozzens*, 2 R. I. 402, 60 Am. Dec. 93, and *In re Hardin*, 1 Bank. Reg. 98, 11 Fed. Cas. 489, both holding a debt is not revived by its entry on the schedule of liabilities of a bankrupt; *White v. Jordan*, 27 Me. 379, and *Livermore v. Rand*, 26 N. H. 91, both holding a mere payment of money is not sufficient to take an account out of the statute; *Holt v. Gage*, 60 N. H. 541, holding the taking of security by a surety on a note from a principal is not of itself an admission to the holder; *Shepherd v. Thompson*, 122 U. S. 236, 237, 30 L. 1157, 7 S. Ct. 1232, holding a note is not taken out of the statute by a writing pledging a claim against the government.

In addition to the foregoing there remain the following, which affirm and rely upon the rule: *Kensington Bank v. Patton*, 14 Pa. St. 481, 53 Am. Dec. 565, where a defendant said he would come up to the bank in a few days and make some arrangement; *Brown v. State Bank*, 10 Ark. 137, where a letter referred to a note and expressed readiness to pay part of it; *De Forest v. Hunt*, 8 Conn. 185, holding a letter regretting inability on account of demands was an acknowledgment; *Kuhn v. Mount*, 13 Utah, 113, 44 Pac. 1038, where the defendant wrote that if anything turned up so that he could make the money, plaintiff could have it; *Aylett v. Robinson*, 9 Leigh (Va.), 49, where a testator said, "I am too unwell to attend to business now, but when I am better I will settle your account;" *Rowe v. Marchant*, 86 Va. 182, 9 S. E. 997, where the statement was "the entries above written * * * are correct;" *Ennis v. Pullman P. C. Co.*, 165 Ill. 179, 46 N. E. 444, holding the words "I will settle this thing" were not sufficient; *Abrahams v. Swann*, 18 W. Va. 280, 41 Am. Rep. 692, holding a writing "You shall be paid as I get the money over my bread and meat" and similar expressions were sufficient; *Bailey v. Crane*, 21 Pick. 324, where a letter contained an acknowledgment but with such qualifications as to exclude any implication of a promise; *Switzer v. Noffsinger*, 82 Va. 523, where letters not containing an unqualified acknowledgment and a promise to pay were held not sufficient; *Johnston v. Hussey*, 89 Me. 495, 36 Atl. 994, where a letter relied upon did not show any words of promise to pay or expressly acknowledge any liability; *Shaw v. Newell*, 2 R. I. 267, 269, where defendant said, "I will pay you all I owe you within a year;" *Sutton v. Burruss*, 9 Leigh, 385, 33 Am. Dec. 248, holding an acknowledgment that items of plaintiff's account are just but that he has offsets, and a subsequent promise to settle all differences and not take advantage of the statute will not remove the bar; *Elliott v. Leake*, 5 Mo. 209, 210, 32 Am. Dec. 315, 316, where one asserted "he never denied it" and "the money was just" and expressed a willingness to make a deed; *Head v. Manners*, 5 J. J. Marsh. 260, where a witness testi-

fied that the defendant had said the work had been done and ought or should be paid for; *Cocks v. Weeks*, 7 Hill, 46, where a defendant said the demand ought to have been paid and that he would pay it as soon as he conveniently could; *Wilcox v. Williams*, 5 Nev. 216, 218, holding a promise to pay a debt when able, insufficient of itself to take a case out of the statute; *Wakeman v. Sherman*, 9 N. Y. 91, 93, where a defendant said he felt in honor bound to pay and would at the end of one year commence paying it if successful in business; *Graham v. Hunt*, 8 B. Mon. 9, considering the effect of a new promise by a debtor discharged in bankruptcy; *Sprogel v. Allen*, 38 Md. 336, discussing the effect of the statute on mutual accounts; *Newhouse v. Redwood*, 7 Ala. 599, on the point as to when the effect of evidence of a new promise should be left to the jury.

See also note to 10 Am. Dec. 572, 573, 35 Am. Rep. 417, and 58 Am. Rep. 750, citing authorities on the sufficiency of acknowledgments; note to 39 Am. St. Rep. 740, discussing moral obligation as a consideration to uphold express promise; and notes to 13 Am. Dec. 445, and 3 Am. Dec. 733. Cited generally in *Vankeuren v. Parmelee*, 2 N. Y. 531, 51 Am. Dec. 328, on the sufficiency of an acknowledgment.

Not approved in *Henry v. Root*, 33 N. Y. 532, 533, 534, where the court said a mere acknowledgment of the existence of a debt is sufficient.

Statute of limitations.—If there be no express promise to pay a debt barred by the statute, but a promise by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay, p. 362.

Cited and holding relied upon in *Somerset v. Veghte*, 44 N. J. L. 514, on the point that the circumstances must amount to an unqualified admission of the continued existence of the debt and not negative willingness to pay; *Conover v. Conover*, 1 N. J. Eq. 411, holding that if there be circumstances repelling presumption of willingness to pay or if expressions be vague it is not sufficient; *Hunter v. Kittredge*, 41 Vt. 368, holding that from an unqualified acknowledgment unaccompanied by any unwillingness to pay, a new promise may be inferred; *Jordan v. Jordan*, 85 Tenn. 566, 3 S. W. 898, holding an express waiver of the statute, supported alone by the moral obligation, sufficient; *Hancock v. Bliss*, 7 Wend. 269, where a debtor admitted a demand, but declared his inability to pay and said he hoped to see his creditors and do something about it; *Stafford v. Bryan*, 3 Wend. 536, holding that if effect can be given to admissions without referring them to the particular demand they will not constitute a new promise; *Bissell v. Jaudon*, 16 Ohio St. 508, holding consent to a decree ordering a sale of mortgaged premises and that the proceeds be applied on the judgment

was an acknowledgment; *Gage v. Dudley*, 64 N. H. 274, 9 Atl. 788, holding items of a mutual account constitute of themselves no admission; *Courson v. Courson*, 19 Ohio St. 460, discussing the effect of new items of a mutual account; *McNear v. Roberson*, 12 Ind. App. 93, 39 N. E. 898, where a letter acknowledged a debt with a request not to exact the entire amount and a statement that if given time he would pay; *Goldsby v. Gentle*, 5 Blackf. 438, holding the words "plaintiff might have paid long ago if he had not treated me badly," insufficient; *Russell v. Copp*, 5 N. H. 155, where a defendant said he thought he had paid it and if anything was due he supposed he must pay it; *Crowder v. Nicholl*, 9 Yerg. 454, holding a statement by one that he would fix it or arrange it, was not sufficient; *Webber v. Cochrane*, 4 Tex. 36, where the acknowledgment was "the within obligation and interest is just, due and unpaid;" *Ventris v. Shaw*, 14 N. H. 425, where the defendant said "he guessed the note was outlawed, but that would make no difference;" *Russell v. Davis*, 51 Minn. 483, 53 N. W. 767, where there was an indorsement on one of two notes attached together, "this note and the one attached are all right and I think I can pay one hundred dollars on them next fall;" *Ridgway v. English*, 22 N. J. L. 417, where a testator said of his daughter that she had been a good housekeeper, that "she had never been paid, but he intended she should be;" *Broddie v. Johnson*, 1 Sneed, 468, holding an agreement to submit matters to a third person and to pay whatever may be found due would not revive a debt; *Stockett v. Sasscer*, 8 Md. 381, holding that where there are disputed accounts an agreement to refer will not remove the bar; *Toothaker v. Baulder*, 13 Colo. 227, 22 Pac. 471, where, in an action against a city on bonds, it was attempted to remove the bar by showing the payment of coupons; *Carroll v. Forsyth*, 69 Ill. 131, where the promise was not to the creditor, but to one from whom he had borrowed money to repay him such loan.

Distinguished in *Hopkins v. Stout*, 6 Bush (Ky.), 386, where the court considered the effect of partial payment of a note as an acknowledgment.

Statutes.—In the construction of local statutes, the Supreme Court respects and follows the judgments of local tribunals, p. 363.

Cited in *Inglis v. Trustees, etc., of Sailors' Snug Harbor*, 3 Pet. 128, 7 L. 627, holding that it is the uniform rule of the Supreme Court with respect to the title to apply the same rule applied in State tribunals; *Thompson v. Phillips*, 1 Bald. 284, F. C. 13,974, following the construction by a State court on the priority between purchasers under execution; *Balkam v. Woodstock Iron Co.*, 154 U. S. 188, 38 L. 957, 14 S. Ct. 1014, and *Nicolls v. Rogers*, 2 Paine, 440, F. C. 10,260, following the construction of the State courts on the statutes of limitations; *Bauserman v. Blunt*, 147 U. S. 652, 37 L. 318, 13 S. Ct. 469, holding such construction would be followed, although decided the other way by the Circuit Court.

Statute of limitations.—An admission by a debtor of an unliquidated account, on which something is due, but no specific balance being admitted and no document produced at the time from which it can be ascertained, is not sufficient to take the case out of the statute, p. 366.

Cited and affirmed in *Magee v. Magee*, 10 Watts, 173, holding an acknowledgment must be so precise as to preclude hesitation about its meaning; *Blair v. Drew*, 6 N. H. 244, on the point that it ought to clearly appear that an acknowledgment relates to the identical debt sought to be recovered; *Pray v. Garcelon*, 17 Me. 146, holding that a mere general admission that something is due without reference to a particular claim is not sufficient; *Harrison v. Philler*, 32 Miss. 238, holding an acknowledgment of an indefinite balance due on a claim would not save the bar; *United States v. Wilder*, 13 Wall. 256, 20 L. 683, holding an admission of a certain sum as due cannot be converted into a payment on a larger sum, so as to take the larger sum out of the statutes.

Distinguished in *Eastman v. Walker*, 6 N. H. 369, holding a declaration by the maker of a note that something was due which he was ready to pay was sufficient. Commented on in *Conway v. Reyburn*, 22 Ark. 291, 292, 293, 294, 298, 299, 301, holding that an acknowledgment of indebtedness on a demand without specification of the amount due removes the bar.

Partnership.—The act of each partner during the continuance of the partnership and within the scope of its objects binds all others, p. 370.

Cited in *Gulick v. Gulick*, 14 N. J. L. 582, holding the acts and assumptions of one partner in relation to any of the partnership dealings will bind him and his partner.

Partnership.—A dissolution puts an end to the authority of a partner, except to settle partnership concerns already existing and distribute the remaining funds, pp. 370, 371.

This doctrine is affirmed and variously applied by the citing cases, as follows: *Woodson v. Wood*, 84 Va. 485, 5 S. E. 280, holding no partner can create a cause of action against the other partners, except by a new authority; *Vanzant v. Kay*, 2 Humph. 110, holding a note by one partner would not be binding on the other; *National Bank v. Norton*, 1 Hill; 575, and *Hurst v. Hill*, 8 Md. 404, 63 Am. Dec. 706, holding a partner cannot renew a firm note after dissolution; *Lockwood v. Comstock*, 4 McLean, 384, F. C. 8,449, holding that neither partner can by any note in writing bind the firm, even for a firm debt; *Merrit v. Pollys*, 16 B. Mon. 356, holding that one partner cannot bind his former co-partner by any writing creating a new cause of action or for the renewal or liquidation of a partnership note or account; *Humphreys v. Castam*, 5 Ga. 167, 48 Am. Dec. 248, holding a partner's indorsement of a note in the

name of a firm, though in payment of a debt of the firm, is not binding; *Palmer v. Dodge*, 4 Ohio St. 35, 62 Am. Dec. 278, holding a liquidating partner has no power to extend time for payment of debts, to increase their amounts or create new ones; *Miller v. Niemerick*, 19 Ill. 174, holding that statements of one partner are incompetent to charge the others; *Hogg v. Orgett*, 34 Pa. St. 348, holding the admissions of a partner bind no one but himself; *Feigley v. Whittaker*, 22 Ohio St. 612, 613, 10 Am. Rep. 782, 783, holding admissions of a partner in adjusting unsettled business were evidence to charge the other; *Doughton v. Tillay*, 4 Blackf. 435, as to the effect of the admissions of a partner, the court not deciding the question; *Hall v. Lanning*, 91 U. S. 169, 23 L. 274, holding that one partner could not cause appearance of another partner to be entered; *Lachomette v. Thomas*, 5 Rob. (La.) 175, holding one partner could not use the social name so as to bind the rest, nor bind by an acknowledgment of a debt or account; *First Nat. Bank v. Payne*, 85 Va. 895, 9 S. E. 155, where before checks drawn on defendant firm and for collection sent it by plaintiff bank a partner died, and survivor charged the checks to drawer and credited the amount to plaintiff bank; *Bentley v. White*, 3 B. Mon. 266, 38 Am. Dec. 189, holding authority of a special partner ceases when the particular purpose of the partnership is concluded; *Rose v. Coffield*, 53 Md. 23, 36 Am. Rep. 391, where the effect of want of notice of dissolution was considered. See note to 6 Am. Dec. 574, citing authorities on the partners' powers after dissolution; note to 77 Am. Dec. 115, discussing proceedings to enforce partnership liability where one partner has died.

Statute of limitations.—An acknowledgment of a debt barred by the statute of limitations is a new contract springing out of and supported by the original consideration, p. 371.

Bell v. Morrison has also been extensively relied upon for this principle which the citing cases affirm and apply as follows: *Penley v. Waterhouse*, 3 Iowa, 433, holding that it is as a new promise with the previous debt as a consideration and supports the action independent of the original promise; *Kampshall v. Goodman*, 6 McLean, 193, F. C. 7,605, holding the remedy is on the new promise that the original debt is not revived and is considered only as affording a good consideration; *Bradford v. Spyker*, 32 Ala. 146, on the point that the recovery must be on the new promise only; *Coles v. Kelsey*, 2 Tex. 573, dissenting opinion, where the court considered whether the declaration should be on the new promise or the original obligation; *Coles v. Kelsey*, 2 Tex. 549, 47 Am. Dec. 668, and *Butcher v. Hixton*, 4 Leigh, 525, both holding that a plaintiff must count on the subsequent acknowledgment in his declaration; *Reigne v. Desportes*, Dud. L. 127, holding the promise is a new cause of action which must be declared upon in the words in which it was made; *Howe v. Saunders*, 38 Me. 352, holding where the new promise

varies from the original there should be a count upon the new promise; *Wolffe v. Eberlein*, 74 Ala. 105, 49 Am. Rép. 813, on the point as to the nature of a new promise to pay a debt discharged in bankruptcy; *Depuy v. Swart*, 3 Wend. 140, 20 Am. Dec. 675, holding a new promise to pay a debt discharged in bankruptcy does not renew the old contract; *Cape Girardeau Co. v. Harbison* 58 Mo. 95, and *Huntington v. Babbitt*, 46 Miss. 535, both holding that an administrator could not revive a debt; *Shoemaker v. Benedict*, 11 N. Y. 184, 62 Am. Dec. 97, on the question whether a joint debtor could revive a debt as against the other; *Dickerson v. Turner*, 12 Ind. 230, holding that neither a partner nor a joint contractor can make a new contract; *Exeter Bank v. Sullivan*, 6 N. H. 136, holding that if a debt be admitted but the debtor refuse to pay, no promise can be raised by implication; *Grayson v. Taylor*, 14 Tex. 676, where the question was as to whether a mortgage given was subject to a homestead exemption; *Stubblefield v. McAuliff*, 55 Pac. 638, relying on this principle in holding a husband's acknowledgment of a mortgage debt insufficient to revive it against the wife; *Briscoe v. Anketell*, 28 Miss. 372, 61 Am. Dec. 556, holding a new promise before a note is barred does not create a new contract; *Russell v. Buck*, 11 Vt. 179, dissenting opinion, holding that a promise by one already legally liable if waited on a certain time creates no new liability; *Hubbard v. Bugbee*, 58 Vt. 179, 2 Atl. 597, holding assumpsit lies on a new promise made by a feme who is disovert and capable of binding herself. See note to 8 Am. Dec. 162, citing authorities on the nature of new promise and the form of the declaration. Cited generally in *Johnson v. Albany, etc., R. R. Co.*, 54 N. Y. 427, 13 Am. Rep. 609, on the effect of the statute on the debt. Cited in valuable note, 65 Am. St. Rep. 683, 684, 685, 687, 688, 690, on revival of debt by a joint obligor.

Distinguished in *Foute v. Bacon*, 24 Miss. 166, where the promise was made before the bar and the court said it was merely a continuation of the original promise; referred to in *Woodlie v. Towles*, 9 Baxt. 593, holding that a homestead is not exempt from the payment of a debt contracted before the passage of the homestead law, although the bar is complete if the new promise is made subsequently. Not approved in *Dean v. Hewitt*, 5 Wend. 263, holding a demand revived by the statute is the same after the remedy has been revived.

Statute of limitations.—After the dissolution of a partnership, one partner cannot, by an acknowledgment, revive a debt due by the firm so as to take it out of the statute of limitations, p. 374.

The citations collect the following cases affirming and adopting this rule: *Wilson v. Torbert*, 3 Stew. 304, 21 Am. Dec. 635; *Ellicott v. Nichols*, 7 Gill, 101, 48 Am. Dec. 550; *Van Keuren v. Parmelee*, 2 N. Y. 533, 51 Am. Dec. 329; *Searight v. Craighead*, 1 Peur. & Watts.

138; Meggett v. Jones, 4 Strob. L. 221, 222, dissenting opinion, 229; Muse v. Donelson, 2 Humph. 168, 36 Am. Dec. 310; Belote v. Wynne, 7 Yerg. 544; Speake v. White, 14 Tex. 369, and Yandes v. Lefavour, 2 Blackf. 373, all holding an acknowledgment by one partner after dissolution would not take a case out of the statute as to the other partners; Cooper v. Wood, 1 Colo. App. 106, 27 Pac. 886, holding that no acknowledgment by a surviving partner after the death of his co-partner will revive a debt; Tate v. Clements, 16 Fla. 355, 362, 26 Am. Rep. 711, 716, holding an acknowledgment after dissolution and before a debt was barred did not prevent the reviving as to the others; Cronkhite v. Herrin, 15 Fed. 888; Mayberry v. Willoughby, 5 Neb. 370, 373, 374, 25 Am. Rep. 493, 494, 496, and Burr v. Williams, 20 Ark. 188, all holding that part payment by one partner does not revive a debt as to the other partner; Harper v. Fairley, 53 N. Y. 445, on the distinction between a part payment by a partner during the partnership and one made after dissolution; Conrad v. Buck, 21 W. Va. 407, holding an agreement that one of the partners shall wind up the business does not authorize him to create any new liability; Whitney v. Reese, 11 Minn. 149, where one partner in the course of liquidation signed a writing to the effect that a balance due should not be barred; Kerper v. Wood, 48 Ohio St. 621, 15 L. R. A. 659, and n., member's note will not take a demand out of the statute as to the others; Bloodgood v. Bruen, 8 N. Y. 369, holding one who was a surviving partner and also executor cannot in either relation revive a debt; Bispham v. Patterson, 2 McLean, 90, 92, F. C. 1,441, holding a letter admitting an account is not admissible to bind the firm; Daniel v. Nelson, 10 B. Mon. 318, holding the admissions of one partner are not competent to charge the firm; Willis v. Morrison, 44 Tex. 31, where a charge that if the jury found against one partner they must also find against the other was held incorrect; Western Stage Co. v. Walker, 2 Iowa, 512, 65 Am. Dec. 791, holding a majority of the partners could conduct the business after dissolution, notwithstanding the dissent of the minority; Atwood v. Gillett, 2 Doug. (Mich.) 216, where, after bankruptcy, the partners continued in business and one executed a written acknowledgment of a debt; Thompson v. Richards, 14 Mich. 189, holding the admissions of one of two defendants sued for a joint liability are evidence against him but not against his co-defendant; Leonard v. Hughlett, 41 Md. 387, on the point that no promise by one obligor would revive the remedy on a bill single as against a co-obligor; Biscoe v. Jenkins, 10 Ark. 116, holding that part payment of a debt by one joint and several debtor is not a revival as to the co-debtor; Meitzler v. Todd, 12 Ind. App. 382, 54 Am. St. Rep. 532, 39 N. E. 1046; Oleson v. Wilson, 20 Mont. 549, 63 Am. St. Rep. 642, 52 Pac. 373; Shoemaker v. Benedict, 11 N. Y. 182, 62 Am. Dec. 96; Cowhick v. Shingle, 5 Wyo. 93, 101, 63 Am. St. Rep. 21, 28, 37 Pac. 691, 694, 25 L. R. A. 610; Steel v.

Souder, 20 Kan. 41, and Goudy v. Gillam, 6 Rich. L. 30, all holding payment on note by one maker does not revive note as against other makers; Whipple v. Stevens, 22 N. H. 226, holding that a partial payment by one of two joint debtors does not take the case out of the statute as to the other; Turner v. Thom. 89 Va. 747, 17 S. E. 324, holding a joint obligor is not liable to contribution on a payment under a barred debt; Craig v. Calloway Co. Court, 12 Mo. 101, holding payment of interest by one obligor in a bond before the statute attached took it out of the statute as to the others; Smith v. Irwin, 37 Mo. 175, 90 Am. Dec. 377, holding joint makers are not affected by an allowance of a claim against the estate of a deceased maker and payments thereon; Exeter Bank v. Sullivan, 6 N. H. 134, holding an acknowledgment by one of two sureties did not revive a debt as to the other; Ligan v. Henderson, 1 Bland Ch. 278, holding that where several were liable an acknowledgment must be equivalent to a renewal by all; Whitaker v. Rice, 9 Minn. 18, 86 Am. Dec. 80, holding payment by one joint obligor of interest on a bond before the bar took the case out as against his co-obligor; Kallenbach v. Dickinson, 100 Ill. 438, 441, 443, 446, 39 Am. Rep. 53, 56, 57, 60, and Willoughby v. Irish, 35 Minn. 66, 67, 69, 59 Am. Rep. 299, 300, 302, 27 N. W. 380, 382, both holding a payment by one joint debtor before the statute has run does not affect the other.

Other cases citing and affirming the rule are: Bowdre v. Hampton, 6 Rich. L. 220, 221, holding joint payment is not evidence against another liable by a separate contract for the same debt; Lowther v. Chappell, 8 Ala. 355, 42 Am. Dec. 643, holding the liability of a surety is not revived by the principal's subsequent acknowledgment; Abbott v. North Andover, 145 Mass. 486, 14 N. E. 758, holding a town treasurer had no authority to bind a town by renewal; Frazer v. Perdrieau, 1 Bail. L. 173, the court saying one person could not make another liable for a debt without his consent. See note to 55 Am. Rep. 52, citing authorities on the effect of payment by one of the joint and several makers; note to 6 Am. Dec. 576, citing authorities on the power of a partner to revive liabilities after dissolution; note to 40 Am. St. Rep. 566, discussing at length the rights, liabilities and remedies of partners after the dissolution of the firm; also 13 Am. Dec. 461, note; 65 Am. St. Rep. 683, 684, 685, 687, 688, 690, valuable note on revival of a debt by one of joint obligors.

Distinguished in Cox v. Bailey, 9 Ga. 470, 54 Am. Dec. 360, holding a promise by one of the makers before the statute had operated takes the case out of the statute; Sigourney v. Drury, 14 Pick. 397, holding the payment of interest by the principal promisor in a note took the case out of the statute as to a surety; Miller v. Miller, MacArthur & Mack, 738, 48 Am. Rep. 739, 740, and Shoemaker v. Benedict, 11 N. Y. 193, dissenting opinion, both holding

payments by one of the makers before an action is barred do not affect the others; *Parker v. Merrill*, 6 Me. 47, holding declarations concerning facts transpiring previous to dissolution are admissible against all the members. Referred to in *Greenleaf v. Quincy*, 12 Me. 14, 28 Am. Dec. 146, holding admissions by a partner after dissolution were sufficient to take a case out of the statute; *Shepley v. Waterhouse*, 22 Me. 499, holding that a new promise by one of the several makers of a note revives the debt as to all; *Joslyn v. Smith*, 13 Vt. 357, holding that payments by one joint contractor took a case out of the statute as to the others; *Tillinghast v. Nourse*, 14 Ga. 648, holding a payment on a joint note is sufficient to take it out of the statute as against a co-promisor; *Partlow v. Singer*, 2 Or. 309, holding the Oregon statute revived the old rule that a payment by one joint debtor revived the liability as to all; not followed in *Willis v. Hill*, 2 Dev. & Bat. L. 234, 31 Am. Dec. 414, holding if a debt be proved, declarations by a partner after dissolution removed the bar.

Miscellaneous.—Miscited in *Gatling v. Robins*, 8 Ind. 187, note.

1 Pet. 376-385, 7 L. 185, **MECHANICS' BANK OF ALEXANDRIA v. LYNN.**

Specific performance.—The court ought not to decree performance according to the letter when unconscionable, but may so modify the agreement as to do justice so far as possible and make compliance with such modification a condition of the grant of relief, p. 383.

Cited in *Hulmes v. Thorpe*, 5 N. J. Eq. 429, on the point that the court may modify the agreement so as to do justice if circumstances require it; *Elfelt v. Hart*, 1 McCrary, 16, 1 Fed. 269, holding that where a contract is tainted with fraud, it may be amended and equity would enter a decree which would be just; *Wabash & E. Canal v. State*, 7 Ind. 183, on the point that equity cannot dispense with a statute on a contract but it may use discretion in regard to enforcing it; *Fitzpatrick v. Beatty*, 1 Gilm. 468, on the point that equity will not enforce a contract founded in fraud or mistake; *Palo Alto Co. v. Harrison*, 68 Iowa, 90, 26 N. W. 19, holding a contract founded in fraud or mistake or not supported by an adequate consideration will not be enforced; *Morrison v. Pray*, 21 Ark. 116, holding mere naked hardness of the bargain would not prevent its enforcement; *Wallace v. Rappleye*, 103 Ill. 259, on the point that a change of circumstances may be regarded before decreeing performance; *Daughdrill v. Edwards*, 59 Ala. 429, where there was a question as to the enforcement of a contract payable in Confederate money; *Miami Exp. Co. v. Bank of the United States*, Wright, 253, on the point that if a conveyance is a mortgage it cannot be changed as against intervening interests.

Equity pleading.— If a bill charges notice an answer must be given without special interrogatory; but a defendant is not bound to answer an interrogatory not warranted by some matter contained in a former part of the bill, p. 383.

Judgments.— Where a judgment debtor comes into court asking protection on the ground that he has satisfied the judgment, the court may modify or grant his prayer upon such conditions as justice demands, p. 384.

Cited in *Veazie v. Williams*, 8 How. 161, 12 L. 1030, where false steps were taken to enhance the price of property sold at auction and a party sought relief in equity.

Miscellaneous.— Miscited on the construction of a devise in *Jenkins v. Merritt*, 17 Ala. 322, and in *Perkins v. Currier*, 3 Wood. & M. 80, F. C. 10,985.

1 Pet. 386-454, 7 L. 189, *CONARD v. ATLANTIC INS. CO.*

Bottomry and respondentia.— That a borrower at respondentia applies the money in discharge of a prior loan does not make any difference as to the legal right of the parties, p. 436.

Cited in *The Brig Draco*, 2 Sumn. 188, F. C. 4,057, holding it is not necessary to a bottomry bond that the money be advanced for necessities. Cited generally in *The Unicorn*, 5 Hughes, 82, F. C. 9,849, on the definition of bottomry, the court construing the terms loss, average and salvage in maritime contracts.

Distinguished in *Greeley v. Waterhouse*, 19 Me. 14, 36 Am. Dec. 730, holding valid bottomry bonds may be executed at home port, although not applied to the purposes of the ship or voyage. Referred to in *Greely v. Smith*, 3 Wood. & M. 248, 249, 251, 254, 256, F. C. 5,750, holding a bottomry bond would not be valid for a pre-existing debt but only for repairs or outfits and cargo.

Admiralty.— It is not necessary that a respondentia loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel or invested in the goods on which the risk is taken, p. 437.

Cited in *The Rapid Transit*, 11 Fed. 325, the court saying the same principle applied to bottomry bonds; *Gardner v. The White Squall*, 9 Fed. Cas. 1203, holding the master cannot make a loan on bottomry to pay claims for repairs in a foreign port, contracted five months prior; *The Ship Panama*, Olcott, 351, F. C. 10,703, on the point that validity of bottomry is not affected if it be given after the ship has sailed, provided the debt is at risk.

Admiralty.— The lender at respondentia is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund where the risk was bona fide upon

other goods and it was not a mere contract of wager and hazard, p. 437.

Insolvency in the sense of the act of 1799, giving United States priority, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense; it supposes that all the debtor's property has passed from him, p. 439.

Cited in *Morewood v. Hollister*, 6 N. Y. 322, holding an assignment of all one's estate to trustees, for the payment of one's debts, is conclusive of insolvency; *Stanley v. Robbins*, 36 Vt. 429, holding a general assignment by a creditor must contain a trust for others not parties and embrace all the debtor's property. Cited generally in *Woodhull v. Wagner*, 1 Bald. 302, F. C. 17,975, on the effect of a discharge in one State on a debt payable in another.

Insolvency.— Mere inability of the debtor to pay all his debts is not an insolvency within the act of 1799, giving United States priority, but it must be manifested in one of the three modes pointed out in the statute, p. 439.

Cited in *United States v. McLellan*, 3 Sumn. 352, F. C. 15,698, on the same point.

Insolvency.— Priority of the United States under insolvency act of 1799 is not a right superseding an assignment of a debtor as to any property which the United States may afterwards take in execution so as to prevent such property passing by the assignment, but is a mere right of prior payment out of general funds of debtor in the hands of assignee, p. 439.

Cited and followed in *Conrad v. Nicoll*, 4 Pet. 310, 7 L. 868, and *Conrad v. Pac. Ins. Co.*, 6 Pet. 280, 8 L. 398, both similar to the principal case; *Thayer v. Hedges*, 22 Ind. 307, on the point that the provision that the laws of the United States should be supreme justified the act giving priority; *United States v. McLellan*, 3 Sumn. 355, F. C. 15,698, on the point that a conveyance to one or more creditors to discharge their debts was not a "voluntary assignment" so as to give priority; *United States v. Wood*, 28 Fed. Cas. 753; S. C., sub nom. *United States v. Lewis*, 13 Bank. Reg. 38, and *Campbell v. Cole*, etc., Co., 9 Colo. 66, 10 Pac. 252, both holding that the priority did not attach where a partial assignment only was made; *United States v. Langton*, 5 Mason, 284, 285, F. C. 15,560, holding that priority is not affected by an omission of a small part by mistake or fraud; *United States v. Couch*, 25 Fed. Cas. 674, holding an assignment of the firm property and property of only one member does not establish insolvency of the firm so as to give priority; *United States v. Wilkinson*, 5 Dill. 277, F. C. 16,695, holding the priority is secured only when the property is attached or is being administered for his creditors generally; *Bush v. United States*, 8 Sawy. 330, 14 Fed. 323, holding a judgment confessed

for an amount of one's assets not an assignment giving priority; *United States v. Griswold*, 7 Sawy. 303, 8 Fed. 501, holding that when a debtor assigned his property by means of judgments confessed, priority attached; *Farmers' Bank v. Beaston*, 7 Gill & J. 426, 28 Am. Dec. 229, holding priority does not apply in mere cases of inability to pay; *Kalkman v. Causten*, 2 Gill & J. 365, on the point that the United States is entitled to priority in the payment of custom-house bonds; *Forsyth v. Clark*, 3 Wend. 655, and *Storm v. Waddell*, 2 Sandf. Ch. 527, 528, holding that the priority creates no lien on specific property; *Cottrell v. Pierson*, 2 McCrary, 393, 12 Fed. 807, *United States v. Lewis*, 13 N. B. R. 33, 26 Fed. Cas. 924, and *United States v. Duncan*, 12 Ill. 541, 543, all holding the priority does not supersede a prior lien; *Beaston v. Farmers' Bank*, 12 Pet. 134, 136, 9 L. 1029, 1030, holding the right secured by an attachment could not be defeated; *United States v. Duncan*, 4 McLean, 630, F. C. 15,003, holding the priority does not disturb the lien of a mortgage or of a judgment made perfect by levy; *Savings & L. Soc. v. Multnomah Co.*, 169 U. S. 428, 42 L. 805, 18 S. Ct. 395, on the point that a mortgage of realty will defeat the priority; *United States v. Duncan*, 12 Ill. 535, and *United States v. Duncan*, 4 McLean, 622, F. C. 15,003, both holding the priority suspended State laws on the distribution of estates; *Postmaster-General v. Robbins*, 1 Ware, 169, F. C. 11,314, holding the priority did not supersede the allowance to a widow; *United States v. Crookshank*, 1 Edw. Ch. 237, 240, holding the priority does not give priority out of real estate vested in the heirs of the debtor; *United States v. Hack*, 8 Pet. 275, 8 L. 913, holding the priority did not extend so as to take the property of a partner from partnership effects to pay a separate debt; *Brent v. Bank of Washington*, 10 Pet. 611, 612, 9 L. 553, holding the priority does not overreach a prior conveyance by a debtor; *United States v. Canal Bank*, 3 Story, 81, F. C. 14,715, on the point that there is no general priority in the United States, but the priority depends upon the statute; *Watson v. Watson*, 1 Ga. 268, holding the estate of a guardian who dies chargeable to his wards is liable therefor before any other debt; *Doe ex dem. v. Deavors*, 8 Ga. 485, holding that taxes are a general lien on all property of the debtor; *Anderson v. State*, 23 Miss. 476, holding although a tax was not a lien on choses in action the tax collector had a right to prior payment of their proceeds; *Kimball v. Jenkins*, 11 Fla. 125, 89 Am. Dec. 241, holding that an execution lien was not dissolved by death; *Brunswick & Alb. v. Hughes*, 52 Ga. 560, on the point that secret liens are dangerous and are only upheld where some great public interest is involved.

Mortgages.—A mortgage is not only a lien for a debt but, both in law and equity, a transfer of the property itself as security; and equity treats it as a trust estate, and, according to the intention of the parties, as a qualified estate and security, p. 441.

Cited in *Rogers v. Bradford*, 1 Pinn. 434, on the point that both at law and in equity a mortgage is not only a lien but is a transfer as a security; *Chaffe v. Hevner*, 31 La. Ann. 612, 613, dissenting opinion, on the point that a mortgage is an absolute conveyance with a defeasance and the mortgagor has only an equity; *Gordon v. Rixey*, 76 Va. 698, on the point that a mortgagee is a purchaser to the extent of his interest; *Hammond v. Solliday*, 8 Colo. 613, 9 Pac. 783, on the point that when possession is taken by a mortgagee, the title is in him for the purpose of subjecting the property to his debts; *Jefferson Coll. v. Dickson*, 1 Freem. Ch. 483, on the point that the fee passes and the mortgagee may at once enter or bring ejectment; *United States v. Stowell*, 133 U. S. 19, 33 L. 560, 10 S. Ct. 248, where a mortgagee of land with an illicit distillery on it was protected; *United States v. Arcola*, 24 Fed. Cas. 850, where the interest of a loyal mortgagee in a vessel was protected; *Waterman v. Mackenzie*, 138 U. S. 260, 34 L. 927, 11 S. Ct. 337, on the point that when the right of possession as well as of property is in the mortgagee, suit must be brought by him; *Bank of Muskingum v. Carpenter*, 7 Ohio (1 pt.), 70, 28 Am. Dec. 621, on the point that a mortgagee has a specific interest and his preference over judgment creditors; *Mundy v. Monroe*, 1 Mich. 72, holding an act inhibiting ejectment by mortgagees was void as to prior mortgages; *Bronson v. Kinzie*, 1 How. 318, 11 L. 146, holding a law extending the equitable estate of a mortgagee unconstitutional; *Upham v. Brooks*, 2 Wood. & M. 413, F. C. 16,797, and *Kennebeck, etc., R. R. Co. v. Portland, etc., R. R. Co.*, 59 Me. 75, dissenting opinion, on the point that in equity when the debt is discharged there is a resulting trust for the mortgagor; *Cleveland v. La Crosse, etc., R. R. Co.*, 5 Fed. Cas. 1035, on the point that without a defeasance one would have a right to recover by discharging his liabilities; *Pickett v. Buckner*, 45 Miss. 244, discussing the effect of a mortgage on a right to dower; *Holmes v. Gardner*, 50 Ohio St. 176, 33 N. E. 646, 20 L. R. A. 332, bona fide purchaser from a fraudulent mortgagee would be protected as against the general creditors; *Whittington v. Flint*, 43 Ark. 519, 51 Am. Rep. 582, holding the possession of a grantee of a mortgagor not adverse to the mortgagee without express disclaimer; *Green v. Turner*, 38 Iowa, 118, where a mortgagee in possession after being paid set up the statute of limitations; *Williams v. Beard*, 1 S. C. 324, holding one purchasing from a mortgagor in good faith acquires a title against a mortgagee whose mortgage is unrecorded; *Charter v. Stevens*, 3 Den. 35, 45 Am. Dec. 445; *Waterman v. McKenzie*, 138 U. S. 258, 34 L. 926, 11 S. C. 336, and *Tannahill v. Tuttle*, 3 Mich. 113, 61 Am. Dec. 484, all considering the effect of a chattel mortgage; *Colby v. Cato*, 47 Ala. 253, on the point that a conveyance to secure payment for an acceptance is in effect a mortgage; *Alexander v. Mortgage Co.*, 47 Fed. 135, construing a conveyance to secure creditors with a provision for reconveyance on payment; *Pollard*

v. Saltonstall, 56 Fed .863, on the point that where an instrument or transfer is given and the possession is not taken and the transaction is for a security, it is a mortgage; *Flagg v. Walker*, 113 U. S. 677, 28 L. 1078, 5 S. Ct. 705, construing a contract and holding it to create a trust and not a mortgage; *Thibodaux v. Anderson*, 34 La. Ann. 800, holding a deed of trust would not be regarded as a mortgage because recorded in the mortgage-book; *Dunlap v. Burnett*, 5 Smedes & M. 710, 45 Am. Dec. 271, construing a deed of trust to secure bona fide debts to a creditor without notice of any lien; *Babcock v. Hoey*, 11 Iowa, 377, discussing whether mortgages were embraced within the term conveyances; *Porter v. Green*, 4 Iowa, 574, holding a mortgagee was a purchaser within the recording laws; *Jordan v. Peak*, 38 Tex. 442, holding a deed of trust by a husband and wife to be a conveyance within the act governing transfer where the wife has an interest; *Bingham v. Frost*, 6 N. B. R. 131, 3 Fed. Cas. 401, construing the word "conveyance" as used in the bankrupt act; *Graham v. McCampbell*, Meigs, 56, 33 Am. Dec. 128, discussing whether the reservation of title by a vendor is a mere lien; *Andrews v. Burdick*, 62 Iowa, 722, 16 N. W. 279, discussing the nature of a mechanic's lien; *Bonner v. Minnier*, 13 Mont. 287, 34 Pac. 35, 40 Am. St. Rep. 448, note, dissenting opinion, discussing the nature of a lien and holding a homestead is not exempt from a lien for materials; *Leland v. Ship Medora*, 2 Wood. & M. 99, F. C. 8,237, citing authorities and discussing the lien for repairs and the effect on it of the vessel's sailing; *Ridgely v. Iglehart*, 3 Bland Ch. 542, discussing the nature of lien given by the act to direct descents; *Grigg v. Banks*, 59 Ala. 316, on the point that a debtor may charge or alienate property attached in subordination to the lien. See also note to 49 Am. Dec. 731, citing authorities on distinctions between pledge and mortgage. Cited generally in *Ringo v. Woodruff*, 43 Ark. 489, and *Everett v. Buchanan*, 2 Dak. Ter. 263, 8 N. W. 32, discussing the character of mortgages and the relative right of mortgagors and mortgagees; *Booth v. Barnum*, 9 Conn. 290, 23 Am. Dec. 341, on the point that debts secured by a mortgage must be described with sufficient certainty.

Judgment lien does not constitute per se property or right in the land itself; but only a right to levy thereon, to the exclusion of other adverse subsequent interests. Subject to this the debtor has full power to dispose of the land, and other creditors may levy on it, p. 443.

The citing cases affirm and follow this principle, as follows: *Bell v. Goetter*, 106 Ala. 471, 17 So. 711, holding that such lien bears no legal relation to a general assignment; *Biscoe v. Sandefur*, 14 Ark. 593, on the point that however full and public a lien might be it could not discharge a judgment nor amount to satisfaction; *Kollock v. Jackson*, 5 Ga. 157, holding the lien does not

give title but a special interest, enforceable by levy and sale; In re Boyd, 4 Sawy. 264, F. C. 1,746, on the point that a judgment creditor acquires no *jus in re* but only a power to make his general lien specific by a levy; Presbyterian Corp. v. Wallace, 3 Rawle, 158, holding that in Pennsylvania the right does not depend upon issuing execution; Dudley's Case, 7 Fed. Cas. 1154, where the court said there could be a lien without execution; Forsyth v. Marbury, Charl. (Ga.) 326, holding this lien to be effectual against all subsequent claims derived through the debtor; Moseley v. Edwards, 2 Fla. 438, citing authorities and holding the lien not lost by mere delay to sue out execution; Patton v. Hayter, 15 Ala. 22, holding that if a judgment creditor holds up the execution it will postpone the lien in favor of junior judgments; Commercial Bank v. Yazoo Co., 6 How. (Miss.) 534, 38 Am. Dec. 448, and Andrews v. Doe, 6 How. (Miss.) 566, 38 Am. Dec. 453, both holding a sale under a junior judgment under a levy made first, cannot impair the lien on an elder judgment; Metz v. St. Bk., 7 Neb. 171, holding a judgment does not become a lien as against a subsequent bona fide purchaser, until properly indexed; McMahan v. Green, 12 Ala. 74, 46 Am. Dec. 243, holding personalty subject to a lien, removed to another State and sold, may if brought back be sold under an alias *fi. fa.*; Grevemeyer v. So. Mut. F. I. Co., 62 Pa. St. 342, 1 Am. Rep. 421, holding a judgment creditor has no insurable interest in the specific property of the debtor; Vaughn v. Schmalsle, 10 Mont. 194, 25 Pac. 103, 10 L. R. A. 413 and n., judgment not a specific lien, so as to exclude a prior equitable title; Norton v. Williams, 9 Iowa, 533, holding a judgment does not hold over a prior unrecorded deed; Gilbert v. Stockman, 81 Wis. 607, 29 Am. St. Rep. 925, 51 N. W. 1078, holding a judgment is not a lien on land the defendant had conveyed before its entry; Warner v. Veitch, 2 Mo. App. 462, where one having a judgment which was a lien, suffered the property to be sold under a deed of trust which was a prior lien without taking out execution; Baker v. Morton, 12 Wall. 158, 20 L. 265, and Brown v. Pierce, 7 Wall. 217, 19 L. 188, holding a judgment lien gave way before the right of an owner who had conveyed to the debtor by duress; Lynn v. Gridley, Walk. (Miss.) 550, on the point that if a debtor should sell the property an execution creditor cannot follow it; Bowen v. Billings, 13 Neb. 442, 14 N. W. 153, holding a judgment against an individual was not a lien upon the firm property standing in defendant's name; Gould v. Lockett, 47 Miss. 116, holding a judgment against a husband does not defeat a widow's right of dower; Young v. Templeton, 4 La. Ann. 257, 50 Am. Dec. 568, holding a claim of a wife under a marriage settlement is of no avail against a judgment creditor first asserting his lien; Burwell v. Tullis, 12 Minn. 578, holding an act limiting the time within which an execution could be sued out and applied to existing judgments was valid; Massingill v. Downs, 7 How. 767,

12 L. 906, where the effect on a judgment lien of a subsequent law requiring judgments to be recorded in a particular way was considered; *Koning v. Bayard*, 2 Paine, 257, F. C. 7,924, considering the effect of judgments of Federal courts as liens; *Ward v. Chamberlain*, 2 Black. 437, 17 L. 323, considering the rights under a lien on a judgment obtained in admiralty for a collision; *Byers v. Fowler*, 12 Ark. 276, 54 Am. Dec. 278; *Den ex dem. v. Jones*, 2 McLean, 83, F. C. 12,818, and *Pollard v. Cocke*, 19 Ala. 196, all holding that judgments of Federal courts have the same liens as judgments of State courts; *Coombs v. Jordan*, 3 Bland Ch. 317, 22 Am. Dec. 264, discussing estates which were subject to be taken in execution to satisfy judgments; *Ex parte Waddell*, 28 Fed. Cas. 1314, on the distinction between a right to priority of payment out of a given fund and a specific lien thereon; *Mansony v. United States Bank*, 4 Ala. 750, holding that where a judgment is enjoined, the injunction suspends the lien; *Stanton v. Catron*, 8 N. Mex. 375, 45 Pac. 890, holding a judgment creditor has no such lien as would enable him to maintain a bill to remove a cloud from debtor's land; *Ashton v. Slater*, 19 Minn. 350, 351, on the point that a judgment creditor after the time to issue an execution cannot come into equity; *Hopping v. Burnam*, 2 G. Greene, 53, and *Walton v. Hargroves*, 42 Miss. 26, 97 Am. Dec. 430, on the point that where a levy is actually made the title of a purchaser relates back to the judgment; *Ex parte Foster*, 2 Story, 145, 147, F. C. 4,960, discussing the effect of an attachment where a party has filed a petition in bankruptcy. See note to 15 Am. Dec. 249, discussing the subject of relation. Cited generally in *Rohrbach v. Germania F. I. Co.*, 62 N. Y. 54, 20 Am. Rep. 456, discussing who had an insurable interest.

Judgments.—Creditor's judgment lien does not place him in a better situation as a creditor over the general funds of the debtor in the hands of the assignee, p. 444.

Contracts.—All the instruments relating to a transaction must be taken together and treated as one entire agreement, p. 445.

Bills of lading.—Consignee in a bill of lading is authorized agent of owner to receive goods, and by his indorsement of the bill to a bona fide purchaser the latter becomes owner as against all the world, p. 445.

Cited in *Jones v. Sims*, 6 Port. 159, 163, holding a bill passed title to the consignee, but was not conclusive on question of ownership; *Pollard v. Reardon*, 65 Fed. 851, 21 U. S. App. 639, and *Munroe v. Philadelphia Wh. Co.*, 75 Fed. 546, both holding that one voluntarily putting out a bill was postponed to one advancing money on it in good faith; *Winslow v. Norton*, 29 Me. 421, 50 Am. Dec. 602, and *Chandler v. Sprague*, 5 Met. 308, 309, 38 Am. Dec. 406, 407, both holding a transferee of the bill had priority over creditors; *Schooner Mary Ann Guest, Olcott*, 501, F. C. 9,197, holding

an indorsee held free from any equities between the consignor and consignee; *Means v. Bank of Randall*, 146 U. S. 627, 36 L. 1110, 13 S. Ct. 189, holding a transfer of cattle can be made as effectually by transfer of a bill as by a physical delivery; *Jeffersonville, etc., R. R. Co. v. Irvin*, 46 Ind. 185, construing a bill with a provision that the goods are to be delivered "on presentation of duplicate hereof;" *Winston v. Cox*, 38 Ala. 272, where the question was as to the sufficiency of the delivery; *The Thames*, 14 Wall. 106, 20 L. 806, holding a carrier is liable if it deliver to any one but a consignee or his assignee; *Ratzer v. Burlington, etc., R. R. Co.*, 64 Minn. 248, 58 Am. St. Rep. 532, 66 N. W. 990, citing authorities and holding that a carrier delivering without the bill does so at its peril.

Bills of lading are transferable by indorsement, p. 445.

Cited in *Dixon v. C. & I. R. R. Co.*, 4 Biss. 141, F. C. 3,929, on the point that a bill is a contract and is assignable very much like a note or bill; *Walters v. Western & R. R. Co.*, 63 Fed. 393, on the point that while bills are not negotiable instruments they may be taken as security while the consignment is in the hands of the consignee; *National Bank v. Atlanta, etc., Ry. Co.*, 25 S. C. 223, on the point that a bill is so far negotiable as to pass to its indorsee all the rights of possession; *McNeil v. Hill*, Woolw. 97, F. C. 8,914, holding an indorsement for a warehouse receipt is regarded as equivalent to the delivery of the article.

Bills of lading.—Indorsement by a consignee in a bill of lading transfers the goods whether he is buyer of the goods or factor or agent of the owner, p. 445.

Cited and followed in *Audenreid v. Randall*, 3 Cliff. 107, F. C. 644, holding such a transfer by indorsement defeated consignor's right of stoppage in transitu. And see cases under next syllabus.

Bills of lading.—Assignment by the owner of goods shipped under bill of lading to a consignee is good as against all persons except a purchaser for a valuable consideration by an indorsement of the bill of lading itself, p. 445.

Cited and this holding relied upon in *Conrad v. Nicoll*, 4 Pet. 310, 7 L. 868, and *Pacific Ins. Co. v. Conrad*, 1 Bald. 139, F. C. 10,647; S. C., on appeal, 6 Pet. 280, 8 L. 398, both similar to the principal case; *Walters v. Western & A. R. Co.*, 66 Fed. 867, 30 U. S. App. 34, holding carrier of goods liable for delivering goods without presentation of the bill of lading, in suit brought by one innocently advancing money as pledgee of the goods by indorsement of the bill of lading; *Halsey v. Warden*, 25 Kan. 136, on the point that when a bill has not been delivered and there has been no transfer to the consignee, the general owner may transfer by transferring the bill; *Bank of Rochester v. Jones*, 4 N. Y. 500, 501, 55 Am. Dec. 292, 293, holding that until the merchandise is delivered

to the factor, the consignor can sell, mortgage or pledge, although indebted to the factor; *Means v. Bank of Randall*, 146 U. S. 628, 36 L. 1110, 13 S. Ct. 189, on the point that a bank making advances on a bill has a lien which the consignee cannot defeat, although the consignor is indebted to him; *Webb v. Anderson*, Taney, 512, F. C. 17,318, holding the assignee to whom a bill is assigned as security has the property in the goods and the assignor has no rights except in the surplus; *First Nat. Bank v. Mt. Pleasant M. Co.*, 103 Iowa, 522, 72 N. W. 690, and *Neill v. Rogers P. Co.*, 41 W. Va. 51, 57, 23 S. E. 707, 709, both holding one discounting a draft and receiving a bill of lading against which the draft was drawn acquires a special property; *Chaffe v. Heyner*, 31 La. Ann. 620, dissenting opinion, on the point that where goods are transferred as security for a debt, not in payment, the risk is with the transferrer; *Michel v. Ware*, 3 Neb. 235, holding an order drawn on and accepted by a warehouseman was a warehouse receipt and the assignee was entitled to the property.

Sales.—The product of, or substitute for, the original thing, by sale or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner in the same quality as he held the thing, p. 448.

Cited in *McLaren v. Brewer*, 51 Me. 405, holding a change of property from one form to another cannot divert those who have distinct and immediate rights in the thing; *Walston v. Smith*, 67 Vt. 545, 32 Atl. 487, on the point that if property is conveyed subject to a trust, no change in the form divests it of the trust; *Keene v. Wheatley*, 14 Fed. Cas. 197, on the point that the special property which a lender has for security is transferred to and continued in the product or substitute.

Mortgages may validly be given to secure future advances and contingent debts, if the transaction is bona fide, p. 448.

The citations collate a number of authorities affirming and relying upon this principle, as follows: *Leeds v. Cameron*, 3 Sumn. 492, F. C. 8,206, on the point that at common law a mortgage could be made to secure future advances; *Schuelenberg v. Martin*, 2 Fed. 748, 1 McCrary, 350, holding valid such a mortgage at a time when no indebtedness existed; *Madigan v. Mead*, 31 Minn. 98, 16 N. W. 540, holding that mortgages may be given to secure future optional advances and contingent liabilities; *Lawrence v. Tucker*, 23 How. 27, 16 L. 479, sustaining a mortgage given to secure an existing debt and a future advance; *Speer v. Skinner*, 35 Ill. 293, holding that the mortgage should show on its face it was intended to secure future advances; *Loufsville Bank Co. v. Leonard*, 90 Ky. 111, 13 S. W. 522, holding a mortgage to be valid to the amount named, although it purports to be for an amount advanced at the time; *Mobile, etc., R. R. Co. v. Talman*, 15 Ala. 490, 492, where it was

said uncertainty in the amount to be secured, and that the security is for advances to be made in the future did not affect it; *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. 488, on the point that the drawing and indorsing of notes at a future period is a valuable consideration; *McDaniels v. Colvin*, 16 Vt. 305, 42 Am. Dec. 514, holding a mortgage to secure what the mortgagor "may owe on book," is valid; *Calkins v. Lockwood*, 16 Conn. 288, 41 Am. Dec. 147, where one agreed to lend his credit to another to manufacture goods, stipulating he should have the right to take the articles manufactured; *Arthur v. Commercial, etc., Bank*, 9 Smedes & M. 432, holding that priority given to one who might advance money to a road for its completion did not make the deed fraudulent; *Hubbard v. Savage*, 8 Conn. 221, holding a mortgage took priority as against a bona fide creditor taking security on the property; *Robinson v. Williams*, 22 N. Y. 383, holding a mortgage, the limit of which was not fixed, is good as against a creditor by a judgment recovered before such advances became due; *Wells v. Thompson*, 50 Ala. 85, on the point that future advances will be covered by the lien in preference to a claim under a junior intervening incumbrancer with notice; *Bell v. Radcliff*, 32 Ark. 664, holding a mortgage protected additional advances over the limitations in the deed; *Keyes v. Bump*, 59 Vt. 398, 9 Atl. 601, holding the consideration named does not determine the amount of a mortgage; *McCarty v. Chalfant*, 14 W. Va. 547, holding a deed of trust is good to the amount specified as between the parties and against purchasers with notice; *Schmidt v. Zahrudt*, 148 Ind. 453, 47 N. E. 337, discussing the effect of advances made after notice of subsequent advances; *Boswell v. Goodwin*, 31 Conn. 81, 81 Am. Dec. 170, holding such mortgages will be upheld as to all advances or liabilities before the execution of a subsequent mortgage; *Smith v. Montoya*, 3 N. Mex. 24 (11), 1 Pac. 181, on the point that the question of bad faith may be raised in all such mortgages and especially when it is interposed against attaching creditors; *Truscott v. King*, 6 N. Y. 160, holding a judgment may be confessed as security for future advances. See also note to 49 Am. Dec. 734, citing authorities on the obligations which may be secured by pledge.

Fraud.—Whether a transaction was fraudulent or not, in fact, is a question for the jury, upon the whole evidence, and is properly left to their consideration, p. 448.

Fraudulent conveyances.—Want of possession, even in cases of absolute sales of personal property, is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties, p. 449.

Cited in *First Nat. Bank v. Crocker*, 111 Mass. 167, on the point that delivery of a bill of lading by indorsement was sufficient to transfer property that was elsewhere; *Meade v. Smith*, 16 Conn.

364, holding the presumption of fraud from want of change of possession is repelled where it is not practicable to take possession; *Ricker v. Cross*, 5 N. H. 572, 22 Am. Dec. 481, holding a sale of chattels at a distance conveys the property to a vendee using reasonable diligence to get possession as against a sheriff attaching; *Adams v. Foley*, 4 Iowa, 54, holding that goods in a warehouse may be transferred by a transfer of the receipts; *In re Hussman*, 12 Fed. Cas. 1076, 2 Bank. Reg. 141, holding a retention after an absolute sale is conclusive of fraud as to creditors; *State v. Smith*, 31 Mo. 572, where the question was as to damages, where property remaining in possession of a seller was seized under execution as his.

Fraudulent conveyances.—Where a sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties and a fortiori, if flowing directly from them, has never been held, per se, a badge of fraud, p. 449.

Cited in *Hempstead v. Johnson*, 18 Ark. 135, 65 Am. Dec. 467, holding the rule that retention is presumptive of fraud does not apply to mortgages and deeds of trust permitting the retention until default; *Ex parte Dalby*, 1 Low. 432, F. C. 3,540; S. C., sub nom. *In re Griffiths*, 3 Bank. Reg. 180, holding that, independently of statute, a mortgage given for value and in good faith may be valid without change of possession; *Ash v. Savage*, 5 N. H. 547, holding a mortgagor's remaining in possession was not alone evidence of fraud; *Planters, etc., Bank v. Willis*, 5 Ala. 781, on the point that the retention by a mortgagor does not make the security prima facie fraudulent; *Runyon v. Groshon*, 12 N. J. Eq. 90, where a mortgagee was held to have a superior claim over a subsequent purchaser, although possession had not been changed; *The Schooner Romp, Olcott*, 203, F. C. 12,030, where a mortgagor of a vessel was postponed to the rights of purchaser, because the mortgagor retained possession; *Kellough v. Steele*, 1 Stew. & P. 281, holding a sale with condition of defeasance, or mortgage, if bona fide, is not fraudulent per se where the possession is retained; *White v. Cole*, 24 Wend. 143, on the distinction between a chattel mortgage and a pledge in the necessity of change of possession; *Almy v. Wilbur*, 2 Wood. & M. 387, 388, F. C. 256, holding possession by a mortgagor, under the circumstances of the case, was not evidence of fraud; *Rogers v. Traders' Ins. Co.*, 6 Paige, 587, on the point that a mortgage of personalty transfers the whole interest, and the mortgagee becomes the owner; *Maxwell v. Tufts*, 8 N. Mex. 399, 45 Pac. 979, 33 L. R. A. 855, vendee under conditional sale protected against attaching creditor of vendor, though vendor retained possession of the chattels sold.

Fraudulent conveyances.—Want of possession does not show fraud when the goods, at the time of the transfer, were at sea on a

voyage in which they were to be sold or exchanged by the consignee and the proceeds sent back in the same ships, p. 449.

Cited in *Pratt v. Parkman*, 24 Pick. 47, on the point that delivery of a bill of sale of goods at sea would be sufficient to pass them; *Gibson v. Stevens*, 8 How. 399, 400, 12 L. 1129, 1130, holding a bill of sale passes title if personalty, from its character or situation, is incapable of manual delivery; *Crapo v. Kelly*, 16 Wall. 641, 21 L. 441, on the point that a ship at sea may be transferred to a purchaser by the delivery of a bill of sale; *Harris v. D'Wolf*, 4 Pet. 150, 151, 7 L. 813, holding nondelivery of a vessel at sea assigned to secure or pay a debt does not render the assignment void; *Barrow v. West*, 23 Pick. 273; *Cole v. White*, 26 Wend. 520, and *Brinley v. Spring*, 7 Me. 253, 254, all holding the transfer of a ship at sea passes the title subject only to be defeated by negligence in taking possession on her return; *White v. Cole*, 24 Wend. 129, 130, holding a mortgage of a vessel at sea void as against a purchaser at execution where possession was not taken forthwith on her return; *Crapo v. Kelly*, 16 Wall. 623, 21 L. 436, discussing the priority between an assignment in insolvency while a vessel was at sea and an attachment levied when she arrived; *Pinkerton v. Manchester, etc., R. R. Co.*, 42 N. H. 448, 452, where the question was as to the sufficiency of the delivery of stock transferred at a distance from the office.

Pleading.—By pleading to the merits, the defendant necessarily admits the capacity of the plaintiffs, in this case a corporation, to sue; exception should be taken by plea in abatement, and failure to do so is a waiver, p. 450.

The following cases cite, affirm and variously apply this principle: *Gause v. Clarksville*, 1 McCrary, 86, holding all matters which challenge jurisdiction or capacity to sue should be presented by plea in abatement; *Brown v. Noyes*, 2 Wood. & M. 81, F. C. 2,023, generally a plea in abatement to the jurisdiction is necessary, and the objection is waived by pleading to the merits; *Philadelphia, etc., R. R. Co. v. Quigley*, 21 How. 214, 16 L. 77, holding that under the general issue no question can be raised as to capacity to sue; *Strickland v. Burns*, 14 Ala. 513, holding the general issue or other plea in bar admits the character of the plaintiff to be such as set out; *Carr v. Gale*, 3 Wood. & M. 69, F. C. 2,435, holding it is too late to object to an assignee in bankruptcy suing after a plea of the general issue and trial; *Alderman v. Finley*, 10 Ark. 425, 52 Am. Dec. 245, holding in assumpsit by a public corporation a plea of non-assumpsit admits the capacity to sue; *Butterfield's O. D. Co. v. Wedeles*, 1 N. Mex. 532, holding the capacity of a corporation to sue can only be tested by plea in abatement; *Methodist Episcopal Church v. Wood, Wright*, 12, 13, and *Boston T. & S. F. Co. v. Spooner*, 5 Vt. 96, both holding that want of corporate capacity to sue must

be taken by plea in abatement or bar; *Oregonian, etc., Ry. Co. v. Oregon R. & N. Co.*, 10 Sawy. 476, 23 Fed. 235, holding want of corporate existence may be pleaded in abatement or bar, but the want of capacity to sue must be pleaded in abatement; *Blackburn v. Selma, etc., R. R. Co.*, 2 Flipp. 533, F. C. 1,467, declining to notice an objection that a corporation was never organized, after an answer filed to the merits; *Goodyear v. Blake*, 10 Fed. Cas. 646, holding that by pleading to the merits the defendant admits the capacity of the corporation to sue; *United States v. Insurance Cos.*, 22 Wall. 101, 22 L. 817; *Society, etc. v. Pawlet*, 4 Pet. 501, 503, 7 L. 934, 935, and *Phenix Bank v. Curtis*, 14 Conn. 440, 36 Am. Dec. 494, all holding the general issue in an action by a corporation admits the capacity of the plaintiff to sue; *Union Cement Co. v. Noble*, 15 Fed. 503, and *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 562, F. C. 3,810, both holding the general issue admitted the corporate existence of the plaintiff; *Methodist Episcopal Church v. Wood*, 5 Ohio, 286, holding that legal organization cannot be questioned unless upon plea in abatement; *Savage Manuf. Co. v. Armstrong*, 17 Me. 37, 35 Am. Dec. 229, holding the existence of a private corporation can be questioned only by plea in abatement; *Rheem v. Naugatuck W. Co.*, 33 Pa.St. 364, holding the want of an act of incorporation must be pleaded in abatement or specially in bar; *Northumberland Co. Bank v. Eyer*, 60 Pa. St. 440, holding misnomer of a corporation must be pleaded in bar; *Freeland v. Pennsylvania C. I. Co.*, 94 Pa. St. 514, on the point that if there is no charter it must be specially pleaded in bar; *Dutcher v. Dutcher*, 39 Wis. 662, holding that, in an action of divorce, the plaintiff's want of residence is matter in abatement and not in bar; *Lessey v. President, etc., of Green Bay*, 1 Pinn. 488, holding a city suing on a note for a license need not prove compliance with their charter in every respect; *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 160, holding a corporation need not set out how or by what authority they were incorporated nor call or aver themselves a corporation; *Oregon Central R. R. Co. v. Wait*, 3 Or. 96, where the court considered the effect of a denial of the corporate existence as authorizing a judgment in bar; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 537, holding that in assumpsit against a corporation on an issue on nonassumpsit, plaintiff must prove the corporate existence; *Baltimore, etc., R. R. Co. v. Fifth Baptist Church*, 137 U. S. 572, 34 L. 786, 11 S. Ct. 186, on the point that proof that a corporation had acted as a corporation de facto was sufficient; *Williamsburg Ins. Co. v. Frothingham*, 122 Mass. 394, on the point that where a bond sued on ran to a corporation, it was sufficient prima facie of the incorporation.

Cited, without special application of the rule, in *Sheppard v. Graves*, 14 How. 511, 14 L. 520.

Distinguished in *Commissioners of Canal Fund v. Perry*, 5 Ohio 61, holding, on a suit in the individual names of commissioners, de-

defendants were not precluded from objecting to the inability to sue by pleading over. Referred to in *Missouri Pac. Ry. Co. v. Meeh*, 69 Fed. 755, 32 U. S. App. 691, 30 L. R. A. 252, rule that plea to jurisdiction was waived by a plea to the merits or the general issue had been abolished in Federal courts by statute. Not followed in *Lewis v. Bank of Kentucky*, 12 Ohio, 148, 149, 40 Am. Dec. 471, holding that on a suit by a foreign corporation, a plea of non assumpsit puts in issue the plaintiff's capacity to sue.

Trial.—The order of proof is a matter of discretion in the court itself and not of absolute right in the party, p. 451.

Trial.—Allowing a joint and several bond to go to a jury upon the proof of an execution by one party only is not error where it was not introduced as general evidence as to all the parties who were named in it, but only as to the one who executed it, p. 407.

Evidence.—Acts and proceedings of third persons not in privity with a party, nor known to him, are not evidence against him, p. 451.

Miscellaneous.—Cited, but not in point, in *Doe ex dem. Sprague v. Litherberry*, 4 McLean, 446, F. C. 13,251; *Gubbins v. Laughtenschlager*, 75 Fed. 621; *Cole v. Tucker*, 6 Tex. 268.

1 Pet. 455-468, 7 L. 219, *BANK OF COLUMBIA v. HAGNER*.

Payment.—Where, under a contract for the conveyance of land, the time of payment is left to the option of the vendor, the money is payable on demand, p. 463.

Cited in *Pierce v. Whiting*, 63 Cal. 541, on the point that on a promise to pay without qualification, either generally or on demand, it is due immediately.

Vendor and vendee.—In contracts for the conveyance of land the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears, p. 465.

The citations collect the following similar cases: *Robinson v. Harbour*, 42 Miss. 801, 97 Am. Dec. 506, holding that in determining, the order of time in which they are to be performed is important; *Coleman v. Rowe*, 5 How. (Miss.) 466, 37 Am. Dec. 165, holding that where the day for payment is before the time for performance the covenant for payment is independent; *Brennan v. Ford*, 46 Cal. 16, holding that on a contract for exchange, the law implies the conveyances are to be made concurrently and the covenants are dependent; *Cincinnati, etc., R. R. Co. v. Bensley*, 51 Fed. 741, 6 U. S. App. 115, 19 L. R. A. 799, subscription to purchase of a certain site on condition that a building be erected; *Hill v. Grigsby*, 35 Cal. 662; *Glenn v. Rossler*, 156 N. Y. 168, 50 N. E. 787, and *Shinn v. Roberts*, 20 N. J. L. 444, 43 Am. Dec. 640, all holding

that delivery of a deed and payment of the price are dependent conditions; *Gibson v. Newman*, 1 How. (Miss.) 349; *Southern Pac. R. R. Co. v. Allen*, 112 Cal. 465, 44 Pac. 799, dissenting opinion, and *Bowen v. Bailey*, 42 Miss. 410, 2 Am. Rep. 603, all holding that on a contract for sale on installments the covenants were independent; *Shelly v. Mikkelson*, 5 N. Dak. 27, 63 N. W. 213, on the point that where the deed was to be delivered on payment of the last installment the agreement to pay the entire price and to deliver became mutual; *Powell v. D. S., etc., R. R. Co.*, 14 Or. 357, 12 Pac. 666, where one agreed to purchase on or before the expiration of five years, and on payment the plaintiff was to make a deed; *Telfener v. Russ*, 162 U. S. 180, 40 L. 933, 16 S. Ct. 699, where one agreed to convey his right to acquire lands, to make field notes, surveys, etc., and the other was to pay so much an acre for the rights and so much an acre for the surveys, etc.; *Green v. Town of Dyersburg*, 2 Flipp. 498, F. C. 5,756, reviewing authorities, and holding a municipal subscription to a railroad, and the railroad's agreement to build to the town, dependent covenants; *Epping v. Devanny*, 28 Ga. 430, and *Hickman v. Raye*, 55 Ind. 557, both holding an agreement to lease and an agreement to repair were dependent conditions; *Hamilton v. Thrall*, 7 Neb. 218, where one party agreed to furnish a hotel and the other agreed to rent it and pay for the furniture in certain installments; *Halloway v. Lacy*, 4 Humph. 469, where one agreed to serve another for a certain time for a certain sum and it was held this was a dependent covenant; *Summers v. Sleeth*, 45 Ind. 600, holding payment of a note and issuance of the stock were dependent acts; *Lester v. Jewett*, 11 N. Y. 458, holding, that where one agreed to purchase at the end of one year stock at a price named, the transfer of the stock and the payment are dependent acts; *Currie v. White*, 45 N. Y. 854, dissenting opinion, to the same effect in a similar contract; *McNeil v. Magee*, 5 Mason, 255, F. C. 8,915, where an award directed each party to release to the other certain estate within a certain time; *King Phillip Mills v. Slater*, 12 R. I. 87, 34 Am. Rep. 607, holding that a plaintiff failing in the first deliveries of goods to be manufactured cannot compel the acceptance of goods subsequently manufactured; *Davis v. Jeffris*, 5 S. Dak. 355, 58 N. W. 816, where the contractor for a building agreed to furnish a right to use a patent and it was held this was a dependent stipulation; *Bigler v. Morgan*, 77 N. Y. 319, on the point that a vendee cannot be subjected to damages without showing that he would have received what he contracted for; *Sanford v. Emery*, 34 Ill. 475, on the point that a rescission must be mutual so as to discharge the vendor as well as vendee; *Manning v. Brown*, 10 Me. 52, holding that by enforcing payment of notes one waives his right to avoid a covenant to convey; *Leary v. Durham*, 4 Ga. 601, on the point that deeds must be interpreted according to the intent.

Distinguished in *Hall v. Rupley*, 10 Pa. St. 232, where it was

contended that there could be no recovery on an entire contract on a neglect to supply material contracted for; *Weaver v. Childress*, 3 Stew. 370, where one sold land to another on installments, possession to be delivered before payment; *Loud v. Pomona L. & W. Co.*, 153 U. S. 579, 38 L. 828, 14 S. Ct. 933, holding that an agreement to pay on installments generally made the covenants independent. See note on entire contracts, 59 Am. St. Rep. 294.

Vendor and vendee.—In contracts for sale of land, if vendor or vendee wish to compel the other to perform, he must show actual performance of the agreement on his part or a tender and refusal, p. 465.

Cited, affirmed and principle applied as follows: *Powell v. D. S.*, etc., R. R. Co., 12 Or. 490, 8 Pac. 546, on the point that mere readiness to perform is not sufficient, but the plaintiff must aver a tender of performance; *Newsome v. Williams*, 27 Ark. 635, and *School District v. Rogers*, 8 Iowa, 318, both holding that the plaintiff must show he has made and tendered or offered to make and tender a conveyance; *Wadlington v. Hill*, 10 Smedes & M. 563, holding payment of price and tender of conveyance are mutual covenants; *Hageman v. Sharkey*, 1 How. (Miss.) 278, 279, 29 Am. Dec. 628, 629, holding a vendor may sue without executing a conveyance when the promise to pay is independent; *McGehee v. Hill*, 4 Port. 177, 29 Am. Dec. 279, holding a vendee must show that he was ready to pay according to the contract before he can sue; *Stockton v. George*, 7 How. (Miss.) 175, holding that in a bond to make title when the price is paid before the obligor can recover he must perform or offer to perform; *Dudley v. Hayward*, 11 Fed. 545, where, in a suit to enforce a verbal contract, the vendee failed to aver he had tendered installments but only that he had always been ready; *Smith v. Henry*, 7 Ark. 212, 44 Am. Dec. 544, holding a vendee need not aver and tender a deed to the vendor in his plea to an action for the price; *Kelsey v. Crowther*, 162 U. S. 409, 40 L. 1019, 16 S. Ct. 810, holding that in a bill to enforce an optional contract it is necessary to tender performance and payment of the price; *Harris v. Bolton*, 7 How. (Miss.) 171, holding that a vendee coming into equity to restrain the collection of the price until titles are perfected, must show a performance; *Pollak v. Brush Electric Assn.*, 128 U. S. 455, 32 L. 477, 9 S. Ct. 122, holding, in the case under consideration, covenants to pay money for goods sold were independent of covenants to transfer stock to a corporation. See note to 59 Am. St. Rep. 294, discussing entire contracts and the necessity of complete performance in an action *ex contractu*.

Contracts.—An averment of performance or of a tender and refusal is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof, p. 465.

Cited in *Sanford v. Cloud*, 17 Fla. 550, on point that general averment of readiness to perform is not sufficient, without tender of the deed; *Ackley v. Richman*, 10 N. J. L. 305, holding a general averment that plaintiff is ready to pay price and complete contract is not sufficient; *Henderson v. Wheaton*, 139 Ill. 586, 28 N. E. 1101, holding a plaintiff must aver the performance of a condition precedent or a readiness until discharged by defendant or a prevention; *Breithaupt v. Thurmond*, 3 Rich. L. 221, holding that on a contract to purchase land the plaintiff must allege and prove the consideration to entitle him to recover.

Vendor and vendee.—The time fixed for performance is, at law, deemed of the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end; p. 465.

Cited in *Tyler v. Young*, 2 Scam. 448, 35 Am. Dec. 118, and *Liddell v. Sims*, 9 Smedes & M. 612, both holding that if vendor is not ready at time fixed, the purchaser may consider the contract at an end; *Cunningham v. Gwinn*, 4 Blackf. 344, holding a failure to tender a deed by the day was a defense to an action on a note, although the note was due before that time; *Hunt v. Reeves*, 5 Blackf. 178, holding that in debt on a bond for a conveyance, a tender after the time fixed cannot be pleaded; *McCulloch v. Dawson*, 1 Ind. 418, on the point that if a plaintiff fail on the day to perform and shows no legal excuse, the purchase money cannot be recovered; *Green v. Finucane*, 5 How. (Miss.) 545, where a vendor had used diligence, but was necessarily delayed and equity refused to enjoin the collection of the notes; *Edgerton v. Peckham*, 11 Paige Ch. 360, where a party failed to pay by the day named and he was not called on for payment nor tendered a deed, and it was held time was not of the essence; *Inman v. West F. I. Co.*, 12 Wend. 461, 462, construing a provision in a policy that notice of loss should be given forthwith; *Bowles v. Newby*, 2 Blackf. 364, 365, holding that a note given on consideration that bricks be delivered by a certain day, failed if the bricks were not so delivered; *Curtis v. Blair*, 26 Miss. 326, 59 Am. Dec. 261, holding that a party has until the last moment of the last day, but the offer must be at the proper place and within a reasonable time.

Vendor and vendee.—Vendor suing for purchase price must aver performance on his part or due offer to perform, or waiver thereof by purchaser, and sustain the averment by proofs, p. 467.

Cited in *Owen v. Norris*, 5 Blackf. 481, holding that if the deed is to be made on a certain day, a replication should show an offer to execute on that day; *Coughran v. Bigelow*, 164 U. S. 310, 41 L. 447, 17 S. Ct. 120, holding sureties on vendor's bond for performance discharged by failure of vendee, are not bound by a waiver of non-performance by their vendor.

Contracts.—He who prevents a thing from being done may not complain of the nonperformance. But this rule applies only where the act, which is construed into a waiver, occurs previous to the time fixed for performance, p. 468.

Cited in *Heirn v. Carron*, 11 Smedes & M. 366, 49 Am. Dec. 66, on the point that refusal and evasion of tender in legal intendment constitute performance; *Gray v. Smith*, 83 Fed. 829; S. C., sub nom. *Gray v. Mills*, 48 U. S. App. 588, holding that where either party gives notice that he will not comply, the other need not aver or prove a tender of performance; *Doyle v. Teas*, 4 Scam. 263, where a purchaser defended on the ground that the vendor had parted with his title and incapacitated himself from performing; *Robertson v. Davenport*, 27 Ala. 577, holding that if a seller cease to have ability to furnish goods according to contract, defendant may refuse to pay for goods received and recoup his damages.

Vendor and vendee.—Where vendee takes possession, believing vendor will perform and convey title to him, he has, if the contract is unexecuted, a right to disaffirm it and restore the possession, p. 468.

Cited in *Sayre v. Mohney*, 30 Or. 243, 47 Pac. 198, and *Muchmore v. Bates*, 1 Blackf. 248, note, both holding that, although the vendee took possession, if the vendor fail to perform, vendee may quit possession and treat the contract as ended; *Curtis v. Clark*, 133 Mass. 511, holding a vendor failing to perform cannot recover on a note even though the vendee has been in occupation; *Lewis v. Bibb*, 4 Port. 88, on the point that a vendee cannot defend an action for the price while he retains possession; *Jewett v. Lawrenceburgh, etc., R. R. Co.*, 10 Ind. 543, in discussing whether the failure to perform a condition upon which a subscription was made, gave a right to recover an amount paid before the violation.

Vendor and vendee.—Vendee is not bound to accept a deed where, in order to obtain a clear title, he would have to resort to a court of chancery, p. 468.

Cited in *Newell v. Turner*, 9 Port. 422, holding a vendee may rescind where there was a defect of title, no conveyance having been executed; *Ankeny v. Clark*, 1 Wash. 557, 20 Pac. 587, holding a contract cannot be satisfied where title is in the United States and the vendor has merely an equity; *Whitehurst v. Boyd*, 8 Ala. 381, holding vendee may plead the title is in a third person; *Oakey v. Cook*, 41 N. J. Eq. 363, 7 Atl. 502, holding that on an agreement for exchange the existence of mortgages on one place does not violate a stipulation as to good title.

Distinguished in *Mitchell v. McMullen*, 59 Mo. 256, holding a purchaser in undisturbed possession will not be relieved on the mere ground of defect of title.

Miscellaneous.—Cited, but not in point, in *In re Hambright*, 12 N. B. R. 498 (157), 11 Fed. Cas. 316.

1 Pet. 469-475, 7 L. 224, DOE ex dem. ELMORE v. GRYMES.

Trial — Nonsuit.— Circuit Court may not order a peremptory nonsuit, in jury trial, against the will of plaintiff, p. 471.

The following citing cases affirm and follow this ruling: Baylis v. Travellers' Ins. Co., 113 U. S. 321, 28 L. 991, 5 S. Ct. 497, holding that a court errs if it substitutes itself for a jury and passes upon the effect of evidence; Booe v. Davis, 5 Blackf. 115, 33 Am. Dec. 458, the court saying that a plaintiff has a right to have every question of fact tried by a jury; D'Wolf v. Rabaud, 1 Pet. 497, 7 L. 236, holding a nonsuit may not be ordered in any case without the consent and acquiescence of plaintiff; Baxter v. Payne, 1 Pinn. 504, holding this to be so, although the District Court may have been fully satisfied that the plaintiff was not entitled to verdict; Cook v. Morris, 66 Conn. 210, 33 Atl. 998, holding it error to grant a nonsuit on the ground that allegations of complaint, if proved, would not support a judgment; Hyde v. Barker, 1 Pinn. 306, holding a justice of the peace has no power to nonsuit, although he is trying the case without a jury; Folger v. The Robt. G. Shaw, 2 Wood. & M. 535, F. C. 4,899, on the point that if there be any evidence to be considered it is improper to nonsuit; Spensley v. Lancashire Ins. Co., 54 Wis. 437, 11 N. W. 895, holding, that where the plaintiff's evidence, construing it most favorably, would sustain a verdict, a nonsuit should not be granted; Boucicault v. Fox, 5 Blatchf. 91, F. C. 1,691, an action for the violation of a copyright of a play; Foote v. Silsby, 1 Blatchf. 461, note, F. C. 4,916; S. C., on appeal, sub nom. Silsby v. Foote, 14 How. 222, 14 L. 396, an action on the case for the violation of a patent right; Crane v. Morris, 6 Pet. 609, 8 L. 518, and Montoya v. Donahoe, 2 N. Mex. 220, both actions of ejectment; Holt v. Van Eps, 1 Dak. Ter. 219, 46 N. W. 690, an action for the recovery of specific personalty; Mulhern v. Union Pac. R. R. Co., 2 Wyo. 457, and Northern Pacific R. R. Co. v. Charless, 51 Fed. 572, 7 U. S. App. 359, both actions of negligence; Castle v. Bullard, 23 How. 183, 16 L. 427, where, in an action on the case, a nonsuit was refused as to one defendant; Insurance Co. v. Folsom, 18 Wall. 250, 21 L. 833, where an exception was taken to the refusal of the court to decide the evidence was not sufficient to entitle plaintiff to a verdict; Schuchardt v. Allens, 1 Wall. 369, 17 L. 646, laying down the rule as to when a court by its instructions may take a case from the jury; Herrera v. Chaves, 2 N. Mex. 91, dissenting opinion, p. 92; Alexander v. Tennessee, etc., R. R. Co., 3 N. Mex. 194 (178), 3 Pac. 740; Martin v. Webb, 5 Ark. 74, 39 Am. Dec. 364; Carr v. Crain, 7 Ark. 249, and Ringo v. Field, 6 Ark. 49, all holding that a court may instruct the jury to find for the defendant if the plaintiff has failed to make out his case; Amos v. Sinnott, 4 Scam. 450, and State v. Roper, 8 Ark. 493, both holding a court cannot instruct the jury "to find for the defendant as in case of nonsuit;" Tymason v. Bates, 14 Wend. 688, where the court said the refusal to grant a nonsuit is not ground

for exception to be brought up by bill; *Guest v. Guest*, Dall. (Tex.) 394, where a judgment of nonsuit was set aside and a new trial granted; *McColgan v. McKay*, 25 Ga. 632, holding it almost a matter of course to let in new evidence to save a nonsuit; *Atchison, etc., R. R. Co. v. Myers*, 63 Fed. 796, 24 U. S. App. 295, holding that a defendant who introduces evidence waives his motion to instruct the jury at the close of the plaintiff's case to find for defendant; *Miller v. Baltimore, etc., R. R. Co.*, 17 Fed. Cas. 305, where the court said they would not follow the State practice, since the act of June 1, 1872, but would follow the common law and the decisions of the Supreme Court. See 24 Am. Dec. 620, note on this point.

Referred to in *Wiley v. Shoemak*, 2 G. Greene, 207, holding that if verdict for plaintiff would be clearly against the weight and legal effect of the evidence, a nonsuit may be ordered; *Tison v. Yawn*, 15 Ga. 493, 60 Am. Dec. 710, holding a nonsuit may be granted where there is no proof to support the issue; *Smith v. Frye*, 14 Me. 462, holding a nonsuit would not be reversed where the evidence would not by law enable one to maintain his action; *Zittle v. Schlesinger*, 46 Neb. 846, 65 N. W. 892, holding the granting of an involuntary nonsuit is harmless error, where on the evidence the defendant was entitled to have a directed verdict; *Coughran v. Bigelow*, 164 U. S. 307, 41 L. 446, 17 S. Ct. 119, holding that since the statute of June 1, 1872, Federal courts may order nonsuits in pursuance of State statutes; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 39, 35 L. 61, 11 S. Ct. 480, 481, holding a statute of a State authorizing a nonsuit may be followed in the Circuit Court.

Appeals — Certiorari.— When the record is so defective that the appellate court cannot render final judgment, plaintiff may apply for certiorari to bring up a perfect record, or dismiss the writ of error and proceed anew, p. 472.

Cited in *Sowles v. United States*, 21 Fed. 223, holding a case would not be heard upon an incomplete record.

1 Pet. 476-502, 7 L. 227, *DE WOLF v. RABAUD*.

Trial — Nonsuit.— A nonsuit may not be ordered by the court upon application of defendant and cannot be ordered in any case without the consent and acquiescence of plaintiff, p. 497.

Cited and holding relied upon as follows: *Crane v. Morris*, 6 Pet. 609, 8 L. 518, holding a Circuit Court has no authority whatever to order a peremptory nonsuit; *Guest v. Guest*, Dall. (Tex.) 394, holding that neither the District nor any other court could compel a party to take a nonsuit; *Baxter v. Payne*, 1 Pinn. 504, holding the District Courts of the Territory cannot order peremptory nonsuits; *Hyde v. Barker*, 1 Pinn. 306, holding a justice of the peace could not order a peremptory nonsuit, although he was trying the cause without a jury; *Holt v. Van Eps*, 1 Dak. Ter. 219, 46

N. W. 690, the court saying the defendant has a right to a trial by jury and to have the case submitted to them; *Baylis v. Travellers' Ins. Co.*, 113 U. S. 321, 28 L. 991, 5 S. Ct. 497, holding that where parties do not waive a jury, the court may not substitute itself for a jury; *Folger v. The Robert G. Shaw*, 2 Wood. & M. 535, F. C. 4,899, on the point that if there be any evidence, it is error to nonsuit; *Wiley v. Shoemak*, 2 G. Greene, 207, holding that if evidence is adduced which tends, even remotely, to prove facts which would support the action, a nonsuit should not be granted; *Spensley v. Lancashire Ins. Co.*, 54 Wis. 437, 11 N. W. 895, holding that plaintiff's evidence, if undisputed and giving it its most favorable construction, would sustain a verdict of nonsuit, was error; *Tymason v. Bates*, 14 Wend. 688, holding a refusal to grant a nonsuit is not ground for exception, to be brought up by bill; *Castle v. Bullard*, 23 How. 183, 16 L. 427, holding that where there are several defendants, there cannot at common law be a nonsuit as to one and a verdict against the others; *Amos v. Sinnott*, 4 Scam. 450, holding a court could not instruct the jury either to nonsuit the plaintiff or to find against him as in case of a nonsuit; *Schuchardt v. Allens*, 1 Wall. 369, 17 L. 646, where instructions sought in effect to take a case from a jury; *Herrera v. Chaves*, 2 N. Mex. 91, and *Martin v. Webb*, 5 Ark. 74, 39 Am. Dec. 364, both holding that where a party has failed to make out his case, the court will instruct the jury to find for defendant; *Boucicault v. Fox*, 5 Blatchf. 91, F. C. 1,691, an action for damages for the violation of a copyright; *Foote v. Silsby*, 1 Blatchf. 461, note, F. C. 4,916, and S. C. on appeal, sub nom. *Silsby v. Foote*, 14 How. 222, 14 L. 396, an action on the case for the violation of a patent; *Carr v. Gale*, 3 Wood. & M. 58, F. C. 2,435, an action for trover for a quantity of goods; *Ringo v. Field*, 6 Ark. 49, an action of replevin; *Booe v. Davis*, 5 Blackf. 116, 33 Am. Dec. 458, an action of trespass for breaking and entering the plaintiff's close; *Northern Pac. R. R. Co. v. Charless*, 51 Fed. 572, 7 U. S. App. 359, and *Miller v. Balt. & O. R. R. Co.*, 17 Fed. Cas. 305, actions for damages for injuries through negligence. See note to 24 Am. Dec. 620, on compulsory nonsuits; *Atchison, etc., R. R. Co. v. Myers*, 63 Fed. 796, 24 U. S. App. 295, and *Union Ins. Co. v. Smith*, 124 U. S. 424, 31 L. 505, 8 S. Ct. 544, holding a motion to take plaintiff's case from the jury is waived by introduction by defendant of testimony.

Referred to in *Mo. Pac. Ry. Co. v. Meeh*, 69 Fed. 755, 32 U. S. App. 691, 30 L. R. A. 252, holding this rule abolished by act of March 3, 1875; *Tison v. Yawn*, 15 Ga. 494, 60 Am. Dec. 710, holding a nonsuit should be granted if, admitting all the facts and all reasonable deductions, the plaintiff ought not to recover.

Citizenship.—The question of citizenship constitutes no part of the issue upon the merits, but must be brought forward by proper plea in abatement in an earlier stage of the cause, p. 498.

Cited in *Smith v. Kernochen*, 7 How. 216, 12 L. 674; *Farmington v. Pillsbury*, 114 U. S. 143, 29 L. 116, 5 S. Ct. 809, and *Educational Soc. v. Varney*, 54 N. H. 379, all holding that the question of the citizenship of a party to an action can only be raised by plea in abatement; *Imperial Refining Co. v. Wyman*, 38 Fed. 576, 3 L. R. A. 505, and n., notwithstanding acts of 1872 and 1875 plea to jurisdiction on the ground of citizenship must be by a special plea in abatement; *Sharon v. Hill*, 10 Sawy. 668, 26 Fed. 723, holding an adjudication upon a plea in abatement on the question of citizenship was conclusive; *Dred Scott v. Sandford*, 19 How. 590, 15 L. 777, dissenting opinion, on the point that when the declaration contains the necessary averments of citizenship the Supreme Court cannot look at the record; *Sheppard v. Graves*, 14 How. 511, 14 L. 520, on the point that when jurisdiction is averred in the pleadings one who would impeach it must allege and prove the causes for impeachment; *Gause v. Clarksville*, 1 McCrary, 86, note, holding that all matters which challenge jurisdiction on capacity to sue should be presented by plea in abatement; *Nesmith v. Calvert*, 1 Wood. & M. 38, F. C. 10,123, on the point that an objection is too late if not stated until after the answers were put in to the merits; *Cuthbert v. Galloway*, 35 Fed. 468, holding that where a defendant denied on information and belief the allegations as to jurisdiction and then answered on the merits, this was a waiver of the plea; *Dennistoun v. Draper*, 5 Blatchf. 340, F. C. 3,804, where the court said the principle had no application to the case of original jurisdiction, acquired indirectly by a removal from a State to a Federal court; *Davies v. Lathrop*, 21 Blatchf. 165, 13 Fed. 566, holding that one not objecting to the removal of a cause for want of jurisdiction cannot afterwards have the cause remanded; *Prince v. Commercial Bank*, 1 Ala. 245, 34 Am. Dec. 776, on the point that the right to sue in the Federal courts is admitted by a plea to the merits; *Dutcher v. Dutcher*, 39 Wis. 662, holding that in a divorce suit a plaintiff's want of residence is matter in abatement and not in bar; *Johnson v. Wilson*, 1 Pinn. 67, holding an objection that a foreign administrator cannot sue is waived unless taken at the proper time and in the proper manner; *Davis v. Packard*, 6 Wend. 332, holding that a consul sued in a State court and pleading to the merits cannot assign as error want of jurisdiction; *United States v. Woolsey*, 28 Fed. Cas. 767, on the point that the records of Federal courts must show jurisdiction either of the person or subject-matter.

Referred to in *Draper v. Springport*, 21 Blatchf. 243, 15 Fed. 331, holding this rule to be abolished by the code of New York; *Bland v. Fleeman*, 29 Fed. 672, holding this rule abrogated by the act of March 4, 1875.

Statute of frauds.— If A. agree to advance B. a sum of money for which B. is to be answerable, but at the same time it is expressed upon the undertaking that C. will do some act for the security of A. and enter into an agreement with A. for that purpose, it is not a case of collateral undertaking but each is an original promise, though the one may be deemed secondary or subsidiary to the other, p. 500.

The citations collate a number of authorities relying upon this holding and the rule as to collateral and original promise which it lays down, as follows: *Hall v. Rogers*, 7 *Humph.* 540, holding that when the promise to pay the debt of another arises out of some new and original undertaking it is not within the statute; *Lane v. Levillian*, 4 *Ark.* 84, 37 *Am. Dec.* 770, and *Read v. Cutts*, 7 *Me.* 190, 22 *Am. Dec.* 187, on the point that a guaranty must be supported by a new and independent consideration except where given at the time the debt is contracted; *Smith v. Loomis*, 72 *Me.* 55; *Huntress v. Patten*, 20 *Me.* 33, and *Simons v. Steele*, 36 *N. H.* 82, all holding that where the principal and collateral agreements are made out at the same time the consideration of one is *prima facie* that of the other; *Nabb v. Koontz*, 17 *Md.* 290, the court saying that the consideration of a guaranty need not be set forth where it is made out at the same time; *Snevily v. Johnston*, 1 *Watt & Serg.* 309, holding in an action on a guaranty on a note it is not necessary to prove any other consideration than what appears upon the paper; *Ellett v. Britton*, 10 *Tex.* 211; *Brooks v. Dent*, 1 *Md. Ch.* 530, and *Britton v. Angier*, 48 *N. H.* 421, all holding a guaranty need not state the consideration of the promise; *Rogers v. Kueeland*, 10 *Weud.* 250, on the point that a consideration implied from the terms of the instrument is as effectual as if expressly appearing; *O'Bannon v. Chumasero*, 3 *Mont.* 425, where a letter "you * * * make out the record * * * and we will guarantee the payment of your fees" was held to express the consideration; *Townsley v. Sumrall*, 2 *Pet.* 182, 7 *L.* 390, holding that if A. said to B. "pay so much money to C. and I will repay you" it is an original contract; *Hetfield v. Dow*, 27 *N. J. L.* 445, 451, 453, where the court considered as to when the promise to pay for goods delivered to another should be in writing; *Graves v. Scott*, 23 *La. Ann.* 692, holding a guaranty that if plaintiff would deliver goods to one S. that S. would account for it was within the statute; *Pearce v. Wren*, 4 *Smedes & M.* 97, where an account was made out for goods and at the time the defendant wrote under it, "I will guarantee the payment of the above;" *Ashford v. Robinson*, 8 *Ired.* 117, where one wrote "This is to certify that I pass over the following notes * * * and agree to make them good;" *Hopkins v. Richardson*, 9 *Gratt.* 495, holding that where one assigns a bond to enable another to purchase goods and guarantees the payment of the bond by indorsement the contract is not within the statute;

Anderson v. Spence, 72 Ind. 316, 37 Am. Rep. 163, and Dunn v. West, 5 B. Mon. 383, both holding a promise by one to indemnify another if he will become surety is not within the statute; May v. Williams, 61 Miss. 132, 48 Am. Rep. 83, holding an oral agreement to indemnify one for becoming a surety was invalid within the statute; Carville v. Crane, 5 Hill, 485, 40 Am. Dec. 365, holding the statute of frauds applies to a parol promise to indorse the note for a purchaser of goods; Moses v. Lawrence Co. Bank, 149 U. S. 303, 37 L. 745, 13 S. Ct. 901, on the point that a guaranty of a note, written before its delivery, requires no other consideration; Gist v. Drakely, 2 Gill, 342, 41 Am. Dec. 429, holding an indorsement upon an instrument under seal to enable the obligor to negotiate it creates the liability of an original promisor; Rutledge v. Townsend, 38 Ala. 717, holding that where a third person joins with a debtor in a note to be delivered as collateral for the original debt the note is without consideration; Culbertson v. Smith, 52 Md. 637, 36 Am. Rep. 389, holding that a mother indorsing a note of her son in blank after it was drawn, is not liable; Heidenheimer v. Jones, 1 Tex. Civ. App. 349, holding a verbal promise to indemnify a sheriff for levying execution, good; Crozer v. Chamber, 20 N. J. L. 262, where the court considered the effect of the signature of a third person on the note before its indorsement by the payee; Harwood v. Kiersted, 20 Ill. 374, where one putting his name on a note as security two days after it was written was held liable; Nelson v. Boynton, 3 Met. 401, 37 Am. Dec. 150, holding a promise by a son to pay the note of his father if the promisee should discontinue an action on it, is within the statute; Horn v. Bray, 51 Ind. 564, 19 Am. Rep. 746, holding a contract of indemnity between sureties in the same instrument was not within the statute; Mallory v. Gillett, 21 N. Y. 436, dissenting opinion, where a promise to one in possession of a boat on which he had a lien that if he would deliver it to another he would pay him was held to be within the statute. See also note to 6 Am. Dec. 372, citing authorities on original undertakings; note to 95 Am. Dec. 252, 253, 255, discussing the subject of collateral agreements and the necessity of their being in writing. Cited in Independent Dist. v. Beard, 83 Fed. 14, on the point that the judicial interpretation by the State courts of the statute of frauds was followed in Federal courts.

Evidence.—Parol evidence is admissible to show that there was sufficient consideration for the agreement, what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects, p. 500.

Cited in Jones v. Palmer, 1 Doug. (Mich.) 382, 383, holding that the consideration of a guaranty may be proved by parol; Phelps v. Clasen, Woolw. 211, F. C. 11,074, holding that parol proof may be received of the consideration of an instrument different from the one recited in it.

Evidence.—Parol evidence is admissible to supply the defect of a written instrument as to the consideration and *res gestæ* between the parties; p. 501.

Miscellaneous.—Miscited in *Johnston v. Straus*, 26 Fed. 67; *Woodhull v. Wagner*, 1 Bald. 302, F. C. 17,975.

1 Pet. 503-510, 7 L. 239, DAVIS v. MASON.

Federal courts — State laws followed.—On appeal from a judgment in ejectment, the Supreme Court will be governed in deciding on the rights of the parties by the law of the State where the land is situated, p. 505.

Cited in *Smith v. Powers*, 23 Tex. 33, holding State decisions upon land titles binding upon every court where these titles are drawn in litigation.

Curtesy.—A husband may have a good estate as tenant by curtesy in the wild lands of his wife in the absence of evidence of actual seisin, p. 506.

Cited in *Vanarsdall v. Fauntleroy*, 7 B. Mon. 402, holding that as a general rule actual possession during coverture was necessary to constitute the husband tenant by the curtesy; *Mettler v. Miller*, 129 Ill. 639, 22 N. E. 531, holding a seisin in fact as distinguished from a seisin in law was not necessary; *Forbes v. Sweeny*, 8 Neb. 527, when the wife was in actual possession by her tenants; *Day v. Cochran*, 24 Miss. 276, holding that if the land be in lease for years curtesy may be had without entry or receipt of rent; *Wass v. Bucknam*, 38 Me. 360, holding a husband was entitled to curtesy in lands of which his wife was seized as co-tenant; *McDaniel v. Grace*, 15 Ark. 483, and *Todd v. Oviatt*, 58 Conn. 182, 20 Atl. 441, 7 L. R. A. 696, and *n.*, wild or waste lands may be constructively in wife's possession unless in the adverse possession of another; *Borland v. Marshall*, 2 Ohio St. 313, 316, holding a husband may have curtesy although the wife was never seized, either actually or constructively, and although the same be adversely held; *Wescott v. Miller*, 42 Wis. 466, where the adverse possession for twenty-five years was held not to bar ejectment by a husband and wife; *Redus v. Hayden*, 43 Miss. 635, on the point that a deed of conveyance of a freehold of itself operates to create a seisin in the grantee, unless in adverse possession of another. Cited generally in *Allen v. Hanks*, 136 U. S. 310, 34 L. 418, 10 S. Ct. 964, discussing the power to divest a husband of his marital rights in the lands of his wife.

Not followed in *Neely v. Butler*, 10 B. Mon. 49, where the court said that in Kentucky no distinction was made between cultivated lands and those that remained in a state of nature.

Curtesy.—If a right of entry exists it ought to be sufficient to sustain the tenure acquired by the husband where no adverse possession exists, p. 508.

Curtesy.—In equity the husband has curtesy of a trust as well as of a legal estate, of an equity of redemption, a contingent use or money to be laid out in lands, p. 508.

Cited in *Wells v. Thompson*, 13 Ala. 803, 48 Am. Dec. 81, on the point that curtesy applies as well to qualified or conditional as to absolute estates in fee; *Robinson v. Lakenaur*, 28 Mo. App. 140, on the point that a husband has curtesy in an equity of redemption; *McDaniel v. Grace*, 15 Ark. 484, holding a husband had no curtesy in a pre-emption right.

Wills.—In Kentucky a will with two witnesses is sufficient to pass title to real estate, and the copy of such a will duly proved and recorded in another State is good evidence of execution, p. 508.

Wills.—In Kentucky, although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it, p. 509.

Cited in *Compton v. Milton*, 12 N. J. L. 75, holding that if one witness testify expressly to the fulfillment of every ceremony required by the statute, it is sufficient.

1 Pet. 511-546, 7 L. 242, AMERICAN INS. CO. v. THREE HUNDRED AND FIFTY-SIX BALES OF COTTON.

Another appeal in this case is reported in 3 Pet. 307, 316, 7 L. 688, 692.

Constitutional law.—The Constitution confers absolutely on the Union the powers of making war and treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty, p. 542.

Cited in *Nelson v. United States*, 30 Fed. 115, 12 Sawy. 288, and *Stewart v. Kahn*, 11 Wall. 507, 20 L. 179, on the point that the war power and the treaty-making power each carries with it authority to acquire territory; *Dred Scott v. Sandford*, 19 How. 611, 613, 15 L. 786, 787, dissenting opinion, discussing the words "territory belonging to the United States;" *Gardiner v. Miller*, 47 Cal. 575, holding that after acquiring territory congress may pass laws to protect the private rights guaranteed by treaty that are beyond the interference of State authority.

International law.—The usage of the world is if a nation be not entirely subdued by another, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace, p. 542.

Cited in *New Orleans v. Steamship Co.*, 20 Wall. 397, 22 L. 359, sustaining a lease during the military occupation of New Orleans made by the mayor appointed by the general commanding the department; *United States v. Huckabee*, 16 Wall. 434, 21 L. 464, holding land sold to the Confederate States and captured by the United States became after the Confederacy ended, without further proceeding, the property of the United States.

International law.—If territory be ceded by one nation to another the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such terms as its new master may impose, p. 542.

Cited in *Holden v. Joy*, 17 Wall. 247, 250, 21 L. 535, 536, construing the treaties with the Cherokee Nation ceding land to United States.

International law.—On the transfer of territory by one nation to another it has never been held that the relations of the inhabitants with each other undergo any change, p. 542.

Cited and doctrine followed in *Leitensdorfer v. Webb*, 1 N. Mex. 44, holding that on cession of conquered territory laws then in force remain in full force until repealed; *Hart v. Burnett*, 15 Cal. 560, on the point that neither military occupation nor complete conquest produces generally any change in private property; *Chicago & P. Ry. Co. v. McGlinn*, 114 U. S. 547, 29 L. 272, 5 S. Ct. 1007, on the point that laws governing property and to secure good order, etc., are left in force; *Palmer v. Low*, 98 U. S. 15, 25 L. 64, on the point that the laws regulating private rights continue in force after the conquest; *United States v. Lucero*, 1 N. Mex. 447, on the point that the right of property of a Pueblo to lands is not affected; *Sunol v. Hepburn*, 1 Cal. 286, dissenting opinion, on the point that the acquisition of California effected no change in the law regulating the rights of individuals; *Pollard v. Kibbe*, 14 Pet. 374, 376, 389, 391, 398, 404, 407, 409, 414, 10 L. 501, 508, 509, 512, 515, 516, 517, 520, where the question was as to the title to a lot granted by the Spanish government in territory ceded to the United States under the Florida treaty; *First Nat. Bank v. Kinner*, 1 Utah, 105, the court saying this doctrine applied in the acquisition of Utah; *Crook v. Old Pt. Comfort Hotel Co.*, 54 Fed. 609, on the point as to what law prevails in places ceded to the United States; *Hill v. Boyland*, 40 Miss. 634, holding all acts passed in Mississippi during the war and not in conflict with the organic law are valid; *Cutting v. Taylor*, 3 S. Dak. 13, 51 N. W. 950, 15 L. R. A. 692, holding laws of the Territory of Dakota continue in force as the laws of the new State. Also cited in 31 Am. St. Rep. 838, note.

Referred to in *Woodworth v. Fulton*, 1 Cal. 314, dissenting opinion, holding the title of the United States to the land in California

related back to the time of the occupation by the American army, and from that time the Mexican laws ceased to exist. See the authorities cited under the next head.

International law.—A transfer of territory by one nation to another transfers the allegiance of those who remain in it; laws in their nature political are changed but those regulating the intercourse and general conduct of individuals remain in force until altered by the newly-created power of the State, p. 542.

Cited and principle followed in *Cross v. Harrison*, 16 How. 194, 14 L. 904, holding that the civil government in California, formed during the war with Mexico, continued after the peace until congress legislated otherwise; *Murphy v. Ramsey*, 114 U. S. 45, 29 L. 57, 5 S. Ct. 764, on the point that the personal and civil rights of the inhabitants are secured to them; *State v. Boyd*, 31 Neb. 756, 48 N. W. 761, dissenting opinion, holding that the alien inhabitants of Nebraska on its admission did not become citizens of the United States under the acts admitting the State; *Tobin v. Walkinshaw*, McAll. 192, F. C. 14,068, construing the right of election given to Mexican citizens under the treaty of Guadalupe Hidalgo; *In re Rodriguez*, 81 Fed. 351, on the point that Mexicans remaining in the territory after the cession, failing to declare their intention to remain citizens of Mexico, became citizens of the United States; *People ex rel. v. De la Guerra*, 40 Cal. 342, holding it was no violation of the treaty of Guadalupe Hidalgo that the Constitution of California excluded some of the inhabitants from certain political rights; *Barnett v. Barnett*, 50 Pac. 338, holding Mexican law as to acquiescent property between husband and wife remained in force in New Mexico after its acquisition. See authorities under prior head.

Treaty is the law of the land, p. 543.

Cited in *United States v. Reese*, 5 Dill. 409, F. C. 16,137, on the point that congress cannot interfere with rights under treaties except in cases purely political.

Constitutional law — Territories.—The power of governing a territory belonging to the United States which has not by becoming a State acquired the means of self-government belongs unquestionably to the United States to the fullest extent, p. 543.

Cited to this point and holding affirmed and followed in *Shively v. Bowlby*, 152 U. S. 48, 38 L. 349, 14 S. Ct. 566, holding that the United States has entire dominion, national and municipal, Federal and State, over all territories; *Northern Pac. R. R. Co. v. Barnes*, 2 N. Dak. 350, 51 N. W. 397, on the point that legislation of congress regarding a territory is the supreme law of the land and cannot be questioned; *Franklin v. United States*, 1 Colo. 39, on the point that the power is derived from the clause enabling congress to make all needful rules regulating territory; *Case v. Loftus*, 14 Sawy.

217, 39 Fed. 733, 5 L. R. A. 688, and n., in governing territories congress exercises the combined power of the national and State governments; *Territory v. Lee*, 2 Mont. 133, holding a territory has none of the attributes of sovereignty and is a province over which congress has supreme control; *United States v. Gratiot*, 14 Pet. 538, 10 L. 578, on the meaning of the word territory, the court saying that congress has the same power as over any other land of the United States; *Utter v. Franklin*, 172 U. S. 423, holding congress may validate bonds issued by Arizona territorial legislature in aid of a railroad; *Dred Scott v. Sandford*, 19 How. 501, 15 L. 740, on the point that the government may organize territorial governments with powers of legislation; *Baer v. Moran Bros.*, 2 Wash. 611, 27 Pac. 471, on the point that land covered by the flow of the tide in a territory, congress can dispose of as it sees fit; *Endleman v. United States*, 86 Fed. 459, 57 U. S. App. 6; *United States v. Nelson*, 29 Fed. 204, 205, and *Nelson v. United States*, 30 Fed. 116, 12 Sawy. 290, all holding congress has power to prohibit the manufacture and sale of liquor in Alaska; *Mormon Church v. United States*, 136 U. S. 43, 34 L. 491, 10 S. Ct. 803, holding congress had the power to repeal the act of incorporation of the Mormon Church in Utah; *United States v. Kagama*, 118 U. S. 380, 30 L. 230, 6 S. Ct. 1112, holding an act giving territorial courts jurisdiction over crimes committed by Indians within the territory is constitutional; *Reynolds v. People*, 1 Colo. 181, where an indictment for selling liquors within a military reservation was held good; *Dred Scott v. Sandford*, 19 How. 442, 15 L. 716, dissenting opinion, p. 540, 15 L. 757, discussing the power of the Federal government over slavery in territory acquired by it; *Treadway v. Schnauber*, 1 Dak. Ter. 274, 276, 280, 46 N. W. 473, 474, 475, dissenting opinion, holding a territorial legislature has only such powers as are given it by congress and that an extra session was void; *Territory v. Scott*, 3 Dak. Ter. 395, 20 N. W. 405, dissenting opinion, p. 412, 20 N. W. 417, holding that a legislature of a territory exercised delegated powers and that an act selecting a seat of government was valid, being authorized; *Wagner v. Harris*, 1 Wyo. 198, holding legislatures of territories may create municipal corporations and grant charters; *Territory v. Cox*, 6 Dak. Ter. 506, 528, holding an act of the territory, authorizing the governor to fill vacancies, does not conflict with revised statutes, section 1858; *Downes v. Parshall*, 3 Wyo. 427, 26 Pac. 995, holding a territory could pass a law declaring that any creditor accepting a dividend from property of an assignor shall release him; *Koenigsberger v. Richmond S. M. Co.*, 158 U. S. 48, 39 L. 892, 15 S. Ct. 754, discussing the effect on the jurisdiction of courts of the admission of a territory. Cited generally in *Ex parte Bushnell*, 9 Ohio St. 228, discussing whether congress had any power to pass a law for the reclamation of slaves.

Distinguished in *United States v. Rhodes*, 1 Abb. (U. S.) 43, F. C. 16,151, discussing the nature of citizenship and holding the civil rights bill of April 9, 1866, constitutional.

Florida.—Under the treaty with Spain, by which Florida was ceded to the United States, the inhabitants of Florida do not participate in political power, nor share in the government until Florida becomes a State; in the meantime Florida continues to be a territory of the United States, governed by congress under the powers conferred by the Constitution, p. 542.

Cited in *Boyd v. Thayer*, 143 U. S. 168, 36 L. 112, 12 S. Ct. 384, discussing the effect of the admission of a State on members of the political community.

Territorial courts.—The general grant of jurisdiction to territorial courts of Florida by the act of March, 1823, is common to both the superior and inferior courts, and their jurisdiction is concurrent except so far as it may be made exclusive in either by other provisions of the statute, p. 544.

Cited in *American Ins. Co. v. Fisk*, 1 Paige, 93, holding an act of Florida creating a wrecker's court to be valid, notwithstanding the act of congress giving jurisdiction in admiralty and salvage cases to the superior courts of the territory; *Ex parte Lothrop*, 118 U. S. 117, 118, 30 L. 110, 6 S. Ct. 986, 987, holding the County Court of Cochise county, established by the legislature of Arizona, is an inferior court within the meaning of revised statutes, section 1908.

Federal courts.—The Constitution and laws of the United States give jurisdiction to the District Court of all cases in admiralty; but jurisdiction over the case does not constitute the case itself, p. 545.

Cited in *The Wave*, Blatchf. & H. 251, 252, F. C. 17,297, on the point that the jurisdiction of District Courts in admiralty is exclusive; *United States v. New Bedford Bridge*, 1 Wood. & M. 501, F. C. 15,867, on the point that when an exclusive power is conferred on the Federal courts, no concurrent remedy except a common law one exists in the State courts; *The Brig John Gilpin*, Olcott, 82, F. C. 7,345, on the point that salvage compensation may be obtained in admiralty for services within the ebb and flow of the tide without regard to location; *United States v. Coombs*, 12 Pet. 76, 9 L. 1006, on the point that where salvage services are performed, partly on tide-waters and partly on shore, admiralty has jurisdiction to decree salvage; *The Huntsville*, 12 Fed. Cas. 1002, holding the admiralty jurisdiction extends to salvage suit by a city fire department for services rendered from the land; *United States v. New Bedford Bridge*, 1 Wood. & M. 434, F. C. 15,867, discussing admiralty law as to crimes.

Federal courts.—The Constitution of the United States, in defining the judicial power, contemplates the classes enumerated as three distinct classes; the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two, p. 545.

Cited in *People v. Tyler*, 7 Mich. 253, on the point that the object of the admiralty clause in the Constitution was to give something not already given by the two preceding clauses; *In re Metzger*, 17 Fed. Cas. 234, on the point that all Federal courts inferior to the Supreme receive their jurisdiction from congress, and can exercise only such as is provided.

Admiralty.—A case in admiralty does not in fact arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime as it has existed for ages is applied by our courts to the cases as they arise, pp. 545, 546.

Cited in *Murray v. Chicago, etc., Ry. Co.*, 62 Fed. 28, where the court considered the effect of the common law upon Federal courts; *Russell v. Forty Bales of Cotton*, 21 Fed. Cas. 45, where there was a libel for salvage against the proceeds of cotton derelict, and an intervention by the United States; *Nickels v. Griffin*, 1 Wash. Ter. 391, dissenting opinion, on the point that an admiralty civil cause cannot arise under the laws of the United States.

Admiralty — Territorial courts.—Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories; in legislating for them congress exercises the combined powers of the general and of a State government, p. 546.

Cited in *Arizona v. Duffield*, 1 Ariz. Ter. 69, on the point that in legislating for territories, the United States exercises the whole power on the subject; *United States v. Coe*, 155 U. S. 85, 39 L. 79, 15 S. Ct. 19, discussing the power of congress to establish inferior courts and to provide appeals from their decisions; *Smith v. United States*, 1 Wash. Ter. 270, holding that territorial courts exercise the combined jurisdiction of Circuit and District Courts of the United States; *Orchard v. Hughes*, 1 Wall. 77, 17 L. 561, holding that territorial courts are not governed exclusively by the legislative act creating them; *The City of Panama*, 101 U. S. 458, 25 L. 1063, holding the District Courts of a territory have jurisdiction in admiralty; *Phelps v. S. S. City of Panama*, 1 Wash. Ter. 523, 526, 527, where the court discussed the admiralty law existing in a territory and the effect of the Federal admiralty law; *Benner v. Porter*, 9 How. 240, 244, 13 L. 122, 123, holding that after a transfer from the territorial to the State courts of Florida, if a territorial court took cognizance of a libel it acted without jurisdiction; dissenting opinion,

Lincoln, etc., Min. Co. v. District Court, 7 N. Mex. 517, 38 Pac. 590, arguing that the test of the validity of a territorial statute is whether it contravenes the organic act of the territory.

Territorial courts.—The judges of the Superior Courts of the territory of Florida hold their offices for four years; these courts are not constitutional in which the judicial power conferred by the Constitution on the general government can be deposited, p. 546.

The following citing cases affirm and rely upon this holding: Nickels v. Griffin, 1 Wash. Ter. 380, 385, holding that the judicatory act of 1789, and other acts conferring jurisdiction on Federal courts do not apply to territorial courts; United States v. C. O. & G. R. R. Co., 3 Okl. 451, 41 Pac. 745, on the point that legislation in regard to territorial courts has been under the general powers of congress; In re Dana, 68 Fed. 901, on the point that territorial courts are created under the authority to make all needful rules for the territories; Manning v. French, 149 Mass. 398, 21 N. E. 946, 4 L. R. A. 342, holding courts of territories have only such powers as are conferred; Newcomb v. Smith, 2 Pinn. 143, dissenting opinion, on the point that the judicial power of territorial courts is not part of the judicial power of the United States; McAllister v. United States, 141 U. S. 180, 182, 35 L. 695, 696, 11 S. Ct. 951, 953, dissenting opinion; Sanders v. Farwell, 1 Mont. 602; Braithwaite v. Jordan, 5 N. Dak. 235, 65 N. W. 714, 3 L. R. A. 253, and Beatty v. Ross, 1 Fla. 208, all holding courts in a territory were not United States courts; Territory v. Murray, 7 Mont. 259, 15 Pac. 149, and Clinton v. Englebrecht, 13 Wall. 447, 20 L. 663, on the point that the fact that the territorial judges are appointed by the president does not make the territorial courts United States courts; Blackburn v. Wooding, 56 Fed. 547, 15 U. S. App. 84, on the point that congress could not create a Circuit Court in a territory and invest it with the judicial power defined in the Constitution; Reynolds v. United States, 98 U. S. 154, 25 L. 246, on the point that the fact that the territorial courts have the same jurisdiction as District and Circuit Courts does not make them such; Carter v. Bennett, 4 Fla. 324, and Inerarity v. Curtis, 4 Fla. 189, on the point that while not constitutional courts, the courts established in the territory of Florida were United States courts; In re Osterhaus, 18 Fed. Cas. 896, on the point that the territorial court of Wyoming is a United States court within the act of May 12, 1864; McCann v. United States, 2 Wyo. 281, 298, where the question was whether a territorial court was a District or Circuit Court within a statute giving criminal jurisdiction; Rogers v. Bradford, 1 Pinn. 428, on the point that the Supreme Court of a territory is not subject to the restriction of the seventh article of the amendments to the Constitution; Burke v. Oklahoma, 2 Okl. 515, 37 Pac. 835, holding the act limiting the power of Federal courts to punish for contempt does not apply to territorial courts; Mackey v. Enzensperger, 11 Utah,

159, 39 Pac. 542, dissenting opinion, holding a territorial act permitting a verdict in a civil case on the concurrence of nine jurors, was valid; *United States v. Guthrie*, 17 How. 308, 15 L. 108, dissenting opinion, on the question as to the power of the president to remove territorial judges; *McAllister v. U. S.*, 141 U. S. 198, 35 L. 701, 11 S. Ct. 958, dissenting opinion, holding territorial judges were subject to removal; *Steamer Coquitlam v. United States*, 163 U. S. 351, 41 L. 186, 16 S. Ct. 1119, holding the District Court of Alaska is the Supreme Court and its decree is subject to review by the Circuit Court of Appeals of that district; *Suesenbach v. Wagner*, 41 Minn. 110, 42 N. W. 926, holding that the judgments and records of the territories stand on the same footing as those of a State as respects faith and credit; *United States v. Ritchie*, 17 How. 534, 15 L. 238, on the point that the board of commissioners to settle land claims in California was not a court under the Constitution; *Taylor v. Place*, 4 R. I. 335, defining and illustrating judicial power in the constitutional sense; *Walker v. New Mexico, etc.*, R. R. Co., 7 N. Mex. 288, 34 Pac. 43, holding seventh amendment inapplicable to the States and territories.

Constitutional law.—Act of the territory of Florida creating a court under whose decree a cargo of a wrecked vessel was sold to pay salvors is not inconsistent with the laws and Constitution of the United States, and is valid, and the sale made in pursuance of it changes the property, p. 546.

Miscellaneous.—Cited in *Roberts v. Cooper*, 20 How. 481, 15 L. 974, on the point that a second writ of error on the same questions which were open on the first will not be allowed; *Corning v. Troy*, etc., Fac., 15 How. 466, 14 L. 775, and *Republican Min. Co. v. Tyler Min. Co.*, 79 Fed. 735, 48 U. S. App. 218, on the point that after a mandate had issued to the court below a second writ of error brings up nothing but the proceedings subsequent to the mandate; *Dodge v. Gaylord*, 53 Ind. 369, on the point that the decision of the Supreme Court upon a given state of facts becomes the law of the case; *Young v. Buckingham*, 5 Ohio, 489, on the point that the action of the court in which it has jurisdiction cannot be collaterally questioned; *George Ins. & T. Co. v. Cliver*, 1 Ga. 40, on the point that persons who are prevented from paying over money by process of court are not taxable for interest; *Minturn v. Larue*, McAll. 396, F. C. 9,646, on the point that abandonment by a State of a right ought never to be presumed.

1 Pet. 547-551, 7 L. 257, UNITED STATES v. FOUR HUNDRED AND TWENTY-TWO CASKS OF WINE.

Practice — Stare decisis.—It is not the habit of the United States Supreme Court to consider points again open for discussion, once deliberately decided, and the groundwork of judgment already rendered in the same cause in a former hearing, p. 549.

Cited in *Hambs v. Corbin*, 34 Mo. App. 397, on the point that where a case has been appealed the decision is the law of the case; *Cherry v. Kansas City, etc., Ry. Co.*, 61 Mo. App. 308, holding that when a case has been decided and comes again before the court, only questions not before determined will be noticed.

Proceedings in rem.—In proceedings in rem the claimant is an actor and is entitled to appear only in virtue of his proprietary interest in the thing in controversy. It is, therefore, necessary that he establish his right to that character as a preliminary to his admission as a party, p. 549.

Cited in *The Lottawanna*, 20 Wall. 223, 22 L. 264, on the point that supplemental suits in the nature of suits in rem may be entertained in favor of parties having an interest; *United States v. One Hundred and Twenty-nine Packages*, 27 Fed. Cas. 286, on the point that if a claimant cannot establish his claim except through fraud he is left in the position he assumed; *North Carolina v. Vanderford*, 35 Fed. 284, holding a manufacturer of illicit whisky could not be admitted as a claimant; *The R. W. Skillinger*, 1 Flipp. 438, F. C. 12,181, dismissing answer of a claimant who failed to show any ownership in a libelled vessel; *The Steamship Idaho*, 4 Ben. 276, F. C. 6,996, where one whose interest arose solely from the fact that he had indemnified the claimant against the result of the litigation was not allowed to intervene; *Reynolds v. Steamboat Favorite*, 10 Minn. 250, on the point that although a proceeding is in rem it is not necessarily a proceeding in admiralty, it being claimed that a common-law court could not give the remedy; *Our House No. 2 v. State*, 4 G. Greene, 175, on the point that proceedings in rem against property used for unlawful purposes may be sanctioned without violating the Constitution.

Proceedings in rem.—A claimant in a proceeding in rem must put his claim upon oath, positively averring his proprietary interest; and his refusal to do so is sufficient reason for rejection of his claim, p. 549.

Cited in *Steamer Spark v. Lee Choi Chum*, 1 Sawy. 718, F. C. 13,206, holding a claim must be filed by the owner, and must state the facts in a direct issuable form.

Proceedings in rem.—If a proceeding in rem be made through an agent, he is required to make oath to his belief of the verity of the claim, and may also be required to produce and prove his authority. If this is not done it furnishes matter of exception and may be insisted upon by the adverse party for dismissal of the claim, p. 550.

Proceedings in rem.—If a claim is admitted without objection and allegations or pleadings to the merits are put in, it is an admission that the party is rightfully in court and capable of contesting the merits, p. 550.

Cited in *The Prindiville*, 1 Brown, 487, F. C. 11,435, holding the right of a party to appear and defend a suit in rem must be put in contestation if at all before the hearing; *Read v. Owen*, 9 Port. 183, holding that where a claim is admitted and pleadings to the merits are put in, it is a waiver of the preliminary inquiry; *United States v. One Hundred Barrels of Cement*, 27 Fed. Cas. 293, on the point that if one were in a formal manner before the court, his right must be disputed by an exceptive allegation or by a plea in abatement.

Appeal and error.— Upon a writ of error upon an exchequer information tried by a jury, the evidence given at the trial is not properly before the court, p. 550.

Cited in *Insurance Co. v. Folsom*, 18 Wall. 249, 21 L. 833, holding that if a case is tried by the Circuit Court and the finding is a general one, the Supreme Court will only review questions of law; *United States v. King*, 7 How. 865, 12 L. 948, on the point that the Supreme Court on a writ of error will not revise or give judgment as to the facts, but takes them as found; *United States v. One Hundred and Thirty Barrels of Whisky*, 1 Bond, 590, F. C. 15,938, on the point that the trial of issues of fact in cases of seizure on land under the revenue laws is to be by jury.

Fraudulent conveyances.— A conveyance of property in trust for oneself, if fraudulent as to creditors, is not absolutely void, and only voidable by them, p. 550.

Miscellaneous.— Cited in *The Montserat*, 17 Fed. Cas. 650, as to the disposition of the cargo and vessel, or the proceeds after payment of salvage and expenses.

1 Pet. 552-561, 7 L. 259, **STEELE'S LESSEE v. SPENCER.**

Judgments — Deeds.— A decree of the Supreme Court of Ohio directing a conveyance to be made vests such a legal title in the land as would be vested by a conveyance, p. 559.

Recording laws.— In the construction of registry acts, the term "purchaser" is usually taken in its technical, legal sense. It means a complete purchaser, or in other words, a purchaser clothed with the legal title, p. 559.

Cited in *Den ex dem. v. Richman*, 13 N. J. L. 60, in considering whether a purchaser at execution was a purchaser within the meaning of the statute; *Campbell Printing Co. v. Dyer*, 46 Neb. 836, 65 N. W. 906, holding that a mortgagee of a conditional vendee in possession of chattels is not a purchaser.

Recording laws.— Under Ohio statute, failure to record a deed within time prescribed avoids it as to all subsequent purchasers for a valuable consideration without notice, whether their titles be recorded or not, p. 569.

Cited in *Coster v. Bank of Georgia*, 24 Ala. 63, holding an unrecorded mortgage is void as to a subsequent mortgagee without notice, although his mortgage is unrecorded; *Miller v. Merine*, 43 Fed. 265, holding a subsequent bona fide purchaser took priority over a purchaser under an unrecorded deed, although his deed was not first recorded; *Sanborn v. Adair*, 29 N. J. Eq. 343, holding a deed not recorded within the time prescribed cannot regain its priority by being placed on record before such subsequent deed.

Distinguished in *Den ex dem. v. Richman*, 13 N. J. L. 53, holding a deed, if recorded within six months, was valid as against a subsequent bona fide purchaser whose deed was recorded first.

Recording laws.— Parties in whose favor a decree is made directing land to be conveyed to them on the payment of a certain sum, are purchasers for value without notice, under the Ohio statute, and their rights prevail over a prior unrecorded deed, p. 560.

Alteration of instruments.— Whether erasures and alterations have been made in a deed is a question of fact for the jury, their materiality one of law to be decided by the court, p. 560.

Cited in *Deem v. Phillips*, 5 W. Va. 178, holding erasures and interlineations in a deed after it is acknowledged vitiate it; *Yeager v. Musgrave*, 28 W. Va. 111, on the point that the alteration of an agreement by the obligee in a material matter vitiates it; *Collins v. Collins*, 51 Miss. 323, 24 Am. Rep. 640, holding an alteration by consent, on a deed of trust, did not affect it; *Bailey v. Taylor*, 11 Conn. 532, 29 Am. Dec. 323, on the point that it is for the jury to say whether an erasure or interlining is before delivery; *Burnham v. Ayer*, 35 N. H. 354, holding that whether an alteration is material is a question of law, and it is error to leave it to the jury; *Keen v. Monroe*, 75 Va. 427, holding that whether a blank was filled before or after delivery was for the jury, but its materiality was for the court; *Printup v. Mitchell*, 17 Ga. 562, 63 Am. Dec. 261, holding an instrument whose execution is proved, should be admitted without reference to alterations, leaving this question to the jury.

Deed.— Construction of a deed belongs to the province of the court, p. 561.

1 Pet. 562-566, 7 L. 263, *NICHOLLS v. HODGES*.

Executors and administrators.— The allowance by the Orphans' Courts of the commissions of an executor within the limits fixed by the legislature is final and conclusive, p. 566.

Cited in *Atkinson v. Robbins*, 5 Cr. C. C. 314, F. C. 617, on the point that the rate of compensation is exclusively within the discretion of the Orphans' Court, and its decision conclusive; *Ringgold's Case*, 1 Bland Ch. 9, and *Winder v. Diffenderfer*, 2 Bland Ch. 207, on the point that an allowance within the prescribed limits rests conclusively with the court of original jurisdiction; *West v. Smith*,

8 How. 411, 412, 12 L. 1134, where the court said that although the commission seemed high yet if within authority it was binding; *Mathis v. Matais*, 18 N. J. L. 68, reviewing the allowances in various States, and holding that in the absence of fraud or mistake the Orphans' Court are the sole judges; *Shirley v. Shattuck*, 28 Miss. 26, on the point that the equity of statutes fixing compensation of executors has been held to apply to general trustees. See note to 17 Am. Dec. 270, discussing the compensation of trustees.

Executors and administrators.—The legality and equity of a claim of an executor must be examined in the same manner as the claim of any other creditor, p. 566.

Executors and administrators.—To support the claim of an executor against an estate, it is incumbent on the party making it to prove some contract, promise or agreement, express or implied, in relation to it, p. 566.

Contracts.—Evidence relating to an agreement between an uncle and a nephew, by which the former was to board and clothe the latter, and to pay his expenses, the latter performing services, reviewed and held not to constitute a sufficient basis for a claim for extra services as clerk in the uncle's store, p. 566.

1 Pet. 567-569, 7 L. 265, *BANK OF COLUMBIA v. SWEENEY*.

Mandamus.—Where a court allows a party to plead a defective plea, the revising power of the Supreme Court can be exercised only by a writ of error, and not by mandamus, p. 569.

Cited in *State v. Judge of Orphans' Court*, 15 Ala. 742, on the point that the writ will not lie where the party may have a writ of error; *Ex parte Hendree*, 49 Ala. 361, on the point that where a judgment is final and will support an appeal it cannot be corrected by mandamus; *Ex parte Williamson*, 8 Ark. 428, holding mandamus would not lie to compel a judge to award restitution, as appeal would lie; *Jelley v. Roberts*, 50 Ind. 7, holding mandamus would lie to compel a judge to sign a bill of exceptions; *People v. Pearson*, 2 Scam. 204, 33 Am. Dec. 448, citing authorities, and holding a mandamus will lie to compel a judge to sign a bill of exceptions originally presented; *State ex rel. Ames v. Judge Second District*, 32 La. Ann. 303, where mandamus was brought to compel a judge to grant an appeal from an interlocutory order; *American Construction Co. v. Jacksonville Ry. Co.*, 148 U. S. 379, 37 L. 489, 13 S. Ct. 761, on the point that mandamus would not lie to review a ruling or interlocutory order made in the progress of a cause.

1 Pet. 570-572, 7 L. 266, *WARING v. JACKSON*.

Federal courts.—With respect to the titles to real property, the Supreme Court of the United States applies the same rules that it finds applied by the State tribunals in like cases, p. 571.

Cited in *Sellers v. Corwin*, 5 Ohio, 405, 24 Am. Dec. 306, on the point that the Supreme Court will, in respect to titles to realty, apply the rules applied by the State tribunals; *Independent District v. Beard*, 83 Fed. 15, citing authorities and holding that decisions of a State court regarding trusts which have become a rule of property will be followed; *Smith v. Power*, 23 Tex. 33, holding that a series of decisions settling title to lands become a rule of property and binding; *Inglis v. Sailors Snug Harbor*, 3 Pet. 175, 7 L. 644, on the point that the decisions of a State upon a point of local law in the construction of a statute is decisive; *Abbott v. Essex Co.*, 2 Curt. 134, F. C. 11, on the point that any settled rule of construction by a State court applicable to a will, will be followed.

Wills.— On a devise to sons and to their heirs and executors forever, with the provision that if either die without issue his share is to go to the other, and if both die without issue, then to go to other relatives, nothing passes under the ulterior devise over, and the first devisees take fee simple, p. 571.

Cited in *Brown v. Brown*, 86 Tenn. 296, 6 S. W. 875, where a limitation over similar to the one in the principal case was held not to be void for remoteness; *Moody v. Walker*, 3 Ark. 203, on the effect of a devise of property to each of two sons and if either should die without issue his share to go to the survivor; *Crane v. Cowell*, 2 Curt. 186, F. C. 3,353, on the point that a devise to A. and B. in fee and if either die without issue his share to go to the survivor, creates a conditional fee.

Adverse possession.— An adverse possession will not prevent the operation of a devise over, p. 572.

Cited in *Whittemore v. Bean*, 6 N. H. 49, on the point that after a man has been disseized, his right of entry is devisable; *Fite v. Doe*, 1 Blackf. 133, note 1, holding that where A. conveyed to B. and afterwards the same land to C., the possession of C., claiming only under his deed, was not adverse to B.; *Mitchell v. Lipe*, 8 Yerg. 182, holding that where a purchaser at execution sold the land while the defendant was in possession, the possession of the defendant was not adverse to the sheriff's vendee.

Miscellaneous.— Cited in *Pollard v. Cocke*, 19 Ala. 196, on the point that Federal judgments have the same liens as attach to judgments of State courts.

1 Pet. 573-577, 7 L. 267, UNITED STATES v. STANSBURY.

Judgments — Execution.— At common law, the release of a debtor whose person is in execution is a release of the judgment itself, p. 575.

Cited in *David v. Blundell*, 40 N. J. L. 376, holding a release of a defendant on his giving bond to apply for the benefit of the insol-

vent law will not prejudice the plaintiff; *Magniac v. Thomson*, 15 How. 301, 14 L. 704, where the release by a plaintiff of a defendant in execution under a ca. sa. was held to release the defendant from all liability; *Hyde v. Long*, 4 Vt. 533, holding the discharge of one of the makers from prison discharged the whole note as to the other makers; *Harden v. Campbell*, 4 Gill, 31, where one arrested offered to surrender himself but the plaintiff refused to commit him, and it was held this barred a revival of the judgment; *Steele v. Murray*, 1 Blackf. 178, note a, on the point that a judgment creditor having sued out one execution may abandon it and sue out another of a different sort; *Hartland v. Hackett*, 57 Vt. 97, citing authorities on the point but not deciding the question.

Principal and surety.—Sureties are not released because the principal, who was imprisoned, has been discharged from imprisonment under the act for the relief of persons imprisoned for debts due the United States, upon his conveying his property to the United States, p. 575.

Cited in *Salmon v. Clagett*, 3 Bland Ch. 178; S. C. on appeal in 5 Gill & J. 333, holding a conditional extension of time to a debtor, not absolute, does not discharge the sureties; *United States v. Hunter*, 5 Mason, 65, F. C. 15,426, holding the discharge of a principal from imprisonment by the secretary of the treasury does not discharge the sureties; *Hunter v. United States*, 5 Pet. 186, 7 L. 91, holding a release, both of the principal and surety, from prison by the government, does not release a debt against the surety.

Miscellaneous.—Cited in *McFerran v. Wherry*, 5 Cr. C. C. 678, F. C. 8,792, where an attachment served while defendant was attending court in another cause was dissolved.

1 Pet. 578-584, 7 L. 269, *BANK OF COLUMBIA v. LAWRENCE*.

Bills and notes.—Party giving notice of nonpayment to an indorser must use due diligence. He may adopt the ordinary mode for conveying notice and need not see that the notice is brought home to the party, p. 582.

Cited, affirmed and applied as follows: *Bank of Alexandria v. Swann*, 9 Pet. 46, 9 L. 45, holding the law does not require the utmost possible diligence, but merely reasonable diligence; *Harris v. Robinson*, 4 How. 348, 11 L. 1006, on the point that all one's duty is to use ordinary diligence, and he need not insure that the notice actually reached the indorser; *Baumgardner v. Reeves*, 35 Pa. St. 256, holding a visit to the maker's place of business and finding it closed is equivalent to an actual presentment and demand; *Woodman v. Jones*, 8 N. H. 346, on the point that if a notice is put in the post-office, it is legal notice, whether the person to whom it is directed receive it or not; *Bank of West Tennessee v. Davis*, 5 Heisk. 439, holding that where one was employed about the house of another

as clerk, notice left there would not bind unless actually received; *Boyd v. City Savings Bank*, 15 Gratt. 505, where notice was directed to the legal representatives and deposited in the post-office of the place where the note was payable and where the indorser had lived; *Caruthers v. Harbert*, 5 Cold. 369, 98 Am. Dec. 424, where a notice left at the office of one who had discontinued his office and had gone upon the bench was held insufficient; *McVeigh v. Bank of The Old Dominion*, 26 Gratt. 806, discussing the sufficiency of notice where the civil war broke out and there was a military occupation of the place where the note was payable; *Big Sandy Nat. Bank v. Chilton*, 40 W. Va. 499, 500, 21 S. E. 776, 777, discussing necessity of personal notice where there were several indorsers; *Musson v. Lake*, 4 How. 279, 281, 286, 11 L. 974, 975, 977, dissenting opinion, holding that a notarial protest could not be read if it did not set out that the bill was presented to the drawee; *Hawkins v. Barney*, 27 Vt. 395, holding a demand on a nonnegotiable note is sufficient at any time if the drawer sustains no injury from the delay.

Bills and notes.—When the facts are ascertained and undisputed what shall constitute due diligence in notifying indorser of non-payment is a question of law, p. 583.

Cited and rule followed in *Turner v. Rogers*, 8 Ind. 143, note 4, and *Hunt v. Maybee*, 7 N. Y. 274, both holding that where there was no dispute as to the facts, the question of due diligence was for the court; *Bell v. Hagerstown Bank*, 7 Gill, 232, and *Parkison v. McKim*, 1 Pinn. 220, both holding the question of sufficiency of notice, and what constitutes due diligence, where the facts are not disputed, are questions of law; *Carter v. Burley*, 9 N. H. 569; *Townsend v. Lorain Bank*, 2 Ohio St. 353; *Brenzer v. Wightman*, 7 Watts & Serg. (Pa.) 266; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 547, 2 S. E. 898; *Central Nat. Bank v. Adams*, 11 S. C. 455, 32 Am. Rep. 497, and *Walker v. Stetson*, 14 Ohio St. 96, 84 Am. Dec. 365, all holding the question of due diligence in giving notice one of law when the facts were ascertained; *Harris v. Robinson*, 4 How. 345, 11 L. 1004, holding it was a question of law whether inquiry as to residence was necessary and whether the notice as given was sufficient; *Watson v. Tarpley*, 18 How. 519, 15 L. 510, holding an instruction is incorrect in committing to a jury to determine whether the proceedings as to protest and notice were legal; *Dyas v. Hanson*, 14 Mo. App. 370, holding that the question of reasonable time is one for the court after the facts are determined; *Haskell v. Varina*, 111 Mass. 86, holding a delay of more than thirty days to proceed with the levy of an execution unreasonable; *Adams v. Boyd*, 33 Ark. 50, on the point that the facts being ascertained it is the duty of the court to declare the law to the jury; *Rhett v. Poe*, 2 How. 481, 11 L. 347, where an instruction that the jury should infer due diligence from certain facts was held correct; *Sussex Bank v. Baldwin*, 17 N. J. L. 494, on the point that cases arise where it becomes necessary to

direct the jury whether due diligence has been used; *Bank of Commerce v. Chambers*, 14 Mo. App. 154, where the court said this was not an inflexible rule, and that there were many cases where the question should be determined by the jury; *New York B. & P. Co. v. Ela*, 61 N. H. 353, on the point that what is due and reasonable diligence is a mixed question of law and fact; *Dickins v. Beal*, 10 Pet. 581, 9 L. 541, where the court said that if the facts were disputed it was a question for the jury; *Godley v. Goodloe*, 6 Smedes & M. 257, 45 Am. Dec. 288, holding that the question of diligence is properly submitted to a jury under appropriate charges, where it depends upon testimony of witnesses; *Winans v. Davis*, 18 N. J. L. 285, holding whether the plaintiff had used due diligence in finding out the place to which the defendant had moved and given notice accordingly, are questions of fact; *Linville v. Welch*, 29 Mo. 204, holding that where the facts are disputed the court should give hypothetical instructions, leaving the facts to be determined by the jury; *Sanderson v. Reinstadler*, 31 Mo. 487, reviewing facts which were regarded as due diligence. See note to 17 Am. Dec. 547, discussing the subject of reasonable time as a question of law.

Bills and notes.—Where a party to be notified has within the compact part of a town, both a dwelling-house and place of business, notice delivered at either is sufficient, and if both be within the district of letter carriers, notice by letter to either, left at the post-office, is sufficient, p. 583.

Cited in *Stephenson v. Primrose*, 8 Port. 159, 33 Am. Dec. 283, and *Ransom v. Mack*, 2 Hill, 590, 38 Am. Dec. 603, holding that a notice must be served personally, or left at the residence or place of business, where the parties reside in the same place; *Sussex Bank v. Baldwin*, 17 N. J. L. 489, holding, if one have an office or known place of business a good demand may be made there; *Westfall v. Farwell*, 13 Wis. 509, on the point that where an indorser resides out of the corporate limits, if he gets his mail within the town it is sufficient to mail notice there; *Reier v. Strauss*, 54 Md. 290, 39 Am. Rep. 392, where an indorser removed from a city but left his sign there and had his name in the directory; *Walters v. Brown*, 15 Md. 293, 74 Am. Dec. 570, holding notice by mail where both parties live in a large commercial city is sufficient if the parties live within the limits of a letter carrier. See also note to 38 Am. Dec. 613, citing authorities on necessity of personal notice; note to 38 Am. Dec. 615, citing cases on notice served at a place of business; note to 38 Am. Dec. 608, discussing notice where parties reside in the same place; note to 38 Am. Dec. 612, citing authorities on the subject of what was the same place. Cited also in *Carpenter v. Providence, etc., Ins. Co.*, 4 How. 219, 11 L. 947, upon question of notice to an insurance company.

Questioned and criticised as against the weight of authority, in *Brown v. Bank of Abingdon*, 85 Va. 102, 7 S. E. 360.

Bills and notes.—When the holder and indorser live in different post-towns, notice sent by mail is sufficient, whether it reaches the indorser or not, p. 583.

Cited in *United States v. Koehersperger*, 26 Fed. Cas. 807, on the point that the Supreme Court has used the word “post-town” as including all places other than those designated as rural.

Bills and notes.—When the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice, p. 584.

Cited in *Sanderson v. Reinstadler*, 31 Mo. 487, and *Foster v. Sineath*, 2 Rich. L. 339, holding notice may be sent to the post-office nearest to him or to which he usually resorts for his mail; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 557, 2 S. E. 903, on the point that notice may be given at a particular post-office directed by him or that at which he usually receives mail; *Sharpe v. Drew*, 9 Ind. 283, holding notice by mail to town where maker had post-office box, sufficient; *Slaughters v. Farland*, 31 Gratt. 147, where notice sent by mail, while there was a mail communication, though not by direct route, was held sufficient; *Goodwin v. McCoy*, 13 Ala. 279, where a notice to the place where the maker had resided was held sufficient, although he had moved; *New Orleans C. & B. Co. v. Barrow*, 2 La. Ann. 326, and *Bordurant v. Everett*, 1 Met. (Ky.) 660, holding that where the maker lives near but not in a place and receives his mail there, notice by mail there is sufficient; *Patrick v. Beazley*, 6 How. (Miss.) 624, dissenting opinion, where one lived a mile and a half from a town, received his mail there and kept an office there, and notice deposited in the town was held not sufficient; *Jones v. Lewis*, 8 Watts & Serg. 16, and *Nevius v. Bank of Lansingburgh*, 10 Mich. 551, both holding notice deposited in the office where one usually receives his letters sufficient, unless he resides within the place, in which case it must be personal; *Bank of the United States v. Carneal*, 2 Pet. 551, 7 L. 516, where a notice addressed to a county was, under the circumstances of the case, held sufficient. See note to 35 Am. Rep. 487, citing authorities on sufficiency of notice, where one lives outside the place of dishonor.

Bills and notes.—If one was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to party giving notice, that might be the more proper channel of communication, p. 583.

Cited in *Timms v. Delisle*, 5 Blackf. 448; *Bank of Louisiana v. Tournillon*, 9 La. Ann. 134; *Bank of Geneva v. Howlett*, 4 Wend. 331, and *Hazelton Coal Co. v. Ryerson*, 20 N. J. L. 132, 40 Am. Dec. 218, all holding that notice sent to the office where one usually receives his mail is sufficient, although it is not the nearest; *Hume v. Watts*, 5 Kan. 45, and *Westfall v. Farwell*, 13 Wis. 506, on the point

that a notice to the post-office where the indorser usually receives his mail is sufficient, though it may not be in the town where he resides; *Bank of Manchester v. Slason*, 13 Vt. 340, holding a letter addressed to the town post-office is sufficient, although there may be another post-office in the town nearer; *Follain v. Dupre*, 11 Rob. (La.) 473, on the point that if a party receives his mail at two offices, notice directed to either will be sufficient; *McGrew v. Toulmin*, 2 Stew. & P. 434, holding notice to the office where the maker had been accustomed to receive mail was sufficient, although he had received letters at another place nearer; *Seneca Co. Bank v. Neass*, 5 Den. 339, holding that where an indorser receives his mail at an adjoining town nearer than a post-office in his own town, notices may be sent to either; *Graham v. Sangston*, 1 Md. 70, holding if the legislature was in session notice sent to the rooms of a member was held sufficient; *Chouteau v. Webster*, 6 Met. 7, 39 Am. Dec. 707, and *Tunstall v. Walker*, 2 Smedes & M. 657, both holding notice sent to a United States senator at Washington sufficient; *Cabot Bank v. Russell*, 4 Gray, 169, holding notice addressed "Hadley," was sufficient where it was done in ignorance that there was a post-office at North Hadley nearer; *Wachusett Nat. Bank v. Fairbrother*, 148 Mass. 185, 12 Am. St. Rep. 533, 19 N. E. 347, on the point that there may be a sufficient residence without actually living in a place as where one is accustomed to receive his mail there.

Bills and notes.—Where notice is sent by mail to an indorser living in the country, it is distance alone or the usual course of receiving letters which must determine the sufficiency of the notice, p. 584.

Bills and notes.—Where an indorser, entitled to notice, resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it, p. 584.

Cited in *Lathrop v. Delee*, 8 La. Ann. 171, holding, where indorser lived three miles from the town, holder was not bound to send a messenger; *Walker v. Bank of Augusta*, 3 Ga. 498, 499, holding one was not bound to employ a special messenger when the indorser was in the habit of receiving his mail in the city; *Bird v. McCalop*, 2 La. Ann. 352, holding that where an indorser usually received his mail at a town, notice there by mail was sufficient; *Foster v. Sineath*, 2 Rich. L. 341, 342, where the court said a different mode of giving information cannot reasonably be required in cases of bills and notes from that used in ordinary business transactions; *Wilson v. Richards*, 28 Minn. 342, 9 N. W. 874, holding the due depositing in a post-office stands as and for notice to an indorser, whether he receives it or not.

Bills and notes.—Notice to indorser of nonpayment deposited in the mail at Georgetown, and addressed to indorser there, is sufficient, where he lives in the country, two or three miles away, even

though he had a residence in Washington to which he went regularly several times a week and where he received his mail, p. 585.

Criticised in *Patrick v. Beazley*, 6 How. (Miss.) 618, 38 Am. Dec. 459, holding an indorser is deemed to live in the same town or place with the holder where he lives in the same immediate neighborhood, whether in the town or country, and notice by mail is insufficient; also in *Brown v. Bank of Abingdon*, 85 Va. 102, 7 S. E. 360, holding a mailed notice insufficient where party resided just without the corporate limits of a town.

1 Pet. 585-590, 7 L. 272, *ARCHER v. DENEALE*.

Wills — Definitions.—The word "estate" used in a will is sufficiently comprehensive to embrace property of every description and will charge lands with debts if used with other words which indicate an intention to charge them, p. 589.

Cited in *Taylor v. Dodd*, 58 N. Y. 344, where it was contended that the whole of an estate was liable for legacies; *Pulliam v. Pulliam*, 10 Fed. 40, F. C. 11,463a, construing a clause in a will that debts should be paid "out of the remainder of my estate;" *Hunter's Estate*, 6 Pa. St. 108, holding that bonds, notes and cash were not included in a direction to sell all one's real and personal estate and distribute the proceeds; *Campbell v. Campbell*, 37 Wis. 215, on the point that estate may be restricted to personalty; *Troth v. Robertson*, 78 Va. 55, construing the word "estate" as used in a statute authorizing a Circuit Court to decree a sale; *Higgins v. Higgins*, 121 Cal. 489, 66 Am. St. Rep. 59, 53 Pac. 1082, holding wife's annuity charged on husband's "estate" is a lien on all his lands. See valuable note on this point, 66 Am. St. Rep. 59, 61.

Will.—Construed and held not to charge a testator's lands with his debts, pp. 590, 591.

1 Pet. 591-603, 7 L. 275, *TAYLOE v. RIGGS*.

Evidence.—The best evidence must be given of which the nature of the thing is capable; no evidence shall be received which presupposes greater evidence behind in the party's possession or power, and the withholding of better evidence raises a presumption that if produced it might be unfavorable, p. 596.

Cited in *United States v. Scott*, 25 Fed. 471, holding that parol evidence that one was a pensioner, not admissible; *Patten v. Rambo*, 20 Ala. 487, holding that when all the evidence is of a primary character, it cannot be excluded because more conclusive proof might have been offered; *McCormick v. Hamilton*, 23 Gratt. 576, holding it no objection that there was a selection of weaker instead of stronger proof or an omission to supply all the proof capable; *De Lane v. Moore*, 14 How. 264, 14 L. 414, admitting secondary proof, upon affidavits showing loss of original.

Evidence.— Party in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence or prove its contents, p. 596.

Cited and followed in *Halderman v. Halderman*, Hemp. 560, F. C. 5,909, holding original papers must be produced and a copy is inadmissible unless the original is lost, destroyed, or cannot be produced; *Burke v. Voyles*, 5 Blackf. 191, holding a plaintiff cannot give parol evidence of the contents of a written award without accounting for its absence; *Allen v. Blunt*, 2 Wood. & M. 131, 132, F. C. 217, where parol evidence of the contents of a letter was rejected because there was no proof of its loss or possession by the other party; *Juzan v. Toulmin*, 9 Ala. 693, 44 Am. Dec. 461, holding loss of a deed was sufficiently proved where it was shown that diligent search had been made where it might probably be; *De Lane v. Moore*, 14 How. 263, 265, 14 L. 414, reviewing evidence sufficient to warrant the introduction of secondary evidence of a written contract; *Taylor v. Carpenter*, 2 Wood. & M. 5, F. C. 13,785, holding a witness may testify generally as to what accounts of sales were rendered, but could not give their contents without producing them, if called for. Affirmed, *De Lane v. Moore*, 14 How. 264, 14 L. 414, admitting copy of lost instrument.

Evidence.— The testimony which establishes the loss of a paper is addressed to the court not the jury; it does not relate to its contents, or prove anything in the cause, p. 597.

Cited and followed, *De Lane v. Moore*, 14 How. 264, 14 L. 414, admitting copy of instrument shown to be lost; *Dormady v. State Bank*, 2 Scam. 244, holding that proof to show loss of an instrument is not evidence in a cause; *Woods v. Gassett*, 11 N. H. 446, holding proof of loss is addressed to the court and is not evidence in the cause; *Scott v. Loomis*, 13 Smedes & M. 641, on the point that the affidavit as to the loss is addressed to the court who is to determine the competency of the secondary evidence; *Bell v. Kendrick*, 25 Fla. 791, 6 So. 871, on the point that whether it has been made to appear that an original deed is not in the possession of the party offering the copy, is for the court; *Fitch v. Bogue*, 19 Conn. 291, on the point that testimony as to loss or destruction of a written instrument may be received before proof of its validity; *Miller v. Wack*, 1 N. J. Eq. 211, the court saying such evidence must be strictly confined to the fact of loss.

Evidence — Affidavits.— Affidavit of a party to an action of the loss of a written instrument is proper to lay the foundation of secondary evidence of its contents, p. 598.

Cited in *McNeil v. McClintock*, 5 N. H. 357; *Worthington v. Curd*, 15 Ark. 509; *Woods v. Gassett*, 11 N. H. 445, 448, and *Becker v. Quigg*, 54 Ill. 394, all holding a party to a suit may make an affidavit as to the loss of the paper, so as to permit secondary evidence of

its contents; *Willis v. Cresey*, 17 Me. 13, on the point that courts of law have allowed this preliminary step to be taken without usurping the powers of a court of equity; *Boyle v. Arledge*, Hemp. 624, F. C. 1,758, the court saying the proof of loss is addressed to the court and cannot go to the jury at all; *Davis v. Black*, 5 Smedes & M. 231, holding the affidavit was not competent to support the issue before the jury; *Harper v. Hancock*, 6 Ired. 127, holding that the loss must be proved by the person in whose possession the conveyance is presumed to be; *Smith v. Wilson*, 1 Dev. & B. 41, holding the affidavit of parties on collateral questions arising in a cause are competent.

Doubted in *Suydam v. Combs*, 15 N. J. L. 137, where the court, however, did not express any opinion on the point.

Evidence.—In an action on a written contract the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration, p. 598.

Contracts — Evidence.—The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract to be taken into view in construing the instrument itself, p. 598.

Cited in *Phillips v. Preston*, 5 How. 291, 12 L. 158, on the point that between the contracting parties all prior conversation is supposed, so far as binding, to be embodied into the written contract.

Contracts.—In an action on a written contract, neither party can be permitted to show his inducements to make it, or to substitute his understanding of it for the agreement itself, p. 598.

Cited in *Nicholson v. Tarpey*, 89 Cal. 622, 26 Pac. 1102, holding evidence of intention inadmissible in the absence of fraud or mistake; *Fuller v. Parrish*, 3 Mich. 227, holding that parol is admissible to show that a bill of sale absolute on its face is a mortgage.

Referred to in *Johnson v. Miln*, 14 Wend. 199, holding that in an action on a charter-party, the defendant may give in evidence fraudulent representations as to the burden or capacity of the vessel.

Evidence.—When a written contract is to be proved by parol testimony, no vague uncertain recollection concerning its stipulation ought to supply the place of the written instrument itself, p. 600.

Cited and principle followed in *Potts v. Coleman*, 86 Ala. 100, 5 So. 782, holding that to justify secondary evidence, there must be proof of the genuineness of the document or of the execution of the deed; *Metcalf v. Van Benthuyzen*, 3 N. Y. 428, holding that the proof must show the contents or the substance of the contents of the operative parts; *Shorter v. Sheppard*, 33 Ala. 654, on the point that proof of the contents should be clear and satisfactory; *Hooper v. Chism*, 13 Ark. 502, where the testimony was vague and

unsatisfactory; *Rankin v. Crow*, 19 Ill. 630, holding the contents of the lost instrument must have been known to the witness and understood by him, so as not to leave doubt as to its material parts; *Edwards v. Rives*, 35 Fla. 98, 17 So. 418, where the testimony of the witnesses varied materially and left much doubt and uncertainty as to its material points; *Shouler v. Bonander*, 80 Mich. 535, 45 N. W. 488, where the testimony was uncertain as to whether it included land; *Henry v. Gates*, 76 N. W. 706, holding the parol proof offered of a justice's judgment too vague and uncertain; *Stewart v. Stewart*, 19 Fla. 851, where there was no evidence as to the identity, quality or quantity of an estate conveyed; *Bank of Mobile v. Meagher*, 33 Ala. 629, holding in an action on lost bank notes, proof of their aggregate amount and issue without other evidence of identity and contents is not sufficient; *Evans v. Bolling*, 5 Ala. 558, where a witness testifying as to the validity of a copy could not state with certainty anything about the copy having been compared; *Fries v. Griffin*, 35 Fla. 217, 17 So. 68, where two witnesses swore to the existence of a deed and other circumstances corroborated their testimony and no witness denied such deed existed; *Thompson v. Thompson*, 9 Ind. 335, note, holding an instruction that one must prove substantially such parts of the deed as will enable the court to say what the legal effect of the deed was without relying on the witness's opinion, was error; *Tisdale v. Tisdale*, 2 Sneed, 607, 64 Am. Dec. 782, remarking that the strictness of the rule is somewhat relaxed when paper has been lost by party to be charged; *Burdick v. Peterson*, 72 Fed. 867, where oral evidence as to a lost unrecorded deed was held sufficient to establish it; *Gildersleeve v. Caraway*, 10 Ala. 264, 44 Am. Dec. 487, discussing when testimony as to what a deceased witness swore to on a former trial was admissible.

Assumpsit.—The law implies a promise to refund money, where the consideration of a contract totally fails, p. 600.

Assumpsit.—A mere speculative bargain, where the parties know they are treating for a thing of uncertain value which depends on unknown contingencies and may greatly exceed their estimate or may be nothing, is not a bargain on which the law will raise a promise to refund the purchase money, if the consideration should fail, p. 601.

1 Pet. 604-619, 7, L. 280, *FULLERTON v. BANK OF UNITED STATES*.

Federal courts — Practice.—The process act of 1792 was expressly confined to State process in force on the days of its passage, and did not have operation in the State of Ohio, which was subsequently created, p. 612.

Cited in *Livingston v. Story*, 11 Pet. 396, 398, 399, 9 L. 764, 765,

dissenting opinion, in considering the question whether the act of 1792 applied in a State in which the civil law prevailed; *Baker v. Biddle*, 1 Bald. 411, F. C. 764, on the point that the acts of congress distinguishing cases at law from those in equity refer to principles settled in England before their passage and not to State practice.

Federal courts — Practice.— The District Court of Ohio adopted by a rule the State system of practice, p. 613.

Cited in *Livingston v. Story*, 11 Pet. 413, 9 L. 771, dissenting opinion, on the point that a District Court in a new State had power to create a practice for its own government; *Sellers v. Corwin*, 5 Ohio, 406, 24 Am. Dec. 307, holding judgments of the Circuit Court of Ohio attached as liens, by virtue of the adoption of the execution laws.

Federal courts — Practice.— The State practice of Ohio has by uniform understanding been pursued by the Circuit Court of Ohio without having passed any positive rules on the subject, p. 613.

Cited in *Ely v. Hanks*, 8 Fed. Cas. 602, on the point that Federal courts may adopt rules of State practice which were unknown to the common law; *In re Griner*, 16 Wis. 437, on the point that Federal courts have enlarged their process, so as to sustain forms of action given only by State laws; *Kennerly v. Shepley*, 15 Mo. 650, 57 Am. Dec. 222, holding the State laws, as such, are not binding on the Federal courts and only became such by being adopted; *Ex parte Crane*, 5 Pet. 210, 8 L. 100, on the point that the English common law was a system that was intended to be applied to the exercise of the judicial power by the courts of the Union.

Courts — Practice.— Practice of a court, as such, does not have to be sustained by written rule, p. 613.

Cited and principle followed in *Valarino v. Thompson*, 28 Fed. Cas. 867, holding that by following the usages of State Supreme Court, they become rules of Federal court; *Ricker's Petition*, 66 N. H. 210, 29 Atl. 560, 24 L. R. A. 741, provisions acquiesced in and acted on may be regarded as having the force of rules for the adoption of which a written order is not necessary; *United States v. Douglass*, 2 Blatchf. 214, F. C. 14,989, on the point that the rules of State practice acted on by the Federal courts as obligatory have the efficiency of rules adopted by express order; *Citizens' Bank v. Farwell*, 56 Fed. 574, 12 U. S. App. 409, holding that the statute providing that Federal courts may adopt State laws by rule, does not require the rule to be written; *Koning v. Bayard*, 2 Paine, 255, F. C. 7,924, holding that no express rule must be shown in order to justify the practice of docketing judgments; *United States v. Stevenson*, 1 Abb. (U. S.) 501, F. C. 16,395, holding that to establish that a particular mode of proceeding has been adopted there

need not be a written rule declaring such adoption; *Duke v. Trippe*, 6 Ga. 323, and *Crump v. People*, 2 Colo. 319, on the point that the power to make rules is inherent in all courts; *Bowman v. McLaughlin*, 45 Miss. 490, on the inherent powers of courts of record.

Federal courts — Practice.—It is administering justice in the true spirit of the Constitution and laws of the United States, to conform as nearly as practicable to the administration of justice in the courts of the State, p. 614.

Cited in *Burgess v. Seligman*, 107 U. S. 34, 27 L. 365, 7 S. Ct. 22, holding that Federal courts will lean towards an agreement of views with the State courts, if the question seems balanced with doubt. Cited generally in *McMillan v. Sprague*, 4 How. (Miss.) 648, 35 Am. Dec. 414, holding a court may alter the remedy without impairing the obligation; *Ex parte Davis*, 41 Me. 50, holding the right and duty of a court to decide questions before it are inseparable.

Federal courts — Practice.—The Circuit Court may adopt into its practice a State act to regulate judicial proceedings, where banks are parties and apply it in an action on a note prior in date to the act, where no right is violated and no hardship or injury produced, p. 615.

Cited in *Williams v. Bank of the United States*, 2 Pet. 106, 7 L. 363, where the court declined to reconsider the point that this act was in force in Ohio; *Lewis v. Bank of Kentucky*, 12 Ohio, 147, 40 Am. Dec. 470, holding that foreign banks suing in a State can avail themselves of the act regulating proceedings, where bankers are parties; *United States v. Mackenzie*, 30 Fed. Cas. 1162, on the point that full effect will be given by every judicatory to a statute unless clearly unconstitutional.

Bills and notes.—On a note made payable at a particular bank, it is sufficient proof of demand to show that the note had been discounted and become the property of the bank, and that it was in the bank not paid at maturity, p. 617.

Cited in *Bank of Syracuse v. Hollister*, 17 N. Y. 50, 72 Am. Dec. 419, holding, where a bank itself is holder of note, no formal demand is necessary; *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 648, 19 L. 425, on the point that if a bill is the property of a bank its presence there need not be proved; *Bank of the United States v. Carneal*, 2 Pet. 549, 7 L. 516, holding that where a note is payable at a particular bank, it is not necessary to make any personal demand elsewhere; *Hallowell v. Curry*, 41 Pa. St. 325, holding it was sufficient to excuse want of demand to show the maker had no funds in the banking office.

Bills and notes — Evidence.—If the note be at the place where payable on the day it is payable, this throws the onus to prove payment on the maker, p. 617.

Cited in *Magenau v. Bell*, 14 Neb. 8, 14 N. W. 665, on the point that when payment is pleaded, the burden of proof is on the party asserting such fact.

Bills and notes.—Notice of nonpayment and protest should be given to the indorser, through the mail, the day after the last day of grace, in time to go by the succeeding mail, p. 618.

Cited in *Lawson v. Farmers' Bank*, 1 Ohio St. 216, on the point that notice must be deposited in time to be sent by the mail of the day succeeding the day of dishonor.

Trial — Instructions.—Refusal of instructions as asked is not error, where the instructions given covered the whole ground of the instructions prayed for, as far as the party had a right to require, p. 617.

Banks.—On renewal of bank loans, the lending is qualified and not absolute; when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application, p. 619.

Appeal and error.—A question commented on in argument, but not raised by one of the exceptions, will not be considered, p. 619.

Cited in *Tilghman v. Tilghman*, 1 Bald. 491, F. C. 14,045, on the point that one who sets up a right against another must be confined to the allegation of his bill or answer.

1 Pet. 620-625, 7 L. 287, *McDONALD v. SMALLEY*.

Appeal and error.—When the lower court considered and decided only the jurisdictional question, Supreme Court will do likewise, although counsel argue and desire decision of whole controversy, p. 621.

Federal courts.—Citizen of one State having title to lands in another is not disabled from suing for them in the Federal courts, by fact that his title comes from a citizen of the State where the lands lie, p. 623.

Cited in *Farmington v. Pillsbury*, 114 U. S. 143, 29 L. 116, 5 S. Ct. 809, on the point that it was a matter of no importance that the assignee or grantee could sue in the Federal courts when his assignor or grantor could not; *Gest v. Packwood*, 14 Sawy. 148, 39 Fed. 537, where it was contended that the plaintiff was simply the last assignee and that as the assignors could not maintain an action in the Federal courts he could not.

Distinguished in *Pond v. Vermont Valley R. R. Co.*, 12 Blatchf. 290, F. C. 11,265, where a suit was brought in one State and another

defendant living in another State appeared and answered without objection.

Contracts.—The motives which induce one to make a contract, whether justifiable or censurable, can have no influence on its validity, p. 625.

Cited in *Lehigh Min. Co. v. Keley*, 160 U. S. 334, 40 L. 447, 16 S. Ct. 310, and *Smith v. Kernochen*, 7 How. 216, on the point that the motive of the parties in making an assignment of a mortgage cannot affect its validity if the assignment was absolute.

Federal courts.—Court in deciding on the question of its jurisdiction cannot enter into the motives of a party in making a sale of land, or be influenced by fact that sale was made to confer jurisdiction, if satisfied it was not wholly fictitious, p. 624.

Cited, and this holding relied upon in *Neal v. Foster*, 13 Sawy. 259, 36 Fed. 41, on the point that the motive of a purchaser of a claim cannot affect his right to maintain an action in a Federal court any more than in a State court; *Barney v. Mayor, etc., of Baltimore*, 1 Hughes, 122, F. C. 1,029, on the point that conveyances to give the Circuit Court jurisdiction must be real and not fictitious; *Crawford v. Neal*, 144 U. S. 593, 36 L. 556, 11 S. Ct. 761, holding a transfer to enable the purchaser to bring suit in the Federal court did not defeat jurisdiction where the sale was absolute; *Lehigh M. Co. v. Kelly*, 160 U. S. 332, 335, 40 L. 446, 447, 16 S. Ct. 310, 311; dissenting opinion, 347, 349, 40 L. 452, 16 S. Ct. 315, 316, on the same point; *Barney v. Baltimore City*, 6 Wall. 288, 18 L. 827, on the point that a transfer made for the avowed purpose of enabling the court to entertain jurisdiction will accomplish that purpose if the property is really transferred; *Foote v. Hancock*, 15 Blatchf. 346, F. C. 4,911, on the point that where a plaintiff is owner of coupons of municipal bonds he may sue in the Federal courts, although his sole purpose in bringing them was to bring an action there; *McCall v. Hancock*, 20 Blatchf. 345, 10 Fed. 8, holding this to be true, although the former owners of the coupons guaranteed their collection and the plaintiff was not to pay for them unless collected; *Perrine v. Thompson*, 17 Blatchf. 20, F. C. 10,997, holding this to be true; although the plaintiff intended to pay over a portion of the proceeds recovered on the coupons to another person; *Van Dolsen v. Mayor, etc., of New York*, 21 Blatchf. 456, 17 Fed. 818, holding, that under a real lease a lessee can sue in the Federal courts, although the controlling reason for the lease was to enable him to sue there; *Smith v. Kernochen*, 7 How. 216, 12 L. 674, holding that if a mortgagee assigns to a citizen of another State, it is necessary to divest jurisdiction to bring knowledge of the motive and purpose home to the assignee; *Cheever v. Wilson*, 9 Wall. 123, 19 L. 608, where it was contended that a petitioner in a divorce suit went to another State

to procure a divorce and that she never resided there; *Blackburn v. Selma, etc., R. R. Co.*, 2 Flipp. 538, F. C. 1,467, disregarding allegation that property in controversy was collusively conveyed to plaintiff to give the Federal court jurisdiction.

Distinguished in *Wood v. Mann*, 1 Sumn. 584, F. C. 17,952, discussing the manner of objecting to jurisdiction of a Circuit Court; *Doe ex dem. v. Hawks*, 5 McLean, 321, F. C. 13,311, holding that where a conveyance was merely colorable with a view to give jurisdiction to the Federal courts, a writ will be dismissed; *Banigan v. Worcester*, 30 Fed. 394, holding that in determining the question of jurisdiction the court will look at the citizenship of the real owners and not to that of a party who is trustee only. Limited, *Lake County Commissioners v. Dudley*, 173 U. S. 251, reviewing authorities and remarking that act of 1875 prohibited collusive assignments to confer Federal jurisdiction.

Mortgages — Federal courts.— Where mortgagor and mortgagee are citizens of different States, the latter may bring ejectment or foreclose in the Federal courts, p. 625.

Equity — Practice.— Rules in chancery for the Circuit Courts are prescribed by the Supreme Court and ought to be observed, p. 625.

Cited in *Betts v. Lewis*, 19 How. 73, 15 L. 577, on the point that the equity practice of the Federal courts is governed by rules presented by the Supreme Court under the authority of act of congress; *Haley v. Eureka County Bank*, 20 Nev. 426, 22 Pac. 1103, holding the rules adopted were intended to be supplemental to the statutes and have the same force and effect; *Gutierrez v. Pino*, 1 N. Mex. 394, holding rule applicable to chancery practice of territorial courts.

Miscellaneous.— Cited in *De Sobry v. Nicholson*, 3 Wall. 423, 18 L. 264, on point that no exception can be considered, not taken in court below; *Slaughter v. Bernards*, 88 Wis. 118, 59 N. W. 578, to same effect.

1 Pet. 626-627, 7 L. 290, *McARTHUR v. PORTER*.

Appeal.— Conditional verdict for plaintiff or defendant according to opinion of the court on validity of a deed with other evidences of title, is too imperfect to enable the Supreme Court to render judgment when this deed and the other evidences of title are not exhibited by the record in such manner as to enable the court to notice and identify them, p. 627.

Cited in *Lee v. Campbell*, 4 Port. 202, holding the Supreme Court would not aid a defective special verdict by reference to extrinsic facts which appear on the record; *Fries v. Mack*, 33 Ohio St. 62, holding that where, in an action for money, a verdict when read in connection with the record is so uncertain that the amount assessed

cannot be ascertained, no judgment can properly be entered on it; *Saltonstall v. Birtwell*, 150 U. S. 420, 37 L. 1129, 14 S. Ct. 170, holding that where findings of fact are defective on material points, judgment cannot be directed for either party.

Appeals.—Where a deed forms a part of a bill of exceptions, the Supreme Court cannot know, judicially, that this is the same deed which is referred to in a verdict which is conditional for the plaintiff or defendant, according to the opinion of the court on its validity, p. 627.

1 Pet. 628-639, 7 L. 290, *JACKSON v. CLARK*.

Public lands.—United States government received the territory ceded to it by Virginia in trust not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation, p. 635.

Cited in *McConnell v. Wilcox*, 1 Scam. 357, holding the northwest territory was ceded as a common fund for the benefit of all the States and should be faithfully disposed of for that purpose.

Congress — Public lands.—Congress, after the cession to the United States of territory by Virginia, had power to limit the time within which military warrants should be located and surveyed, and to annex conditions to the extension of the time, p. 635.

Cited in *Fussell v. Hughes*, 8 Fed. 390, holding that entry and survey did not vest one with an equitable estate of which congress could not deprive one; *Board of Trustees v. Cuppett*, 52 Ohio St. 578, 40 N. E. 793, and *Fussell v. Gregg*, 113 U. S. 556, 28 L. 995, 5 S. Ct. 634, discussing the effect of failure to return surveys in time.

Public lands.—The word "survey," as used in the act of 1807, prohibiting locations of military land-warrants on lands previously surveyed, does not mean the mere moving of chain and compass round a piece of ground, but means a survey made in virtue of a warrant for the purpose of appropriating land to which the holder of that warrant is entitled in law, p. 635.

Public land.—A military land warrant can be an authority for surveying and appropriating so much land only as it professes to grant, p. 636.

Public lands.—The proviso in act of March 2, 1807, to extend the time for locating Virginia military warrants was intended to protect those surveys which were defective and which might be avoided for irregularity, p. 636.

Cited in *Winsor v. O'Connor*, 69 Tex. 577, 8 S. W. 522, on the point that the act prohibited the location or patent of lands covered by patents or surveys, although these may have been void; *Stubblefield v. Boggs*, 2 Ohio St. 221, holding an entry is not unlawful be-

cause made on land covered by a previous, but unsurveyed and void entry; *Lindsey v. Miller*, 6 Pet. 677, 8 L. 543, holding the design of the act was to cure irregularities which occurred without fraud; *Harlan v. Thatcher*, 18 Ohio, 53, holding a mistake in the survey does not render it void; *Saunders v. Niswanger*, 11 Ohio St. 302, holding that the act extends to survey, however invalid, if made in good faith on a subsisting warrant; *Price v. Johnston*, 1 Ohio St. 394, holding the act does not confirm or make valid entries and surveys in the name of a deceased person; *Galloway v. Finley*, 12 Pet. 298, 299, 9 L. 1093, holding the acts of congress of 1807, and subsequent thereto, were intended to remedy any defects in patenting the lands in the name of the warrantee who might have been deceased at the time; *McArthur v. Dun*, 7 How. 269, 270, 272, 12 L. 696, 697, holding that the act of March 1, 1823, protected an entry made by a dead man in 1822.

Distinguished in *Dresback v. McArthur*, 7 Ohio, 150 (pt. 1), as to the interest acquired by a plat and survey within the Virginia military district.

Public lands.— Under a statute providing that “no locations shall be made on tracts of land for which patents had been previously surveyed,” lands surveyed are as completely withdrawn from subsequent location as lands patented, p. 638.

Cited in *Gibson v. Choteau*, 39 Mo. 564, on the point that a patent may be void because the land had been previously reserved from sale; *Massey v. Galveston, etc., Ry. Co.*, 7 Tex. Civ. App. 653, 27 S. W. 209, on the point that location or patent of lands covered by void patents or surveys is without any standing.

Miscellaneous.— Miscited in *Lehigh M. & M. Co. v. Kelly*, 64 Fed. 403. Cited in *Cragin v. Powell*, 128 U. S. 699, 32 L. 568, 9 S. Ct. 206, on the point that while lands are subject to the supervision of the general land office, the decisions of that bureau are unassailable.

1 Pet. 640-654, 7 L. 295, *BARRY v. COOMBE*.

Statute of frauds.— The statute of frauds requires written evidence of a contract to convey land or a court cannot decree performance, p. 650.

Statute of frauds.— A note or memorandum, in writing, is sufficient, and in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law, p. 650.

See the authorities cited under next head.

Statute of frauds.— The form of the note or memorandum, in writing, is not regarded nor the place of signature, provided it be in the handwriting of the party or his agent and furnishes evidence of a complete and practicable agreement, p. 650.

Cited and principle followed in *Nichols v. Johnson*, 10 Conn. 198, 199, holding, that in a memorandum, the form of the note and the place of the signature are not material; *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 651, 32 Pac. 740, on the point that a contract is signed on whatever part of the instrument the signature appears; *Traylor v. Cabanne*, 8 Mo. App. 133, on the point that it is sufficient that the name appears in the first clause; *Saunders v. Hackney*, 10 Lea, 202, holding there may be a valid deed without the name of the grantor being subscribed thereto; *Kirk v. Williams*, 24 Fed. 446, holding an unsigned memorandum competent as an admission of the facts, though it might not be sufficient to answer the statute of frauds; *Sanborn v. Flagler*, 9 Allen, 478, on the point that a signature is valid and binding, although made with the initials; *State v. Hill*, 47 Neb. 501, 66 N. W. 548, on the point that failure of principal to sign a bond at the end did not release the sureties; *McConnell v. Britthart*, 17 Ill. 361, 65 Am. Dec. 665, on the point that any form of writing from a solemn deed down to mere hasty notes or memoranda will suffice; *Thornton v. Kelly*, 11 R. I. 501, where a memorandum was held sufficient, although it did not show a promise; *MaGee v. Blankenship*, 95 N. C. 569, on the point that evidence in writing, when the writing contains all the stipulations and was signed, was sufficient; *Hurley v. Brown*, 98 Mass. 546, 96 Am. Dec. 672, where an agreement contained in a receipt given for part payment of purchase money was held sufficient; *Robeson v. Hornbaker*, 3 N. J. Eq. 65, holding specific performance will not be refused merely because the agreement did not state the township, county or State. See note to 7 Am. Dec. 290, citing authorities on the sufficiency of the memorandum under the statute of frauds.

Statute of frauds.—In construing a memorandum under the statute of frauds, courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contract was created, p. 651.

Cited in *St. Louis, etc., Ry. Co. v. Beidler*, 45 Ark. 28, on the point that it matters not what may have been the immediate purpose for which some of the writings may have been prepared.

Specific performance—Vendor and vendee.—If the description of the property contracted for is ambiguous, it is a sufficient ground to refuse relief, p. 652.

Evidence—Ambiguities.—An ambiguity in the description of a wharf as the “E. B. Wharf,” is fully removed and legally, by reference to a medium of explanation suggested on the face of the memorandum and on evidence which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds, p. 653.

Cited and principle affirmed and followed in *Crockett v. Green*, 3 Del. Ch. 475, holding that terms of a contract may be applied to

their subject-matter by proof; *Patton v. Rucker*, 29 Tex. 407, on the point that if the substantial terms are sufficiently expressed, collateral circumstances may be supplied; *Eggleston v. Wagner*, 46 Mich. 619, 10 N. W. 42, on the point that the sufficiency of a description arises on the face of the papers and is preliminary to evidence to connect the contract with the property; *White v. Core*, 20 W. Va. 280, on the point that a contract to sell "my farm," or "my mill," is sufficient if the vendor had but one farm or building; *Hooper v. Laney*, 39 Ala. 341, construing a contract of sale and holding the description sufficiently certain; *Ross v. Purse*, 17 Colo. 28, 28 Pac. 474, holding that if a written instrument contain indications by which the identity of the premises can be ascertained, specific performance will be decreed; *Mellen v. Ford*, 28 Fed. 644, 649, where a building contract containing an ambiguity suggested the means by which the ambiguity might be removed; *Williams v. Morris*, 95 U. S. 456, 24 L. 362, on the point that parol evidence is admissible to explain latent ambiguities and to apply an instrument to the subject-matter.

Distinguished in *Crockett v. Green*, 3 Del. Ch. 477, where, in an agreement of sale, the lines were not previously run and incorporated in the contract or the depth or front of the lot given.

Election.—One who has the right to exercise an alternative offered him cannot claim the benefit of the right after a bill is filed, p. 654.

Statute of frauds.—A memorandum, "by my purchase of your half, E. B. Wharf and premises this day agreed upon between us, \$7,576.63," is sufficient under the statute of frauds, p. 654.

Miscellaneous.—Cited in *Ellis v. Burden*, 1 Ala. 465, on meaning of word "tenement."

1 Pet. 655-669, 7 L. 302, *ROSS v. BARLAND*.

Federal courts.—Supreme Court has jurisdiction on error to State court in ejectment, where the titles of both parties are derived under act of congress, the construction of the statute is drawn directly in question, and the decision of the highest court of law of the State is against title and right of party specially set up in his defense under the statute, p. 664.

Cited in *Wilcox v. Jackson*, 13 Pet. 517, 10 L. 273, holding that where the question is whether the title to property which had belonged to the United States had passed, the question must be resolved by the laws of the United States; *Kissell v. St. Louis Pub. Schools*, 18 How. 27, 15 L. 328, on the point that where both titles depend on acts of congress the Supreme Court can take jurisdiction; *Mobile v. Eslava*, 16 Pet. 249, 10 L. 954, on the point that where both sides claim under private act of congress the Supreme Court has jurisdiction.

Ejectment.—Upon common-law principles the legal title should prevail in the action of ejectment, p. 664.

Cited and rule followed in *Brown v. Clements*, 3 How. 673, 11 L. 778, holding, in ejectment, patent is conclusive; *Hall v. Pearl*, 7 J. J. Marsh. 577, dissenting opinion, holding patent not contestible in court of law; *Bryan v. Forsyth*, 19 How. 336, 15 L. 675, on the point that a survey under the act of 1823 conferred an incipient title and ejectment could be maintained on it, even though no patent issued; *Chever v. Horner*, 11 Colo. 74, 7 Am. St. Rep. 221, 17 Pac. 498, on the point that Federal courts do not hold that the equitable title shall prevail at law generally.

Distinguished in *Hayner v. Stanly*, 8 Sawy. 225, 13 Fed. 226, on point that at law the senior patent is conclusive as to the title; *Bagnell v. Broderick*, 13 Pet. 450, 10 L. 242, holding that at law a patent from United States is conclusive. See authorities under next head.

Ejectment.—In Mississippi and some other States, law courts, in ejectment, look beyond the grant and examine the progressive stages of the title from its incipient stage until final consummation by grant, and if found regular in these progressive stages, the grant is held to relate back to the inception of the right and to have dignity accordingly, p. 664.

Cited and rule affirmed in *Lewis v. Mixon*, 11 Tex. 571, where it was held that a certificate overreached a patent for the same land; *Talbott v. King*, 6 Mont. 108, 9 Pac. 442, and *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 423, 5 Pac. 581, holding where two parties are contending for the same property the first in time for the commencement of the proceedings is first in right; *Welch v. Dutton*, 79 Ill. 468; *Gibson v. Choteau*, 39 Mo. 569; *Frost v. Missionary Soc.*, 56 Mich. 91, 22 N. W. 204; *French v. Spencer*, 21 How. 240, 16 L. 100, and *McAlpin v. Henshaw*, 6 Kan. 191, all holding that the issue of a patent relates back to the entry and takes date with it; *Warren v. Shuman*, 5 Tex. 456, holding the doctrine of relation applied only where the senior equity is valid in law; *Les Bois v. Bramell*, 4 How. 462, 11 L. 1057, on the point that the doctrine of relation applies where both the parties have a grant; *Laurissini v. Corquette*, 25 Miss. 181, 57 Am. Dec. 202, holding the doctrine of relation has never been extended further than to hold that a legal title related back to the period when the right accrued; *Megerle v. Ashe*, 33 Cal. 88, as to the propriety of admitting evidence to connect a patent with a prior entry to show the right attaching; *Doe ex dem. v. Files*, 3 Ala. 52, holding that a patent, the invalidity of which appears by inspection, will not authorize a recovery and it is unnecessary to resort to equity; *Bagnell v. Broderick*, 13 Pet. 456, 10 L. 245, dissenting opinion, on the point that fraud in a patent may be investigated at law as well as

In equity; *Magwire v. Tyler*, 40 Mo. 439, on the point that as regards the inceptive right to which patents relate, the whole matter falls within the jurisdiction of a court of law; *Poppe v. Athearn*, 42 Cal. 615, and *Smith v. Athearn*, 34 Cal. 512, on the point that in cases of conflicting patents, even at common law or ejectment, the court will look behind the patents; *Gould v. West*, 32 Tex. 351, holding that a location vested the right to the land, even before survey, and became capable of alienation; *Hamilton v. Avery*, 20 Tex. 635, on the point that a survey confers a right to maintain suit upon it, to try the title and eject trespassers; *Magruder v. Esmay*, 35 Ohio St. 232, and *Doe ex dem. v. Hearick*, 14 Ind. 248, on the point that an intermediate bona fide alienee of an incipient interest may claim the patent inures to him; *Kingman v. Holthous*, 59 Fed. 314, discussing the effect of an incipient location under a New Madrid patent; *Gwynne v. Niswanger*, 20 Ohio, 563, on the point that as between individuals the State would have a right to make an equitable right a legal one and enforce it as such; *Johnson v. Ballou*, 28 Mich. 397, on the point that all the acts relative to grants or donations by the general government are taken as one act and operate by relation; *Sellers v. Corwin*, 5 Ohio, 406, 24 Am. Dec. 306; *McClure v. Owen*, 26 Iowa, 254, and *Mitchell v. Lippincott*, 2 Woods, 472, F. C. 9,665, all on the point that the decisions of State courts touching titles are binding authorities in the courts of the United States; *Gwynne v. Niswanger*, 20 Ohio, 577, on the point that in similar cases the courts of the United States, will be controlled by State legislation and the practice of State courts.

Public lands.—A patent based on a certificate of commissioners, west of Pearl river, organized under the act of congress of March 3, 1803, is superior to a patent founded on a purchase at the general sale of United States lands under the same act, unless there is some fatal defect in the act which renders it void, p. 666.

Cited in *Hannibal, etc., R. R. Co. v. Smith*, 41 Mo. 334, holding that a title acquired under the grant of swamp lands was superior to the title acquired under the grant of lands to a State for a railway; *Arnold v. Grimes*, 2 Iowa, 13, holding that lands once sold or appropriated by the government cannot be sold over again; *Stone v. Young*, 5 Kan. 232, holding, where land has been sold, the government and any second purchaser takes the land charged with the trust. Cited in dissenting opinion, *United States v. Loughrey*, 172 U. S. 229, collecting instances where a subsequent patent has been held to relate back to the prior inchoate right.

Statutes.—In construing the ambiguous words of a statute, conferring a bounty, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature, p. 667.

Public lands.—A court is bound to presume that every fact necessary to warrant the certificate in the terms of it was proved before the board of commissioners, west of Pearl river, organized under the act of March 3, 1803, p. 669.

Cited in *Lewis v. Lewis*, 9 Mo. 190 (189), 43 Am. Dec. 545, holding that a register and receiver are special judicial officers and their decisions are final upon pre-emption rights; *McGee v. Wright*, 16 Ill. 558, holding that the right of pre-emption which has been adjudicated by the proper authorities will not be inquired into; *Stephenson v. Smith*, 7 Mo. 643, dissenting opinion, holding that State courts have jurisdiction of proceedings to compel one taking patent in his own name to convey the title to one to whom it belongs; *McGehee v. Mathis*, 21 Ark. 55, holding that a board of levee commissioners in adjusting the assessment and levy tax acted as ministerial and not as judicial officers.

Miscellaneous.—Cited, but not in point, in *Pollard v. Cocke*, 19 Ala. 196. Cited in *Gates v. Parmly*, 93 Wis. 313, 66 N. W. 259, on question of effect of tax deed.

1 Pet. 670-682, 7 L. 309, *PRAY v. BELT*.

Wills.—A clause in a will empowering executors to decide in all cases of dispute and making their decision final will receive such judicial construction as would comport with the reasonable intention of the testator, p. 680.

Cited in *American Board of Commissioners of Foreign Missions v. Ferry*, 15 Fed. 700, 701, construing a clause designating an executor as umpire and investing him with power to construe his will and determine doubtful questions. See authorities cited under subsequent head.

Wills.—Even when the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts have considered it, if it be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties, and the courts will step in if an unreasonable use of this power be attempted, p. 680.

Cited in *Hunter's Estate*, 6 Pa. St. 111, where the court said, provisions in a will forfeiting the interest of any one who should contest were in *terrorem* and the power of courts to determine rights not ousted.

Wills.—A clause in a will, providing that the executors may decide in all cases of dispute, their judgment be final, does not include the power of altering the will and a party injured is not concluded by the decision of the executors, but may resort to the courts, p. 680.

Cited in *Bound v. So. Ca. Ry. Co.*, 50 Fed. 854, on the point that,

however large the discretion of trustees may be, the court never loses its power to review it; *Bogers Appeal*, 10 Pa. St. 441, where an appraisement made by persons authorized under a will was not interfered with by the Orphans' Court.

Executors and administrators — Powers.— Where a decedent by will gives power to a majority of the acting executors, "his wife to have a voice as executrix," her participation in the decision is indispensable to its validity, p. 680.

Parties.— In an action against executors to recover a legacy bequeathed to the plaintiffs and others, all the claimants ought to be brought before the court, p. 681.

1 Pet. 683-685, 7 L. 314, *ALEXANDER v. BROWN*.

Executions — Notice.— The notice given to sureties on an execution debtor's forthcoming bond, upon the debtor's failure to surrender up the property levied on, is sufficient, if explicit enough to inform them of the fact without possibility of mistake; technical defects are immaterial, p. 685.

Cited in *Burleson v. Henderson*, 4 Tex. 52, where a judgment was set aside for want of legal notice; *Malendy v. Hungerford*, 5 Ga. 546, holding a notice of an application for the benefit of the "honest debtors act," directed to a firm, is sufficient.

Distinguished in *Schulenberg v. Bascom*, 38 Mo. 192, holding the notice required under the mechanics' lien act must conform to the requisites of the statute.

1 Pet. 686-694, 7 L. 315, *BIDDLE v. WILKINS*.

Judgments — Pleading.— When the court in which the judgment is rendered has not jurisdiction over the subject-matter, or when the judgment is absolutely void, this may be pleaded in bar or may, in some cases, be given in evidence under the general issue, p. 692.

Cited in *Hunt v. Mayfield*, 2 Stew. 129, holding that special matters of defense for want of jurisdiction must be specially pleaded; *Lynde v. Col., etc., Ry. Co.*, 57 Fed. 995, on the point that if a judgment pleaded in bar was rendered without jurisdiction that fact should be set up by replication instead of setting the plea down for argument; *Lucas v. Bank of Darien*, 2 Stew. 310, holding a judgment of another State, without jurisdiction, is not binding, and the want of jurisdiction is a good plea at law and, therefore, equity will not relieve.

Judgments — Pleading.— The general rule is that there can be no averment in pleading against the validity of a record, though there may be against its operation; and so no matter of defense can be pleaded in such case which existed anterior to the judgment, p. 692.

Cited in *Whitaker v. Bramson*, 2 Paine, 223, F. C. 17,526, holding

it is presumed that a record of a judgment conforms to the law and usage of the State; *Hay v. Alexandria, etc., R. R. Co.*, 1 Hughes, 170, F. C. 6,254, holding that a record of satisfaction of a judgment could not be contradicted by parol; *Lucas v. Copeland*, 2 Stew. 153, holding in debt on a foreign judgment a plea alleging its entry by fraud of a clerk was bad in demurrer; *Tucker v. Carr*, 40 Atl. 2, refusing to allow a new defense in suit on attachment bond, after judgment against the defendant, who was attached.

Judgments — Pleading.— In declaring upon a judgment, the rule is not to plead the whole of the proceedings in the former suit, but only to allege generally that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, p. 692.

Cited in *Burnes v. Simpson*, 9 Kan. 663, on the point that in pleading the judgment it is not necessary to show the facts by which the court obtained jurisdiction; *Tenney v. Townsend*, 9 Blatchf. 277, F. C. 13,832, holding, in debt on a judgment, a declaration not averring the court had jurisdiction of the defendant is not demurrable; *Davis v. Davis*, 65 Fed. 383, holding a petition stating a decree entered in a former proceeding need not set out the petition on which such decree was rendered.

Judgments — Executors and administrators.— In debt on a judgment by an administrator it is no defense that the defendant had himself taken out letters of administration in another State; it should have been set out in the former suit, p. 692.

Cited in *Weeks v. Pearson*, 5 N. H. 325, on the point that a judgment in an action for the same cause in another State is in general a bar; *First National Bank v. Wallis*, 59 N. J. L. 48, 34 Atl. 984, holding no defense can be interposed in an action on a judgment of a sister State upon matters existing before its recovery; *Hazard v. Griswold*, 21 Fed. 182, on the point that a release must be pleaded before a decree; *Board of Commissioners v. Platt*, 79 Fed. 572, 49 U. S. App. 224, holding a judgment against a city by default on bonds estops the city to claim the indebtedness was in excess of the city's power; *Lawrence v. Nelson*, 143 U. S. 223, 36 L. 134, 12 S. Ct. 443, holding an administrator appearing and having judgment rendered against him in another State cannot file a bill of review in the same court because not being appointed there he could not sue there.

Executors and administrators.— An administrator suing in debt on a judgment is not bound to make profert of the letters of administration, p. 692.

Cited in *Riddle v. Hill*, 51 Ala. 228, holding profert is never necessary except where the cause of action accrued to the intestate; *Anderson v. Wilson*, 13 Ark. 413, holding that where the cause of action accrues after the death profert is not necessary; *Savage v.*

Merriam, 1 Blackf. 176, note, holding that if a plaintiff sue as administrator when he might have sued in his own name, he need not make profert of the letters.

Executors and administrators — Pleading.— In an action by an administrator on a judgment, it is not necessary for him to name himself as administrator, and if he does so name himself it may be rejected as surplusage, pp. 692, 693.

Cited and rule followed in *Innerarity v. Kennedy*, 2 Stew. 159, holding that describing the plaintiff as administrator is merely descriptio personæ; *Lewis v. Adams*, 70 Cal. 409, 412, 59 Am. Rep. 425, 427, 11 Pac. 836, 837, and *Newberry v. Robinson*, 36 Fed. 842, both holding an administrator may sue in another State on a judgment, and allegations of representative capacity are mere surplusage; *Barnes v. Modisett*, 3 Blackf. 254, holding a note due A., administrator of B., is due to A. in his own right, and if he sue on it as “administrator of B.,” these words may be rejected as surplusage; *Higgins v. Halligian*, 46 Ill. 176, holding that where a count described the plaintiff as executrix, but was not on a liability as such, such words may be regarded as surplusage; *Gibson v. Land*, 27 Ala. 125, where the words “as trustee for his wife” in a declaration in detinue were held surplusage; *Casto v. Evinger*, 17 Ind. App. 302, 46 N. E. 649, where the words “guardian of P. M.,” following the name of a payee, were said to be merely descriptio personæ.

Executors and administrators — Pleading.— In an action of debt, brought by an administrator on a judgment recovered by him, the debt sued for is due to the plaintiff in his personal capacity, and he may declare that the debt is due to himself, p. 693.

The following citing cases affirm and apply this rule: *Lawrence v. Vilas*, 20 Wis. 386, holding that on a cause of action accruing after the testator’s death, an executor may sue either in his own name or representative capacity; *Newhall v. Turney*, 14 Ill. 339, and *Rucks v. Taylor*, 49 Miss. 560, holding an executor can sue in his personal right on a note payable to himself as administrator and in which he has no personal interest; *Oglesby v. Gilmore*, 5 Ga. 62, holding a judgment recovered by an administrator is a debt due to him in his personal character upon which he may sue in his own name; *Green v. Foley*, 2 Stew. & P. 449, where an action on a decree in favor of three administrators was brought in the name of one, declaration averring others removal; *McCully v. Cooper*, 114 Cal. 261, 55 Am. St. Rep. 69, 46 Pac. 83; 35 L. R. A. 494, *Hall v. Harrison*, 21 Mo. 230, 64 Am. Dec. 226; *Barton v. Higgins*, 41 Md. 547; *Page v. Cravens*, 3 Head, 383, and *Wilkins v. Ellett*, 108 U. S. 259, 27 L. 719, 2 S. Ct. 643, all holding that a foreign administrator may bring suit in his own name on the judgment recovered in another State; *State v. Kaime*, 4 Mo. App. 481, holding a foreign admin-

istrator may sue in his own name, the suit being founded on an order of the Probate Court to pay over money; *Merritt v. Seaman*, 6 N. Y. 173, and *Mercein v. Smith*, 2 Hill, 214, holding in a suit by an administrator upon a cause of action accruing after the death, a defendant cannot set off a demand against the intestate; *Humphreys v. Hopkins*, 81 Cal. 560, 563, 15 Am. St. Rep. 79, 80, note, 22 Pac. 895, 896, 6 L. R. A. 797, 798, and n., dissenting opinion, foreign receiver can only sue the ground of comity; *Wilkinson v. Culver*, 23 Blatchf. 418, 25 Fed. 640, holding that when a receiver sues in New York on a judgment recovered in New Jersey, he sues on it as an individual and not as a receiver, though he calls himself a receiver.

Miscellaneous.—Miscited in *Powell v. Spaulding*, 3 G. Greene, 466.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1829.

BY RICHARD PETERS,

Counselor at law and Reporter of the Decisions of the Supreme Court
of the United States.

VOL. II.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, *Chief Justice.*

The Hon. BUSHROD WASHINGTON, *Associate Justice.*

The Hon. WILLIAM JOHNSON, *Associate Justice.*

The Hon. GABRIEL DUVAL, *Associate Justice.*

The Hon. JOSEPH STORY, *Associate Justice.*

The Hon. SMITH THOMPSON, *Associate Justice.*

WILLIAM WIRT, Esq., *Attorney-General.*

WILLIAM THOMAS CARROLL, Esq., *Clerk of the Supreme Court of the United States.*

TENCH RINGOLD, Esq., *Marshal.*

The Hon. John M'Lean was appointed an associate justice of the Supreme Court of the United States on the 7th day of March, 1819, in the room of the Hon. Robert Trimble, deceased. Mr. Justice M'Lean did not take his seat during the term.



THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1829.

1*] *ABRAHAM L. PENNOCK AND JAMES
SELLERS, *Plaintiffs in Error*,

v.

ADAM DIALOGUE.

*Practice—instructions of the court to the jury—
patent law—abandonment—English law—con-
struction of the words “not known or used be-
fore the application.”*

The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial of the cause by each party in support of the issue. It is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burthen upon the record. This court has had occasion, in many cases, to express its regret on account of irregular proceedings of this nature. There was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the court, delivered to the jury, presented a general principle of law; and the application of the evidence to it was left to the jury. [15]

It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. [16]

If either party considers any point presented by the evidence omitted in the charge of the court, it is competent for such party to require an opinion

from the court upon that point. The court cannot be presumed to do more in ordinary cases than to express its opinion upon questions which the parties themselves have raised on the trial. [16]

It has not been, and indeed it cannot be denied, that an inventor may abandon *his invention, [*2 and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute. The question which generally raises on trials is a question of fact rather than of law; whether the acts or acquiescence of the party furnish, in the given case, satisfactory proof of an abandonment, or dedication of the invention to the public. [16]

It is obvious that many of the provisions of our patent act are derived from the principles and practice which have prevailed in the construction of the law of England in relation to patents. [18]

Where English statutes—such, for instance, as the statute of frauds, and the statute of limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. This is not the case with the English statute of monopolies, which contains an exception, on which the grants of patents for inventions have issued in that country. The language of that clause in the statute is not identical with the patent law of the United States; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents; as they must have known, and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it. [18]

The true meaning of the words of the patent law, “not known or used before the application,”

NOTE.—*Patent law—abandonment.*

As to patent law, see note to *Evans v. Eaton* 3 Wheat., 454.

Although the invention was original with the patentee, and he was otherwise entitled to a patent, on seasonable application; yet if the inventor delayed applying and made his invention known and suffered it to be used by the public without objection, his doing so will operate as an abandonment or dedication of it to the public, and will avoid a patent afterwards obtained. *Kendall v. Winsor*, 21 How., 322; *Whittemore v. Cutter*, 1 Gall., 478; *Mellers v. Silsbee*, 4 Mas., 108; *Thompson v. Haight*, 1 U. S. Law. J., 575; *Winans v. Schenectady and Troy R. R. Co.*, 2 Blatchf., 279; *Evans v. Eaton*, Pet. C. C., 322; *Treadwell v. Bladen*, 4 Wash. C. C., 703; *Whitney v. Emmett*, Baldw., 303.

Whatever may be the inventor's intention, if he suffers his invention to go into public use through any means whatever, without an immediate assertion of his right, he is not entitled to a patent; nor will a patent, obtained under such circumstances, protect his right. Any acquiescence in the public use, by the inventor, will be an abandonment of his right. *Shaw v. Cooper*, 7 Pet., 292, 320.

Where experiments as to an invention were im-
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perfect and unsatisfactory, and the inventor subsequently threw aside his temporary model, and neglected for years to follow up his experiments so as to produce a perfect machine, such acts amount to an abandonment. *Parkhurst v. Klusman*, 1 Blatchf., 488; 8 N. Y. Leg. Obs., 146.

Declarations of the inventor, that he does not intend to take out a patent, but to let the public have his invention, are equivalent to a license to use it, to a person who acts on the faith of such declarations. *Pitts v. Hall*, 2 Blatchf., 229.

If the public sale or use is without the knowledge or consent of the inventor, or if the use be merely experimental to ascertain its value or utility, or the success of the invention, by putting it in practice, that will not deprive the inventor of his title. *Ryan v. Goodwin*, 3 Sumn., 514; 3 Law Rep., 220; *Wyeth v. Stone*, 1 Story, C. C., 273; S. C., 4 Law Rep., 54; *Pierson v. Eagle Screw Co.*, 3 Story C. C., 402; *Winans v. Schenectady and Troy R. R. Co.*, 2 Blatchf., 279.

The previous use, to avoid a patent, must not be a surreptitious use, in fraud of the patentee, but a public use by his consent, by a sale by himself, or by others with his acquiescence, by which he abandons his right, or disables himself from complying

is, not known or used by the public before the application. [19]

If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries. [19]

If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute, how can the court extract the case from its operation and support a patent, when the suggestions of the patentee were not true, and the conditions, on which alone the grant was authorized, do not exist? [21]

The true construction of the patent law is, that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. This voluntary act or acquiescence in the public sale or use is an abandonment of his right; or rather, creates a disability to comply with the terms and conditions of the law, on which alone the Secretary of State is authorized to grant him a patent. [23]

3*] *THIS case was brought before the court, on a writ of error to the Circuit Court for the Eastern District of Pennsylvania.

In that court the plaintiffs in error had instituted their suit against the defendants for an infringement of a patent-right for "an improvement in the art of making tubes or hose for conveying air, water, and other fluids." The invention claimed by the patentees was in the mode of making the hose so that the parts so joined together would be tight, and as capable of resisting the pressure as any other part of the machine.

The bill of exceptions, which came up with the record, contained the whole evidence given in the trial of the cause in the Circuit Court. The invention for which the patent-right was claimed was completed in 1811; and the letters patent were obtained in 1818. In this interval

upwards of thirteen thousand feet of hose, constructed according to the invention of the patentees, had been made and sold in the city of Philadelphia. One Samnel Jenkins, by the permission of, and under an agreement between the plaintiffs as to the price, had made and sold the hose invented by the plaintiffs, and supplied several hose companies in the city of Philadelphia with the same. Jenkins, during much of the time, was in the service of the plaintiffs, and had been instructed by them in the art of making the hose. There was no positive evidence that the agreement between Jenkins and the plaintiffs in error was known to, or concealed from the public. The plaintiffs, on the trial, did not allege or offer evidence to prove that they had delayed making application for a patent, for the purpose of improving their invention; or that from 1811 to 1818 any important modifications or alterations had been made in their riveted hose. The plaintiffs claimed before the jury that all the hose which had been made and sold to the public, prior to their patent, had been constructed and vended by Jenkins under their permission.

Upon the whole evidence in the case, the Circuit Court charged the jury:

"We are clearly of opinion that if an [*4 inventor makes his discovery public, looks on and permits others freely to use it, without objection or assertion of claim to the invention, of which the public might take notice, he abandons the inchoate right to the exclusive use of the invention, to which a patent would have entitled him had it been applied for before such use. And we think it makes no difference in the principle, that the article so publicly used, and afterwards patented, was made by a particular individual, who did so by the private permission of the inventor. As long as an inventor keeps to himself the subject of his discovery, the public cannot be injured; and even if it be made public, but accompanied by an assertion of the inventor's claim to the discovery, those who should make or use the subject of the invention would at least be put upon their guard. But if the public, with the knowledge and tacit consent of

with the law. *Whitney v. Emmett*, Baldwin, 303; *Morris v. Huntington*, 1 Paine, 348.

Merely lapse of time before application for a patent does not, *per se*, constitute an abandonment. *Russell v. Irwin Man. Co.*, 10 Blatchf., 140.

Merely lapse of time, pending an application for a patent, before one is granted, even for nine years; or delay of public officials or courts, where the inventor is not chargeable with gross laches, will not be considered an abandonment. *Goodyear Dental V. Co. v. Smith*, 5 Off. Gaz. Pat., 585; *Adams v. Jones*, 3 Pittsb., 73; *Jones v. Sewell*, 3 Cliff., 563.

The public use of an invention, by its inventor, for more than two years prior to application for a patent, deprives him of his right, and invalidates a patent subsequently obtained; but not where the use or sale was without his consent, or the use merely experimental. *Russell Manuf. Co. v. Malory*, 10 Blatchf., 140; *Guidet v. Palmer*, 10 Blatchf., 217; *McMillan v. Barklay*, 4 Brewst., 275; *Sisson v. Gilbert*, 9 Blatchf., 185; *Sanders v. Logan*, 2 Pittsb., 241; *Henry v. Francetown Soapstone Stove Co.*, 9 Off. Gaz. Pat., 408; *Jar Co. v. Wright*, 6 Off. Gaz. Pat., 327; *Birdsall v. McDonald*, 6 Off. Gaz. Pat., 682; *Henry v. Prov. Tool Co.*, 14 Off. Gaz. Pat., 855; *Draper v. Wattles*, 16 Off. Gaz. Pat., 629; *Egbert v. Lippman*, 15 Blatchf., 295; *Elizabeth v. Pavement Co.*, 7 Otto, 126.

As to what amounts to an abandonment, see

Adams v. Edwards, 1 Fish., 1, 11; *Bell v. Daniels*, 1 Fish., 372; *Adams v. Jones*, 1 Fish., 527; *Sayles v. Chicago R. Co.*, 2 Fish, 523; *American Hide, &c., Co. v. American Tool, &c., Co.*, 1 Holmes, 503; *Consolidated Fruit Jar Co. v. Wright*, 6 Off. Gaz. Pat., 327; *Johnson v. Fassman*, 1 Wood, 138; *Re Conklin, MacArthur*, 375; *Pickering v. McCullough*, 13 Off. Gaz. Pat., 818; *U. S. Rifle Co. v. Whitney Arms Rifle Co.*, 11 Off. Gaz. Pat., 373; *Sprague v. Adriance*, 14 Off. Gaz. Pat., 308; *Howes v. McNeal*, 15 Off. Gaz. Pat., 608; *Agawam Co. v. Jordan*, 7 Wall., 533.

Inventors may keep their inventions secret, and, if they do, no neglect to petition for a patent will forfeit their right to apply for one. *Bates v. Coe*, 8 Otto, 31; *Ayling v. Hall*, 2 Cliff., 494.

The foregoing case of *Pennock v. Dialogue*, may be regarded as a leading case upon the questions of the abrogation or relinquishment of patent privileges as resulting from avowed intention, from abandonment or neglect, or from use known and assented to. *Kendall v. Winsor*, 24 How., 322.

As to the point that if an inventor makes his discovery public before applying for a patent, he abandons his right, it is followed in *Grant v. Raymond*, 6 Pet., 248; *Shaw v. Cooper*, 7 Pet., 292.

As to priority of invention and application before use by others, it is explained in *Reed v. Cutter*, 1 Story, C. C., 590.

the inventor, is permitted to use the invention without opposition, it is a fraud upon the public afterwards to take out a patent. It is possible that the inventor may not have intended to give the benefit of his discovery to the public; and may have supposed that by giving permission to a particular individual to construct for others the thing patented, he could not be presumed to have done so. But it is not a question of intention which is involved in the principle which we have laid down; but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brings this case within the principle which has been stated. If it does, the court is of opinion that the plaintiffs are not entitled to a verdict."

To this charge the plaintiffs excepted, and the jury gave a verdict for the defendant.

Mr. Webster, for the plaintiff in error, contended,

1. That the invention, being of such a nature that the use of it, for the purpose of trying its utility and bringing it to perfection, must necessarily be open and public, the *implication of a waiver or abandonment of the right, furnished by such public use, is rebutted by the circumstance that the article was made and sold only by one individual; and that individual was authorized and permitted so to do by the inventors.

2. That the use of an invention, however public, if it be by the permission and under the continued exclusive claim of the inventor, does not take away his right, except after an unreasonable lapse of time, or gross negligence, in applying for a patent.

3. That the jury should have been instructed that, if they found the riveted hose which was in use by the hose companies, had been all made and sold by Jenkins, and by no one else, prior to the grant of the patent, and that he was permitted by the inventors, under their agreement, so to make and sell the same; that such use of the invention, not being adverse to their claim, did not take away their exclusive right, nor imply an abandonment of it to the public.

4. That if they found the hose had not been made or sold, prior to the grant of the patent, by any person but Jenkins, then the giving of permission to him, being in itself an assertion of claim, was not a dedication to the public; and that the public, by purchasing and using the hose thus made by the permission of the inventors, acquired no title to the invention, but, on the contrary, if the price paid included a premium for the invention, the public, by so purchasing, admitted the right of the inventors.

5. That, at any rate, there being no use, by the public, of this invention, it should have been left to the jury to say whether, under all the circumstances, considering the nature of the invention and the time necessary to perfect it, the plaintiffs have been guilty of negligence in not sooner applying for a patent.

Mr. Webster stated that the question to be decided by the court laid within a narrow compass. The defense set up was, that the [*6] plaintiffs had suffered their invention to be used before their application for a patent, and Peters 2.

had thus lost all right to the exclusive use of it.

The court, in this case, would be called upon to reverse the English decision relative to abandonments; for it was admitted that those cases had gone to the whole extent of the principles applied to this case in the Circuit Court. Those cases have decided that any public use of an invention, even for experiment, renders it no longer a new machine. In the courts of the United States, a more just view had been taken of the rights of inventors. The laws of the United States were intended to protect those rights, and to confer benefits; while the provisions in the statute of England, under which patents are issued, are exceptions to the law prohibiting monopolies. Hence, the construction of the British statute had been exceedingly straight and narrow, and different from the more liberal interpretation of our laws.

By the decisions of our courts, there must be a voluntary abandonment, or negligence, or unreasonable delay in obtaining letters patent, to destroy the right of the patentee. (*Good-year v. Mathews*, Paine's Rep., 300; *Morris v. Huntington*, Id., 348.)

The exception to the charge of the court is, that the jury should have been instructed to decide, upon the evidence, whether the plaintiff meant to abandon his invention by the permission to Jenkins to use it. Jenkins must be considered as the private agent of the inventors; and their agreement with him, under which he made the hose, is to be considered rather as an assertion of their exclusive right to the invention than a surrender of it. By omitting to leave to the jury this question of an intention to abandon, the case was erroneously withdrawn from them. The rights of the parties also entitled them to have the causes of their delay in patenting their invention inquired of by the jury. As the case is presented on the bill of exceptions, the court in their charge undertook to state the whole law of the subject-matter to the jury; and the omission to instruct them on any one point is error.

*If in this charge of the court anything is [*7] omitted which was matter of law for the jury, it is misdirection.

In a case in Massachusetts, said to be reported in 4th Mason's Rep., it was left to the jury to decide whether seventeen years' delay could be accounted for.

Under the provisions of the laws of the United States, the right is created by the invention, and not by the patent. The court, therefore, may have misled the jury, in stating that the plaintiffs allowed the invention to be used. The thing invented was only permitted to be used.

The suggestion, that by adopting the language of the English statute, the cases decided in England upon that statute are adopted, may be answered by a reference to those cases. They have all arisen within a few years, since the enactment of our law; and, except the *dictum* of Lord Coke, in 2d Institute, the authorities are all of modern date.

If this court shall be of opinion, that as no instructions were particularly asked upon the questions raised here, the court below were not bound to notice them in the charge, and that

the court did not undertake to decide the whole law; the plaintiff in error can make out no case here. But if this court shall consider the questions now submitted doubtful, as the rights of the plaintiffs may not have been fully investigated; by sending the case back to the Circuit Court, a more full investigation of all the points involved in it may be made.

Mr. Sergeant, for the defendant, insisted:

1. That mere invention gives no right to an exclusive use, unless a patent is obtained; and that if at a time when no right is infringed, the public fairly acquire possession of it, the inventor cannot, by subsequently obtaining a patent, take it away.

2. That the inventor, by abstaining from getting a patent, encouraged the public to use the article freely, and thus benefited his own manufactory. And he is not at liberty, when this advantage is exhausted, to turn round, and **S***] endeavor *to reach another and a different kind of advantage, by appropriating the use exclusively to himself.

In the circuit where this cause was tried, it was not the practice to ask the court for special instructions to the jury. After the evidence had been closed, and counsel heard, a charge was given to the jury, according to the nature of the case, upon the points made by counsel, or which might suggest themselves to the mind of the judge. It was competent, however, to either party, after the charge, to ask the opinion of the court upon any point supposed to have been omitted, which was material to the decision. In this case, no such request had been made; and no objection can now be made to the charge, for any imputed omission. The only question was, whether the principles laid down to the jury for their guidance were correct, and according to law, in the particular excepted to.

The charge must of course be considered with reference to the facts, the whole of which appear upon the record. The petition of the plaintiffs to the Secretary of State stated, in the words of the patent law, that they were the inventors of a "new and useful improvement," "not known or used before their application." The "application" was made in July, 1818. Their averment, therefore, upon which they obtained their patent was, that the rivet hose was a new invention, not "known or used" before the year 1818. The facts proved upon the trial were, that the invention had been completed and published in the year 1811, seven years before the application. That during all that period, it had been known and used as common public property (and not as private property), which anyone might use as publicly known. And that it was so known and used, with the knowledge of those who now claim to be the inventors, without any assertion or claim on their part of exclusive property, and without notice of intention to make such claim. There was not a single circumstance offered to explain the delay.

There was an attempt to show that the making of the article for use was limited by the **9***] authority and permission *of the plaintiffs, and thence to infer that they did not intend to give it to the public. A witness, produced by them, and the only person who appeared to have made the article, declared in

substance, "that he was taught by the plaintiffs in 1811 to make hose; that in that year he made a certain quantity of it for the Philadelphia Hose Company, plaintiffs being members of the committee; and that by permission of the plaintiffs he made about thirteen thousand feet of hose, for different hose companies, from 1811 to the time of granting the patent."

Thus, in point of fact, nearly two miles and a half in length of hose had been made at different times in the course of seven years before the patent, and had been sold to different hose companies, not to experiment with, in order to bring the invention to perfection, but for public use, as a thing already completed, and adapted to the purpose of arresting the ravages of fire. It was so used; and from the year 1811 to the year 1818, it was never materially altered or improved. The thing patented in 1818 was precisely the thing invented, completed and used in 1811.

Were the plaintiffs, under these circumstances, entitled to a patent? or could a patent, thus obtained be supported? The authorities upon the subject are decisive. He did not admit that the weight of judicial or legal opinion in England was lessened by the supposed difference in the policy of the two countries, or that in fact any such difference existed. It was true, that the process or mode of legislation was varied according to the existing state of things. The statute of James was made to abolish monopolies; but it saved, by exception, the rights of the inventors of new and useful inventions, who had before enjoyed exclusive privileges. The Constitution of the United States and the Act of Congress, on the contrary, having no monopolies to deal with, created exclusive privileges in favor of the same description of persons. The one preserved to them a pre-existing monopoly, and the other conferred it upon them. Both were influenced by the merits of the inventor, and the public advantage of encouraging inventive genius. And they were *equally influenced by [***10**] these considerations; for it required at least as strong a sense of their just claims to distinction, to except new and useful inventions from the statutory odium and denunciation of monopolies, as it did to confer upon them the benefits of monopoly by direct enactment. There was no reason, therefore, why the judicial construction of the statute of James (from which our Act of Congress was in this respect copied), which had become, as it were, incorporated with and part of the statute, should not be as much respected as in the instance of any other statute. The adoption of the language of the statute, was the adoption also of its settled interpretation. It could not, surely, be insisted that England was wanting in intelligence to discern the value of genius, or in liberality to reward it; or that there was a prevailing bias in her judiciary towards an unjust restriction of the rights of meritorious inventors. The sentiment of the nation, and the government, in all its branches, was the opposite of this.

Before referring to the cases, it might be well, however, to examine the matter a little upon principle. What is the right of an inventor? It is the right, given to him by the law, to apply for and obtain a patent for his invention. The patent, when duly obtained,

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secures to him the exclusive enjoyment. Has he any other right before he obtains a patent than the one just stated? It is obvious that he has not. This, then, is what the learned judge, in his charge, styles, with peculiar aptness, an inchoate right; that is, a right to have a title upon complying with the terms and conditions of the law. It is like an inchoate right to land, or an inceptive right to land, well known in some of the States, and everywhere accompanied with the condition, that to be made available it must be prosecuted with due diligence, to the consummation or completion of the title. If the condition be not complied with, the right is abandoned or lost, and the rights of others are let in. The abandonment is not a question of intention of the party, but it is the legal construction of his acts or omissions.

Had the plaintiffs ever such an inchoate right? **11*]** According *to the opinion of the judge, they undoubtedly had such a right by their invention in 1811. Then, they could have made out the case required by the first section of the Act of Congress—they could have stated with truth, that the thing invented “was not known or used before their application.” But in the year 1818 it was no longer true. It might be stated, but it could not be truly stated. They were unable to comply with the condition of law. For, if the inventor, as was the case here, voluntarily permit his invention to be known and used, as a thing not intended to be patented, how can he make this statement? By so doing, he abandons his inchoate right, he proclaims to the world that he does not mean to secure it by patent, and everyone is at liberty to consider it abandoned; because everyone acquainted with the law knows that he has incurred a disability. This is the inevitable legal construction of his conduct, and is altogether independent of his intention, unless we suppose the Act to be guilty of the absurdity of requiring that to be stated which it does not require to be true.

But the terms of the Act are in this respect too plain to admit of a doubt. Suppose an applicant should state that his invention had been known and used for seven years before his application, could he obtain a patent? Suppose he should state that he had always intended to reserve to himself a right to obtain a patent, would that help him? Or, if he should state that it had been so known and used only by his permission? The language of the Act is plain and imperative. There is no scope for interpretation. The prescribed condition is express. And there is no doubt that it was the intention of Congress to refer to the “application,” as the period before which the thing was not known or used; for in the subsequent Act of 17th April, 1800, conferring the privileges of the patent law upon resident aliens, the same word is used for the same purpose. And it is declared that the patent shall be void if the thing patented was known or used before the application. (Act of 17th April, 1800, sec. 1.)

12*] *It is not contended that if the invention should be pirated, the use or knowledge obtained by the piracy, or otherwise obtained without the knowledge or consent, and without the fault of the inventor, would bar him from getting a patent. Nor is it contended that his own knowledge and use would

be a bar. The latter is a necessary exception out of the generality of the terms of the law, because every inventor must know his invention, and must use it to the extent of ascertaining its usefulness before he applies for a patent. The former is a case where there is no fault on the part of the inventor. But it is contended that the inventor who means to rely upon a patent must make his application within a reasonable time, and that if he permit his invention to be publicly known and used before he applies, he cannot obtain a patent. He abandons his right if he sell it for public use himself, and, *a fortiori*, if he permit another so to sell it.

There is a cautious intimation in the charge that possibly there might be some saving efficacy in accompanying the use with an assertion of claim by the inventor. And it is also put as a circumstance against the plaintiffs (which was clearly in evidence) that there was no such assertion or notice. The charge is, therefore, applicable only to a case of unqualified public use without notice or assertion of claim. That such a notice would be available, or that there can be any other assertion of claim than the legal assertion by applying for a patent, are propositions which it is not now necessary to examine. They were not affirmatively laid down by the court, nor otherwise adverted to than for the purpose of showing that the facts did not entitle the plaintiffs to the benefit of them. They cannot, therefore, complain. Whether such assertions or notice, contradicted by the acts of the inventor, will be available, is a question not decided below. Certain it is that a secret permission given to their own agent can no more be an assertion or notice than a resolution locked up in their own breasts.

The construction contended for is in accordance with the policy of the law. Patents are intended to be granted *for a limited [***13** time, beginning with the invention. He who asks for one must describe his invention with such certainty as will insure to the public its use when the patent expires, and at the expiration of the time, the thing invented is public property. The inventor, to enjoy its benefits, must place his whole reliance upon it. Is it competent for him, then, to secure to himself the advantages of his own peculiar knowledge and skill as long as these will avail him, and when they are exhausted to apply for a patent? There are many inventions, the secret of which is not at once discoverable from an inspection of the thing invented. The inventor may keep that as long as he can. He may have extraordinary skill or methods of working, which will enable him to keep the market to himself. May he enjoy these exclusive privileges for seven years, and then obtain a patent for fourteen more? He would, then, have the exclusive use for twenty-one years. If for seven, why not for fourteen, or twenty-one, or any other assignable time? The moment that his invention comes into the most common or public use is the moment when he applies for a patent. When the public have fully got possession of it, he seeks to withdraw it from the common stock and appropriate it to himself. This is directly contrary to the design of the law. It extends the term, and inverts the or-

der of proceeding. The inconveniences would be very great. Those who were engaged in making the article must stop. Those who had arranged for making it must abandon their arrangements. Those who had employed their time in learning to make it must lose their time and their labor. And even a *bona fide* inventor, who had discovered the same thing by his own study and experiments, would be deprived of the fruits of his ingenuity and exertions. And why? Simply because the first inventor did not choose sooner to take out a patent, as he might have done. The conditions of the law being such as he can comply with, and ought to comply with, he postpones a compliance for his own profit, and leads the community into an injurious error. If it be designed, **14*** it is a wrong. If it be without design, it is negligence. Ought he to be benefited by his own wrong or negligence?

The authorities are against him. He cited 3 Inst., 184; *Wood v. Zimmer* (1 Holt's N. P. Rep., 58), *Whittemore v. Cutter* (1 Gall., 482), and referred to *Evans v. Eaton* (1 Peter's C. C. Rep., 348), *Thompson v. Haight* (1 U. S. Law Journal, 563).

He then examined the several points stated for the defendant, contending that some of them were unsupported by the facts, and others by the law. Under the second he argued that there had been an "unreasonable lapse of time" and "gross negligence." That seven years (the period here) unexplained were beyond all reasonable bounds.

He contended, also, that due diligence, where there were no circumstances of explanation, was a question of law, and that it consisted in applying for a patent as soon after the invention was completed as could reasonably be done; and, finally, that due diligence required that the application should be made before the thing invented was publicly known and used with the consent of the inventor.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of Pennsylvania. The original action was brought by the plaintiffs in error for an asserted violation of a patent, granted to them on the 6th of July, 1818, for a new and useful improvement in the art of making leather tubes or hose for conveying air, water, and other fluids. The cause was tried upon the general issue, and a verdict was found for the defendant, upon which judgment passed in his favor; and the correctness of that judgment is now in controversy before this court.

At the trial a bill of exceptions was taken to an opinion delivered by the court, in the charge to the jury, as follows, viz.: "That the law arising upon the case was that if an inventor makes his discovery public, looks on and permits others freely to use it without objection or assertion of claim to the invention, of which the public might take notice, he **15*** abandons *the inchoate right to the exclusive use of the invention to which a patent would have entitled him had it been applied for before such use; and that it makes no difference in the principle that the article so publicly used, and afterwards patented, was made by a particular individual, who did so by the

private permission of the inventor; and thereupon did charge the jury that if the evidence brings the case within the principle which had been stated, the court were of opinion that the plaintiffs were not entitled to a verdict."

The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial, by each party, in support of the issue. It is very voluminous, and, as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burden upon the record. This court has had occasion in many cases to express its regret on account of irregular proceedings of this nature. There was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the court, delivered to the jury, presented a general principle of law, and the application of the evidence to it was left to the jury.

In the argument at the bar much reliance has been placed upon this evidence by the counsel for both parties. It has been said on behalf of the defendants in error that it called for other and explanatory directions from the court, and that the omission of the court to give them in the charge furnishes a good ground for a reversal, as it would have furnished in the court below for a new trial. But it is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it. *The court [**16** cannot be presumed to do more, in ordinary cases, than to express its opinion upon the questions which the parties themselves have raised at the trial.

On the other hand, the counsel for the defendant in error has endeavored to extract from the same evidence strong confirmations of the charge of the court. But, for the reason already suggested, the evidence must be laid out of the case, and all the reasoning founded on it falls.

The single question, then, is whether the charge of the court was correct in point of law. It has not been, and indeed cannot be, denied that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way, they become absolute. Thus, if a man dedicates a way, or other easement to the public, it is supposed to carry with it a permanent right of user. The question which generally arises at trials is a question of fact rather than of law, whether the acts or acquiescence of the party furnish in the given case satisfactory proof of an abandonment or dedication of the invention to the public. But when all the facts are given, there does not seem any reason why the court may not state the legal conclusion deducible from them. In this view of

the matter, the only question would be whether, upon general principles, the facts stated by the court would justify the conclusion.

In the case at bar it is unnecessary to consider whether the facts stated in the charge of the court would, upon general principles, warrant the conclusion drawn by the court independently of any statutory provisions, because we are of opinion that the proper answer depends upon the true exposition of the Act of Congress under which the present patent was obtained. The Constitution of the United States has declared that Congress shall have power "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." It contemplates, therefore, that this ex-

17*] elusive right shall exist but *for a limited period, and that the period shall be subject to the discretion of Congress. The Patent Act of the 21st of February, 1793, ch. 11, prescribes the terms and conditions and manner of obtaining patents for inventions; and proof of a strict compliance with them lies at the foundation of the title acquired by the patentee. The first section provides "that when any person or persons, being a citizen or citizens of the United States, shall allege that he or they have invented any new or useful art, machine, manufacture or composition of matter, or any new or useful improvement on any art, machine, or composition of matter not known or used before the application, and shall present a petition to the Secretary of State signifying a desire of obtaining an exclusive property in the same, and praying that a patent may be granted therefor, it shall and may be lawful for the said Secretary of State to cause letters patent to be made out in the name of the United States, bearing teste by the President of the United States, reciting the allegations and suggestions of the said petition, and giving a short description of the said invention or discovery, and thereupon granting to the said petitioner, &c., for a term not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery, &c." The third section provides "that every inventor, before he can receive a patent, shall swear or affirm that he does verily believe that he is the true inventor or discoverer of the art, machine, or improvement for which he solicits a patent." The sixth section provides that the defendant shall be permitted to give in defense to any action brought against him for an infringement of the patent, among other things, "that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work, anterior to the supposed discovery of the patentee."

These are the only material clauses bearing upon the question now before the court; and upon the construction of them, there has been 18*] no inconsiderable diversity of *opinion entertained among the profession, in cases heretofore litigated.

It is obvious to the careful inquirer, that many of the provisions of our Patent Act are derived from the principles and practice which

have prevailed in the construction of that of England. It is doubtless true, as has been suggested at the bar, that where English statutes—such, for instance, as the statute of frauds, and the statute of limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts, or has been received with all the weight of authority. Strictly speaking, that is not the case in respect to the English statute of monopolies; which contains an exception on which the grants of patents for inventions have issued in that country. The language of that clause of the statute is not, as we shall presently see, identical with ours; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it.

By the very terms of the first section of our statute, the Secretary of State is authorized to grant a patent to any citizen applying for the same, who shall allege that he has invented a new and useful art, machine, &c., &c., "not known or used before the application." The authority is a limited one, and the party must bring himself within the terms before he can derive any title to demand, or to hold a patent. What, then, is the true meaning of the words "not known or used before the application?" They cannot mean that the thing invented was not known or used before the application by the inventor himself, for that would be to prohibit him from the only means of obtaining a patent. The use, as well as the knowledge of his invention, must be indispensable to enable him to ascertain its competency to the end proposed, as well as to perfect its component parts. The words, then, to have any rational interpretation, must mean, *not known or used by others before the [*19 application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself; or if before his application for a patent his invention should be pirated by another, or used without his consent; it can scarcely be supposed that the Legislature had within its contemplation such knowledge or use.

We think, then, the true meaning must be, not known or used by the public before the application. And, thus construed, there is much reason for the limitation thus imposed by the Act. While one great object was, by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of genius; the main object was "to promote the progress of science and useful arts;" and this could be done best by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible; having a due regard to the rights of the inventor. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make, and sell his invention publicly, and thus gather the whole profits of it, relying upon his supe-

rior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any farther use than what should be derived under it during his fourteen years; it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries.

A provision, therefore, that should withhold from an inventor the privilege of an exclusive right, unless he should, as early as he should allow the public use, put the public in possession of his secret, and commence the running of the period, that should limit that right, would not be deemed unreasonable. It might **20*** be expected to find a place in a *wise prospective legislation on such a subject. If it was already found in the jurisprudence of the mother country, and had not been considered inconvenient there, it would not be unnatural that it should find a place in our own.

Now, in point of fact, the statute of 21 Jac., ch. 3, commonly called the statute of monopolies, does contain exactly such a provision. That Act, after prohibiting monopolies generally, contains, in the sixth section, an exception in favor of "letters patent and grants of privileges for fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patent and grants, shall not use." Lord Coke, in his commentary upon this clause or proviso (3 Inst., 184), says that the letters patent "must be of such manufactures, which any other at the time of making such letters patent did not use; for albeit it were newly invented, yet if any other did use it at the making of the letters patent, or grant of the privilege, it is declared and enacted to be void by this Act." The use here referred to has always been understood to be a public use, and not a private or surreptitious use in fraud of the inventor.

In the case of *Wood v. Zimmer* (1 Holt's N. P. Rep., 58), this doctrine was fully recognized by Lord Chief Justice Gibbs. There the inventor had suffered the thing invented to be sold, and go into public use for four months before the grant of his patent; and it was held by the court, that on this account the patent was utterly void. Lord Chief Justice Gibbs said: "To entitle a man to a patent, the invention must be new to the world. The public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void." By "invention" the learned judge undoubtedly meant, as the context abundantly shows, not the abstract discovery, but the thing invented; not the new secret principle, but the manufacture resulting from it.

The words of our statute are not identical **21*** with those of *the statute of James, but it can scarcely admit of doubt, that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord

Coke. But if there were no such illustrative comment, it is difficult to conceive how any other interpretation could fairly be put upon these words. We are not at liberty to reject words which are sensible in the place where they occur, merely because they may be thought, in some cases, to import a hardship, or tie up beneficial rights within very close limits. If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say that his case is, nevertheless, such as the Act was intended to protect? If such a public use is not a use within the meaning of the statute, what other use is? If it be a use within the meaning of the statute, how can the court extract the case from its operation, and support a patent, where the suggestions of the patentee are not true, and the conditions on which alone the grant was authorized to be made do not exist? In such a case, if the court could perceive no reason for the restrictions, the will of the Legislature must still be obeyed. It cannot and ought not to be disregarded, where it plainly applies to the case. But if the restriction may be perceived to have a foundation in sound policy, and be an effectual means of accomplishing the legislative objects, by bringing inventions early into public and unrestricted use; and above all, if such policy has been avowed and acted upon in like cases in laws having similar objects, there is very urgent reason to suppose that the Act in those terms embodies the real legislative intent, and ought to receive that construction. It is not wholly insignificant in this point of view, that the first Patent Act passed by Congress on this subject (Act of 1790, ch. 34, ch. 7), which the present Act repeals, uses the words "not known or used before," without adding the words "the application;" and in connection with the structure of the sentence in which they stand, might have been referred either to the time of the invention, or of the application. The addition of the *latter words in the Patent Act of [***22** 1793, must, therefore, have been introduced, *ex industria*, and with the cautious intention to clear away a doubt, and fix the original and deliberate meaning of the Legislature.

The Act of the 17th of April, 1800, ch. 25, which extends the privileges of the Act of 1793 to inventors who are aliens, contains a proviso declaring, "that every patent which shall be obtained pursuant to the Act for any invention, art or discovery, which it shall afterwards appear had been known or used previous to such application for a patent, shall be void." This proviso certainly certifies the construction of the Act of 1793, already asserted; for there is not any reason to suppose that the Legislature intended to confer on aliens, privileges essentially different from those belonging to citizens. On the contrary, the enacting clause of the Act of 1800 purports to put both on the same footing; and the proviso seems added as a gloss or explanation of the original Act.

The only real doubt which has arisen upon this exposition of the statute, has been created by the words of the sixth section already quoted. That section admits the party sued to give in his defense as a bar, that "the thing thus secured by patent was not originally discovered by the patentee, but had been in use

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anterior to the supposed discovery of the patentee." It has been asked, if the Legislature intended to bar the party from a patent in consequence of a mere prior use, although he was the inventor, why were not the words "anterior to the application" substituted, instead of "anterior to the supposed discovery?" If a mere use of the thing invented before the application were sufficient to bar the right, then, although the party may have been the first and true inventor, if another person, either innocently as a second inventor, or piratically, were to use it without the knowledge of the first inventor, his right would be gone. In respect to a use by piracy, it is not clear that any such fraudulent use is within the intent of the statute; and upon general principles it might well be held excluded. In respect to the case of a 23*] second invention, it is questionable *at least, whether, if by such second invention a public use was already acquired, it could be deemed a case within the protection of the Act. If the public were already in possession and common use of an invention fairly and without fraud, there might be sound reason for presuming, that the Legislature did not intend to grant an exclusive right to anyone to monopolize that which was already common. There would be no *quid pro quo*, no price for the exclusive right or monopoly conferred upon the inventor for fourteen years.

Be this as it may, it is certain that the sixth section is not necessarily repugnant to the construction which the words of the first section require and justify. The sixth section certainly does not enumerate all the defenses which a party may make in a suit brought against him for violating a patent. One obvious omission is, where he uses it under a license or grant from the inventor. The sixth section in the clause under consideration, may well be deemed merely affirmative of what would be the result from the general principles of law applicable to other parts of the statute. It gives the right to the first and true inventor, and to him only; if known or used before his supposed discovery he is not the first, although he may be a true inventor; and that is the case to which the clause looks. But it is not inconsistent with this doctrine, that although he is the first, as well as the true inventor, yet if he shall put it into public use, or sell it for public use before he applies for a patent, that this should furnish another bar to his claim. In this view an interpretation is given to every clause of the statute without introducing any inconsistency, or interfering with the ordinary meaning of its language. No public policy is overlooked; and no injury can ordinarily occur to the first inventor, which is not in some sort the result of his own laches or voluntary inaction.

It is admitted that the subject is not wholly free from difficulties; but upon most deliberate consideration we are all of opinion that the true construction of the Act is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be *publicly sold for use, before he makes application for a patent. His voluntary act or acquiescence in the public sale and use is an abandonment of his right; or rather, creates a disability to comply with the terms and conditions on which alone the Sec- Peters 2.

retary of State is authorized to grant him a patent.

The opinion of the Circuit Court was therefore perfectly correct; and the judgment is affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Pennsylvania, and was argued by counsel; on consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said Circuit Court. Whereupon, it is considered, ordered and adjudged by this court, that the said judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Aff'g, 4 Wash., C. C., 538.

Cited—6 Pet., 248; 7 Pet., 318, 322; 1 How., 207, 210; 6 How., 483; 21 How., 329-331; 24 How., 322; 1 Black, 219; 1 Wall., 103; 7 Wall., 608; 11 Wall., 199; 18 Wall., 584; 8 Otto, 46; Bald., 309-314, 317; 4 Wash., 582; 2 Wood. & M., 142, 148; 1 Blatchf., 95; 2 Blatchf., 7; 1 Story, 597, 598; 3 Story, 408; 3 Sumn., 518; 3 Biss., 233; 2 Cliff., 577; 5 Sawy., 441; 7 Bank. Reg., 206; Pat.-Office Gazette, 1879, p. 174.

*THE COLUMBIAN INSURANCE [*25
COMPANY OF ALEXANDRIA, *Plaintiffs in Error*,

v.

JOSEPH W. LAWRENCE, Survivor of
LAWRENCE & POINDEXTER, *Defendants in Error*.

Evidence—insurable interest—misrepresentation—waiver of preliminary proof of loss—construction of an insurance policy.

It is undoubtedly true, that questions respecting the admissibility of evidence, are entirely distinct from those which refer to its sufficiency or effect. They arise in different stages of the trial, and cannot, with strict propriety, be propounded at the same time. [44]

L. & P., at the time an insurance was made for them against loss by fire, were entitled to one-third of the property by deed, and to two-thirds as mortgages; but one moiety of the whole was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. L. & P. had an insurable interest in the property. [46]

That an equitable interest may be insured is admitted; and we can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has, undoubtedly, a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money the property is equivalent, and is still valuable to him. The embarrassments of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The

NOTE.—Fire insurance—a misrepresentation material to the risk avoids the policy.

That a material misrepresentation avoids a marine policy, see note to *McLanahan v. Universal Ins. Co.*, 1 Pet., 170.

A misrepresentation or suppression of a fact material to the risk will, in general, avoid the policy. *Roth v. City Ins. Co.*, 6 McLean, 324; *Nicoll v. American Ins. Co.*, 3 Wood. & M., 529; *Carpenter v. Providence W. Ins. Co.*, 16 Pet., 495; *Farmers' Ins. Co. v. Snyder*, 16 Wend., 481; *S. C.*, 13 Wend., 92; *Lappin v. Charter Oak Ins. Co.*, 58 Barb., 325.

Overestimate of value, in application, unless in

destruction of the property is a real loss to the person in possession, who claims title under an executory contract; and the contingency, that his title may be defeated by subsequent events, does not prevent this loss. [46]

The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence & Poindexter, and states it afterwards to be their stone mill. It contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute. The title of the assured was subject to contingencies, and was held under contracts which had become void by the non-performance of the same. This court is of opinion, that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in this offer for insurance; construing the words of that offer as they are fairly to be understood. [48]

The contract for insurance against fire, is one in which the underwriter generally acts on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material to the underwriter to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state if it was offered for sale; but fair dealing requires [*26*] that he should state *everything which might influence the mind of the underwriter, in forming or declining the contract. [49]

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautionary means to avoid the calamity insured against, which would be suggested by his interest. The extent of that interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. Underwriters do not rely so much on the principles as on the interest of the assured; and it would seem therefore to be material, that they should always know how far this interest is engaged in guarding the property from loss. [49]

In all treaties on insurance, and in all the cases in which the question has arisen, the principle is that a misrepresentation which is material to the risk, avoids the policy. [49]

What will not constitute a waiver of the preliminary proof of loss the assured is bound by the policy to produce. [53]

Construction of a policy of insurance against loss by fire. [56]

THIS was a writ of error to the Circuit Court of the County of Alexandria, in the District of Columbia.

tentional, does not vitiate the policy. *National Bank v. Insurance Co.*, 5 Otto, 673; *Whittle v. Farmville Ins. Co.*, 3 Hugh., 421; *Sturm v. Great Western Ins. Co.*, 40 How. Pr., N. Y., 423.

A false and exaggerated statement of the amount and value of the goods in store at time of fire, made knowingly and with intent to defraud the insurance company, forfeits the claim under the policy. *Sibley v. St. Paul Ins. Co.*, 7 Reporter, 169.

If there is no fraud, and no misleading, the policy is not affected by the false representation. *Jefferson Ins. Co. v. Cotheal*, 7 Wend., 72.

The representation, in order to vitiate the contract, must relate to some fact material to the risk. *Mayor of N. Y. v. Brooklyn Ins. Co.*, 4 Keyes, N. Y., 465; affirming S. C., 41 Barb., 231.

Where the representations are written, and declared to be warranties, their materiality is not a question for the jury. *LeRoy v. Market Ins. Co.*, 30 N. Y., 90.

A representation is a verbal or written statement, made by the insured to the underwriter, before the subscription of the policy, as to the existence of some fact or facts tending to induce the latter more readily to assume the risk; a warranty is a stipulation inserted in the policy, or in another writing referred to therein, and made a part thereof, on the literal truth or fulfillment of which the validity of the entire contract depends. *Pierce v. Empire Ins. Co.*, 62 Barb., 636.

Statements in the application, when not adopted and made the basis of the contract so as to constitute warranties, are to be treated as representations not prejudicing the rights of the assured, unless they are material to the risk, untrue, and made

The action was brought, originally, by Lawrence & Poindexter, on a policy of insurance for \$7,000 against fire on a mill.

The declaration, after setting out the contract of insurance, avers that the plaintiffs "were interested in, and the equitable owners of the insured premises at the time the insurance was made." After stating the loss by fire on the 14th February, 1824, as within the policy, there is the following averment. "Of which said loss, together with the proofs thereof in conformity with the conditions subjoined to the said policy, the defendants, on the 20th February, 1824, at, &c., had due and regular notice."

Upon the trial of the general issue, verdict and judgment passed for the surviving plaintiff, Lawrence, for the whole amount of the insurance, under certain instructions from the court, stated in two bills of exceptions tendered by the defendants, now plaintiffs in error.

During the progress of the suit, Poindexter, one of the plaintiffs, died, and the suit, instituted in their joint names, was carried on in the name of the survivor, for the use of his assignee.

The evidence exhibited to the jury on the part of the plaintiff, showed that Lawrence & Poindexter, by their *agents, had made [*27 application in writing to the defendants for insurance in these words:

"What premium will you ask to insure the following property, belonging to Lawrence & Poindexter, for one year, against loss or damage by fire, on their stone mill, four stories high, covered with wood, situated on an island about one mile from Fredericksburg, in the county of Stafford? The mill called Elba; seven thousand dollars is wanted; not within thirty yards of any other building, except a corn-house, which is about twenty yards off."

The premium demanded was one hundred and five dollars.

The application was made upon a printed form, of which blanks are kept at the insurance

in bad faith. (*Owens v. Holland P. Ins. Co.*, 56 N. Y., 565.

A representation is a statement incidental to the contract relative to some fact having reference thereto, and upon the faith of which the contract is entered into. May on Ins., sec., 181; *Banteau v. Phoenix Ins. Co.*, 67 N. Y., 595.

Representations are either affirmative or promissory. The former are allegations of facts as then existing; the latter concern what is to happen during the existence of the insurance, either as expectation or contract. Material falsity in an affirmative representation will avoid the contract. *Lycoming Ins. Co. v. Rubin*, 79 Ill., 402.

But the failure of an oral promissory representation does not affect it, although it may be evidence of fraud. *Kimball v. Aetna Ins. Co.*, 9 Allen [Mass.], 540.

Representations being outside the policy, may be proved by parol. If false and material, they prove that the risk is not the one which was insured. *Campbell v. N. E. Ins. Co.*, 98 Mass., 381; *Miller v. Nat. Benefit Ins. Co.*, 31 Iowa, 216.

The question of the truth of the representations is ordinarily for the jury, their materiality for the court. *N. A. Ins. Co. v. Throop*, 22 Mich., 146; *Foot v. Aetna Ins. Co.*, 61 N. Y., 571.

Where the facts are in dispute, the question of materiality is for the jury. *Garelon v. Hampden Ins. Co.*, 50 Me., 580; *Mutual Ins. Co. v. Deale*, 18 Md., 26; *Keeler v. Niagara Ins. Co.*, 16 Wis., 523; *Farmers' Ins. Co. v. Snyder*, 16 Wend., 481; *Daniels v. Hudson River Ins. Co.*, 12 Cush., 416.

Where the representations are in writing, it may appear from the papers themselves that the parties

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office, and filled up as required. At the foot of this document was the following:

N. B.—Persons offering for insurance are requested to be particular in their descriptions, more especially of what materials the walls and roofs are constructed, &c.

The policy, an unsealed instrument, was executed in the usual form, containing the several stipulations, provisos, and exceptions, usual in fire policies; and among others, the following:

"And it is understood and agreed, as well by this company as by the assured named in this policy, and all others who may become interested therein, that this insurance is made and accepted in reference to the conditions which accompany these presents; and in every case the said conditions are to be used to explain the rights and obligations of the parties, except so far forth as the policy itself expressly declares those rights and obligations."

Upon the back of this policy were printed the "Fundamental rules of the Columbian Insurance Company," and also, the "Rates of annual premiums to be paid for insurance," among which were:

"1. Persons desirous to make insurance on buildings, are to state in writing the following particulars, viz.: Of what materials the walls and roofs of each building are constructed, as well as the construction of the buildings contiguous thereto; whether the same are occupied **28***] as private dwellings *or how otherwise; where situated; also the name or names of the present occupiers."

"Each building must be separately valued, and a specified sum insured thereon; and in like manner a separate sum insured on the property contained therein.

"All manufactories which contain furnaces, kilns, stoves, ovens, or use fire heat, are chargeable at additional rates.

"In the assurance of goods, wares and merchandise, the building or place, in which the same are deposited, is to be described, also

whether such goods are of the kinds denominated hazardous, and whether any manufactory is carried on in the premises. And if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force.

"2. Goods held in trust, or on commission, are to be insured as such, otherwise the policy will not extend to cover such property.

"9. All persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company, and as soon as possible thereafter, deliver as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same by their oath or affirmation, and by their books of accounts, or other proper vouchers, as shall be reasonably required; and shall procure a certificate under the hand of a magistrate or a sworn notary, of the town or county in which the fire happened, not concerned in such loss, directly or indirectly, importing that they are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she, or they, really, and by misfortune, without any kind of fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and, until such affidavit and certificate are produced, the loss claimed shall not be payable; also, if there appears any fraud, the claimants shall forfeit his claim to restitution or [***29** payment, by virtue of his policy."

The property intended to be insured, was proved to be a square building, four stories high, built of stone to the square or eaves, the roof being framed, and covered entirely of wood, the two gable ends running up perpendicularly from the stone wall to the top of the roof, they being constructed of wood.

On the 14th of February, 1824, the property

have treated certain matters as conclusive, and if they have done so, it is final. *Wilson v. Conway Ins. Co.*, 4 R. L., 141; *LeRoy v. Market Ins. Co.*, 39 N. Y., 90; *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51; *Anderson v. Fitzgerald*, 4 H. L. Cas., 484.

If the representations are false as to part, the contract is void. *Day v. Charter Oak Ins. Co.*, 51 Me., 91; *Gould v. York Co. Ins. Co.*, 47 Me., 403; *French v. Chenango Ins. Co.*, 7 Hill, N. Y., 122; *Friesmuth v. Agawam Ins. Co.*, 10 Cush. [Mass.], 587; *Smith v. Empire Ins. Co.*, 25 Barb., 497; *contra*, *Koontz v. Hannibal Ins. Co.*, 42 Mo., 126; *Phoenix Ins. Co. v. Lawrence*, 4 Mete. Ky., 9.

The state of the facts at the time the contract is closed is its basis. If the representation is true, then it is immaterial that it was false when made. If false then, it avoids the policy. *Trail v. Baring*, 4 DeG. & S., 318; *British Eq. Ins. Co. v. Great Western Railway Co.*, 39 L. J. Ch. 132; *Calvert v. Hamilton Ins. Co.*, 1 Allen, 308; *Brady v. N. W. Ins. Co.*, 11 Mich., 425; *Baltimore Ins. Co. v. McGowan*, 16 Md., 47; *N. E. Ins. Co. v. Wetmore*, 32 Ill., 221; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y., 379.

Representations will not be made warranties by construction of the court. *Rann v. Home Ins. Co.*, 59 N. Y., 387; *Rafferty v. Brunswick Ins. Co.*, 18 N. J., 480; *Boardman v. Merrimaek Ins. Co.*, 8 Cush., 583; *Boardman v. H. H. Ins. Co.*, 20 N. H., 551.

If the application be in writing, parol evidence of other representations is not admissible. *Borgs v. American Ins. Co.*, 30 Mo., 63; *Kimball v. Aetna Ins. Co.*, 9 Allen, 540; *Alston v. Mechanics' Ins. Co.*, 4 Hill, N. Y., 329; *Girard Ins. Co. v. Stephenson*, 37 Penn. St., 293.

What representations are material and how con-

strued. *Bartean v. Phoenix Ins. Co.*, 67 N. Y., 595; *Nicoll v. American Ins. Co.*, 3 Wood. & M., 529; *Sibbald v. Hill*, 2 Bowl. P. C., 263; *La. Ins. Co. v. N. O. Ins. Co.*, 13 La. Ann., 246; *Schulz v. Merchants Ins. Co.*, 57 Mo., 331; *Boardman v. N. H. Ins. Co.*, 20 N. H., 551; *Stebbins v. Globe Ins. Co.*, 2 Hall, N. Y., 632; *Williams v. N. E. Ins. Co.*, 31 Me., 219; *Collins v. Charleston Ins. Co.*, 10 Gray, 155; *Sims v. State Ins. Co.*, 47 Mo., 54; *Ins. Co. of N. A. v. McDowell*, 50 Ill., 120; *Wynne v. Liverpool Ins. Co.*, 71 N. C., 121; *Maryland Ins. Co. v. Whiteford*, 31 Md., 219; *Buchanan v. Exchange Ins. Co.*, 61 N. Y., 26; *Aurora Ins. Co. v. Eddy*, 49 Ill., 106.

Where the insurers were fully informed of the facts, they cannot charge misrepresentation. *Andes Ins. Co. v. Fish*, 71 Ill., 620; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y., 379; 8 Am. Rep., 556.

Preliminary proofs.

The decision in the foregoing case (*Columbian Ins. Co. v. Lawrence*, 2 Pet., 25), as to rejecting the preliminary proofs, is disapproved in *Aetna Ins. Co. v. Tyler*, 16 Wend., 385, 401. It is held to be well settled in New York, that if there is a formal defect in the preliminary proofs, which could probably be supplied on objection, if the insurers do not object to them on that ground, but put their refusal to pay distinctly on other grounds, the production of further preliminary proof will be waived. *Aetna Ins. Co. v. Tyler*, *supra*; *Vos v. Robinson*, 9 John. R., 192; *Ocean Ins. Co. v. Francis*, 1 Wend., 64; *Curry v. Com. Ins. Co.*, 10 Pick., 536.

The decision to the contrary in the foregoing case (*Columbian Ins. Co. v. Lawrence*) may now be deemed overruled. *Taylor v. Merchants' Ins. Co.*, 9 How., 390.

was destroyed by fire; and the following documents were given in evidence, to sustain the right of the plaintiffs to demand payment of the loss; the same having been exhibited as "the preliminary proof of the loss claimed under the policy."

FREDERICKSBURG, February 16, 1824.

To the president, directors and company of the Columbian Insurance Company of Alexandria.

Gentlemen—We regret that we have now to inform you of the total destruction of our mill by fire, on the night of the 14th inst., which was insured in your office, the particulars of which we will forward you as soon as we can prepare the necessary documents as laid down in the conditions accompanying the policy.

LAWRENCE & POINDEXTER.

The affidavit of the said Lawrence & Poindexter, with the certificate of Murray Forbes, was annexed.

We hereby certify, that by the burning of our mill, situated on an island in the county of Stafford, about one mile from the town of Fredericksburg, and State of Virginia, called the Elba mill, four stories high, the walls of stone and covered with wood, on which seven thousand dollars were insured by us in the office of the Columbian Insurance Company of Alexandria, on the 9th day of April last, per policy No. 279, and which was destroyed by fire on the night of Saturday last, the 14th inst., we lost, or were damaged at least twelve thousand dollars, exclusive of the contents of said mill. We are entirely ignorant of the circumstances which occasioned the fire, and we further certify that we have no other insurance, directly or indirectly on the aforesaid property, except the above-mentioned.

JOSEPH LAWRENCE,
THOS. POINDEXTER, JUN.

30*] **Commonwealth of Virginia, Stafford County, to wit:*

Joseph W. Lawrence and Thomas Poindexter this day personally appeared before me, a justice of the peace for the said county, and made oath, in due form, that the above certificate contains the truth to the best of their knowledge and belief.

MURRAY FORBES.

I, Murray Forbes, a magistrate duly commissioned, in and for the county of Stafford, and State of Virginia, do hereby certify that I am acquainted with Joseph W. Lawrence and Thomas Poindexter; that the fire originated in their mill burnt on the night of the 14th inst., by accident, or without fraud or design on their part, as far as I know or believe; and that the damage or loss they sustained by the said fire is at least ten thousand dollars. And I further certify, that the said mill was not within thirty yards of any other building, except a corn-house, which was about twenty yards off.

MURRAY FORBES.

The affidavits of Thomas Sedden and James Vasse were annexed:

I, Thomas Sedden, of the town of Fredericksburg, in the county of Spotsylvania, and State of Virginia, do hereby certify, that I am well acquainted with the mill called and known by the name of the Elba mill, owned and occupied by Joseph W. Lawrence and Thomas Poindexter, situate on an island in the county of Staf-

ford, about one mile from the town of Fredericksburg; that the said mill was built of stone four stories high and covered with wood; that between ten and eleven o'clock on Saturday night, the 14th inst., I was alarmed by the cry of fire, which I soon ascertained to be the mill aforesaid; that I have since viewed the ruins, and am of opinion that it would require at least ten thousand dollars to rebuild the same, and restore the proprietors in the situation they were in previous to the said fire; that I have no knowledge or idea how the fire originated.

THOMAS SEDDEN.

Commonwealth of Virginia, Stafford County, to wit:

Thomas Sedden this day personally appeared before me, one of the Commonwealth's justices of the peace of the *county aforesaid, [*31 and made oath to the truth of the foregoing certificate signed by his hand.

MURRAY FORBES.

I, James Vasse, of the town of Falmouth, in the county of Stafford, and State of Virginia, do hereby certify, that I am well acquainted with the mill called and known by the name of the Elba mill, owned and occupied by Joseph W. Lawrence and Thomas Poindexter, situate on an island in the county of Stafford, and about one mile from the town of Fredericksburg; that the said mill was built of stone four stories high and covered with shingles; that between the hours of ten and eleven o'clock on Saturday night, the 14th current, I was alarmed by the cry of fire, which I soon ascertained to be the mill aforesaid; that I have since viewed the ruins, and I am of opinion that it will require the sum of ten thousand dollars, or thereabout, to restore the proprietors to the situation they were in previous to the said fire; farther, that I have no knowledge whatever how the fire originated.

JAMES VASSE.

Commonwealth of Virginia, Stafford County, to wit:

James Vasse this day personally appeared before me, one of the Commonwealth's justices of the peace of the county aforesaid, and made oath to the truth of the foregoing certificate signed by his hand.

MURRAY FORBES.

The plaintiff also gave in evidence the following extracts from the minutes of the proceedings of the insurance company in relation to the claim of payment for the loss.

Friday, 20th February, 1824.—Lawrence & Poindexter. Claim made by them this day by their attorney, Anthony Buck, with the policy and certificates of loss by fire, on policy No. 279.

On the application of Anthony Buck, leave is given to Joseph W. Lawrence and Thomas Poindexter to assign to William J. Roberts policy No. 279, effected in this office, without prejudice to any defense which this office may have against the payment of the sum insured, or to the claim of John H. Ladd & Co., under their attachment heretofore served on the president of this company.

Saturday, 13th March, 1824.—Ordered, That the secretary *address a letter to John [*32 Scott, to require the title of Lawrence & Poindexter to the Elba mill.

Thursday, 1st April, 1824.—The following
Peters 2.

papers were this day received, to wit: A letter from John Scott, Esq., Fredericksburg, covering copies of a deed from William and George Winchester to Joseph Howard and Joseph Lawrence; an agreement between Joseph Howard and Joseph Lawrence; and an agreement between Joseph Lawrence and Thomas Poindexter, Jun.

Friday, 16th April, 1824.—In the case of Lawrence & Poindexter, Ordered, that a copy of the mortgage to the banks, proof of the execution of the contract between Lawrence and Poindexter on the day it bears date, and a copy of the notes in the bank be required.

Thursday, 22d April, 1824.—Lawrence & Poindexter. The following papers were presented by R. I. Taylor, Esq., inclosed to him by Mr. John Scott, Fredericksburg: Deed of trust from Joseph Howard and Mary, his wife, and Joseph W. Lawrence, to William J. Roberts, for the benefit of the banks, dated 13th May, 1814.

An agreement between Joseph W. Lawrence and Thomas Poindexter, dated 28th November, 1822.

A copy of a note drawn by Howard & Lawrence, dated 10th March, 1824, to the Farmers' Bank of Virginia, at Fredericksburg, for \$1,800.

A copy of another note, dated 5th March, 1824, drawn by the same, to the Bank of Virginia, at Fredericksburg, for four thousand one hundred and eighty-seven dollars.

Saturday, 26th June, 1824.—Walter Jones, Esquire's, opinion having been submitted to a called board this day, on motion of Mr. Mandeville, it was resolved that the claim of Lawrence & Poindexter be resisted, and that the secretary furnish them with a copy of this resolution.

Wednesday, 11th November, 1824.—Will the board now enter into a compromise with John Scott, Esq., for the claim of Lawrence & Poindexter on this office, it being perfectly understood that an agreement to enter into a compromise is not to be considered as an admission of the claim? Yes.

33*] Thursday, 18th November, 1824.—The board having duly considered the case of Lawrence & Poindexter, decline making any compromise at this time, and the secretary is directed to inform Mr. Scott of their determination.

Friday, 10th December, 1824.—A communication from John Scott, Esq., of Fredericksburg, was received; whereupon it was ordered that a board be called for to-morrow at twelve o'clock, to receive said John Scott's proposals for an arrangement in the case of Lawrence & Poindexter.

Saturday, 11th December, 1824.—On application of John Scott, Esq., it is agreed to receive propositions for an arrangement between John Scott and this office, in the case of Lawrence and Poindexter, without prejudice to either of the parties concerned. John Scott, Esq., has this day proposed to settle his claim against this office by receiving from them fifty cents in the dollar in full for said claim. Will the board now agree to pay said Scott fifty cents? They will not.

The opinion of Walter Jones, Esq., counsel of the defendants, referred to in the minutes, was as follows:

"Claim of Lawrence & Poindexter, as stated Peters 2.

by the Columbian Insurance Company of Alexandria.

"An equitable title in general is doubtless an insurable interest against fire; but it seems that the interest in this case was so incumbered with liens and precedent conditions, as to make the legal estate not worth the calling for on the part of the insured; whilst, on the other hand, their circumstances were such as in all probability to make any suit against them, for a specific execution of the contract, or for compensation for damages, fruitless and unproductive; so that, to any practical effect or purpose, the insured were unable to call for the legal estate by performing the contract of sale, and, consequently, the vendor had no motive to throw the legal estate upon them by a compulsory execution of such contract. How the insurance may be affected by such a state of facts, is a question entirely at large, and undetermined by authority; and if there were any insurable interest, it might be matter of serious doubt; under the peculiar circumstances of the property and the parties, to what *degree [***34** the general terms in which the description of the estate to be insured is given (unlimited by any specification of the quality of the estate, or of the value and quantity of the interest), involved misrepresentation or concealment.

"Whether in the description of a stone building covered with wood the gables be necessarily understood to be a part of the masonry, is a question of art belonging to architects or house-builders, and depending upon the common use and understanding of the terms connected with that art. How, upon these principles, would a contract to build a house of brick or stone covered with wood be understood? would the undertakers be bound to run up the gables with brick or stone? If that question be answered in the affirmative (as I am informed, and, indeed, have no doubt it should be), then the omission in this case, to disclose the fact of timber gables, is a concealment of a material fact; and the unqualified description given of a stone mill, a material misrepresentation which avoids the policy.

W. JONES."

The plaintiff also examined witnesses relative to the proceedings of the board, from which, as well as from the facts stated in the minutes, he claimed to infer that if there was a defect in the preliminary proof, the same had been waived by the representatives of the Insurance Company. This evidence, so far as it was by the court considered to affect or influence the law and merits of the case, is sufficiently set out in the opinion of the court. After this and other testimony to the same effect had been given on the part of the plaintiff, the defendants' counsel objected to the admissibility, competency, and sufficiency of the same, and of all or any of the facts thereby proved; admitting the same to be true as above stated; to entitle the plaintiffs to recover for the loss stated in the declaration and proved by the evidence; and the grounds of the said objections were specifically stated as follows:

1. That the interest claimed by the plaintiffs in the property insured, as disclosed by such evidence, was not, at *the respective times [***35** of effecting the insurance, and of the happening of the loss, an insurable interest and property.

2. That it was not such an interest as is described in the original offer of the plaintiffs' agent for insurance, and in the policy, nor such as is averred in the declaration.

3. That the said documents, produced as preliminary proof of loss, do not import a fulfillment, on the part of the plaintiffs, with the terms and conditions upon which the loss is declared to be payable by the ninth of the said printed proposals, or rules annexed to the policy.

And the counsel for the defendants thereupon prayed the opinion and direction of the court to the jury, that the said evidence was not admissible, competent, and sufficient to be left to the jury as proof of the plaintiffs' title to recover for such loss in this action.

Which instruction the court refused to give, being of opinion, 1. That the interest of the plaintiffs in the property insured, as disclosed by the said evidence, is a sufficient insurable interest to support the policy, and the averment of interest in the plaintiffs' declaration in this action.

2. That it is such an interest as is described in the original offer for insurance, and in the policy and in the declaration; and,

3. That, although the said certificate of Murray Forbes is not such a certificate as is required by the said ninth rule annexed to the said policy, yet the evidence aforesaid is admissible, competent, and sufficient to be left to the jury, and from which they may infer that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid.

The counsel for the defendants below took a bill of exceptions to the refusal and opinion of the court.

The defendants then gave evidence of the nature and particulars of the property insured, that, in a policy of insurance upon the same property, by the Mutual Insurance Society of Virginia, Lawrence & Poindexter had described the property differently, stating it to be "covered with wood; gable ends of the roof of wood;" that Lawrence & Poindexter were **36** *insolvent; and that the property had greatly depreciated in value; that the title to the property was embarrassed, and litigated in chancery; that the property thus incumbered was not worth the purchase, and that the assured were unable to comply with their agreements to pay for the same, or to respond in damages for the breach thereof.

The plaintiff also produced evidence to show that it was the usual practice of the country to build the gable end of brick or stone mills of wood; and that a mill so constructed had been insured by the Mutual Insurance Society, described in the same terms used in the policy, upon which this suit was brought.

Whereupon the defendants prayed the opinion of the court, and their instruction to the jury, that if the said contracts between Howard and Lawrence, and between Lawrence and Poindexter, have not been performed on either side; and if, from the actual state and condition of the title, and the value of the property bargained for between Howard and Lawrence, and between Lawrence and Poindexter in the said contracts; and from the circumstances of the parties, the said contracts between the said

parties could not have been specifically performed, or effectually enforced on either side, so as to have vested the legal estate pursuant to said contracts; or to have vested in said Lawrence & Poindexter an equitable estate, with a right to call for the legal estate; and that the said contracts between the said parties were not practically available, but were, as to the practical intent and purpose which they purported an intent to effectuate, incapable of being executed; then the said Lawrence & Poindexter had not, at the time of the said insurance; and of the said loss, such an interest in the said mill as to entitle them, or either of them, to recover in this action for the loss averred in the declaration, and proved by the evidence.

Which instruction the court refused; being of opinion that it would leave a question of law to the jury, viz.: Whether, under the circumstances therein stated, the said parties therein mentioned, or either of them, could be compelled *specifically to perform the agreements therein mentioned; and because the court is of opinion that, under the circumstances stated in the said evidence, the plaintiffs had, at the time of effecting the insurance, and at the time of the loss, an insurable interest in the said mill.

Whereupon the defendants prayed the opinion of the court, and their instruction to the jury, that, in order to verify the description of the property insured, as given in the policy, it is necessary that the whole of the exterior walls of the mill-house, upon which the roof or covering rests, from the foundation to the top of the roof should be of stone; and that, if the plan of the said house were such as that two of the exterior walls terminated in upright gable ends, run up perpendicularly from the eaves to the top of the roof; and sloping at the same angle as the pitch of the roof, such gable ends not properly forming, according to the ordinary rules and terms of architecture, a part of the covering or roof; it was necessary, to verify the said description, that such gable ends should have been of stone; and if, in point of fact, such gable ends, as well as the covering or roof were of wood, which, under any circumstances of actual conflagration, might have increased either the risk of catching fire, or the difficulty of extinguishing or stopping the progress of fire once commenced, it amounted to a material misrepresentation, and avoids the policy; and it is not material whether the said misrepresentation was wilful and fraudulent, or from ignorance and without design, nor whether the actual loss was produced by such misrepresentation, or by having gable ends of wood instead of stone.

Which instruction the court refused; being of opinion that it was competent for the jury, from all the facts given in evidence, to decide whether, in order to verify the said description in the said policy, it was necessary that the whole of the exterior walls, from the foundation to the top of the roof, should be of stone.

And being also of opinion, that, under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured from the *true [***38** description thereof, not made fraudulently, would vitiate the policy, unless by reason of such variation the insurance was made at a low-

er premium than would otherwise have been demanded.

The defendants then proved, by James Sanderson, the witness before sworn and examined on the part of the plaintiff, that, in making the insurance aforesaid, the defendants were not governed by the said printed rates of premium, and did not insure the said mill as a building under the class No. 4 of the said printed rates, though the same premium therein indicated was charged; but that the board, in their discretion, fixed the premium as for an extrarisk, considering the frequent accidents to mills, from the circumstance of millers being in the habit of grinding all night; and if the insurers had understood the mill to have been built with wooden instead of stone gable ends, it would have been at their discretion to have charged a higher premium, or to have declined the risk. And the plaintiff's counsel having argued to the jury upon the presumed authority of the court's opinion upon the second of the aforesaid instructions, moved by the counsel for the defendants, and overruled as aforesaid, that the misrepresentation of the class of the building insured, if found by the jury to be such as above objected on the part of defendants, did not vitiate or avoid the policy, either as a breach of warranty or misrepresentation, unless it had been designedly and fraudulently made, or had induced the defendants to insure at a lower premium than they would otherwise have done; and that, in fact, the insurance was done at the maximum rate indicated by the said printed rates.

The counsel for the defendants thereupon prayed the opinion of the court, and an instruction to the jury, that if the jury find from the evidence that the materials and description of the mill, for the destruction of which this loss is claimed, as it actually existed at the time of insurance, differed from the representation of the same made by the plaintiffs, or their agents, at the time of effecting the said insurance, in this: that the walls at the two ends of **39** the building, *all the way from the eaves to the top of the roof, constituting what are commonly called the gable ends, were constructed of wood instead of stone, and that the risk from fire was greater with such wooden gable ends than if they had been constructed of stone, it ought to be deemed a material misrepresentation, and avoids the policy, whether such misrepresentation proceeds from fraud, or casual inadvertence in the assured; and, in such case, it is not necessary for the defendants to prove further that a higher premium would have been charged, if a true and accurate representation of the building had been made; nor does it vary the effect of such misrepresentation, that the highest rate of premium stated in the said printed rates was actually charged for the said insurance.

Which instruction the court refused to give for the following reason: That, under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured from the true description thereof, not made fraudulently, would vitiate the policy, unless by reason of such variation the insurance was made at a lower premium than would otherwise have been demanded.

Whereupon the defendants prayed the opinion of the court, and an instruction to the jury, that if the jury find from the evidence that the materials and description of the mill, for the destruction of which this loss is claimed, as it actually existed at the time of insurance, differed from the representation of the same made by the plaintiffs, or their agents, at the time of effecting the said insurance, in this: that the walls at the two ends of **39** the building, *all the way from the eaves to the top of the roof, constituting what are commonly called the gable ends, were constructed of wood instead of stone, and that the risk from fire was greater with such wooden gable ends than if they had been constructed of stone, it ought to be deemed a material misrepresentation, and avoids the policy, whether such misrepresentation proceeds from fraud, or casual inadvertence in the assured; and, in such case, it is not necessary for the defendants to prove further that a higher premium would have been charged, if a true and accurate representation of the building had been made; nor does it vary the effect of such misrepresentation, that the highest rate of premium stated in the said printed rates was actually charged for the said insurance.

of the court, and their instruction to the jury, that the said J. W. Lawrence, as the survivor of the said Lawrence & Poindexter, if entitled, upon the principles aforesaid, to recover anything in this action, is not entitled to recover anything more than a moiety of the said loss. Which instruction the court also refused, and the defendants excepted.

Messrs. Jones and C. C. Lee, for the plaintiff in error, made the following points:

1. In order to fulfil either the general law of insurance against fire, or the contract of insurance in this case, or the averments of the declaration; the interest of the insured in the freehold estate that constituted the particular subject of insurance, should have consisted in a substantial ownership and proprietary right, legal or equitable; whereas nothing appears from the paper-muniments, which the plaintiff relied on **[*40]** as the sole evidence of such interest, but a naked pretense, or mere color of title.

2. If any technical estate, equivalent to an insurable interest, appeared, yet its essential quality, quantity and condition, were either positively misrepresented by the assertion of unqualified ownership and proprietary right; or were concealed, when a particular disclosure of the nature and condition of the interest was material.

Therefore, whether a total defect of interest appeared, or its essential attributes were either misrepresented or concealed, or the plaintiff failed in proving the more specific averment of interest in the declaration, the defendants were, at all events, entitled to the general instruction, against the plaintiff's right of action, asked of the court.

3. If these paper-muniments did import, *prima facie*, any insurable interest, the presumption was absolutely repelled by the facts proved on the other side; showing the supposed title in equity to have been merely nominal or colorable.

Therefore, the direction to the jury asked by the defendants of the court on this point, should have been granted on the hypothesis of proof therein stated; not being liable to the objection stated by the court, of referring matter of law to the jury. On the contrary, the court in their positive direction to the jury, that the insured, under the circumstances supposed, had a substantial property in the subject of insurance, trenching more upon the province of fact, than the jury, under the required direction, would have done on that of law.

4. The preliminary tests of the claim of loss, required by the ninth fundamental rule above cited, are strictly in the nature of a condition precedent; and cannot be dispensed with, but by an express discharge; consequently, the evidence or inference of a waiver by implication was inadmissible.

5. The declaration avers an actual compliance with the rule; therefore, no evidence of any dispensation from it, express or implied, was admissible.

6. The circumstances, from which such a waiver was **[*41]** inferred by the court in this case, were wholly insufficient to raise any legal or reasonable presumption to that effect; whereas, from the terms of the court's direction to the jury, it must have been received by the jury as a positive presumption or inference of

law from written evidence. The company were in no manner bound to communicate their reasons for resisting the claim; and their resolution to resist it, notified as it was in general terms to the insured, covered the whole ground; and was just as good notice, if any was required, of one defect as another in the claim.

7. The misrepresentation of the materials and construction of the building insured, was palpable and material; and the direction to the jury, asked by the defendants and refused by the court on this point, properly referred the fact of misrepresentation, and the circumstances from which its materiality resulted, to the jury; the effect of such misrepresentation, and the result of materiality from the circumstances, to the court.

8. The first of the said rules above cited, did not reduce the materiality of misrepresentation in the policy to the alternative tests of fraud, or of a consequent reduction in the rate of insurance, as was ruled by the court; or if it did, then such reduction in the rate of insurance was a necessary presumption from a lower risk, and was not to be proved, *aliunde*, as was also required by the court.

9. The fact that a premium equal to the highest rate for insurance on the fourth class of hazards indicated in the said printed list of rates, had been paid, was wholly immaterial; and did not, as ruled by the court, convert the risk itself to one of that class, as on a "slight or timber building;" when the specific description of it in the policy identified it with the lower risk indicated in the second class of the said printed rates; and it turned out, in fact, to be neither of the second nor of the fourth class, but identically of the third; nor did it supply any competent evidence whatever; far less conclusive evidence, as was, in effect, ruled by the court; that the premium was, in fact, accommodated to any higher risk than that specifically described in the policy.

42*] 10. The defendants, in the direction asked of the court to the jury on this point, condescended to the terms of materiality of misrepresentation, and an actual increase of the risk. They, nevertheless, maintain that the description of the risk, in the body of the policy, amounted to a warranty that it was actually of the class of hazards, to which that description specifically referred it.

For the plaintiffs in error, were cited, 2 Marsh. on Ins., 787; *Id.*, 115, 118; 2 Caines' Rep., 13; 2 Caines' Cases in Error, 110; 4 Dall., 421; 1 Johns., 341; 3 Dow., 255; 2 Marsh., 811.

Mr. Swann and Mr. Wirt, for the defendant in error, maintained, that the Circuit Court did not err in giving or refusing the charges to the jury, as set forth in the several bills of exceptions. They cited *Burk & Hedrick v. The Chesapeake Ins. Company*, 1 Peters, 151; 1 Marshall on Insurance, 114, 115; 8 T. R., 13; 2 New Rep., 269; 13 Mass. Rep., 96; *Id.*, 267; 3 Mass. Rep., 133; Phil. on Ins., 85, 128, 499; 1 Johns. Rep., 220; 9 Johns., 192; 6 Harris & Johnson, 612; 6 Cranch, 338, 339; 5 Cranch, 100, 109; 2 Sch. & Lef., 712; 13 Johns., 561; 3 Marshall, 221; Dong., 11; also 1 Chitty on Ins., 317, 18; 1 T. R., 638; Doug., 684, 687, 688.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This writ of error is brought to a judgment of the Court of the United States, for the District of Columbia, sitting in the county of Alexandria; which was rendered in a cause in which Joseph Lawrence, survivor of Lawrence & Poindexter, was plaintiff, and the Columbian Insurance Company of Alexandria were defendants.

The suit was brought on a policy insuring a mill, stated in the representation and in the policy to belong to Lawrence & Poindexter, the assured. Pending the suit, Poindexter died; and the suit was continued and tried in the name of Lawrence, the survivor. The verdict and judgment were in favor of the plaintiff below. At the trial, the court, *on the [*43 motion of the defendant's counsel, instructed the jury on several questions of law which were made in the case; to which instructions the counsel for the defendants in the Circuit Court excepted, and the cause is now before this court on those exceptions.

The plaintiff in the Circuit Court had exhibited his policy, the representation on which the contract of insurance was founded; his proofs of title and of loss, the notice which he gave of that loss, together with the documents which accompanied it, as preparatory to the assertion of his claim against the company; and the proceedings of the company in consequence of that claim, which terminated in a refusal to pay it. The counsel for the plaintiff in the Circuit Court, having thus concluded his case, the counsel for the defendants made three objections to his right of action:

1. That the interest claimed by the plaintiff in the property insured, as disclosed by the evidence; was not, at the respective times of effecting the insurance, and of the happening of the loss, an insurable interest and property.

2. That it was not such an interest as is described in the original offer of the plaintiff's agent for insurance, and in the policy; nor such as is averred in the declaration.

3. That the said documents produced as preliminary proof of loss, do not import a fulfillment, on the part of the plaintiff, of the terms and conditions upon which the loss is declared to be payable, by the ninth of the said printed rules annexed to the policy.

And the counsel for the defendants thereupon prayed the opinion and direction of the court to the jury, that the said evidence was not admissible, competent, and sufficient to be left to the jury as proof of the plaintiff's title to recover for such loss in this action.

The court refused to give this instruction, being of opinion, 1. That the interest of the plaintiffs in the property insured, as disclosed by the said evidence, is a sufficient insurable interest to support the policy, and the averment of interest in the plaintiffs' declaration in this action.

2. That it is such an interest as is described in the original *offer for insurance, and [*44 in the policy, and in the declaration.

3. That although the said certificate of Murray Forbes is not such a certificate as is required by the said ninth rule annexed to the said policy, yet the evidence aforesaid is admissible, competent, and sufficient to be left to the jury;

and from which they may infer that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid.

The counsel for the defendants in error have made some preliminary objections to the terms in which the opinion of the Circuit Court was asked. The counsel prayed the opinion and direction of the court to the jury, that the evidence offered by the plaintiff was not admissible, competent, and sufficient to be left to the jury as proof of the plaintiff's title to recover. This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency, is said to be not only unusual, but to confound propositions distinct in themselves, and to be calculated to embarrass the court, and the questions to be decided.

It is undoubtedly true, that questions respecting the admissibility of evidence, are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time. If, therefore, the Circuit Court had proceeded no further than to refuse the instruction which was asked, this court might have considered the refusal as proper; unless the entire prayer, as made, ought to have been granted. But the Circuit Court proceeded to give its opinion on the different points made by counsel, and these opinions must be examined.

1. The first is, that the interest of the assured in the property insured, is a sufficient insurable interest to support the policy, and the averment of interest in the declaration.

The mill insured was built on an island in the Rappahannoc, which was demised by Charles Mortimer to Stephen Winchester, for three lives, renewable forever, at the yearly **45***] *rent of £80 (\$266.66); with a condition of re-entry for rent in arrear, &c.

1801, Dec. 19.—S. W. conveyed one undivided third part to Richard Winchester, and another undivided third part to Joshua Howard.

1806, May 9.—R. and S. Winchester conveyed to Joshua Howard, by deed of mortgage in fee, their two-thirds of the said island, with other property to a considerable amount, in order to secure the said Howard to the amount of \$40,000.

1813, Jan. 27.—Joshua Howard conveyed the whole island to William and George Winchester.

1813, Sept. 23.—William and George Winchester conveyed the island to Joseph Howard and Joseph W. Lawrence.

1818, July 22.—Joseph Howard entered into an agreement with Joseph W. Lawrence, by which the said Lawrence was to take the island, &c., at the price of \$30,000; for which amount in debts, due from Howard & Lawrence, he was to procure a release; on his doing which, Howard was to execute a deed for the property; on the failure or inability of Lawrence to procure this release the contract was to be void.

1822, Nov. 28.—Joseph W. Lawrence enters into an agreement with Thomas Poindexter, Jun., for the sale of one-half of the island, mills, &c.; for which the said Poindexter agrees to assume and take upon himself one-half the debts due from Howard and Lawrence to the

banks in Fredericksburg; which were secured by a deed of trust.

Nov. 29.—An agreement between Howard and Lawrence to work the mills in partnership.

By the deeds of January 27, and Sept. 23, 1813, all the title of Joshua Howard to the island on which the mills insured were erected, passed to Joseph Howard and Joseph W. Lawrence. What was that title?

He held one-third part in his own right, and the remaining two-thirds as mortgagee.

The agreement of July 22, 1818, between Howard and Lawrence, does not appear to have been performed on the part of Lawrence; nor is there any evidence of his ability *to **46** perform it; but it does not appear that Howard has taken any step to avoid it, or has asserted any title in himself.

The agreement of Nov. 28, 1822, between Lawrence and Poindexter admits Poindexter to an undivided moiety of any interest Lawrence might have in the property.

Lawrence & Poindexter, then, when the insurance was made, were entitled to one-third of the property under the deed made by Charles Mortimer, and to the remaining two-thirds as mortgagees; but one moiety of the whole, which moiety was derived from Joseph Howard under the agreement of July 22, 1818, was held under an agreement which had not been complied with; and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it.

It cannot be doubted, we think, that the assured had an interest in the property insured. Lawrence had an unquestionable title to a moiety of one-third, subject to the rent reserved in the original lease, and to a moiety of the remaining two-thirds as mortgagee. He had such title to the other moiety as could be acquired by an agreement for a purchase, the terms of which had not been complied with.

The title is thus stated, because those words which declare the contract to be void if Lawrence should fail to comply with it, do not, we think, render it absolutely void, but only voidable. No time for performance is fixed; and if Howard is content with what has been done by Lawrence, and does not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity. Lawrence, having this title under an executory contract, sells to Poindexter one undivided moiety of the property. These two persons, being both in possession, partly under legal conveyances and partly under executory contracts, require an insurance on it against loss by fire. Had they an insurable interest?

That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, *the **47** person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of

the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in *Phillips on Insurance*, 26, on insurable interest, and in 1 *Marshall*, 104, ch. 4. and 2 *Marshall*, 787, ch. 11, prove, we think, that any actual interest, legal or equitable, is insurable.

2. Having declared the interest of *Lawrence & Poindexter* to be insurable, the Circuit Court instructed the jury that "it is such an interest as is described in the original offer for insurance, and in the policy, and in the declaration."

The original offer for insurance was in these words: "What premium will you ask to insure the following property belonging to *Lawrence & Poindexter*, for one year against loss or damage by fire? On their stone mill four stories high, covered with wood, on an island about one mile from *Fredericksburg* in the county of *Stafford*; the mill called *Elba Mill*. Seven thousand dollars are wanted. Not within thirty yards of any other building, except a corn-house, which is about twenty yards off."

The policy states that the underwriters insure *Lawrence & Poindexter* against loss or damage by fire, to the amount of \$7,000 on their stone mill, &c.

The declaration charges that the defendants insured the plaintiffs \$7,000 against loss or damage by fire on their stone mill, &c.; and avers that they were interested in, and the 48*] equitable owners of the premises insured as aforesaid at the time the insurance was made as aforesaid, &c.

The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to *Lawrence & Poindexter*; and states it afterward to be their stone mill. It contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute. The plaintiffs in error contend that the terms import an absolute legal estate in the property; and that the insurers entered into the contract, having a right to believe that the interest of the assured was of this character.

Instead of such an estate in the property as the representation justified the insurers in expecting, the proof shows that the insured held only one-half of one-third, under a lease for three lives, renewable forever, and one-half of the other two-thirds as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with; and which, if complied with, would give them a title to two-thirds of that moiety only as mortgagees.

The defendants insist that the representation is satisfied by an equitable title under an executory contract, and that in truth and in fact, the mill did, at the time of its insurance and loss, belong to *Lawrence & Poindexter*.

It may be true, that a mill occupied by *Lawrence & Poindexter*, and held under a lease or an executory contract, would be generally spoken of by themselves and others as their mill. The property alluded to would be well

understood, and no inconvenience could arise from this mode of designating it. But if *Lawrence & Poindexter* should proceed to sell the property as theirs, should describe it in the contract as belonging to them, no court would compel the purchaser to take the title they could make.

The assured, then, have not proved "such an interest as is described in the original offer for insurance;" and the Circuit Court, in this respect, misdirected the jury. It may *be [*49 proper to take some notice of the materiality of this misdirection.

The contract for insurance is one in which the underwriters generally act on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state if it was offered for sale; but fair dealing requires that he should state everything which might influence, and probably would influence the mind of the underwriter in forming or declining the contract. A building held under a lease for years about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition.

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss. *Marshall*, in treating on insurance against fire (p. 789, b. 4, ch. 2), says: "It is not necessary, however, in order to constitute an insurable interest, that the insured shall in every instance have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission, may insure; but with this caution that the nature of the property be distinctly specified."

In all the treatises on insurances, and in all the cases in which the question has arisen, the principle is that a misrepresentation which is *material to the risk, avoids the policy. [*50 In this case the Circuit Court has decided that there is no misrepresentation; that the interest of the assured was truly described in the offer for insurance; and consequently no question on the materiality of the supposed variance was submitted to the jury.

As this court is of opinion that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood; the Circuit Court has in this respect misdirected the jury.

3. The third opinion given to the jury is that the evidence given by the plaintiff in the Circuit Court was admissible, competent, and sufficient to be left to the jury, and from which they may infer that the defendants waived the objection to the said certificate, and to other preliminary proof aforesaid. The certificate to which this instruction refers, is, by one of the rules which form conditions of the policy, declared to be an indispensable requisite; without the production of which, the loss claimed "shall not be payable." A certificate intended by the assured to satisfy this condition, accompanied the proof of loss; but it is not such a certificate as the condition requires; and such was the opinion of the Circuit Court. The testimony which the court left to the jury as being sufficient to authorize them to infer a waiver on the part of the insurers of this certificate, consisted of entries on the minutes of the board, with some parol proof.

On the 20th of February, 1824, the claim of Lawrence & Poindexter was submitted to the board with the policy and certificate of loss.

On the 13th of March, an order was made, requiring the title papers of Lawrence & Poindexter to the Elba Mill. On the 1st of April, copies of the deed from William and George Winchester to Joseph Howard and Joseph Lawrence, of the agreement between Howard and Lawrence, and of the agreement between Lawrence and Poindexter, were laid before the **51***] *board. On the 16th of April, further proof respecting the title was required, which was produced on the 22d of the same month.

The opinion of Mr. Jones was taken on the case, which was submitted to the board on the 28th of June, when it was resolved "that the claim of Lawrence & Poindexter be resisted; and that the secretary furnish them with a copy of this resolution."

The opinion of Mr. Jones turns on the interest of the assured, and on the question whether the loss was fair or fraudulent.

On the 11th of November, inquiry was made whether the board would enter into a compromise, "it being understood that the agreement" "is not to be considered as an admission of the claim." Answered "yes."

On the 18th of November, the board passed a resolution declining a compromise, which was communicated to the agent of Lawrence & Poindexter.

On the 11th of December, a farther and more specific proposition for a compromise was made by the agent of the assured, which was rejected by the company.

The secretary of the company was examined, to prove the communications between him and the agent of the assured. When the documentary evidence was exhibited, he informed the agent that he would call a board to decide on the claim. After the board had met and adjourned, he informed the agent that the claim would probably be resisted; that the company thought the interest of the assured was not insurable; that the representation was not faithful; and that Poindexter had set fire to the mill. No objection was made to the preliminary papers. The custom of the board was, if the claim for indemnity was thought just, to refer the preliminary papers to their

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secretary to see if they were regular. In this case no such reference was made.

From the first presentation of the papers in February, till the passing of the final resolution in June, the claim was pending undetermined before the board, waiting for the advice of counsel. This advice being delayed by the absence*and other engagements of counsel, [**52** an agreement was entered into with the agent of the assured, that if the final resolution should be to resist the claim, the suit should be put as forward on the docket as if brought to the intervening April term. This agreement was complied with. All the orders and resolutions of the board which have been stated were communicated by the witness to the agent of the assured; and are the only communications which he was authorized to make.

According to the invariable usage of the bond, the sufficiency of the documents offered by way of preliminary proof of loss, as required by the ninth article of the rules annexed to the policy, was not to be considered by the board till the principle of the claim should have been admitted, and then the course was to submit such documents to the secretary for a special report thereon; in this case the sufficiency of the documents was never discussed or considered by the board, nor referred to the secretary. It never was contemplated by the witness, nor to his knowledge, by the board, to waive any compliance with this ninth article. The consideration of the documents offered under it did not regularly come on till the claim should be admitted in principle.

The agent of the assured was present at some of the meetings of the board when the witness was absent. He has understood that on these occasions the communications between them turned entirely on questions respecting the fundamental objections to the claim. The regularity or irregularity of the preliminary proof was never mentioned. The opinion given by counsel was never communicated to the assured or their agent. To have done so, would have been contrary to the rules and to usage.

This evidence was left to the jury as testimony from which they might infer that the preliminary proof, required by the ninth rule annexed to the policy, as indispensable to entitle the assured to demand payment for a loss, had been waived by the underwriters.

It will not be pretended that any expression is to be found either in the resolutions of the board or in the conversations*held by [**53** their secretary with the agent of the assured, having the slightest allusion to this preliminary proof or to the waiver of it. If, then, the jury might infer a waiver, the inference must be founded on the opinion that the board was bound to specify this particular objection; or that they have taken some step or made some communication, which presupposes an acquiescence in the certificate which was offered.

The resolution of the board to resist the claim is expressed in general terms, and consequently applies to every part of the testimony offered in support of it. We know of no principle nor usage which requires underwriters to specify their objections, or which justifies the inference that any objection is waived. We know of no principle by which this preliminary proof should be separated from the other proofs

which were required to sustain the claim, and its insufficiency be remarked to the assured. The general resolution of the board was notice to the assured that if they intended to assert their claim in a court of justice, they must come into court prepared to support it.

2. Did the examination of the title and the proceedings of the board respecting it, presuppose an examination of the preliminary proofs, and an acquiescence in its sufficiency?

We think not. The proof of interest, and the certificate which was to precede payment, if the claim should be admitted, are distinct parts of the case to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered without violating propriety or convenience. The consideration of the one does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question; and adds, that "until such affidavit and certificate are produced, the loss claimed shall not be payable." The affidavit and certificate must precede the payment, but need not precede the consideration of the claim.

54*] *The testimony of the secretary, if not conclusive on this point, is, we think, entitled to great weight. He states the invariable usage of the office to have been, to consider the merits of the claim before looking into the preliminary proof, which, after deciding favorably on the claim, was always referred to him for examination and report. In this case the decision having been unfavorable to the claimant, no reference was made to him.

We do not think the assured can be presumed ignorant of the standing usage of the office to which he applied for insurance; or be admitted to found upon that ignorance a claim to exemption from the necessity of producing a document required by the policy, as indispensable to his demand of payment for his loss.

We think the case exhibits no evidence of waiver; no evidence from which the jury could infer it, and consequently that this instruction of the court is erroneous.

It would have been subject of much regret, had the merits of the case been clearly in favor of the defendants in error, to reverse the judgment of the Circuit Court on account of the non-production of a document, which may perhaps be so readily supplied. But the cause must go back on the opinion expressed by the Circuit Court to the jury, that the title proved at the trial agrees with that stated in the offer for insurance.

After the opinions which have been stated had been delivered to the jury, the defendants offered evidence to prove the insolvency of the plaintiffs, so as to disable them from obtaining a legal title; and additional embarrassments on the property; and again moved the court to instruct the jury that the assured had not such an interest in the property as entitled them, or either of them, to recover. This instruction the court refused to give, being still of opinion that the assured held an insurable interest in the mill. An exception was taken to this opinion.

The additional incumbrances to the title, and the circumstances of Lawrence & Poindexter, might constitute additional objections to the representation contained in the offer *for [*55 assurance; but do not, we think, disprove an insurable interest in those who were still in possession of the property, and claimed title to it under executory contracts.

The defendants in the Circuit Court then proved that the mill was a square building built of stone to the eaves, that the roof was framed and covered entirely of wood, and that the two gable ends running up perpendicularly from the stone wall to the top of the roof were also constructed of wood. They also offered evidence to prove the general understanding, that the description of a stone house covered with wood was not verified or supported by a house whose gable ends were of wood; that the gable ends were understood to be a part of the wall, not of the roof or covering. They then moved the court to instruct the jury, that if two of the exterior walls terminated in upright gable ends, such gable ends not properly forming, according to ordinary rules and terms of architecture, a part of the covering or roof, it was necessary, in order to verify the said description, that such gable ends should have been of stone; and if, in point of fact, such gable ends as well as the covering or roof were of wood, which under any circumstances of actual conflagration might have increased either the risk of catching fire or the difficulty of extinguishing it, it amounted to a material misrepresentation, and avoids the policy; and it is not material whether the said misrepresentation was willful and fraudulent, or from ignorance and without design; nor whether that actual loss was produced by such misrepresentation, or by having gable ends of wood instead of stone.

The court refused to give this instruction, being "of opinion that it was competent to the jury, from all the facts given in evidence, to decide whether, in order to verify the said description in the said policy, it was necessary that the whole of the exterior walls from the foundation to the top of the roof should be of stone. And being also of opinion that under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of the property insured from the true description thereof, not made fraudulently, would vitiate the policy, unless, by reason *of such variation, the insurance was [*56 made at a lower premium than would otherwise have been demanded."

To this opinion also an exception was taken. The rule referred to in the opinion requires, that

"Persons desirous of making insurance on buildings should state in writing the following particulars, to wit, of what materials the walls and roof of each building are constructed," &c. "And if any person shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force."

If the court was correct in the construction of this rule, and of its effect upon the policy, it will become unnecessary to examine their

opinion, leaving the question whether the property insured was truly described, entirely to the jury.

This rule takes up the subject of describing the property, and provides for it. It requires that the materials of which the walls and roof are constructed shall be truly stated, and prescribes the penalty for a misstatement. The penalty is, that the insurance shall be void, if the assured shall cause the building to be described in the policy otherwise than it really is, so as the same be charged at a lower premium than would otherwise be demanded.

The rule does not place the invalidity of the policy on an untrue description of the building, but on such a description as shall reduce the premium which would otherwise have been demanded. This was a question of fact which the jury alone could decide.

The rule having provided for the case, and prescribed the precise state of things in which the penalty shall be incurred, we do not think that it could be applied in any other state of things. The jury was of opinion that if the building was untruly described, still the misrepresentation was not such as to cause the same "to be charged at a lower premium than would otherwise have been demanded." If this verdict was against evidence, the remedy was a new trial.

This court is of opinion that the Circuit Court erred in instructing the jury that the interest of the assured in the property insured is such as is described in the original offer for insurance and in the policy; and also in the opinion given to the jury that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy.

The judgment is to be reversed, and the cause remanded to the Circuit Court that a *venire facias de novo* may be awarded.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, and was argued by counsel; on consideration whereof, this court is of opinion that the said Circuit Court erred in this: in instructing the jury that the interest of the assured in the property insured is such as is described in the original offer for insurance and in the policy. And also that the said Circuit Court erred in this: in the opinion to the jury, that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy. Whereupon, it is considered by this court that the said judgment of the said Circuit Court in this cause be, and the same is hereby reversed and annulled, and that the said cause be, and the same is hereby remanded to the said Circuit Court with directions to award a *venire facias de novo*, and for further proceedings to be had therein according to law and justice.

See S. C., 10 Pet., 507; overruled—9 How., 390, 403, 404.

Cited—10 Pet., 510, 515, 518; 16 Pet., 505; 8 How., 248; 5 Wall., 513; 14 Wall., 509; 13 Otto, 29; 2 Wood. & M., 481, 489, 493; 3 Wood. & M., 535; 4 Cliff., 282; 3 Sumn., 140; 1 Court., 197.

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*WILLIAM C. GARDNER [*58

v.

JOHN A. COLLINS ET AL.

Decisions of State courts—construction of Rhode Island statute of descents—descent at common-law

Where the question upon the construction of the statute of a State relative to real property has been settled by any judicial decision in the State where the land lies, this court, upon the uniform principles adopted by it, would recognize that decision as a part of the local law. [85]

The statute of descents of Rhode Island of 1822, enacts, "that when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred in the following course." It then provides, "if there be no father, then to the mother, brother and sister of such intestate, and their descendants, or such of them as there be;" and then declares, in the nature of a proviso, that, "when the title to any estate of inheritance as to which the person having such title shall die intestate came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be."

An estate situated in Rhode Island was devised by John Collins to his daughter, Mary Collins, in fee. Mary Collins intermarried with Caleb Gardner, and upon her death, in 1806, the estate descended to her three children, John, George, and Mary C. Gardner. John and George Gardner died intestate and without issue, and Mary C. Gardner, as heir to her brothers, became seized of the whole estate and died in 1822. Held, that under the provision of the law of descents of Rhode Island two-thirds of the estate of Mary C. Gardner descended to Samuel F. Gardner, Eliza Phillips, formerly Eliza Gardner, and Mary Clark, formerly Mary Gardner, children of Caleb Gardner by a former marriage; they being brothers and sisters of the half blood of Mary C. Gardner; it being admitted that the remaining one-third which Mary C. Gardner took by immediate descent from her mother, belongs to the heirs of the whole blood of John Collins. [86]

The phrase "of the blood," in the statute includes the half blood. This is the natural meaning of the word "blood," standing alone and unexplained by any context. A half brother or sister is of the blood of the intestate; for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another, who has any, however small a portion of the same blood derived from a common ancestor. In the common law the word "blood" is used in the same sense. Whenever it is intended to express any qualification the word whole or half blood is generally used to designate it, or the qualification is implied from the context, or known principles of law. [87]

A descent from a parent to a child cannot be construed to mean a descent through, and not from a parent. So a gift or devise from a parent must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote passing through the parent. [90]

It is true that in a sense an estate may be said to come by descent from a remote ancestor to a person upon whom it has devolved through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the terms. When an estate is said to have descended from A to B, the natural and obvious meaning of the words is, that it is an immediate descent from A to B. [91]

At the common law a man might sometimes inherit who was of the whole blood of the intestate, who could not have inherited from the first purchaser. As in the case of a purchase by a son who dies without issue, and his uncle inherits the same, and dies without issue, the father may inherit the same from the uncle, although he could not inherit from his own son.

IN the Circuit Court of the United States for the District of Rhode Island, the plaintiff, William C. Gardner, instituted an action of

ejectment for the recovery of two-thirds of certain real estate in the State of Rhode Island, of which Mary C. Gardner died seized and intestate.

The facts of the case agreed upon were as follows:

"The estate in question, two-thirds of which is demanded by the plaintiff, in his said writ, was the estate in fee-simple of the late John Collins, Esq., deceased, the father of the defendant, and the purchaser of said estate. That the said late John Collins died in 1817, leaving lawful issue, viz.: John A. Collins, Abigail Warren, and Mary Collins; and leaving a last will and testament, wherein and whereby he devised the estate in question to his daughter, the said Mary Collins, in fee-simple; who became seized and possessed thereof accordingly, and continued so seized and possessed thereof to the time of her death, viz., the 2d of October, 1806, and died intestate. That the said Mary Collins intermarried with Caleb Gardner, on or about the day of , and at her death left lawful issue, viz.: John Collins Gardner, George Gardner, and Mary C. Gardner. The said John Collins Gardner died the 17th of November, 1806, aged about , of course intestate, and without issue. The said George Gardner died the 18th of September, 1811, aged about , of course intestate, and without issue. The said Mary C. Gardner died the 31st of December, 1822, aged about , intestate and without issue. That at the death of their mother the said John Collins Gardner, George Gardner, and Mary C. Gardner, took from their said mother the said estate, as her heirs-at-law, in equal parts, and became seized and possessed of the same accordingly in fee-simple, and continued so seized and possessed till the death of **60** the said John Collins Gardner, viz., *till the 17th of November, 1806. That thereupon his part of the said estate descended to and vested in his surviving brother and sister, viz., George Gardner and Mary C. Gardner, in fee-simple, in equal moieties; and thereupon the said George Gardner and Mary C. Gardner became seized and possessed of the estate in question in equal and undivided moieties and fee-simple, and so continued seized and possessed till the death of the said George Gardner the 18th of September, 1811. That thereupon his part of said estate descended to and vested in his sister, the said Mary C. Gardner, in fee-simple, and she became seized and possessed of the same accordingly, and thereby became seized and possessed of the whole estate in question in fee-simple; and so continued seized and possessed to the time of her death, viz., to the 31st of December, 1822. That at the death of the said Mary C. Gardner, the defendants, viz., the said John A. Collins and Abigail Warren, went into possession of the estate in question, claiming to be the heirs of the said Mary C. Gardner; and the defendants have continued possessed thereof, claiming it as their inheritance without interruption or adverse claim till the plaintiff's suit as aforesaid.

That the plaintiff by deeds duly executed became seized and possessed of all the right and title of the said Samuel F. Gardner, Eliza Phillips, and Mary Clarke, in and to the demanded premises. The plaintiff and Samuel

F. Gardner and Eliza Phillips are children of the said Caleb Gardner by a former marriage. That the said Mary Clarke is also a child of said Caleb Gardner by a former marriage, and are brother and sister of the half blood to the said Mary C. Gardner. That the said plaintiff and Samuel F. Gardner, Eliza Phillips, and Mary Clarke, are not of kin to the said late John Collins, Esq., deceased, and have not any of his blood in their veins. And if, upon the foregoing facts, the court shall be of opinion that the plaintiff and those under whom he claims are heirs-at-law of the said Mary C. Gardner and entitled to said estate, then judgment to be given for the plaintiff; but if not, then judgment to be rendered for the said defendant."

The statute of Rhode Island upon which the plaintiffs in *the ejectment claimed to [**61** recover, was passed in January, 1822, and is entitled:

"An act directing the descent of intestate estates and the settlement thereof, and for other purposes therein mentioned:

"SECTION 1. Be it enacted by the General Assembly, and by the authority thereof it is enacted: That henceforth when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass, in equal portions, to his or her kindred in the following course:

To his or her children, or their descendants, if any there be:

If there be no children, nor their descendants, then to the father of such intestate:

If there be no father, then to the mother, brothers and sisters of such intestate and their descendants, or such of them as there be:

If there be no mother, nor brother, nor sister, nor their descendants, the inheritance shall go in equal moieties to the paternal and maternal kindred, each in the following course:

First to the grandfather:

If there be no grandfather, then to the grandmother, uncles and aunts, on the same side, and their descendants, or such of them as there be:

If there be no grandmother, uncle nor aunt, nor their descendants, then to the great-grandfathers, or great-grandfather if there be but one:

If there be no great-grandfather, then to the great-grandmothers, or great-grandmother if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants, or such of them as there be, and so on in other cases without end; passing to the nearest lineal male ancestors, and for want of them, to the lineal female ancestors, in the same degree and the descendant, of such male and female lineal ancestors, or such of them as there be.

But no right in the inheritance shall accrue to any person whatsoever other than to the children of the intestate, unless such persons be in being and capable in law to take as heirs at the time of the intestate's death.

And when herein the inheritance is directed to go by moieties *to the paternal and [**62** maternal kindred, if there be no such kindred on the one part, the whole shall go to the other part; and if there be no kindred either on one part or the other, the whole shall go to the hus-

band or wife of the intestate; and if the wife or husband be dead, it shall go to his or her kindred in the like course as if such husband or wife had survived the intestate and then died entitled to the estate.

The descendants of any person deceased, shall inherit the estate which such person would have inherited, had such person survived the intestate.

When the title to any real estate of inheritance as to which the person having such title shall die intestate came by descent, gift or devise, from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be."

For some time prior to the passage of this Act the law of descents of Rhode Island was regulated by an Act of 1798, the first section of which nearly resembles the clause in the statute of 1822. It was as follows:

"When the title of any real estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise, from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the next of kin of the intestate of the blood of the person from whom such estate came or descended."

The judges of the Circuit Court of Rhode Island having divided in opinion upon the case, the decision was certified to this court for its decision.

Mr. Whipple, for the plaintiff, made the following points:

1. That at common law the phrase "of the blood," includes "the half blood."

2. That if this is not the case at common law, the phrase "of the blood," as it is used in the statute of Rhode Island, necessarily includes the half blood.

63*] *3. That the person whose blood is referred to in the statute, as constituting "the stock of descent," is that kindred from whom the intestate derived the estate, by immediate descent, to wit, the brothers, and not the mother of the intestate, Mary C. Gardner.

He argued, that the Act of the Legislature of Rhode Island gives the estate "to the next of kin of the intestate, of the blood of the person from whom such estate came or descended," and by the Act of 1822, there is added, "if any there be."

The defendants contend that "the blood," *ex vi termini*, means the whole blood; because they assert this to be the meaning at common law.

For the plaintiff, it is claimed that neither at the common law, nor by the proper construction of the statute of Rhode Island, the whole blood is intended; and that as the plaintiff claims as half blood and as representing those who were of the half blood of Mary C. Gardner, the person last seized, the whole question in the cause, and which alone is to be decided by this court, depends upon a proper construction of the law of Rhode Island of 1822.

In order to arrive at a sound conclusion upon the case, it may be proper to examine what is the meaning of the word *blood* at common law.

Under the sixth canon of descents, in reference to the intestate, the word "whole" is Peters 2.

added, which would not have been necessary if that was the natural import of the term. In reference to purchasers the word "blood" simply is used; which means, when used alone, half as well as whole blood.

In a note to Chitty's Blackstone's Commentaries, Vol. II., p. 5, is the following language:

"It should here be noticed, that though it is necessary that a person who would succeed, must show himself to be of the blood of the first purchaser, yet, where the persons who inherit succeed or derive title to the inheritance by virtue of remote and intermediate descents from the purchaser, it will be sufficient if they be related by half blood only to the purchaser, or to such other remote and intermediate ancestors, who were formerly and immediately *seized of the inheritance, in the regular [*64 course of descent from the purchaser; provided, according to the rule which follows, they are the worthiest legal relatives of the whole blood, to the person last seized." Robinson on Inheritance, 45, is cited. He might have cited better authority.

In 1 Co. Litt. sec. 8, p. 14, b., it is said:

"But if there be two brothers by divers *ventres*, and the eldest is seized of land in fee and die without issue, and his uncle enter as next of kin to him, who also dies without issue; now, the younger son may have the land as heir to the uncle, for he is of the whole blood to him, albeit he be but of the half blood of his elder brother."

What is the meaning of the terms "of the blood," as used in the statute?

The object of the provision was to continue the estate in the blood of the person from whom it descended; to find a stock of inheritance, not to establish a new rule of descent.

The provision has no application, except to a case where the purchaser or preceding holder has already transmitted it to his heirs. Under the enacting clause, the half blood take from the purchaser on the first descent. An heir of the purchaser dies, will not the same blood take from the heir that took from the ancestor?

It is to go to the kin, that is the whole or half blood of the intestate, of the whole blood of the purchaser. According to the argument for the defendant, this reverses the common law; which gives to the whole blood of the intestate, of the whole or half blood of the purchaser.

After giving it to the half blood on the first descent, you can never narrow the capacity of inheritance. You may enlarge it as the common law does, but not give in the first descent and take away in the second.

The family, the blood of the purchaser, is his whole and half blood. The object is to continue the estate in the blood.

The second question is, who is "the person" who is to constitute the stock of descent, "the first purchaser, or the last ancestor?"

We agree that the object of the statute was to preserve estates in families. We disagree as to the extent of the *object. What [*65 but the language of the Act can determine that question. It is not the identity, but the extent of the object, about which we differ. The former might be determined by other considerations, the latter by nothing but the words of the Act.

2. The Acts of 1798 and 1822, admit of two readings: "To such of the next of kin of the intestate as are of the blood of the person from whom such right, title or interest came or descended;" or "to the nearest of such of the kin of the intestate as are of the blood," &c. The second reading will, in most cases, give it to a more remote relation of the intestate than the first; and as the next of kin is the primary object of the statute, the former reading should be preferred.

3. Suppose we adopt the latter, however. If first purchaser had been intended, why not expressed? If the principle, why not the language of the common law? Its meaning is well settled and comprehensive. Technical words are adopted, as in other statutes. It was drawn by lawyers, who generally use technical words—not in haste. Why use eight new words to express the meaning of three old ones?

A studious rejection of the words, proves that the principle was not intended to be adopted.

Other legislatures have made the same mistake. They intended the first purchaser if we did, for their language is similar. Not a statute in the Union except that of the State of New York admits the first purchaser. A reference to the statutes of Connecticut, New York, New Jersey and Pennsylvania, will maintain this position.

4. Why connect "descent, gift and devise" together, if there is, in fact, no connecting medium between them? In the case of gift and devise, the last ancestor is agreed to be the stock. If he is not also in the other case of descent, what is there in common between them? Why use them in connection, when they express two separate principles, establish two distinct rules, and transfer the estate to two different sets of heirs. In those three cases, the same person shall be the stock of descent. This is common to them all, connects them in principle, and therefore they are connected *in language. We never speak of a multitude, unless to say something applicable to a multitude. When something is intended applicable to a part, and something else applicable to another part, we separate them in our discourse.

Something, then, was intended, equally applicable to all the three modes of transmission; and this shows that it can be nothing else but the same stock of descent. Something was to be done, equally applicable to all; for the statute directs what shall be done in those three cases. What is it? The answer is, the same stock of descent. There is a difference between the description and the disposition of the estate. The word *or* belongs to the former. It has nothing to do, either distributively or collectively, with the latter. Such estate shall go, &c. What estate? The estate which came by descent, gift or devise. There is but one estate, and one channel for it to pass.

5. To show the true meaning, and necessary construction of the words that are used.

The words "parent or other kindred" embrace the brother. Parent includes father and mother. All the other kindred are included under the other terms. General words comprehending particulars, are the same as an enumeration of particulars. The order in which

they stand is of no importance. "From the brother or other kindred," would be the same as those now used.

If a descent from all is provided for, the same as if enumerated, an immediate descent is intended. They agree that an immediate descent in the case of gift and devise is intended; and in some cases of descent, as an immediate descent from the purchaser; can both be intended? Does not an immediate, exclude an intermediate descent? Such a descent must come through those kindred who are entitled to be stocks of descent.

No other qualification is required than to be of the kindred. The words are not to such of the kindred as are first purchasers.

In the preface of Judge Swift's Treatise on Descents, p. 11, it is said in relation to our statutes: "But in the law of descents there is an almost total change of the common *law. It is radically new in each state, [*67 bearing no resemblance to the common law in most of the States, and having great and essential differences in all."

The laws of descent in every State in the Union, except New York and New Jersey, are altogether different from the common law.

The case of *Hull v. Jacobs*, in 4 Harris & John. Rep., 249, was this: The father devises to his three children, A, B and C, and dies. A and B die intestate, and their shares descend to C.

The court say, that the statute provides for three cases: 1. Estates descended on the part of the father. 2. Estates descended on the part of the mother. 3. Estates by purchase. This case is neither: "but it vested in the intestate by immediate descent from his brother and sister, a course of descent expressly directed by the Act of Assembly in the case of a purchaser, and is known also to the common law."

In *Stewart's Lessee v. Evans* (3 Harris & John., 287), an estate descended to John Stewart's two children, Jane and Alexander. Jane died, and her portion descended to Alexander, who also died intestate. The question was, whether this estate came to the intestate on the part of the father or on the part of the sister. The defendant's counsel agreed, "that it did not come from or through the father, yet that it was on the part of the father;" and so the court decided without giving their reason.

In the case of *Shippen v. Izard* (1 Serg. & Rawle, 225), Tilghman, Chief Justice, says: "The words *on the part of the father*, and *from the father*, are so different that I cannot conceive how the former can be restricted to the father alone without violence to their plain meaning. Not only is there a difference in common phrase, but in legal acceptance; for the phrase, on the part of the father, is familiar to the common law, and must have been borrowed from that source by the persons who drew this Act of Assembly. That it comprehends not only the father but all the ancestors of the father, both paternal and maternal, appears by the citation of the plaintiff's counsel from Co. Litt., 12. a." Yates, Justice, was of the same opinion.

*The Act of Virginia of 1793, provides, [*68 that when an infant died seized of property, which descended "from the father," the maternal kindred should be excluded.

In 1 Munford's Rep., 183, the case of *Tompers* 2.

linson v. Dilliard, decided in 3 Call's Rep., 120, was reviewed. The case of *Wyatt v. Muse and Wife*, also came before the court.

The case was a descent from the father to his children, and from a deceased child to the intestate. The court decided that the mother, or her issue, were not excluded, where the property was derived, not immediately, but by intervening succession from the father. (Cited also, the opinion of *Justice Tucker*, 215.) In p. 197, *Mr. Justice Tucker* cites a former decision, and says: "In that case it was determined, that Mrs. Gee, the mother of Sarah Jones, was entitled to inherit lands from the daughter, who died an infant, which she had derived from her brother John Norfleet; to whom the same were devised by his father, who was also the father of Sarah Jones. In that case, however, John Norfleet had attained his age of twenty-one years; but I was of opinion, and understood the rest of the judges who sat in the cause to concur with me in that opinion, that the mother might have inherited these lands, although John Norfleet had not attained his age of twenty-one years; for that the descent from the father to the daughter was not immediate, but broken, and therefore not within the exceptions contained in the fifth and sixth sections."

The words of the Act under which the above decisions were made, are as follows: "That where an infant shall die without issue, having title to any real estate of inheritance, derived by gift, devise or descent, from the father, and there be living at the death of such infant, his father, or any brother and sister on the part of the father, or the paternal grandfather or grandmother of such infant, or any brother or sister of the father, or any descendant of any of them; such estate shall descend and pass to the paternal kindred without regard to the mother or maternal kindred of such infant; in the same manner as if there had been no mother or maternal kindred."

In section sixth there is a similar provision **69*** as to estates *from the mother. These are the words of the Act of 1819; but they do not in this respect differ from the Act of 1792.

Many other decisions may be found, but not exactly to the point. The remarks of *Mr. Justice Roane*, in 3 Call's Rep., 96, are worthy of attention.

The case of *Hilliard v. Moore*, in 2 Carolina Law Depository, 590, is exactly like the case of *Collins and Gardner* as to its facts. The decision was in favor of the maternal line, and would have been decisively against us, had the words of their Act rendered such a decision unavoidable. The words of the Act are, "descended on the part of the mother." This decision supports the distinction taken by *Chief Justice Tilghman* and *Mr. Justice Yates*, in *Serg. & Rawle*, already referred to.

As to the spirit of the Act, he contended:

1. The defendants take for granted that the object was to preserve the estate in the family of *Mary Collins*.

How do they arrive at this knowledge? The Legislature have not declared their object. They have only provided certain means, and the extent of the object ought to be measured by those means. They make the means bend to the supposed object. Because the object

was to preserve estates in families to a certain extent, they conclude that an estate going out of a family defeats the intention. Have the court a right to resort to other means than those of the statute? Do they do so at common law, in order to prevent an estate's going out of a family?

2. A strong objection to the doctrine of a first purchaser, is the difficulty of ascertaining him, and the consequent uncertainty of the rule.

The proofs of descents frequently rest in parol. The defendants take for granted that the common law means will prevent the evil of an estate going out of the family. So uncertain and impossible is the proof, that the common law has abandoned it, and substituted a rule of law in the lieu of actual proof; this is the sixth canon of descents. In cases of actual descents from a real first purchaser, the difficulties are the same.

*In 2 Bl. Com. it is said: "Yet when [*70 an estate has really descended in a course of inheritance to the person last seized, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed, as if lands come to John Stiles by descent from his mother, Lucy Baker, no relation of his father (as such) shall ever be his heir to these lands.

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors from whom the feud was conveyed to the latter proprietor.

"But when through length of time it can trace it no farther, as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christiana Smith; or if it appear that his grandfather was the first purchaser; in either of those cases, the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their order the heirs to John Stiles of this estate."

Again, to show how uncertain a rule that of the first purchaser was, "the doctrine of the whole blood (p. 230) was calculated to supply the frequent impossibility of proving a descent from the first purchaser. And this purpose it answers for the most part effectually enough. I speak with these restrictions, because it does not, neither can any other method answer this purpose entirely."

Suppose three or four descents with the aid of whole blood, and sole succession. What could we do towards finding the purchaser, under half blood and partible inheritances. Let Blackstone answer. (2 Bl., 201.)

"Here, then, the supply of proof is deficient, and by no means amounts to a certainty; and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that upon the same principles of calculations, the half blood have a much less chance of being descended from an unknown, indefinite ancestor of the deceased, than the whole blood in the same degree; as in the first degree the whole brother of John Stiles is sure to be *descended from the [*71 unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his.

"So in the second degree, John's uncle of

the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood; but they are seven to one against his uncle of the half blood. This much less probability of the half blood's descent from the first purchaser, has occasioned their general exclusion."

These remarks apply to the case of a real descent. Suppose it is not known from whom the grandfather, George Stiles, inherited, his father Walter or his mother Christiana. The whole blood would give an even chance. The half blood might give only one in four.

Partible inheritances increase the difficulty by the number of descents.

In a country increasing in population, and freed from the influence of those principles in the law of inheritance of England, which had their origin in feudal times; rules of such difficult application are impolitic and oppressive.

Another objection to the doctrine of first purchases is that it is inconsistent with an allodial tenure. It acknowledges a claim in some other person than the intestate. This is an objection to going back at all. But going to the first purchaser is worse, because he has no claim, either at common law or the statute; at common law it was in the lord.

If we give it to anyone, give it to him who has some share of claim.

It sacrifices the main objects of regard, the kindred of the intestate, in favor of a subordinate object—the blood of the purchaser.

Among the reasons for the construction of the Act of the Legislature, claimed by the plaintiff, Mr. Whipple urged, that

"Descent, gift, and devise," are connected on account of blood. Whose blood? That of the devisor or devisee, not that of the purchaser. The consideration being their blood, the reward ought to be to their blood.

72*] *The three modes of transmission are the acts of the party. The person who bestowed the bounty is the only person having any claim. His claim extends only to the person upon whom he bestowed the bounty, his heir. He has no claim on any future descendant, because to him he has not been liberal.

The claim, then, is by the devisor or ancestor, because he is the only source of the bounty.

The estate descends upon his heir or devisee, and him alone; because he alone is indebted to the ancestor and devisor, to the extent of the bounty conferred, and to no greater extent.

The intestate, Mary C. Gardner, was her mother's heir for one-third; that was the extent of her bounty. To her brothers for two-thirds. For the same reason that Mary Collins has a claim for one-third, the brothers have for two-thirds.

She transmitted her portion of her father's estate to her children. This gives her a claim upon each. If her children transmit their portion of her estate, they have the same claim upon those to whom they transmit it.

The plaintiff's counsel denied that the construction claimed by the counsel for the defendant was the received law of Rhode Island. No case was cited on the argument in the Circuit Court to establish such a construction; and

when the experience of the bar was appealed to upon the subject, it was not followed by any evidence that the principles of construction the defendants asserted had ever gone into use in the State, with the sanction of a judicial decision. While he admitted that the statement of the counsel of the defendant, that the law was with him by the common understanding of those who did not from their education or their situation know what the law was, he denied that this, which might be denominated "street law," could or should have any influence in this court. The construction which this court would give, would be adopted from other views, and from higher authorities; the principles of the common law, and the fair and legal import of the words of the statute.

Mr. Robbins, for the defendants:

The common law of descent of England has two leading *objects in view; one is to preserve [*73 the inheritance in the blood of that family by whom it was originally acquired; this is the dictate of nature; for it is an object that approves itself to reason, and recommends itself to the best affections of the human heart; it operates as a stimulus to exertion, by furnishing the means and the hope of building up and perpetuating a family, and providing for its happiness; it cherishes, by gratifying the love of kindred, a natural and a noble sentiment, and one in which the sentiment of patriotism itself has its root; for the love of country is but the love of kindred expanded.

The other leading purpose is, to keep the inheritance entire, by keeping it, for the time being, in a single representative of that family by whom it was acquired; this object was the offspring of State policy; and by it the sentiments of nature are more or less controlled.

The people of Rhode Island brought with them from their mother country a fond attachment to both views; and of this the proof is, that for more than one hundred years the law of descent of England was their law. But at length, in 1770, they were weaned from one of these objects, namely, that of keeping the inheritance entire, by keeping it in a single representative of the family; but the other object, that of keeping the descent of the inheritance in the blood of the family by whom it had been acquired, they fondly retained, and still fondly cherish.

This case comes up upon the division of the court below, as to the interpretation of the statute of descent, passed in 1822, which is the same in substance as the statute passed in 1798. One interpretation gives the estate in question to the plaintiff; the other interpretation gives the estate to the defendants; between the two interpretations lies the conflict of the cause.

The defendants claim the inheritance of this estate under a provision of the statute, which is in these words, viz.:

"When the title to any real estate of inheritance, as to which the person having such title shall die intestate, come by descent, gift, or devise, from the parent or other kindred of the intestate, and such intestate die without children, such *estate shall go to the kin next [*74 to the intestate, of the blood of the person from whom such estate came or descended, if any there be."

The question is as to the person referred to,

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whose blood is to inherit. Is it the person from whom the estate originally came or descended to the intestate? If so, then the estate goes to the defendants; for they are the next of kin to the intestate who are of the blood of that person; it goes to the defendants and it keeps the descent of the family inheritance in the blood of the family by whom it was acquired, and from whom it has descended; and this is one interpretation. Or, is it the person from whom the estate last came or descended? If so, then the estate goes to the plaintiff; for though the defendants are of the blood of that person, and of kin to that person as well as the plaintiff, yet the plaintiff is nearer of kin to that person; it goes to the plaintiff, and the family inheritance goes out of the blood of that family by whom it was acquired, and from whom it has descended, into the blood of another and a foreign family, hereafter to descend in the blood of that foreign family; and this is the other interpretation.

Now, "blood of the person from whom such estate came or descended" may mean either the person from whom it *originally* came or descended, or the person from whom it last came or descended; neither the word *originally* nor the word *last* is used, but either may be understood as implied, as the case may require; and that word must be understood as implied which is necessary to express that meaning. That meaning must be adopted which was the meaning of the Legislature. But one way of settling what was the meaning of the Legislature in this case is known, and that is, by determining what was the object of the Legislature in making this provision. Doubtless the Legislature intended those words to be understood in that sense which is necessary to the accomplishment of their object. Say that the object was to preserve the family inheritance in the blood of that family by whom it had been acquired, and from whom it had descended; and our construction must be adopted, in order to effectuate that object; for if it is not, and the **75***] other construction *is adopted, that object must be defeated. It would be defeated in the present instance at once; it must be in all cases sooner or later.

Even if there were any verbal or literal difficulties in the way of our construction, and none are perceived, they must give way when opposed to the intention of the Legislature; for it is a settled rule of law, "that what is within the letter of a statute is not within the statute, if it be not within the intention of the Legislature." The construction claimed by the defendants appears the most natural of the two; and must so appear to every mind accustomed to that law of inheritance which our construction supposes. In expressing this idea we would not think of using the word *originally*; we would understand that word as implied, and would suppose that everybody would understand it as implied.

But it is enough that these words are susceptible of either interpretation; and that the object of the Legislature in making that provision is to determine which of them is the true interpretation.

That the object of the Legislature was to preserve and perpetuate the family inheritance in the blood of the family, by whom it was

originally acquired, appears as evident as if they had so said in so many words.

It is obvious in the first place from the distinction which the statute makes between estates acquired by the intestate and estates derived to the intestate from parent or other kindred. As to all estates acquired by the intestate, or derived to him from any person, other than parent or other kindred; the statute makes the intestate the stock of inheritance, and his next of kin his heir-at-law. But as to all estates derived to the intestate from parent or other kindred, by descent, gift, or devise, the statute makes the person from whom the estate came or descended the stock of inheritance; and it makes the next of kin to the intestate, who is of the blood of that person, the heir-at-law. Now, it is inquired, what possible object could there have been for this distinction but that of keeping the family inheritance in the blood of the family?

*But further, the same distinction is made **[*76** between estates derived, and derived in the same manner, too, to the intestate. If the estate is derived to the intestate by descent, gift, or devise, but not derived from a parent, or other kindred, he is made the stock of inheritance, and his next of kin is made his heir-at-law. But if the estate is derived to him, from a parent or other kindred by descent or devise, then the person from whom it came or descended is made the stock of inheritance; and the next of kin, who is of the blood of that person, is made the heir-at-law. Providing, then, a different stock of descent, and a different rule of descent, for estates derived from a parent or other kindred, and for those estates only, must have been done to keep the descent of such estates in the blood of such parent or other kindred; and could have been done with no other view.

Then it is asked, if this, which had always been an object of their descent law, was not to remain a provision of their descent law, why was this provision introduced at all? If this object was to be abandoned, this provision was not necessary. If this was not the object, and their construction be the true one, the Legislature made a general rule of descent; and then made an exception to it, by which exception no rational end whatever was to be answered.

It has been said that it always had been the wish of the descent law of that people, to perpetuate the family inheritance in the blood of the family. A short review of the history of that law will prove this a correct statement.

The common law of descent of England was the law of descent of that people to 1718, without any alteration or intermission. This law was secured by their descent law up to that time, for it was one of its great purposes. In 1718 they made a statute of descents, which made the intestate, in all cases, the stock of inheritance, and his next of kin his heir-at-law. But, in the short period of ten years, this statute was repealed, and for the very reason that this object was thereby abandoned. The preamble states, "For as much as the aforesaid Act is found by experience to be very prejudicial by destroying inheritances," "be it therefore *enacted," &c. By destroying in- **[*77** heritances—that is, inheritances as they theretofore had existed, and by which family estates had been kept in the blood of the family. This

repeal left the common law of descent to revive as the law of descent of that people, by which the first law was again secured to them, and remained their law of descent to 1770. In 1770 they made another statute of descent, but in making which they were careful to preserve the object which had been abandoned by the statute of 1718. In this statute of 1770, they made the intestate, in all cases, the stock of inheritance; but in all collateral inheritances, they made the next of kin of the full blood of the intestate the heir-at-law. As this statute of 1770 made the intestate in all cases the stock of inheritance, the making the next of kin of the full blood to the intestate, in all collateral inheritances, the heir-at-law, was necessary to the plan of keeping the descent of the estate in the blood of the family. This restriction of the descent in collateral inheritances was adopted for this purpose.

This rule, like the common law rule of descent, would be attended with some occasional cases of apparent hardship.

This statute continued unaltered as this provision to 1798, when all the statutes were revised, and this among the rest.

The statute of 1798 proposed to accomplish the same purpose which was accomplished by the statute of 1770, but by different means; and by a modification that would avoid those occasional cases of apparent hardship which resulted from the application of the rules established by the statute of 1770.

The statute of 1798 made the intestate the stock of inheritance, and his next of kin the heir, but not in all cases as did the statute of 1770; it excepted cases derived to the intestate by descent, gift or devise, from the parent or other kindred; and as to those excepted cases, it made the person from whom the estate came or descended, the stock of inheritance, and made the next of kin to the intestate of the blood of that person the heir-at-law. By this modification, by making the blood not the full **78** blood only, of that person the heir-at-law; it obviated the hardships occasionally incident to the rule established in the statute of 1770.

This statute continued to 1822, when all the statutes were again revised, and this among the rest. The statute of 1798 is re-enacted in the statute of 1822, in substance, differing only in form. As to all the cases in which the intestate is to be the stock of inheritance, or his next of kin to be the heir; and as to all the excepted cases in which the person from whom the estate came or descended, is to be the stock of inheritance, and the blood of that person to be the heir, both statutes are the same.

From this deduction of the history of the law descent of Rhode Island, which cannot be impugned in any one particular, but which will be found verified and confirmed throughout by an examination of that law, it must be admitted that it has always been the object of that law, to keep the inheritance in the blood of that family by whom it had been acquired, and from whom it had descended.

A reference to the statutes of 1718, and of 1770, will verify this exposition of those statutes.

Again, that such was the design of the Legislature, may be, and must be inferred from the

understanding and the practice which has prevailed in the State on this point. The question is practically settled, though not judicially, and settled for such a length of time as gives to the practical settlement all the force of a final judicial determination. For it is the result of an impression, so universal and so decided, as to have precluded all doubt and all litigation up to the origin of this action.

Nor is the statute of 1798 to be considered as a new statute of descent, introducing and prescribing a course of descent for the first time, this, however, it is not, for it is to continue only to regulate the ancient course, not to originate a new one. It is now thirty years since that statute was made; and the rule of descent thereby established, is still the rule of descent in the State. Now, all the collateral descents, in all the State during all that time, have been cast according to the defendant's construction of the statute, without a question being made as to their being rightfully ^{east}; and **[79]** have been, and now are enjoyed accordingly. Not an instance of a descent in that State, contrary to this statement, has been, or can be cited. How numerous those descents have been, is not known; but in that length of time they must have been numerous. This fact is at once a proof of this practical construction by the whole State; extending back a full quarter of a century, prior to the origin of this action; and of the mischiefs which a judicial reversal of this practical construction would now produce; for it must unsettle every one of those descents, which possession has not matured into a perfect title.

We need not go out of this case, to see in the descents which have occurred in the case, how settled the impression has been, that the family inheritance must descend in, and be confined to the blood of the family, according to our construction of the statute.

There was, in the first place, on the death of John Gardner, in 1806, the descent of his third part of the estate to his surviving brother and sister. No stress is laid upon this; for upon both interpretations, the descent was rightly cast. But then came the death of George Gardner in 1811, and the descent of his third part, and of his half of John's third part. On whom was the descent now cast? On Mary, the surviving sister; the descent of the whole, as well that part which George inherited from his brother John, as that part which George inherited from his mother. The plaintiff agrees to all this; agrees that she succeeded legally, rightfully and exclusively, to the part which George had inherited from John. If John, the person from whom it last descended, was the stock of inheritance as to this part, the plaintiff was entitled to succeed equally with Mary. The plaintiff himself agrees that John was not the stock of inheritance as to this part; for he agrees that he himself was not entitled to succeed to any share of that part. The plaintiff himself agrees that the mother, from whom the estate had originally descended, was the stock of inheritance; for he agrees that Mary, her child, alone, had the right to succeed. Then how can the plaintiff claim to inherit from Mary, on a principle on which he agrees he could not claim to inherit from her ^{*brother George}, as to the part which **[80]**

George inherited from his brother John? If the plaintiff could not make John the stock of inheritance, as to the estate which George inherited from his brother John, how can he make Mary the stock of inheritance, as to the estate which she inherited from her brother George? He has, in truth, surrendered the very principle in controversy, and left himself no ground to stand on; for he has made it a matter of record, and the court are now called upon to give to the plaintiff an estate, to which he has agreed, and agreed on the record, that he has no title.

In proof of this position, the court are referred to the statement of facts; and especially to that part distinguished by italics. It reads thus: "That thereupon (that is, upon the death of George), his part of said estate (that is, one moiety of the whole estate, including his original third part who had previously deceased), that thereupon his (George's) part descended to and vested in his sister, the said Mary C. Gardner, in fee-simple; and she became seized and possessed of the same accordingly. *And thereby became seized and possessed of the whole estate in question in fee-simple.*"

The legal effect of this statement, in this case, and upon this case, is a striking illustration of that familiar, that settled, that riveted notion, prevalent in Rhode Island in favor of the principle of descent, which we contend for. The plaintiff's counsel at the time, probably, were not aware of its palpable inconsistency with the new principle of descent, which they had to contend for; and unreflectingly made the statement, according to their habitual notions on the subject.

And the descent itself is another striking illustration of the same fact. It took place in 1811, eighteen years ago; was acquiesced in then, has been acquiesced in ever since, and is ratified even now, so far as a recorded agreement can ratify it.

Then came the death of Mary C. Gardner, and the descent of the whole estate; of which she had one-third directly from her mother, and the other two-thirds, from her mother, but through her two brothers. On the death of Mary, how was the descent cast or supposed to be cast?

§1*] *That such has been the practical construction of the statute, must be admitted, as no instance to the contrary has been cited, or can be.

The State of Connecticut have a parallel provision in their statute of descents. Its construction there is considered as settled, though it never has been judicially settled; it is considered as settled, because long and uniform practice has settled it. The attention of the court is invited to the descent law of Connecticut, as it has been said that the provision in the Rhode Island law was framed by the provision in that; and there is to be found in the statute of 1798 some internal evidence of the fact. It was long in that State a *vexata questio*, whether the words, next of kin, in their then subsisting statute of descents, did not mean, when applied to real estate in the collateral descent, "next of kin to the intestate of the full blood;" which was much agitated, and variously decided by their courts; but it was finally decided, that next of kin meant, next of kin in the civil law

sense of the expression; which had no reference to distinction of blood. It was with a view to preclude this very controversy that the Rhode Island statute of 1798, in providing for the descent of all that part of the intestate's estate which is made to descend to the next of kin" to the intestate, adds, to the words "next of kin," these seemingly unnecessary words, "computing according to the degrees of the civil law." The struggle in that State, about the meaning of the words *next of kin*, it is believed, was occasioned by the strong prevalent sentiment of that people in favor of keeping the family inheritance in the blood of the family. For they were so dissatisfied with the final judicial decision, which frustrated that object, that their Legislature afterwards, in the first revision of their laws, introduced this special provision, viz.:

"Provided that all the real estate of the intestate, which came to him by descent, gift or devise, from his or her parent, ancestor, or other kindred, shall belong equally to the brothers and sisters of the intestate, and those who legally represent them, of the blood of the person or ancestor from whom such estate came or descended;" going on and *following [*82 out the same principle; if there be not any brother or sister.

This statute was made in 1784; therefore soon after the termination of this controversy. The practical construction of their statute ever since has been precisely the practical construction given to that of Rhode Island; and there all the estates coming within their proviso, have uniformly descended to the blood of the person or ancestor from whom the estate originally came, whether by descent, gift, or devise. And such is considered as the settled law of that State; but how settled? not by any judicial adjudication, for there has been none; but by an uniform practical execution of the statute, according to that construction. Wherein such a practical construction is inferior, in point of authority, to a judicial decision, it is difficult to comprehend.

The authority for this statement will be found in the case of *William Hillhouse v. Levi Chester* (Day's Reports, Vol. III., page 166), and also in the statute laws of Connecticut (Digest of 1821, page 208).

In the statute regulating descents in New York, there is also a parallel provision. It is said that there has never been any controversy as to its construction; of course there can be found no judicial decision settling its construction.

The provision is in these words, viz.: "And in such case, every brother and sister of the half-blood of the person so seized, shall inherit equally with those of the full blood; unless when such inheritance came to the person so seized, by descent, devise or gift of some one of his or her ancestors; in which case, all those who are not of the blood of such ancestor, shall be excluded from such inheritance." (See the Act to regulate descents of the State of New York, (Laws of New York, Vol. I., p. 46, sec. 4.)

It is remarkable how exactly alike, in all essential particulars, are all these provisions in both the laws. In one, it is the estate coming by descent, gift or devise; in the other, it is the estate coming by descent, gift or devise; in the

Rhode Island law, it is the estate coming from parent or other kindred; in the Connecticut provision, it is the estate coming from parent, ancestor or other kindred; in the New York **83*** provision, it is the estate coming from the ancestor. But what is most remarkable is, that they all agree in designating the person whose blood is to inherit, in the same general way. In all, it is the person from whom the estate came or descended; leaving the word *originally*, to be understood as implied; and as what would of course be understood as implied.

As to the meaning of the word "blood," as used in the proviso; whether it mean blood or full blood, it is not deemed necessary to discuss in this case; for, whether it mean the one or the other, the plaintiff is not entitled to inherit upon our rule. Our rule is, that the blood of the person from whom the estate originally came, is to inherit; and the plaintiff is not of that blood.

It is said, that the rule (if ours be the rule) could have been more technically expressed; and it is inferred that it could not be the rule, because this was not done. But does it not appear that this difficulty operates both ways? The difficulty is, that the words do not mark our rule with absolute precision; but if they did, there could be no controversy between the parties. The argument is just as good for one as for the other; and therefore is good for nothing for either.

It is said that the common law considers a gift or devise as a purchase; and the purchase as the stock of inheritance; and that we must consider descent as standing on a common foot with gift and devise.

It is true that the common law considers the donee or the devisee as the stock of inheritance. But the question is not who is made so by the common law, but whom the statute makes that stock. It is very clear that the person whom the common law makes that stock, is not the same the statute does. The common law makes it from the donee or devisee; that is, the intestate himself, if he be donee or devisee; but the statute certainly does not; it goes back of the donee or devisee to some other person; now, to say that the donor or deviser is that person, is begging the question. It may go through the donor or deviser, back to the person from whom the estate originally came; and must, if that was the intention. The family inheritance may as well come **84*** down through gifts and devises as through a course of descent; and the words gift and devise were coupled with the word descent, purposely to cover the whole inheritance.

As to the authorities cited by the counsel for the plaintiff, Mr. Robbins observed, that none of them seemed to conflict with any of the grounds which had been taken for the defendant.

In all the numerous references to Reeves's Law of Descent, not one militates with these grounds; nor is it supposed that the practical construction of the parallel provision of the Connecticut statute is different from ours.

As to the two cases from Sergeant & Rawle's Reports, and from Harris & Johnson, they are cases under the statutes of Pennsylvania and Maryland, which are different from that of

Rhode Island. Theirs extends only to the estate which comes by descent; not like the one under which the defendant holds to the estate, which comes by gift or devise, as well as by descent. And one of those cases only goes to say that the estate by devise was not embraced by the proviso in the Maryland statute, relating to estates by descent; and that the estate by devise descended upon other principles.

Mr. Justice STORY delivered the opinion of the court:

This case comes before us from the Circuit Court of Rhode Island, upon a certified division of opinion of the judges of that court, upon the question whether the plaintiff was entitled to recover upon a statement of facts incorporated into the record. The action was an ejectment for two third parts of certain land described in the writ; and the title of the parties being by descent, depends altogether upon the true construction of the statute of descents of Rhode Island, of 1822. Accordingly as that statute shall be construed, the land now in controversy belongs to the plaintiff or the defendants.

The material facts are that the estate (two-thirds of which are demanded in the writ) was devised by John Collins to his daughter, Mary Collins, in fee. Upon her death in 1806, the same descended to her three children, viz.: John C. Gardner, George Gardner, and Mary C. Gardner. The two brothers ***died** [***85** intestate and without issue; and Mary C. Gardner, as heir to her brothers, became seized of the whole estate, and died intestate and without issue, in December, 1822. The defendants are the uncle and aunt of Mary C. Gardner, the intestate, of the whole blood; being children of John Collins, the deviser, and brother and sister of her mother, Mary Collins. The plaintiff is the brother of Mary C. Gardner, the intestate of the half blood; and he holds a conveyance of their shares from her other brothers and sisters of the half blood, they being children of her father by a former marriage. The plaintiff and his brothers and sisters of the half blood claim the two-thirds of the estate now in question, as her heirs of the half blood; and the defendants claim the same as her heirs of the whole blood. It is admitted on all sides that the one-third which Mary C. Collins took by immediate descent from her mother, belongs to the heirs of the whole blood. But the other two-thirds, being taken by immediate descent from her brothers, it is contended that by the statute of 1822, it passes to her heirs of the half blood.

If this question had been settled by any judicial decision in the States where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as a part of the local law. But it is admitted that no such decision has ever been made. If this had been an ancient statute, and a uniform course of professional opinion and practice had long prevailed in the interpretation of it, that would be respected as almost of equal authority. But no such opinion or practice has been known to prevail; and, indeed, the statute itself is but of very recent origin. Even the statute of 1798; of which, in respect to this point, that of 1822 is almost a transcript, is not of a date so remote as to enable us to presume that many cases could have arisen in that State, on which

to found a practical construction, without some unequivocal evidence.

The most that has been urged is, that there has been some general understanding among the people, that such was the meaning of the statute; but even this, though very respectably attested, is encountered by equally respectable statements on the other side. We are **86***] driven, therefore, to *consider the question as entirely new and unsettled; and to be decided not upon the mistakes of parties relative to their rights in one or two unadjudicated cases, even if they existed, but by the true construction of the statute itself.

The statute of 1822 enacts, that "when any person having title to real estate of inheritance shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred in the following course, &c." Among other clauses is the following: "If there be no father, then to the mother, brothers and sisters of such intestate, and their descendants, or such of them as there be." In the present case there was no father or mother of Mary C. Gardner, the intestate, living at the time of her decease; and as her brothers and sisters of the half blood are her brothers and sisters within the meaning of the statute, they would be entitled to the estate in question beyond all controversy; if there were no other disqualifying clause. But in a subsequent clause of the statute in the nature of a proviso, it is declared, that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." The most material difference between the statute of 1898 and that of 1822, so far as regards this question, is, that the words "if any there be" are omitted in the former, which also uses the words "next of kin to," instead of "kin next to." Both of these circumstances have been relied on at the bar as indicating a probable change of intention. It is said that both acts admit of two readings, viz.: "To such of the next of kin of the intestate as are of the blood, &c.," or "to the nearest of such of the kin of the intestate as are of the blood," &c. The latter reading will give the estate to a remote relation of the intestate of the blood, although he be not of the next of kin of the intestate. The former reading requires that the party should be of the next of kin (that being the primary intention), as well as of the blood; and therefore, if a person be not of the next of kin **87***] of *the intestate, although he be of the blood, he cannot take; and the words of the Act of 1822, "if any there be," are relied on to fortify the construction.

We think the legislative intention in both Acts was the same; and that the transposition of the words "next of kin" to "kin next," was accidental, and not introductory of any new object. The true construction of the statute of 1822 is, that it gives the estate to the next of kin of the intestate who are of the blood, excluding all others though of a nearer degree who are not of the blood, &c.

In this view of the clause, two questions Peters 2.

have been argued at the bar: 1. Whether the words "of the blood" include the half blood; or exclusively apply to the whole blood. 2. Whether the words "came by descent, gift, or devise from the parent and other kindred of the intestate," are limited to a proximate and immediate descent, gift, or devise from such parent, &c., to the intestate; or include a descent, gift, or devise which can be deduced mediately from or through any ancestor, however remote, who was the first purchaser to the intestate.

The first question has not been seriously pressed in this court by the counsel for the defendants, though it constituted in the court below a main ground of argument. We think that the phrase "of the blood" in the statute includes the half blood. This is the natural meaning of the word "blood" standing alone, and unexplained by any context. A half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another who has any, however small a portion, of the same blood derived from a common ancestor. In the common law, the word "blood" is used in the same sense. Whenever it is intended to express any qualification, the word whole, or half blood, is generally used to designate it, or the qualification is implied from the context on known principles of law. Thus, Littleton in his sixth section says, that none shall inherit "as heir to any man, unless he be his heir of the whole blood; for if a man hath issue two sons by divers *centres, and the eldest purchase [**88** lands, &c., &c., the younger brother shall not have the land, &c., because the younger brother is but of the half blood to the elder." The same distinction is found in section eighth of the same author; and Lord Coke in his commentary on the text constantly takes it. So Robinson, in his Treatise on Inheritances, 45, after laying down the rule, that the person who is to inherit must be of the whole blood to the person from whom he proximately and immediately inherits, adds, that he must also be of the blood of the first purchaser; but that it is sufficient to satisfy this that he is of the half blood of such purchaser. The legislation of Rhode Island leads to the same result as to the meaning of the word "blood." That Colony was governed by the English law of descents from its first settlement until the year 1718, a period of more than half a century. By an Act passed in 1718 the real estate of the intestate was divided among all his children, giving the eldest son a double share, &c.; and in default of issue, the same was distributable among the next of kin of the intestate, within equal degree, &c. This Act was repealed in 1728, and the common law course of descents was revived and remained in force until 1770, when an Act was passed, providing substantially for the same distribution as the Act of 1718. It contained, however, this remarkable proviso, "that no distribution of any real estate in consequence of this Act, shall extend or be made in the collateral line beyond the brothers and sisters of such intestate and their children, and to those only of the whole blood." In 1772 the Act of 1770 was repealed in regard to the double share

to the eldest son, but in other respects it remained in force until the revision in 1798, when the proviso that none should inherit in the collateral line except the whole blood was dropped; and there is not either in the Act of 1798 or of 1822 any clause referring to the blood of any person as a stock of descent, except the very clause upon which the present questions arise. When, therefore, the distinction between the whole and half blood was well known in the Colony, not only as a part of the common law, but as a part of its own legislation, and **89***] the proviso is *dropped in which the words "whole blood" were studiously used; and the words "of the blood" only are found in any correspondent provision, it affords a strong presumption that the whole blood were no longer deemed to be exclusively entitled to inherit, but that the half blood should be let in. If the half blood were not permitted to inherit in cases of this sort, this anomaly might occur that a son might inherit from his parent the moiety of an estate directly, which he could not inherit from his brother of the half blood, to whom it had passed by descent from the same parent, if such brother should die without issue. We see no reason, then, to doubt that the words "of the blood" include the half as well as the whole blood. The plaintiff, then, and those from whom he claims being the next of kin of the intestate (see *Smith v. Tracey*, 2 Mod., 204; *Crook v. Watts*, 2 Vern. Rep., 124; *S. C. Shower. Parl. Cases*, 108), and of the blood of her two brothers (see *Cowper v. Cowper*, 2 Peere Will., 720, 735; *Collingwood v. Pace*, 1 Vent., 424; *Watkins on Descents*, 227, 228 [153], note; *Reeves on Descents*, 176), from whom she immediately derived that part of the estate which is now in controversy, is entitled to recover, unless the statute in the other part of the clause defeats the descent.

This leads us to the second question. The estate originally came from John Collins by devise to his daughter, Mary Collins, and by descent from her to her three children, and mediately as to the two-thirds to the intestate, through her brothers. The counsel for the plaintiff contends, that the clause looks only to the proximate and immediate descent; the counsel for the defendants, that it looks to the origin of the title in the first purchaser, and requires that the party claiming as heir should be of the blood of the first purchaser, through whatever intermediate devolutions by descent, gift or devise it may have passed, and however remote may be the first ancestor. If the latter be the true construction of the clause, it goes far beyond the common law, for that stopped at the last purchaser in the ancestral line (and persons taking by devise or gift are deemed purchasers), and *ascended no higher than it could trace an uninterrupted course of descents. The common law, therefore, would have considered Mary Collins as the first purchaser for all its own purposes of descent. The words are, "when the title to any real estate, &c., as to which the person having such title shall die intestate came by descent, gift or devise from the parent, or other kindred of the intestate," &c. Now, what reason is there to suppose that the Legislature, in this clause, meant in favor "of the blood of the person, from whom such estate came or descended," to extend its reach

beyond that of the common law? No such intention is disclosed on the face of the provision; and every progressive enactment, for the last fifty years in Rhode Island, is a relaxation of the strict canons of descent of the common law. The words themselves certainly do not necessarily require such an interpretation. As to descents, as well as gifts and devises from a parent, it is plain that the Act looks only to the immediate descent or title. A descent from a parent to a child cannot be construed to mean a descent through and not from a parent. So a gift or devise from a parent must be construed to mean a gift or devise by the Act of that parent; and not by that of some other ancestor more remote, passing through the parent. It has been urged, in another quarter entitled to great respect, that the words may be construed distributively; that a distinction may be taken between a descent, gift or devise, from a parent, and a descent, &c., from other kindred; and so, also, that the words descent, gift and devise may be construed distributively; so that in cases of descents, the party who shall inherit is to be of the blood of the first purchaser, from whom, by intermediate descents, it was passed to the intestate; and that, in cases of gifts or devises, the donor or deviser shall alone be the person whose blood is to be inquired for. It may be admitted that the clause is susceptible of such a construction without any great violation of its terms. But we do not think that such is the natural construction of the terms, nor is any legislative intention disclosed which would justify us in adopting it. There does not seem any sound reason why the clause should be construed, in the *case of a parent, differently from **[*91]** what it would be in the case of any "other kindred of the intestate." The latter words must be construed in the same manner as if each class of kindred had been enumerated in detail; such as uncles, brothers, grand-parents, cousins, &c., &c.; and if they had been, the same rule from the specific enumeration must have been applied to them as is now sought to be applied to the case of parents. The general expression must be deemed to include all the particulars. Then, as to the distinction between descents and gifts and devises.

It is true, that in a sense an estate may be said to come by descent, from a remote ancestor to a person, upon whom it has devolved through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the term. When an estate is said to have descended from A to B, the natural and obvious meaning of the words is, that it is an immediate descent from A to B. If other words of a statute should seem to require another and more enlarged meaning, there would be no absolute impropriety in adopting it; but if the true sense is to be sought from the very terms, *per se*, that which is the usual sense would seem most proper to be followed. It is not for courts of justice to indulge in any latitude of construction, where the words do not naturally justify it; and there is no express legislative intention to guide them. But we think that the connection in which the words stand, justify us in adhering to the ordinary interpretation. If in cases of gifts and devises, the blood of the proximate donor or deviser is alone to be regarded, there being no

distinction pointed out in the words of the Act, between those cases and that of descents; the very juxtaposition of the words affords a strong presumption that the Legislature intended to apply the same rule as to all. If the object was to regard the blood of the party, from whom the estate was derived, what reason is there to suppose that the Legislature intended less regard to the blood of a deviser or donor than to that of an ancestor? The mischief might be as great in suffering the estate to pass into the hands of strangers, when there were next of kin of the blood in the one case, as in the other. ¶2*] *On the other hand, there might be solid reasons for confining the preference of blood to cases of immediate descents, which could be easily known and easily traced. One of the known inconveniences of tracing back titles and relationship, is the obscurity which at a small distance of time gathers over them. It would often be difficult to ascertain, whether there were not relations of a very distant stock, of the blood of a remote ancestor, who might be entitled to the inheritance, to the exclusion of the immediate next of kin of the intestate. And even the course of descents of his own title in a country where estates are universally partible, for two or three generations, might involve the estate of the intestate in inextricable difficulties; and disable the next of kin from ascertaining into what fragments it was to be subdivided, with any reasonable certainty. It would be no want of wisdom, therefore, in a Legislature to limit its provisions in favor of the blood to cases where the immediate title could be traced with almost absolute certainty. Certainty of title, in a country where titles so rapidly change hands, might furnish a far safer principle of legislation than any preference for the blood of persons remotely related to the intestate through some distant, and, perhaps, unknown ancestor. We think, then, that in the case of a gift or devise, the statute stops at the immediate donor or deviser, and ascends no higher for any blood. What reason is there to suppose, that in the case of a descent there was a different legislative intention? In the case of a parent, the parent is, by the very terms of the statute, made the sole stock of descent, whether he derived it by descent, or by gift, or devise, from an ancestor or a stranger. In the case at bar, the mother of the intestate took the estate by devise from her father. She was in by purchase; and in the sense of the common law, as first purchaser, and, of course, the true stock of descent, holding the estate *ut feudum antiquum*.

It has been said that the object was to preserve inheritances in the same family. To a limited extent this is true; that is, as far as the Legislature has provided for such cases. No general declaration is made by the Legislature ¶3*] on the *subject; and no preamble, which discloses any leading intention, exists. What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words. The spirit of the Act must be extracted from the words of the Act, and not from conjectures *abundante*. The common law carries back, in certain cases, the descent to the heirs of the first purchaser. But the common law canons of descents are overturned by the statute.

How, then, can we resort to the common law, to make up the supposed defects in the language of the statute? Here, there is not a *casus omissus*, but a complete scheme of descents; and the only question is, how much the proviso carves out and saves from the operation of the general rule. No such words as "the first purchaser" are to be found in the statute, though it is sufficiently technical in other respects; and what right can this court possess to exchange the words in this statute for the words "first purchaser," when they are not equipollent in meaning or extent? If the Legislature intended to set up anew the rule of the common law, as to descents, &c., from the first purchaser, it seems scarcely credible that it should have omitted the very phrase, considering that for a century at least it was a material ingredient in the law of descents of the Colony. Then, again, if the argument now urged at this bar for the defendants is well founded, it goes (as has been already stated) far beyond, and, indeed, to the overthrow of the common law on the very point of first purchasers. Indeed, at the common law, a man might sometimes inherit, who was of the whole blood of the intestate, who could not have inherited from the first purchaser. As in the case of a purchase by a son, who dies without issue, and his uncle inherits the same, and dies without issue, the father may inherit the same from the uncle, although he could not inherit from his own son. (See Littleton, s. 3, and Co. Litt., 10 b; Litt., s. 8; Co. Litt., 14, b.) The statute of Rhode Island imparts to parents a right to inherit the real estates of their children, in cases where the latter die without issue.

*The statutes of descents of the different States in the Union, are so different in their provisions that it is not easy to apply any general rule of construction to them. The cases cited at the bar, do, however, demonstrate that in those States where a similar language is used in their statutes of descents, the expression has been uniformly construed to mean immediate descents, gifts and devises, unless that construction has been overruled by the context. The statute of Connecticut of 1784, which has been supposed to be the model of that of Rhode Island, as to this proviso, is understood to have received this construction. (See Reeves on Descents, 160, &c.) Under words nearly similar, in the Virginia statute of 1792 (the words being, "that where an infant shall die without issue, having title to any real estate as inheritance derived by gift, devise or descent from the father, &c."), it has been held that an immediate descent from the father, and not an intermediate descent, was intended. (1 Mumf. Rep., 183; 3 Call. Rep., 120.)

Upon the whole, our opinion is, that both points are in favor of the plaintiff. We all think that the words "of the blood" comprehend all persons of the blood, whether of the whole or half blood; and that the words, "come by descent, gift, or devise, from the parent or other kindred, &c.," mean immediate descent, gift or devise, and make the immediate ancestor, donor or deviser, the sole stock of descent.

A certificate will accordingly be sent to the Circuit Court of Rhode Island, in favor of the plaintiff.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Rhode Island; and on the points on which the judges of the said Circuit Court were divided in opinion, and which were certified to this court for its opinion; and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that it be certified to the **95*** said *Circuit Court of the United States for the District of Rhode Island, that the plaintiff and those under whom he claims the estate in controversy, are heirs-at-law of Mary C. Gardner, the intestate, and as such heirs, are by the statute of descents of Rhode Island of (A. D. 1822) eighteen hundred and twenty-two, entitled to the same estate upon the facts agreed in the case, and that judgment ought to be given for the plaintiff in this cause; all which is ordered to be certified to the said Circuit Court.

Aff'g, 3 Mason., 398.

Cited—4 Pet., 392; 4 How., 54; 8 How., 248; 14 How., 504; Bald., 285; 2 Curt., 563.

96* *MICAHAH T. WILLIAMS, *Plaintiff*
in *Error*,

v.

THE BANK OF THE UNITED STATES,
Defendant in Error.

Promissory note—notice to charge indorser—Fullerton et al. v. Bank of United States confirmed.

Action against the indorser on a promissory note.

The notary public, after the note became due, called at the house of the indorser, who resided in the city of Cincinnati, which he found shut up, and the door locked; and on inquiry of the nearest resident, he was informed that the indorser and family had left town on a visit; whether for a day, week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where the indorser had gone, or whether he had left any person in town to attend to his business. He left a notice at the house of a person adjoining with a request to hand it to the indorser when he should return. Held, that this was sufficient diligence, on the part of the holders of the note, to charge the indorser. [100]

The general rule of law applicable to this subject, has long been settled; that to enable the holder of a bill of exchange or promissory note, to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill, or of the non-payment of the note, was given to the indorser; or if this could not be done, he must excuse the omission by showing that due diligence had been used to give such notice. [101]

If the parties reside in the same city or town, the indorser must be personally notified of the dishonor of the bill or note; either verbally, or in writing; or a written notice must be left at his dwelling-house or place of business. Either mode is sufficient, but one or other must be observed, unless it is prevented by the act of the party entitled to the notice. [101]

If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with it, or, by any act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the conditions. Thus, if the prece-

dent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract had imposed upon him. [102]

The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it should be absent from the State, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice. [102]

Where the parties reside in the same city or town, the notice should be given at the dwelling-house, or place of business, and the duty of the holder does not require him to give the notice at any other place. [102]

The court refused to hear a re-argument upon a point decided in the case of Fullerton et al. v. The Bank of the United States (1 Peters, 612), that the Act of the Legislature of Ohio, relative to proceedings against parties to promissory notes, had been well adopted as a rule of practice in the Courts of the United States for the State of Ohio. [106]

***THIS** was a writ of error to the Circuit Court of Ohio, in which court the Bank of the United States has instituted a joint action, under the authority of the Act of Assembly of the State of Ohio, passed 18th February, 1820, entitled, "An Act to regulate judicial proceedings where banks and bankers are parties, &c. : and by the provisions of which the plaintiff may make the drawer and indorsers of a note or bill of exchange, joint defendants in the same action. Thus the suit was against the defendant and two others; and the declaration contained a common count for money lent against all the defendants.

The pleas were *non-assumpsit*; and on the trial of the cause two several promissory notes drawn by J. Embree, indorsed by D. Embree, and Williams, the defendant, in blank, were offered in evidence by the bank. On the subject of notice, the bank then gave the following parol evidence, which was the only proof offered, to wit: "That the notary public, after the protest of the note, and the expiration of the usual days of grace, called at the house of the defendant (Williams), who lived in the city of Cincinnati. He found it shut up, and the door locked; and on inquiry of the nearest resident, he was informed that the defendant and family had left town on a visit, whether for a day, or week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where said Williams had gone, or whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant when he should return." The counsel for Williams submitted to the court, whether the above facts were sufficient evidence of legal notice to charge the indorser, and to entitle the plaintiff to judgment. The court decided that the evidence offered was conclusive against the indorser; to which decision a bill of exceptions was tendered and sealed, and judgment was then rendered for the bank, against Williams, for \$12,202.88.

The cause was argued by *Mr. J. C. Wright* for the plaintiff in error, and by *Mr. Sergeant* for the defendants.

NOTE.—Bills and notes. Sufficiency of step to charge indorser.

See notes to Brown v. Barry (3 Dall., 365); Wilson v. Lenox (1 Cranch, 194); Fenwick v. Sears (1 Cranch, 259); Bussard v. Levering (6 Wheat., 102); Bank of U. S. v. Smith (11 Wheat., 171); Brent v. Bank of Metropolis (1 Pet., 89).

98*] *Mr. Wright maintained,

1. That this court erred in determining that the evidence of notice was sufficient to charge an indorser, and conclusive against him.

2. That the suit below was jointly against several persons, and the cause of action was for several undertakings, upon which there could not be a joint liability.

This court having decided at the last term in the case of *Fullerton et al. v. The Bank of the United States* (1 Peter's Rep., 604), that the Act of the Legislature of Ohio, which authorized this proceeding, was in force in the Circuit Court of the United States, Mr. Wright declined arguing the second point, unless the court should be desirous of hearing a re-argument upon the question. Upon the first point, he contended that the holder of a note is bound to give personal notice of non-payment to the indorser; or to see that it reaches his dwelling, or place of business, if he has one. (10 Johns. Rep., 490; 11 Johns., 231.) The contract of an indorser is contingent; it is that he will pay the note on the default of the drawer; and the court cannot change the nature of his obligation. Notice must be given and proved, or facts must be proved which will enable a jury to presume notice.

In this case the facts do not establish anything equivalent to notice. The defendant was a resident in the city of Cincinnati, and had a right to personal notice at his dwelling-house. The notary called at the house, and not finding the defendant at home, but finding the house shut, perhaps only for an hour, he left the notice with a person who was not called upon to deliver it, and who, it is to be presumed, never did deliver it to the plaintiff in error. The notary did not do what would have been an equivalent act—put the notice in the postoffice. (2 Johns., 275.)

The law may require a merchant to keep his counting house open during the hours of business, but it does not follow that a person must keep his house open during all the hours of day-light, and in his absence a person to be always in the house. The testimony in this case falls short of the requisites of the law, and authorizes a presumption in favor of the claims of the plaintiff in error. While it is fair and proper to draw such an inference, it is not so to infer facts which should have been proved, from other facts which are in evidence. The court should have left the facts to the jury, and their inference from the proof given by the bank was error.

Mr. Sergeant, for the defendants.

There are four cases depending in this court upon the question of notice; and the decisions of the Circuit Court were given in them all before the case of *The Bank of Columbia v. Lawrence* (1 Peters, 578).

This case was decided by the Circuit Court without the intervention of a jury, the facts having been submitted to the court. It cannot therefore be objected that the facts were withdrawn from the jury.

The evidence given by the plaintiffs below was affirmative and positive proof of due diligence; and what is due diligence is a question of law, and was properly decided by the court. (*Tindall v. Brown*, 1 T. R., 167; Chitty, 290, n. 1.)

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It is not necessary that the notice of the default of the drawer, which the indorser has a right to require, shall be in writing. The obligation is to call at the dwelling-house of the indorser, or at his place of business, and if he has left no one there to attend to his affairs, it is his loss, and the holder of the bill or note has done his duty, and all that the law requires. (*Goldsmith v. Blund*, cited in Bailey on Bills, 4th Lond. ed., 224, 225; 1 Maule & Selwyn, 545; Chitty on Bills, Am. ed., 284, 285, note a; *Id.*, 276; cases in note 1, 288).

The difference between the requisites for legal notice at the place of business and dwelling-house is, that if notice is given at the former, it must be in the hours of business; but the dwelling-house being the place of permanent abode, the notice may be given at any hour of the day.

In this case it is denied that what ought to have been done was done. The rule of the commercial law is, that you shall come as near to what is required as you can; and if the party has put it out of your power to do more, you have done sufficient. Here, the indorser having left his house *shut up, and not having [*100 left an agent to attend to his business; shall not be permitted to avail himself of his own neglect, but must take the consequences of the same.

Mr. Justice WASHINGTON delivered the opinion of the court:

This was an action of *assumpsit*, brought in the Circuit Court of Ohio by the president, directors and company of the Bank of the United States, against J. Embree, the maker, and D. Embree and M. T. Williams, the indorsers of two several promissory notes. The only count in the declaration is for money lent and advanced by the plaintiffs to the defendants.

Upon the plea of the general issue, the case, at the trial, was, by consent of the parties, submitted to the court; and the above notes were given in evidence by the plaintiffs, in support of the action. The court gave judgment against the defendants, and ordered it to be certified, in pursuance of the statute of Ohio, that it appeared to the satisfaction of the court that J. Embree had signed the notes on which the suit was brought as principal, and D. Embree and M. T. Williams as sureties.

At the trial of the cause thus submitted to the court, the plaintiffs having proved the demand, and the handwriting of the indorsers of the notes, offered the following evidence of the notice to the defendant Williams, viz.: "That the notary public, after the protest of the notes, and the expiration of the usual days of grace, called at the house of the defendant Williams, who resided in the city of Cincinnati, which he found shut up, and the door locked, and on inquiry of the nearest resident, he was informed that the said Williams and family had left town on a visit, whether for a day, week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where Mr. Williams had gone, or whether he had left any person in town to attend to his business. The witness left a notice at the house of a person adjoining, with a request to hand it to the defendant when he should return."

The court being of opinion that this evidence

was conclusive of legal notice to charge Will-
101*] iams, his counsel took a *bill of excep-
 tions, and the cause is now for judgment before
 this court upon a writ of error.

The only question which this bill of excep-
 tion presents is, whether due diligence was
 used by the defendants in error, to give notice
 to the indorser of the non-payment of these notes
 by the maker of them.

The general rule of law applicable to the sub-
 ject has long been settled; that, to enable the
 holder of a bill of exchange, or promissory
 note to charge the indorser, it is incumbent on
 him to prove that timely notice of the dishonor
 of the bill, or of the non-payment of the note, was
 given to the indorser, or if this could not be
 done, he must excuse the omission by showing
 that due diligence had been used to give such
 notice.

If the parties reside in the same city or town,
 the indorser must be personally noticed of the
 dishonor of the bill or note, either verbally or
 in writing; or a written notice must be left at
 his dwelling-house or place of business. Either
 mode is sufficient, but one or the other must be
 observed unless it is prevented by the act of
 the party entitled to the notice.

In the case now under consideration, the
 banking-house of the defendants in error, and
 the dwelling-house of the plaintiff were located
 in the same city. The notary called at the
 plaintiff's house, which he found shut up, and
 the door locked. Upon inquiry of the nearest
 resident, he was informed that the defendant,
 with his family, had left town on a visit, but for
 how long a period was unknown to this person;
 no further attempt was made to ascertain where
 the plaintiff in error was gone, or whether he
 had left any person in town to attend to his
 business. The question to be decided is, whether
 under these circumstances the defendants are
 excused for not having given the notice which
 the law requires.

In the case of *Goldsmith v. Bland* (Bayley
 on Bills, 224, note), it was decided that it was
 sufficient to send a verbal notice to the defend-
 ant's counting-house, and if no person be there
 in the ordinary hours of business to receive it,
 it is not necessary to leave or send a written
102*] one. The principle *of this decision is,
 that the counting-house of the defendant is the
 place in which the holder was entitled, during
 the regular hours of business, to look for the
 person for whom the notice was intended, or
 for some person authorized by him to receive
 it; and that the omission to give it, was oc-
 casioned, not by the want of due diligence in
 the holder, but by the fault of the party who
 claimed a right to receive it.

The principle here stated is not peculiar to
 this class of contracts. If a party to a contract
 who is entitled to the benefit of a condition,
 upon the performance of which his responsibil-
 ity is to arise, dispense with, or by any act of
 his own prevent the performance, the opposite
 party is excused from proving a strict compli-
 ance with the condition.

Thus, if the precedent act is to be performed
 at a certain time or place, and a strict perform-
 ance of it is prevented by the absence of the
 party who has a right to claim it, the law will
 not permit him to set up the non-performance

of the condition as a bar to the responsibility
 which his part of the contract had imposed
 upon him.

The application of this general principle of
 law to the subject before us, may be illustrated
 by other cases than the one immediately under
 consideration. The holder of a bill or promiss-
 ory note, in order to entitle himself to call
 upon the drawer or indorser, must give notice
 of its dishonor, to the party whom he means to
 charge. But if, when the notice should be
 given, the party entitled to it be absent from
 the State, and has left no known agent to re-
 ceive it; if he abscond, or has no place of resi-
 dence which reasonable diligence used by the
 holder can enable him to discover, the law dis-
 penses with the necessity of giving regular
 notice.

So, where the parties, as in this case, reside
 in the same city or town, the notice should be
 given at the dwelling-house or place of busi-
 ness, of the party entitled to claim it; and the
 duty of the holder does not require of him to
 give the notice at any other place. If the giving
 of the notice at either of these places be pre-
 vented by the act of the party entitled to receive
 it, the performance of the condition is ex-
 cused.

In this case, the notary called at the dwelling-
 house of *the indorser, at the regular [***103**
 time, and at a seasonable hour, for aught that
 appears, to serve the notice, and found the
 house shut up, the doors locked, and the family
 absent from town upon a visit of unknown
 duration to the agent of the bank, or to his
 informer. What was he to do? He was not
 bound to call a second time, nor was he under
 any obligation to leave a written notice; even
 if he could have found an entrance into the
 house.

But it is insisted that the defendants in error
 were bound, under the circumstances of this
 case, to give notice to the plaintiff through the
 channel of the postoffice; and the case of *Ogden*
v. Cowley (2 Johns. Rep., 274) is relied upon
 in support of this position.

In that case, the notary called at the house
 of the indorser, and of his deceased partner, for
 the purpose of giving them notice of the non-
 payment of the note, but found their house
 locked up, and on inquiring at the next door,
 was told that they were gone out of town. On
 the same day, the notary put a letter into the
 postoffice in the city of New York, addressed
 to the defendant and his partner, informing them
 of the non-payment of the note, and that they
 were looked to for payment. It appeared that
 at that time the yellow fever prevailed in the
 city. The court decided that all proper steps were
 taken to communicate the requisite notice to
 the indorser, and that the notice was, of course,
 sufficient.

It may be remarked upon this case that the
 absence of the indorsers from their houses was
 probably the consequence of a temporary re-
 moval from the city, on account of the prevail-
 ing sickness, and that the case does not inform
 us whether the place to which they had re-
 moved was known to the notary. We are not
 prepared to say that in such a case the parties
 entitled to notice were bound to be at their
 dwelling-houses, or to have any person there at

the time the notary called to receive notice, and consequently that their absence, and the closing of their houses ought to have excused the holder from taking other steps to communicate notice to them. But laying these circumstances out of the case, the court decided no more than that the steps taken to give notice were sufficient in point of law for that purpose; **104*** and it is not to be doubted but that they were so. They do not decide that in a case freed from the circumstances before noticed, it was necessary that notice to the indorsers should have been given through the postoffice.

In the case of *Crosse v. Smith* (1 Maule & Selw., 545), the cashier called at the counting-house of the drawer, for the purpose of giving him notice of the dishonor of the bill. He found the outward door open, but the inner locked. The cashier knocked and made noise enough to have been heard, if anybody had been within. After waiting a few minutes, and no person appearing, he left the house and took no further legal steps to give the notice. It was insisted, in opposition to the sufficiency of the notice, that a notice in writing left at the counting-house, or put into the postoffice, was necessary. The answer given by the court was that the law did not require either mode to be pursued. "Putting a letter in the post," says Lord Ellenborough, "is only one mode of giving notice; but where both parties are residing in the same post town, sending a clerk is a more regular and less exceptionable mode." The decision in this case as to the sufficiency of the notice was the same as that given in the case of *Goldsmith v. Bland*, before referred to.

The case of *Ireland v. Kip* (10 Johns. Rep., 490, and 11 Johns., 231) was much pressed upon the court in the argument of the present cause by the counsel for the plaintiff in error. We have examined that case with great attention and respect, but have not been able to view it in the same light as it seemed to have struck the learned counsel. The place of residence of the defendant, the indorser, was three and a half miles from the postoffice, within the limits of the city of New York, but without the compact part of the city, and without the district of any letter-carrier. The case does not state that the indorser had any counting-house, or place of business in the city, at which the notice could have been left. The only notice given to the defendant was a written one put into the postoffice in the city of New York, directed to the defendant, and stating that the note had not been paid. The place of the defendant's residence was known to the clerk of the notary, who put the written notice **105*** to the defendant *into the postoffice. The only question decided by the court was, that under the circumstances of that case the holder of the note was bound to give personal notice to the defendant, or to see that the notice reached his dwelling-house; and that merely putting the notice into the postoffice was not sufficient.

Upon a second trial of the cause it appeared in evidence that the defendant had given directions to the letter-carriers of the postoffice to leave all letters that came to the postoffice

for him at a house in Frankfort street, in the city of New York; that the letter carriers called at the postoffice three or four times every day, and took out and delivered all letters left there; and that the defendant usually called or sent every day for his letters to the house in Frankfort street.

The learned judge who delivered the opinion of the court stated, that, admitting a service of the notice at the house in Frankfort street would have been good and equivalent to a service at the defendant's dwelling or counting-house, still, the delivery of the notice at the postoffice, unaccompanied with proof that it was actually delivered at the house, was not notice. He adds, that "the invariable rule with us is, that when the parties reside in the same city or place, notice of the dishonor of bills or notes must be personal, or something tantamount—such as leaving it at the dwelling-house or place of business of the party, if absent." Now, it is apparent that the question which arises in the case under consideration, was not, and could not be decided in the case just referred to. The objection to the notice in the latter case was, that it ought to have been given at the dwelling-house of the defendant, and could not be given through the postoffice, unless it also appeared that the notice so given reached the dwelling-house, or the house in Frankfort street. No attempt was made to give the notice in the former mode, as was done in this case; and the latter mode, so far from being considered as tantamount to the former, or as being necessary in order to excuse the want of personal notice, is declared throughout to be insufficient without further proof.

*The opinion of this court is, that [***106** the defendants in error were, under the circumstances of this case, excused from taking any other steps than they did to give notice to the plaintiff of the non-payment of these notes; and that the judgment of the court below ought to be affirmed with costs.

[The counsel for the plaintiff in error stated another point, which he admitted had been settled by this court in the case of *Fullerton et al. v. The Bank of the United States* (1 Peters, 612); but requested permission to re-argue the point, in case the court should decide the first point against him. I am directed by the court to say that the case referred to was well considered by the court; that we are entirely satisfied with the decision made in it, and see no cause to call for a re-argument of the principle there decided.]

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; in consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

S. C., 11 Wheat., 414.

Cited—10 Pet., 581; 6 How., 257; 23 How., 377; Olcott, 404; 9 Blatchf., 256.

107*] *ABRAHAM VENABLE AND
GEORGE M'DONALD, *Appellants*,

v.

THE PRESIDENT, DIRECTORS, AND COM-
PANY OF THE BANK OF THE
UNITED STATES, *Appellees*.

Conveyance to defeat creditors—parties:

The court set aside a conveyance which had been made to defeat the claims of creditors.

In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party; his rights under the mortgage not being brought into question. [112]

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The appellees, at the May term, 1822, of the Circuit Court for the District of Kentucky, obtained a decree against Venable and others, for the sum of \$4,700, with interest and costs; upon which execution was issued, and levied by the marshal upon 367 acres of land and sundry slaves and other property, named in the return, dated September 2, 1822, shown, as the marshal says, "as the property of Abraham Venable, and not sold for the want of time."

On the 26th of November, 1822, the appellees exhibited their bill, in which, after giving a history of their case, and stating the facts of the levy on the property of Venable as above, they charge that on the 9th day of February, 1822, the said Venable executed two several deeds, whereby he conveyed all the land, slaves and effects, which belonged to him, to George M'Donald, who is made defendant; that "the said deeds are fraudulent, intended to defraud the creditors of the said Venable, particularly the complainants, and were executed without any valuable or legal consideration passing between the parties with that fraudulent purpose and intent," &c., &c. The complainants pray that the said estate and property be decreed to be sold to discharge the debt aforesaid, for an injunction, and for general relief.

The defendant, M'Donald, by his answer admits that he claims the property as his own, by virtue of a contract, and the conveyances which are referred to; and also in virtue of a mortgage executed long anterior to the decree 108*] against Venable, by said Venable to him and George Norten; in order to indemnify them for their joint liability, as the security of Venable in two bonds; the one as the administrator of the estate of George Adams, and also as the security for said Venable as the guardian of the infant heirs of said Adams, states the probable extent of that liability, and denies all fraud or intention of fraud.

The evidence and proceedings, and other matters in the case, are stated more at large in the opinion of the court.

The court below, by decree, declared the conveyance to M'Donald fraudulent and void, and directed the sale of the estate, under the execution; subject, however, to the mortgage executed by the defendant Venable to the defendant George M'Donald and George Norten, dated the 22d May, 1820, which deed of mort-

gage is not in any manner to be affected by said decree.

The defendants below prosecuted this appeal, and claimed to reverse the same on the ground:

1. That the court erred in the decree, in annulling the deeds of Abraham Venable to George M'Donald.

2. The court ought not to have directed a sale of the real and personal estate conveyed by Abraham Venable to George M'Donald and George Norten, and in their possession, until the mortgage was satisfied, or the condition it contained was performed.

3. Want of parties. No decree should have been pronounced by which the interest of George Norten in the mortgaged premises could be affected, as he was not before the court.

The case was argued for the appellants by Mr. Wickliffe, and by Mr. Sergeant for the appellees.

Mr. Wickliffe contended, that upon the evidence in the cause it was manifest that the liabilities of M'Donald for Venable were sufficiently great to authorize the transfer to him of the whole property conveyed by the deeds for his protection. The extent and effect of the mortgage could not be ascertained until the settlement of the accounts of Venable, as guardian of the children of Adams; and therefore, *the amount of M'Donald's lia- [*109] bilities as the surety of the guardian were undetermined, and must remain so until that event.

Guardians are appointed by the county courts of Kentucky, under the authority of the first section of the Act of 1797 (1 Littell, 673); and the court are required "to take good security of all guardians by them appointed." The Act of 1809 (4 Littell, 125) directs these bonds to be taken in the name of the Commonwealth; and he contended that the responsibility of the security was beyond the penalty in the bond, and to the whole extent of the estate which might come into the hands of the guardian. By an action of "covenant" on the obligation, the liability of the surety might be so extended; when, if "debt" was brought, the penalty in the bond would limit it.

2. If the decree of the court had gone no further than to vacate the deed alleged to be fraudulent, the proceeding might have been sustained. It was no matter who had the equity of redemption of the estate, but the possession of the estate was important, and this should not have been touched. A creditor may protect himself by the purchase of property, which he knows is about to be sold under an execution.

3. The decree of the court, if carried into effect, will take the possession of the estate from George Norten, who was not a party to the proceedings.

Mr. Sergeant, for the appellees, went into a full examination of the facts of the case as admitted by the appellant Venable; and shown, by the evidence, to establish fraud.

He denied that, upon the evidence, the responsibilities of M'Donald exceeded the amount of the mortgage executed to him by Norten; and claimed, that by a reference to the accounts and documents exhibiting the amount of the estate which came, or could come into the hands of Venable as guardian of the children

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of Adams, it would manifestly appear that the protection of the surety was under that mortgage complete.

No decision had been produced to show that the liability of the surety for a guardian goes **110***] beyond the penalty of the *bond; and it is contrary to every principle of law, that such should be the fact. A careful examination of the Acts of the Assembly of Kentucky, will make it evident that such a liability does not exist.

There was no obligation on the appellees to make George Norten a party. A mortgageor may convey the equity of redemption without consulting the mortgagee. In this case, the decree of the court directed a sale of the property, subject to the mortgage; and the rights of Norten were not affected by this proceeding. The whole purpose of the bill of the appellees was to set aside the conveyances to M'Donald, and the decree goes no further.

Mr. Justice STORY delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the Kentucky District.

The Bank of the United States, at Lexington, Kentucky, on the 3d of July, 1819, discounted a note of the same date for \$4,700, signed by one George Norten, payable sixty days after date, to one Daniel Halstead or order, and by him indorsed to Abraham Venable, and subsequently and severally indorsed by William Adams and Joshua Norten, and by the latter to the bank. The note was not paid at maturity, and due diligence having been used to obtain the amount from the maker, according to the local law, a suit in equity was brought in the Circuit Court in November, 1821, against all the indorsers (as is the course by the local law), in which a decree for principal, interest and costs, was rendered in May, 1822. An execution issued upon this decree against the parties, upon which a tract of land of 200 acres, a tract of 113 acres, several negroes, and some other personal property of Venable, were levied on, but the same were not sold; the former for want of proper bidders, the latter on account of a claim set up to the same, by the defendant, George M'Donald.

The present bill, after stating these facts, charges that on the 9th of February, 1822, Venable made two deeds to M'Donald, by which he conveyed the tracts of land and other property to M'Donald, and that the same deeds were **111*]** colorable *and fraudulent; and the prayer of the bill is that the deeds may be declared fraudulent, and the property may be decreed to be sold; and an injunction granted in the meantime, and for further relief.

The answers of the defendants, M'Donald and Venable, deny that the deeds of the 9th of February, 1822, were colorable or fraudulent, and on the contrary, assert them to have been *bona fide*, and for a valuable consideration. The answer of M'Donald further sets up a mortgage executed by Venable on the 22d of May, 1820, to him, M'Donald, and one George Norten (who is not a party to the bill), of a tract of land of about 245 acres (part of the land in controversy), and of nine negroes (including those in controversy), to secure them against a bond executed by them as sureties, with

Venable as principal, upon his appointment as guardian of the infant children of George Adams, deceased, whose mother Venable had since married, she having previously administered upon Adams's estate. The guardianship bond was in the penal sum of \$4,000, and upon the usual condition.

The cause being put at issue, upon the final hearing, the court decreed the deeds of the 9th of February, 1822, to be colorable and fraudulent, and ordered the same to be set aside and annulled; and that the plaintiffs might pursue their judgment and execution against the real and personal estate of Venable, as if the said deeds had never been made; subject, however, to the mortgage aforesaid, which was not in any manner whatever to be affected by this decree.

It is upon an appeal taken by Venable and M'Donald to this decree, that the cause is now before this court; and independently of the merits as to the asserted fraud, or good faith of the deeds of 1822, two objections have been made by the counsel for the appellants.

The first is, that the court erred in directing a sale of the estate conveyed to M'Donald and Norten, until their mortgage was satisfied, or the condition thereof performed; because it had no right to change, by sale of the estate, the rights or interests of the mortgagees under a conveyance admitted to be valid, unless by their consent. The objection is founded upon a misinterpretation of the decree, which does *not authorize any sale to be made by ***112** virtue of it, but merely removes out of the way the deeds which obstructed a sale at law under the judgment and levy. The decree also leaves the mortgage wholly untouched, and consequently no sale could prejudice the rights appertaining to it.

The next objection is, that George Norten, the mortgagee, is not made a party to the bill. But this objection falls for the same reason as the preceding. As the mortgage is not in any measure interfered with by the decree, it is wholly unnecessary to make Norten a party to the bill. He has no interests which are controverted or injured by declaring the nullity of the other deeds.

The real question then is, whether the deeds of 1822 are fraudulent or not; and to that question the consideration of the court will now be addressed. The answers of the defendants, having denied all fraud, those answers are entitled to stand, unless they are overcome by the testimony of two witnesses, or of one witness and circumstances.

One of the deeds purports, for the consideration of \$6,260 paid and secured to be paid, to convey to M'Donald the two tracts of land; the other, for the consideration of \$3,400, to convey certain slaves, household furniture, horses, wagons, hogs, sheep, cattle, &c., and other stock usually belonging to a farm. The bill charges that these constituted the whole estate of Venable; and this fact is not attempted to be denied in the answer. Except his liability as guardian, and as indorser of the note to the bank, it does not appear that Venable was at this time indebted to any persons whatever; the fact is charged in the bill that he was not under any embarrassment, and it is supported by the proofs.

Here, then, is the case of a person upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property, real and personal, to his brother-in-law, for an asserted consideration equal to its full value. The brother-in-law is proved to be a thrifty, industrious man, but not at the time known to possess property sufficient to pay the purchase money; having other purchases* suits; and as soon as the purchase is made, suffering the estate to remain in possession of the former tenant.

How and in what manner is the consideration paid or received? M'Donald in his answer states that Venable, under the administration of his wife on Adams's estate, and his own guardianship of her infant children, was indebted for assets received to the amount of \$6,286 54; and that he, M'Donald, finding that Venable had used this money and was wasting the estate of his wards, and was involved in difficulties by his suretyship for others, &c., with a view to his own safety and that of George Norton (who is now insolvent), first took the mortgage, and afterwards, being fearful of the waste of the estate, was induced to purchase it, that he might have the control of it, and accordingly he did purchase it. The manner in which the consideration was paid and secured, he states to have been as follows: He assumed, by a written contract given to Venable, to pay the debt due by Venable to his wards when they came of age, and in the meantime to pay annually a sufficient sum for their maintenance and support, to be allowed in extinguishment of the interest that might become intermediately due. The contract itself is now produced, and it contains an agreement to pay the wards, not a specific sum of money, but "as much money as they shall have a right to demand of Venable, as guardian, when they become of age." It further contains a promise to furnish Venable "as much beef, pork, hay, corn, flour, &c., to the amount of what it shall be worth, to board, school and clothe" his wards.

The residue of the consideration for the purchase, viz., \$2,060.50, M'Donald asserts to have been paid by him in money to Venable, part of which he admits that he borrowed, but he does not state how much. By the contract above stated, he was to pay the money within three months after the purchase.

Such is the nature of the purchase, and the consideration as disclosed in the answer of M'Donald, and which Venable in his own answer adopts and supports.

The first remark that arises on this part of the case is, that the whole consideration stated in the deeds is \$9,660: *and that the answers state the amount actually paid or secured as no more than \$8,347. This discrepancy is utterly unaccounted for. In the next place, the debt assumed to be due by Venable to his wards, is nowhere established to have been really due by any proofs in the record. Now, this was a material fact in the case, exclusively within the knowledge and power of the defendants, which they were bound to establish by competent evidence, and which, in its own nature, was susceptible of proof beyond their answers. It was vital to

the good faith of the transaction. The omission to do it, would, of itself, throw some doubt upon the transaction. But the proof in the record, so far as it goes, affords a strong negative upon the assumed debt. The inventory of George Adams's personal estate is only \$2,032.07. His widow (independently of the charges of administration) was entitled to one-third part of it. One of the children (a daughter) died early, during her minority; and without stopping to inquire, whether her share in the personalty would not fall to the mother, the remaining sum, deducting only the mother's third, left the sum of \$1,355 only as the distributable shares of Venable's wards. There is in the record a paper which is without any signature or proof of any sort, which puts Adams's personal estate at a much lower sum than the inventory, but which, by adding his real estate at \$2,200, and the rent for three years, and the hire of negroes and interest, swells the aggregate of his estate to \$6,286.54. This paper can be viewed in no other light than a mere speculative statement; but if it were otherwise, it is obvious that it cannot be permitted to pass as proof of the balance then due to Adams's children.

In the first place, the real estate is not properly chargeable to the account of the administrator or guardian merely as such.

The suggestion is that it was afterwards sold and the proceeds received by Venable, for which he may be justly held accountable. There was no sale made, so far at least as we have any evidence, under the general Act of Kentucky on this subject, passed on the third of February, 1813, and therefore that may be laid out of the question; though it is observable, that a guardian is not [*115 authorized under that Act to sell without an order of court, and giving a bond which sufficient sureties. The only proof of any authority to sell found in the record is the following order: "Fayette county, to wit, April court, 1818. On motion of Abraham Venable, Patterson Bain, E. Yieser, and Charles Humphreys, are appointed commissioners, under the Act of Assembly of the last session, for the sale of the estate mentioned in said law, as belonging to the heirs of George Adams, deceased, situated in Lexington." The Act here referred to is not in the record, but so far as we can gather its contents by the order itself, the commissioners, and not the guardian, were authorized to make the sale. Their proceedings under the order do not appear. The only evidence is from a purchaser at the sale, who states that he bought the estate at about \$2,200, and, with the exception of about \$300, he paid the money to Venable by direction of the commissioners. Whether this payment was authorized by the Act is left uncertain; and, indeed, whether security was not directed to be taken from the commissioners on the sale, as in ordinary cases. It is far from being certain that the sureties on Venable's guardianship bond were liable for the sum so received. But we may assume for the present that they were.

Then, there is a charge of \$900 for rent received upon the real estate for three years; and for hire of negroes for seven years \$490, although the inventory mentions only "one negro girl and child, valued at \$300; and to

complete the amount, a charge of interest is added on the whole, of \$1,171.98. Now, certainly, there is no pretense for the last charge, and no justification of it by any proof. The children were maintained during this whole period by Venable and his wife; and in the most favorable view, if Adams's estate had been completely settled, the interest and income from the children's shares of his whole estate could not be presumed to amount to more than, if to so much as, the reasonable expenses for their support and maintenance. At least, if they did, that fact should have been made out by some probable evidence. Then, again, the guardianship bond is in the penalty of \$4,000 **116*** only; and this circumstance discredits the supposition that the sureties had incurred any liability beyond that amount. The usual practice is to take the penalty in double the amount of the supposed value of the property intended to be secured by it. The original administration bond of Mrs. Venable was in the penalty of only \$6,000, and the inventory of personal estate of George Adams, made by her on oath, which is not attempted to be impugned, covers but one-third of that amount. It has been said at the bar, that by the laws of Kentucky, sureties may be charged beyond the penalty of their bonds, and to the same extent of liability as their principals. If this were so it would diminish the force of any argument grounded on the penalty; though it certainly would not establish that there was in fact a debt due to the children beyond that sum. But among the acts of Kentucky, we cannot find any statute that leads to such a conclusion. The Act of 23d January, 1810, concerning the bonds of certain officers, guardians, administrators and executors, has no provision, which varies from the general law on this subject, limiting the responsibility of sureties to the penalty of the bond. It merely declares that "an action in one case on such bond shall in no wise abate or bar an action thereon for another cause," which is entirely consistent with a recognition of the general rule of law. And the Act of 15th January, 1811, which is supplementary to the former, and gives a remedy against sureties beyond the penalty of the bond, is expressly limited to bonds given by public officers. No adjudged case has been cited which goes to establish the position that the statute of 1810 has been differently construed by the State courts. It is not in our view of the facts a very material consideration, because there is no evidence offered which proves that a debt was due to Venable's awards, even to the amount of the penalty. And in a case like the present, it was indispensable for the defendants to make out so material a fact with all due certainty. The court cannot presume it. The statement already alluded to, as a statement of the administration or guardianship account, contains no deductions whatever, either for charges, taxes, **117*** pairs, *or even for debts due from the intestate, or for expenses incurred for the children. It assumes only one side of the account, and deals not in any credits, though the presumption of their existence is almost irresistible.

In respect, then, to this part of the assumed consideration of the deeds, there is the want of Peters 2.

certainty as to any amount of debt due to the children; and the contract given to secure to Venable, does not ascertain any amount as due. It merely provides in general terms that M'Donald shall pay to the children "as much money as they shall have a right to demand," &c., when they shall come of age, and in the intermediate time they are to receive an amount sufficient for their support and maintenance. Even this contract is left wholly without any mortgage or other security for its fulfillment, either to Venable or to the children; and Venable strips himself of his whole estate, and relies exclusively upon the good faith and solvency of M'Donald, to extricate himself from all future difficulties. Such a case may exist; but it must involve some suspicion, when the party who resorts to such measures has a demand hanging over him, which goes deeply to affect his solvency and his interests, and may furnish another and cogent motive for the transaction.

The provision in this contract for the support and maintenance of the children, is somewhat extraordinary, and of a very indefinite nature and extent. M'Donald agrees to deliver to Venable "as much beef, pork, hay, corn, flour, &c., to the amount of what it shall be worth, to board, school, and clothe" them. So that even the amount is not fixed, and is to depend upon the future pleasure of the parties. In case of a real purchase, such a provision could not be expected, even though it went merely to keep down the accruing interest; and in the present case, it is not by its terms confined even within that limit. The contract itself is not avowed upon the face of the deeds, and must be deemed a mere private and secret bargain, to be kept back by the parties.

Then, again, as to the remaining cash payment of \$2,060.50. The bill directly charges that it was a mere formal payment, and that the "money was by the said Venable returned *back to M'Donald, or to the person of [**118** whom M'Donald borrowed it." The answer of M'Donald admits that a part was borrowed; but his denial of its return is couched in terms of an ambiguous purport. He says that the sum of \$2,060.50 "was paid by this defendant in the presence of Moses S. Hall," &c. That he "borrowed a portion of the money to enable him to make the cash payment. That it was paid by him to his co-defendant (Venable) in good faith, and that no part of it was returned to him by said Venable, nor did this defendant receive any part of said money back from said Venable by any fraudulent contrivance, as the complainants have falsely alleged." Venable in his answer says, "that the said sum of money was paid to him by his co-defendant (M'Donald) in good faith, and that no part of it was returned by him to his co-defendant." Now, it is remarkable that neither of these answers, in terms, denies that the money so borrowed was returned back to the person of whom it was borrowed, which is the gist of the charge in the bill; nor does M'Donald deny that he received it back; but only that it was not returned to him by Venable. Nor are these allegations thus loose, from mere accident or carelessness. On the contrary, the proof is direct that the money borrowed was returned to M'Donald, and was by him returned to the lender. Moses S. Hall, in his testimony, says

he was present when the money was paid, and it was handed to Mrs. Venable. William Achison testifies that M'Donald told him that the next morning after the money was paid, Mrs. Venable was at his house with the money, on her way to town to deposit it in bank, and he, M'Donald, borrowed it of her and returned it to Hendley (the lender) the same day. Hendley himself, in his testimony, says: "M'Donald came to me and told me that he had made a purchase; that I was a man of tolerable good sense, I could tell by a little, what a good deal meant; and observed that he wished to borrow of me \$1,000, which I loaned him, and stated he would return it in a few days. He observed that Venable was embarrassed by a debt on account of Norton, and that he had bought him out of every species of property, and that he wanted the money to pay him. He also offered 119*] me a mortgage on a negro man and a tract of land for the payment of the money, but I declined receiving any security, &c., because I expected to receive the money back in a few days. I took a memorandum of the amount and numbers of the different notes loaned him, thinking it was possible I should receive the same notes back, &c. In about three or four days I received from said M'Donald the same notes back again. M'Donald stated to me, that he was security for Venable, as guardian of Mrs. Venable's children, to the amount of \$3,000 or \$4,000, and that he made this purchase to secure himself." In point of fact, independently of the purchase, as we have already seen, he had a mortgage on the same estate as security for that very liability. But it is impossible to wink so hard, as not to perceive, that if this statement be true, and it is nowhere contradicted or denied, the borrowing of the money was merely to exhibit before witnesses a formal payment, and that there was no real *bona fides* in this part of the transaction. It was an attempt, fruitless, as the event has shown, to throw a colorable gloss over the real transaction.

How the other part of the purchase money was obtained, is not proved by the defendants, although there is some hearsay evidence that other money was borrowed; but the answers of the defendants furnish no statement of the amount.

There is also testimony in the case from several witnesses, of the confessions of Venable, as to the object of the deeds, and of subsequent acts of control over the estate to some extent, from which unfavorable inferences have been deduced at the argument against the validity of the deeds. It has been said at the bar, that these confessions and acts, being subsequent to the execution of the deeds, ought not to be permitted to prejudice the title of M'Donald, and are not evidence to bind him. It is true, that neither the acts nor confessions of a grantor, under such circumstances, are admissible to defeat the title of the grantee. But they are certainly admissible to disprove the answer of the grantor, when he is a party to the bill. If they discredit his answer, they withdraw from the case all the influence which his concurrence in the statement of the 120*] grantee would otherwise have; and to this extent they have a bearing upon the whole merits of the case; but not beyond it. Upon

examination of these confessions, they certainly exhibit some misgivings on the part of Venable, and some proof that the sale of the estate was to defeat the debt due by him to the bank, as security of Norton. The acts of control by Venable over the estate are more equivocal; and but for his subsequent liberal participation in all the produce of the estate, would, perhaps, of themselves, not be very significant. As the case is, they cannot but have some weight.

Upon the whole, without going more at large into the case, the circumstances are such, that it appears to us these deeds were not *bona fide* and for a valuable consideration, and therefore they were properly set aside by the Circuit Court. Looking to the nature of the transaction, the assumed considerations, the relation and circumstances of the parties, the impending decree, the sweeping extent of the deeds, the non-disclosure, on the face of them, of the real considerations, the objects of the collateral and secret contract, the very great doubt as to what was due to the children, and the ambiguous explanations of the parties, we think the presumptions are so strong against the validity of the deeds that they ought not to be supported.

The decree of the Circuit Court is affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

Cited—Bald., 357.

*THE PRESIDENT, DIRECTORS [*121
AND COMPANY OF THE BANK OF THE
UNITED STATES, *Plaintiffs in Error*,

v.

THOMAS CORCORAN, *Defendant in Error*.

Promissory note—notice of non-payment—evidence—instructions of court to jury.

Notice to the indorser of a promissory note of non-payment by the drawer.

C, the indorser of the note, at the time it fell due, lived in a house in Georgetown, except the lower front room, which was occupied separately, as a store, by one of his sons. There was a separate entrance to the dwelling part of the house through an alley or passage, apart from the store, which led to the upper rooms, and back buildings, and yard of the house. The son of C who occupied the store, had a dwelling-house separate from the store. C was at that time postmaster of Georgetown, and kept the postoffice in another part of the town; where he usually transacted his private business as well as that of his office. C had no concern in his son's store, but he was frequently about the door. Until he took charge of the post-office, which was a year before the note fell due,

NOTE.—*Bills and Notes. Notice to indorser of non-payment.*

See notes to Brown v. Barry, 3 Dall., 365; Wilson v. Lenox, 1 Cranch, 194; Fenwick v. Sears 1 Cranch, 259; Bussard v. Levering, 6 Wheat., 102; Bank of U. S. v. Smith, 11 Wheat., 171; Brent v. Bank of Metropolis, 1 Pet., 89.

Peters 2.

written communications and notices for him were sometimes left at the store, and were carried by another of his sons, unless when he forgot it, to him. After C took possession of the postoffice, if notices had been left at the store for C, the bearer of them would have been directed to take them to the postoffice; or they would have been delivered to him by his son at the postoffice, if recollected, or if they had been seen when left at the store. The notary stated that he believed the notice of non-payment of the note was left at the store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and he never had been in the dwelling-house, or in the passage or alley. Held, that this notice was not sufficient of non-payment of the note to charge C with a liability to pay the note.

If notice of the non-payment of a note, although left at an improper place, was, nevertheless, in point of fact, received in due time by the indorser, and so proved, or could from the evidence in the cause be properly presumed by the jury, it is sufficient in point of law to charge the indorser. [132]

Presumptions from evidence of the existence of particular facts, are in many cases, if not in all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it; that they would err in giving such an instruction. [133]

ERROR to the Circuit Court of Washington county in the District of Columbia.

In the Circuit Court, the plaintiffs, as indorsers of the Bank of Columbia, instituted this suit against the defendant, as indorser of a promissory note, dated "Georgetown, May 6th, 1819," for \$3,700, drawn by Daniel **122*** Reintzel, and payable at *sixty days to the order of the defendant. The note was protested, when at maturity, by order of the Bank of Columbia, the holders.

The plaintiffs gave in evidence the protest of the note, stating, "that payment thereof had been duly demanded of the maker, on the third day of grace, and refused; and the usual notice of dishonor left next day at the store of James Corcoran (the son of the defendant), in Georgetown."

Two written papers were also put in evidence; one a letter from Thomas Corcoran, the defendant, dated at Georgetown, May 8th, 1822, and addressed to "O. Krantz, cashier, &c.," saying: "Mr. Rind having called on me on the subject of Mr. Reintzel's notes, I have no hesitation in saying that I will not take any advantage of the limitation act, for my indorsement on the note of \$3,700, dated 6th May, 1819, and the note of \$400, dated 27th May, 1819; the other note I have no knowledge of, and will call at bank to-morrow for some explanation of it."

Also a warrant of attorney in blank, dated December 14th, 1824, authorizing the docketing of suits at the ensuing term for the use of the Bank of the United States, on these notes of Daniel Reintzel, viz., two of \$400 each, and one of \$3,700, all due in 1819.

This paper was sent to the defendant for his signature, by Mr. Richard Smith, the cashier of the Bank of the United States, and the defendant addressed to him the following letter:

"Dear Sir: If Mr. Reintzel should not be able to satisfy the bank before court, and they determine to bring suit, I will instruct and authorize Robert Dunlap, Esq. to docket the case for me.

December 16th, 1824. THOMAS CORCORAN."

Benjamin F. Maekall, the notary who made the protest, was examined on the trial, and produced his notarial book, in which he recorded all his protests, and in which he had entered the protest of the note upon which this suit was brought. He stated "that the demand and notice were made and entered in the book, and that although he had no recollection in relation to these notes, he believed the demand *and the notice thereof were made as ***123** stated in the book;" that at the time of the demand and notice of the notes, the defendant lived in a house in Georgetown, except the lower front room thereof, which was occupied separately, as a store, by one James Corcoran, the son of the defendant. There was a separate entrance to the dwelling part of the house, occupied by the defendant, through an alley or passage apart from the store, which led to the upper rooms, apart from the house; and he believes the notice of the note was left by him at the store, because he thinks he frequently had notices to give to the defendant, and was in the habit of leaving them at the store, and he never was in the dwelling part of the house occupied by the defendant, nor in the passage or alley.

It was also proved that James Corcoran, the son of the defendant, who occupied the store at the period referred to by the notary, had a family and a dwelling-house apart from the store. The defendant, at the time of the protest of the note, was postmaster of Georgetown, and kept the postoffice in another part of the town; where he transacted his private business, as well as the business of his office, and had no concern in the store. The defendant was often at the door, and about the door of the store. Another son of the defendant's, a single man, was concerned in the store; he lived with the defendant in the house, until some time in February, 1819, when he left his father's family, but continued his connection with the store. It was also proved by James Corcoran, that until 1818, when the defendant took charge of the postoffice, written communications and notices for the defendant were sometimes left at the store, or at the dwelling part of the house; sometimes the persons bringing such notices were directed to take them into the house, and sometimes he took them at the store, and then, unless he forgot to do so, as he sometimes did, he delivered them to the defendant. After his father took the postoffice, if he had known that such communications or notices had been left at the store, he would have directed the persons who called with them to take them to the postoffice; or, if going there, he would have taken them, and unless he forgot, *would have delivered ***124** them to the defendant; but he had no recollection of such fact having occurred. When the defendant took charge of the postoffice, that became the place where notices and communications were usually left; and where he transacted his business, both private and official, as postmaster and magistrate. The witness stated that he had no recollection of a notice of the protest of the note in suit having been left at the store.

The store never was, before or after the defendant took the postoffice, his place of business, or the place appointed for the delivery of

notices or other communications for the defendant.

The defendant's counsel prayed the court to instruct the jury, that if they found, from the evidence, that the said notices were left at the store of the said James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant as stated in the evidence, the notice is not sufficient to charge the defendant in this action, and the jury, on the said evidence, ought to find for the defendant on the first issue; which instruction the court gave. And the plaintiffs by their counsel prayed the court to instruct the jury, that if they found, from the evidence, that notwithstanding the notices were left at the room occupied as a store by James Corcoran, yet, that the said store was the place where notices for the defendant were generally left, and that the notices in the case of these notes were duly received by the defendant, then their being so left at said store does not defeat the plaintiffs' right to recover, provided the defendant received said notices in due time. And that their said papers read in evidence by the plaintiffs, and signed and given to the plaintiffs by the defendant, as above stated, are competent evidence from which the jury may infer that the defendant did duly receive the said notices; which instructions the court refused to give.

The plaintiffs by their counsel excepted to the instruction given by the court, upon the prayer of the defendant; and to the refusal of the court to instruct the jury as required by them; and the case was brought up upon the bill of exceptions to this court.

125*] *The counsel for the plaintiffs contended that the court erred:

I. In granting the defendant's prayer.

1. Because the plaintiffs used due diligence.

2. Because, if not, it took the whole case from the jury, and directed them to find for the defendant, on the whole evidence, thus excluding any inference, they might have drawn from the evidence, that the defendant duly received the notice.

II. In refusing the plaintiffs' prayer; because,

1. The papers mentioned in it were competent evidence, from which the jury might, or not, have inferred that the notice was duly received by the defendant.

2. Because, if not, it took from the jury the right of inferring from the whole evidence, that the store of James Corcoran was the place where the defendant's notices were generally left; and that this notice was duly received by him.

The case was argued for the plaintiffs by *Mr. Lear* and *Mr. Sergeant*, and by *Mr. Jones* for the defendant.

For the plaintiffs in error it was argued, that the declaration of the notary, that "he believed" he had left the notice at the store, was sufficient evidence of the fact to be left to the jury. The many notarial acts he had to perform, rendered a distinct recollection of each impossible. The suit upon this note was delayed for the benefit of the defendant; and if the recollection of the notary is indistinct, it should not avail the defendant. (*Bank of North America v. Potter*, 4 Dall., 127; *Miller v. Hackley*, 5 Johns., 375.)

As to due diligence, a general rule has been established, and a non-compliance with this rule is claimed to be negligence. But the rule has exceptions in some cases, and upon the same principles which are applied in other cases. In the case of *The Bank of Columbia v. Lawrence* (1 Peters, 576), the court have said that the rule must not be such as will clog commercial operations.

It is no part of the contract between the indorser and the holders, that he shall give him notice of the drawers default, *but the [*126 law has made it necessary. The notice is to inform the indorser that the holder looks to him for payment; but it is not indispensable that the notice shall reach him, if reasonable diligence has been used to accomplish the object. If notice was actually received, and so proved, the mode by which it came to the possession of the indorser is unimportant. This court have said in the case referred to, that a person may have two places at which notices directed to him may be left; and in this case the defendant had a dwelling, and an office of business, the postoffice. The notice was left at the former, in a store where he frequently was; where notices left for him might reach him through his son, and from which it may be inferred they did reach him. The front door of the house was the door of the store, and to that door all who did not know that the alley had been made the main entrance would go; and the notary states he has frequently left notices there, without complaint, for the defendant, but he had never been in the alley. If the notice had been delivered to a servant, the notary going up the alley, it would have been said that the store was the proper place, as there notices had been left. The objection is one so nice as to take away its force or application.

It is not a rule, that it is indispensable that the notice shall be the best the case admits of; for personal notice is always the best, but this is not always required.

The reply of the defendant to the application made to him in 1819 by the cashier, is sufficient to authorize the inference that he had notice. Upon this testimony, and the parol evidence, the question of notice should have been left to the jury. (13 East, 433; 2 Johns. Cases, 337.)

The courts of Massachusetts have decided that a waiver of notice may be inferred from many acts. (4 Mass., 245; 6 Mass., 449; 9 Mass., 155, 159.)

The plaintiffs had a right to submit the evidence to the jury, and they might have inferred notice; and when the court assumed to decide upon its insufficiency they invaded the province of the jury and erred.

Mr. Jones, for the defendant, stated that the question raised *in this case goes to the [*127 whole foundation of commercial law. The liability of the indorser of a note is contingent, and it is essential, as one of the requisites to charge him, to give him notice. There are cases in which some of the prerequisites have been dispensed with; but there are certain acts which are indispensable. The rule is universal, that the notice shall be the best the case admits of; and it is only in cases where there are difficulties in giving notice, that questions have arisen as to the mode in which it should have been given. If a party has a place of business, no-

tice must be left there; if he has two, one or both may be adopted.

In the case before the court, there was a notorious place of business, the postoffice; in which the defendant was postmaster, and a dwelling. In such a case there is no ground for equivalent notice. It is not pretended that the notary was ignorant of the facts.

The claim to support the notice on the ground that it was left at the store of the son of the defendant, cannot be maintained. The son was as a stranger would have been, for the law does not look at those relations. Nor was it of any consequence that the store was under the same roof with the defendant's dwelling; to all the purposes of this case it was the same as if it had been entirely separate.

Nor does the testimony which alleges that notices were sometimes left at the store strengthen the cases, as it is not shown that the defendant ever recognized such proceedings.

Where notice is not sent in the regular mode, the law presumes it would not reach the party; and here the court were called upon to tell the jury, that if they believed the notice reached the defendant, they could infer notice, and they were required to say the notice was regular. This refusal was proper.

The written evidence shows nothing from which the jury could infer notice. When the defendant agreed to waive the statute of limitations, it was a declaration that he would not waive any other defense. His whole object in this arrangement was to benefit the drawer, and he is not to be supposed to have intended to prejudice his own rights.

128*] *Mr. Justice WASHINGTON* delivered the opinion of the court:

This case comes up by writ of error from the Circuit Court for the District of Columbia and county of Washington.

The suit was brought by the plaintiffs in error against the defendant, as the indorser of a promissory note of Daniel Reintzel for \$3,700, payable 60 days after date, and dated the 6th of May, 1819. The only question in the cause turns upon the sufficiency of the notice to the defendant, the circumstances attending which appear in a bill of exceptions taken by the plaintiffs to the opinion of the court. From this it appears, that the plaintiffs gave in evidence a letter from the defendant to the cashier of the Bank of Columbia, where this note was discounted, bearing date the 8th of May, 1822; in which the writer, after mentioning that he had been applied to on the subject of Reintzel's notes, says: "I have no hesitation in saying that I will not take any advantage of the limitation act for my indorsement on the note of \$3,700, dated 6th of May, 1819, and the note of \$400, dated 27th May, 1819; the other note I have no knowledge of, and will call at the bank to-morrow for some explanation of it."

These notes having been transferred to the Bank of the United States, the cashier of that bank, on the 14th of December, 1824, sent to the defendant a paper for the signature of himself and Reintzel, containing a general authority to some attorney to docket suits against them at the next ensuing term of the court, in the names of the president, directors and company of the Bank of the United States, for the Peters 2.

use of that bank, and of the United States, on three notes of Daniel Reintzel, two of \$400 each, and one of \$3,700, all due in 1819. On the back of this note was indorsed the following address, signed by the defendant, viz.: "Dear Sir—If Mr. Reintzel should not be able to satisfy the bank before the court, and they determine to bring suit, I will instruct and authorize Robert Dunlap to docket the case for me. December 16th, 1824."

The plaintiffs proved, by the notary who made the protest of this note, who produced at the trial his notarial *book in which he [*129 recorded all his protests, and in which he had entered the protest of the note in question, and the demand and notice; that the said demand and notice were made and entered in the said book, and that although he had no recollection in relation to these; yet he believed the demand and the notice thereof were made as stated in his said book. He further stated, that at the time of the said demand and notice, the defendant lived in a house in Georgetown, except the lower front room thereof, which was occupied separately as a store by James Corcoran, his son. That there was a separate entrance to the dwelling part of the house, occupied by the defendant, through an alley or passage apart from the store, which led to the upper rooms and back building and yard of the house; and that he believed the notice was left by him at the said store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store; and never was in the dwelling part of the house occupied by the defendant, nor in the passage or alley leading to it.

It was further proved, that James Corcoran, who occupied the store at the time spoken of, had a family, and a dwelling-house apart from his store, and that the defendant was then postmaster of Georgetown, and kept the postoffice in another part of the town, where he commonly transacted his private business, as well as that of his office; and had no concern in his son's store, but that he was often at the door, and about the door of the store; that Thomas, another son of the defendant, was concerned with his brother in the store, and was an active partner, attending in the store to the business thereof; but that he was a single man, and lived with the defendant in the house aforesaid until February, 1819; after which he ceased to live in his father's family, but continued his concern and attention in the store.

It was further proved, by the before-mentioned James Corcoran, that until the defendant took charge of the postoffice, which was in the year 1818, written communications and notices for the defendant were sometimes left at the before-mentioned store, or at the dwelling part of the house; *that the witness [*130 sometimes directed the person bringing such notices to take them into the house, and sometimes he took them at the store, and then, unless when he forgot to do so, as he sometimes did, he delivered them to the defendant; that after his father took the postoffice, the witness, if such notices or communications had been left at his store in the presence of a witness, would have directed the bearer of them to take them to the postoffice, or, if he were going there, would have taken them himself; and that

if he had done so, he would, unless he forgot it, have delivered them to the defendant; but he had no recollection of any such fact having occurred. That when the defendant took charge of the postoffice, that became the place where his notices, communications, &c., were usually left, and where he transacted his business, both private and official, as postmaster and magistrate. The witness had no recollection of ever having seen or known of any notices being left at his store of the protest of the notes now in suit. That the store never was, before or after the defendant took the postoffice, his place of business, or the place appointed for the delivery of notices or other communications for the defendant.

After the above evidence was given, the defendant's counsel prayed the court to instruct the jury, that if they found, from the evidence, that the said notices were left at the store of James Corcoran, occupied by him separately from the dwelling part of the house, occupied by the defendant as stated in the evidence, the notice was not sufficient to charge the defendant in this action, and that the jury, on said evidence, ought to find for the defendant on the first issue; which instruction the court gave.

The plaintiffs then prayed the court to instruct the jury, that if they find from the evidence, that notwithstanding the notices were left at the room occupied as a store by James Corcoran, yet that the said store was the place where notices for the defendant were generally left, and that the notices in regard to these notes were duly received by the defendant, then their being so left at the said store does not defeat the plaintiffs' right to recover, provided the defendant received the said notices in due **131***] time; and that their said *papers read in evidence by the plaintiffs, and signed and given to them by the defendant, as above stated, are competent evidence from which the jury may infer that the defendant did duly receive such notices. This instruction the court refused to give; to which refusal, as also to the giving of the instruction, prayed by the defendant's counsel, the exception was taken by the counsel for the plaintiffs.

The only question which the case presents is, whether such notice was given of the non-payment of the note on which this suit was brought, as the law requires to charge an indorser. It is not pretended that it was given to the defendant personally, either verbally or in writing, or that a written notice was left at his dwelling-house or place of business, or that the holders of the note were prevented from giving the notice at any time by the absence or fault of the defendant. His place of residence, and the way by which access to it was to be gained, was known to the notary; and it is quite improbable that he was ignorant of the place at which he transacted both his private and public business.

The inquiry is then narrowed down to the sufficiency of a notice left at the store of James Corcoran, a son of the defendant, with which the defendant had no concern, and which was not his place of business.

The store of the son was as distinct and separate from the dwelling of the father as if they had been under different roofs. The former was entered from the street, the latter from an

alley or passage; and it does not appear that there was any inside communication between the two. Overlooking, for the present, the circumstances that the notary had been in the habit of leaving notices for the defendant at the store, it must be admitted that the service of the notice in question at the store was no more a compliance with the requisition of law than if it had been delivered to the son in the street or elsewhere, or left at his dwelling-house.

Is the case, then, altered by the circumstance just mentioned? We think not. It seems from the evidence, that the store never was, at any period, the place appointed for the delivery of notices or any other communications to the defendant. But if it had been, the note in question came to maturity some time in the **[*132]** month of July, 1819, and the proof was, that the defendant took charge of the postoffice some time in the year 1818; after which, that became the place at which notices and other communications to him were usually left, and where he transacted both his private and public business. Were it to be admitted that the service of a notice at a place not appointed by the defendant as the one at which notices to him were to be delivered, would be sufficient in law to charge him, upon the ground that other notices had been previously left at the same place, it would surely be too extravagant to contend that a service at the same place would be legal, after another place had been appointed for that purpose, and where they had in point of fact been usually left.

It is unnecessary to pursue this inquiry further; because, although the sufficiency of the service of the notice generally was insisted upon by the counsel for the plaintiff in error in argument, yet the instruction asked for by the plaintiff in the court below placed its validity not merely upon the circumstance that the store was the place where notices for the defendant were generally left, but upon the additional and stronger one, that the notice in this case was duly received by the defendant.

Now, it must be admitted, that if the hypothesis that the notice in this case, though left at an improper place, was nevertheless in point of fact received in due time by the defendant, were proved, or could from the evidence in the cause be properly presumed by the jury, it was sufficient in point of law to charge him. In the case of *Ireland v. Kip* (10 Johns., 490; 11 Johns., 231), it was decided, that admitting a service of notice at the house in Frankfort street, where the defendant had directed his letters to be left by the letter-carriers, would have been good and equivalent to service at his dwelling or counting-house, still the notice, though improperly put into the postoffice, would be sufficient; if it were accompanied by proof that it had actually been delivered at the dwelling-house of the indorser, or at the house in Frankfort street.

But in the present case, there was not a scintilla of direct *or positive proof that the **[*133]** notice in question ever reached the person, the dwelling-house, or place of business of the defendant, and the court was called upon by the plaintiffs' counsel to instruct the jury that the papers which they had given in evidence were competent evidence from which the jury might infer that the defendant did duly receive

the said notice. Was the court wrong in refusing to give this instruction?

Presumptions, from evidence given in a cause of the existence of particular facts, are in many, if not in all cases, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them, that they are at liberty to presume it, that they would err in giving such instruction. For why give it, when it is manifest that if the jury should find their verdict upon the fact so deduced, it would be the duty of the court to set it aside, and to direct a retrial of the cause?

Let us now see what were the papers which the plaintiffs had given in evidence, which the court were called upon to declare to the jury were competent evidence from which the jury might make the inference insisted upon.

The first is the letter of the defendant, dated the 8th of May, 1822, and addressed to the cashier of the Bank of Columbia, in which he declares that he will not take any advantage of the limitation act, for his indorsement on this and another note; the blank authority sent to the defendant by the cashier of the Bank of the United States on the 14th of December, 1824, for the signatures of the defendant and of the maker of the notes, purporting to empower some attorney to docket suits against them on these notes, with a declaration indorsed thereon by the defendant, that if the maker of the notes should not be able to satisfy the bank before court, and they should determine to bring suit, he would instruct a particular person to docket the case for him.

Let it be admitted that these papers bound the defendant to abstain from making a particular defense to which the law entitled him, and to cause the action intended to be commenced against him to be docketed, so as not to delay **134** the plaintiffs, could the jury from thence, infer with any legal propriety, either that the necessity of proving notice of the non-payment of the notes would be dispensed with, or the fact that the notice left at the store of James Corcoran was received by the defendant at any time, much less in due time?

If this was a question of inference fit to be submitted to the discretion of the jury, it seems to the court that the rules respecting this subject, which have been laid down with so much care, would no longer be fixed and certain, but would change with the varying conclusions which a jury might draw of the fact, from evidence however slight given to prove it. What, for example, does the rule that notice must in certain cases be served personally upon the indorser, or be left at his dwelling-house or place of business, signify, if a jury may from any evidence, however remote from the fact, presume that the notice, though left at any other place, may have found its way to the hands of the person whom it was intended to charge?

It was insisted by the counsel for the plaintiffs, that the evidence above noticed, and alone relied upon in the instruction asked for to warrant the inference, was strengthened by the circumstance of the connection between the defendant and the owner of the store where the notices for the former were sometimes left. But Peters 2.

if this circumstance stood alone in the case, and a notice delivered to the son who was not a member of the father's family, would not be a legal notice, nor competent to warrant a presumption that it had reached the father, which it unquestionably would not, the question cannot be affected by its being thrown in as a make-weight with other circumstances in themselves insufficient to justify the conclusion.

In the case of *Ireland v. Kip*, the circumstances to induce a presumption that the notice reached the defendant were certainly as strong as they could well be. The letter-carrier was directed to leave all letters for the defendant at a certain house in Frankfort street. The carrier called at the postoffice three or four times every day, and took out, and delivered all letters left there; and the defendant usually sent or ***135** called every day at that house for his letters. Upon the second trial of this cause, the plaintiffs insisted upon the above evidence, that the jury had a right to presume that the notice in question had been duly received by the defendant. But the *Chief Justice* who tried the cause, instead of leaving it to the jury to make this presumption, overruled the whole of the evidence offered by the plaintiffs, and directed a nonsuit. When the case came before the Supreme Court, it was there stated by the judge who delivered the opinion, that it would be extremely embarrassing to suffer the rule to fluctuate, by making exceptions which would lead to uncertainty, and that it was of the utmost importance in mercantile transactions, to have a certain and stable rule in relation to notices, in which sentiments this court entirely concurred. That court finally decided, that as it did not appear that the notice was left at the defendant's place of business in Frankfort street, and it did appear that he resided in the city, the nonsuit was correct. If this case be law, as to which we are not now called upon to give an opinion, it is in point upon the very question now under consideration.

If the court below, then, committed no error in refusing to give the instructions asked for by the plaintiffs' counsel, they were right in giving that which was prayed for by the defendant's counsel, which merely affirmed that the notice left at the store of James Corcoran, occupied by him separately from the dwelling part of the house occupied by the defendant—if the facts were so found by the jury—were not sufficient to charge the defendant, and that on the said evidence they ought to find for the defendant on the first issue.

It is the opinion of this court, that the judgment of the court below ought to be affirmed, with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is considered, ordered, and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Aff'g, 3 Cranch, C. C., 46.
Cited—10 Pet., 579, 581; 4 Cranch, C. C., 71; 2 Curt., 552.

136*] *DANIEL and JOSEPH JACKSON,
Plaintiffs in Error,

v.

JOHN TWENTYMAN.

Jurisdiction.

The 11th section of the Act of 1789, must be construed in connection with and in conformity with the Constitution of the United States. By this latter, the judicial power does not extend to private suits in which an alien is a party, unless a citizen be the adverse party; and it is indispensable to aver the citizenship of the defendants. to show, on the record, the jurisdiction of the court.

THIS cause was brought before the court by a writ of error to the Circuit Court of the Southern Circuit of New York.

The description of the parties on the record was "*John Twentyman*, a subject of the King of Great Britain, v. *Daniel and Joseph Jackson*." No citizenship of the defendants being argued.

The question was whether the Circuit Court, under the 11th section of the Judiciary Act of 1789, ch. 20, which gives jurisdiction, among other cases, "where an alien is a party," had jurisdiction of the cause without an *assumpsit* on the record of the citizenship of the defendants.

Mr. Taylor, for the plaintiffs in error, argued that the judgment of the Circuit Court should be reversed. He cited *Bingham v. Cabot* (3 Dall., 382); *Hodgson v. Bowerbank* (5 Cranch, 303); *Sullivan v. The Fulton Steamboat Company* (6 Wheaton, 450).

The court were of opinion that the 11th section of the Act must be construed in connection with and in conformity to the Constitution of the United States. That by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party. It was indispensable therefore to aver the citizenship of the defendants, in order to show on the record the jurisdiction of the court.

The omission so to do was fatal, and according to the known course of the decisions of the court, the judgment of the Circuit Court must be reversed for want of jurisdiction.

Cited—Hemp., 424, 425, 664; 2 Blatchf., 164; 3 Blatchf., 248; *Deadly*, 227.

137*] *JOHN P. VAN NESS and MARCIA,
his WIFE, Plaintiffs in Error,

v.

PEREZ PACARD, *Defendant in Error.*

Waste—fixtures—English common law—trade fixtures—usage—instructions of the court to the jury.

Action on the case against the defendant for waste, committed by him while tenant of the

plaintiff, the owner of the reversionary interest, by pulling down and removing from the demised premises a dwelling-house erected thereon, and attached to the freehold. The question raised in the case was, what fixtures erected by the tenant during his term are movable by him.

The general rule of the common law undoubtedly is, that whatever is once annexed to the freehold becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, never was inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; and more liberally between tenant for life and in tail, and remainderman or reversioner, in favor of the former; and tenant, in favor of the tenant. A more extensive exception to the rule has been of fixtures erected for the purposes of trade. Fixtures which were erected to carry on trade and manufactures, were from an early period of the law allowed to be removed by the tenant, during his term; and were deemed personalty for many other purposes. [143]

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright. But they brought with them, and adopted only that portion which was applicable to their situation. [144]

It might deserve consideration, whether, if the rule of the common law of England which prohibits the removal of fixtures erected by the tenant for agricultural purposes, were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State, upon the mere footing of its existence in the common law. [145]

The question whether fixtures erected for the purposes of trade are or not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high; or has a brick or other chimney. The sole question is, whether it is designed for the purposes of trade or not. [146]

If the house were built principally for a dwelling-house for the family, independently of carrying on a trade, then it would doubtless be deemed a fixture falling under the general rule, and irremovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. [147]

Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of this custom, and to contract with a tacit reference to it. [148]

A court cannot be required to give an instruction to the jury as to the relation, right and credibility of the testimony adduced by the parties in a cause. [149]

***ERROR** to the Circuit Court of the [*138
 County of Washington, in the District of
 Columbia.

The plaintiffs in error instituted their action of trespass on the case, in the court below, to recover damages for the removal of certain buildings from a lot of ground in the city of Washington, the property of the plaintiffs, which had been leased to the defendant by the plaintiffs for a term of years, reserving a rent. The jury gave a verdict in favor of the defendant.

Upon the trial of this cause, the plaintiffs

NOTE.—*Fixtures, as between landlord and tenant.*
 A tenant, who has erected a wooden shed upon posts inserted two feet in the earth, has a right to remove it during the term, if it can be done without injury to the soil or the other buildings of the landlord. *Krouse v. Ross*, 1 Cranch, C. C., 368.

Whether a building erected for the purposes of trade is or is not removable by the tenant, does not depend on the form or size of the building; whether it has a brick foundation or not; or is one or

two stories high; or has a brick or other chimney. The sole question is, whether it is designed for the purposes of trade or not. If built for a dwelling-house it is a fixture. But if the residence of the family be merely an accessory for the more beneficial exercise of the trade, then it may be removed. (*Van Ness v. Pacard*, ante, 137; 3 Atk., 13; 2 East, 88; 3 East, 37; 3 Esp., 11.)

The law imposes no obligation on the landlord to pay the tenant for buildings erected on demised

gave in evidence to the jury, an indenture of lease between them and the defendant for a lot of ground in the city of Washington for a term of years, reserving a certain rent, with the privilege to purchase out the fee at a stipulated sum; and offered evidence to the jury to prove that after the defendant had taken possession of the land described in the lease, he erected thereon a building, two stories high in front, with a cellar of stone or brick, and a shed of one story; and that the principal building, which had a brick chimney, rested upon this stone or brick foundation. That the defendant was a carpenter by trade, and resided in the house from the commencement of his lease to about the period of its expiration, and that, before the term had expired, he took down and removed the said house from off the premises.

The defendant gave evidence that, upon obtaining the said lease, he erected the building with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which was a spring, was made and used exclusively for a milk cellar; that in the upper part of the house were kept, and scalded, and washed, the utensils of his said business; and that that part was also occupied as a dwelling for his family; that he was also a carpenter, and had tools and two apprentices in the house, and a work-bench out of doors; and that he worked in said house at his trade of a carpenter; that the house was in a rough, unfinished state, and made partly of old materials; and that he also erected on said lot a stable for his cows, of plank and timber, fixed upon posts fastened into the **139** ground; and that the stable was pulled down and removed at the same time with the principal building.

Upon this evidence the counsel for the plaintiffs prayed the instructions of the court to the jury, that if they should believe the same to be true, the defendant was not justified in removing the house from the premises, and that he is liable in this action to the plaintiffs for the value of the house; which instructions the court refused to give.

The defendant also offered evidence to prove that a usage and custom existed in the city of Washington which authorized a tenant to remove any building which he might erect upon leased premises; provided the same was removed before the expiration of the term.

Upon this evidence the counsel for the plaintiffs asked from the court instructions to the jury, that the same was not competent to establish the fact that a general usage did exist in the city of Washington which authorized a tenant to remove such a house as that which has been erected by the defendant; nor was it competent for the jury to infer from the evidence that such a usage existed. These instructions were refused by the court.

The plaintiffs then gave evidence, by the examination of a number of persons, who, as owners of real property in the city of Washington, were claimed to know all that appertained to it, to show that the usage under which the defendant asserted a right to remove the buildings erected by him, did not exist; and thereupon moved the court to instruct the jury, that upon the evidence it is not competent for them to find a usage or custom of the place by which the defendant could be justified in recovering the house in question; and that there being no such usage, the plaintiffs are entitled to a verdict for the value of the house, which the defendant pulled down and destroyed. These instructions were also refused.

The plaintiffs by their bill of exceptions presented the whole of these matters for the consideration of this court.

Mr. Coxe, for the plaintiff, contended that the court erred in giving and refusing the instructions. The question ***in this case [*140]** is one of great interest to the owners of property in the city of Washington. The evidence offered by the defendant was insufficient to establish a usage; and, if upon such testimony a usage can be made out, there is no safety to any owner of property. To establish a usage, the evidence must be clear and certain, and uncontradicted; and the court should take care to apply this principle whenever a usage is claimed; as when it has been established it becomes the law of all cases under similar circumstances. (The principles of law relative to usage are settled in 1 Gallison's Rep., 444; *Collings & Co. v. Hope*, 3 Wash. Cir. Court Rep., 149.)

It cannot be contended that the building could be recovered by the defendant, upon the principles which courts have established in favor of trade. No case can be found, in which a building fixed to the freehold was allowed to be taken away. All the adjudged cases go to the extent of permitting instruments and machinery used for the purposes of trade to be

premises. The rule that all buildings become part of the freehold, has been relaxed only so far as to give the tenant a right of removal while he remains in possession. *Kutter v. Smith*, 2 Wall., 491.

A wooden building standing upon blocks and rollers so that it could be removed without disturbing the freehold, and which was built for the purpose of removal, if necessary, is the personal property of the tenant, and removable. *Robinson v. Wright*, 2 McArthur, 54.

The right of the tenant to remove fixtures is not lost by non-payment of rent, and notice to quit, but only by quitting. If the landlord has prevented the removal by attachment of the fixtures, the right is not lost, even by leaving the premises. *Ex parte Hemenway*, 2 Low., 496.

The right of tenants to remove articles annexed by them to the freehold, is regarded with favor by the law. *Wall v. Hinds*, 4 Gray, 256; *Elsver v. Maw*, 3 East, 38; 2 Smith's Leading Cas., 223, 241.

He may, as a general rule, rightfully remove ad-

ditions or improvements made by him, until his term ceases. After his possession ends, such right ceases. *King v. Wilcomb*, 7 Barb., 263; *Cromie v. Hoover*, 40 Ind., 57; *Winslow v. Merchants' Ins. Co.*, 4 Mete. Mass., 306; 2 Kent's Comm., 344, and notes; *Ford v. Cobb*, 20 N. Y., 344; *Tiffe v. Horton*, 53 N. Y., 377; *Climie v. Wood*, L. R., 3 Exch., 257; *Capen v. Peckham*, 35 Conn., 88; *Poole's case*, 1 Salk., 368; *Weathersby v. Sleeper*, 42 Miss., 732; *Thomas v. Crout*, 5 Bush. (Ky.), 37; *Seeger v. Pettit*, 77 Penn. St., 437; *Penton v. Robart*, 4 Esp., 33; *O'Donnell v. Hitchcock*, 118 Mass., 401; *Whitehead v. Bennett*, 27 L. J. Ch., 474.

Furnaces, cider-mills, buildings resting on blocks, salt-pans, platform scales, factory machines, and many other things of like nature are removable by the out-going tenant. *Holmes v. Tremper*, 20 John., 29; *Swift v. Thompson*, 9 Conn., 63; *Taffe v. Warwick*, 3 Blackf. (Ind.), 111; *Gaffield v. Hapgood*, 17 Pick., 192; *Lanphere v. Lowe*, 3 Neb., 131; *Graves v. Pierce*, 53 Mo., 423; *Hanrahan v. O'Reilly*, 102 Mass., 201; *Hayes v. N. Y. Min. Co.*, 2 Col. T., 273.

carried away, but nothing more. The freehold is never to be injured, and must always be left in the condition it was when the lease commenced. (Cited, 3 East, 35; Woodfall's Landlord and Tenant, 223.) This building was erected for the accommodation of the family of the defendant. It could not therefore be considered as required for the trade of the defendant; nor was it appropriated to a particular trade; the defendant being a carpenter, and also employing himself in vending milk.

Mr. Barrett and Mr. Jones, for the defendant, argued,

1. That independent of the benefit from the usage, which was set up as matter of defense, the buildings removed from the premises were erected and used by the tenant for the purposes of his trade, and he had therefore a right to remove them under the general law of landlord.

2. The usage of the city of Washington, which was fully proved, recognizes the right of tenants to remove buildings put up by them, on lots which before the lease were in an unimproved state.

3. The instructions given by the court, and **141**]* their refusal *to instruct the jury as required by the counsel for the plaintiffs, were correct.

In support of the first point were cited 1 H. Bl., 258; 2 East, 88; *Elwes v. Maw* (3 East, 37; 7 Johns., 227; 20 Johns., 30.)

In the English cases a distinction is taken between fixtures on buildings for agricultural purposes and those for trade. This distinction, upon a fair view of those cases, cannot be sustained. The principles which have always been applied in those cases to trade, may be as well applied to agriculture. In the city of Washington, where there is and for a long period will be a large space upon which no buildings will be placed, the application of more liberal principles than those found in the English cases is proper and necessary. (Cited, Woodfall's Landlord and Tenant, 224; Buller's *Nisi Prius*, 34, 2, 3.) The court properly submitted the question of usage to the jury. It was regularly a question for them. Had the court proscribed a rule which would have taken from the jury the question of usage it would have been error; but here, whether the usage was proved, was submitted, and correctly.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Columbia, sitting for the county of Washington.

The original was an action on the case brought by the plaintiffs in error against the defendant for waste committed by him, while tenant of the plaintiffs to their reversionary interest by pulling down and removing from the demised premises a messuage or dwelling-house erected thereon and attached to the freehold. The cause was tried upon the general issue, and a verdict found for the defendant, upon which a judgment passed in his favor; and the object of the present writ of error is to revise that judgment.

By the bill of exceptions filed at the trial, it appeared that the plaintiffs in 1820 demised to the defendant, for seven years, a vacant lot in

the city of Washington, at the yearly rent of \$112.50, with a clause in the lease that the defendant should have a right to purchase the same at any *time during the term for [***142** \$1,875. After the defendant had taken possession of the lot, he erected thereon a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials from the lot. The defendant was a carpenter by trade, and he gave evidence that upon obtaining the lease he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk cellar, in which the utensils of his said business were kept and scalded, and washed and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. That the defendant had his tools as a carpenter and two apprentices in the house, and a workbench out of doors; and carpenter's work was done in the house, which was in a rough, unfinished state, and made partly of old materials. That he also erected on the lot a stable for his cows, of plank and timber fixed upon posts fastened into the ground, which stable he removed with the house before the expiration of his lease.

Upon this evidence the counsel for the plaintiffs prayed for an instruction, that if the jury should believe the same to be true, the defendant was not justified in removing the said house from the premises; and that he was liable to the plaintiffs in this action. This instruction the court refused to give; and the refusal constitutes his first exception.

The defendant farther offered evidence to prove that a usage and custom existed in the city of Washington which authorized a tenant to remove any building which he might erect upon rented premises, provided he did it before the expiration of the term. The plaintiffs objected to this evidence but the court admitted it. This constitutes the second exception.

Testimony was then introduced on this point, and after *the examination of the wit- [***143** nesses for the defendant, the plaintiffs prayed the court to instruct the jury that the evidence was not competent to establish the fact that a general usage had existed or did exist in the city of Washington, which authorized a tenant to remove such a house as that erected by the tenant in this case; nor was it competent for the jury to infer from the said evidence that such an usage had existed. The court refused to give this instruction; and this constitutes the third exception.

The counsel for the plaintiffs then introduced witnesses to disprove the usage, and after their testimony was given he prayed the court to instruct the jury that upon the evidence given as aforesaid in this case, it is not competent for them to find an usage or custom of the place by which the defendant could be justified in removing the house in question;

and there being no such usage, the plaintiffs are entitled to a verdict for the value of the house, which the defendant pulled down and destroyed. The court was divided and did not give the instruction so prayed; and this constitutes the fourth exception.

The first exception raises the important question, what fixtures erected by a tenant during his term are removable by him?

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The principal cases are collected and reviewed by Lord Ellenborough in delivering the opinion of the court in *Elwes v. Maw* (3 East's R., 38); and it seems unnecessary to do more than to refer to that case for a full summary of the general doctrine and its admitted exceptions in England. The court there decided that in the case of landlord and tenant there had been no relaxation of the general rule in cases of erections, solely for agricultural purposes, however beneficial or important they might be as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one between fixtures for the purposes of trade and fixtures for agricultural purposes; at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges at different periods in that country, have entertained different opinions upon it, down to the very date of the decision in *Elwes v. Maw* (3 East's R., 38).

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing Peters 2.

from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was[*145] so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture and to favor any erection which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication; it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

It has been already stated that the exception of buildings and other fixtures for the purpose of carrying on a trade or manufacture is of very ancient date, and was recognized almost as early as the rule itself. The very point was decided in 20 Henry VII., 13, a and b, where it was laid down that if a lessee for years made a furnace for his advantage, or a dyer made his vats or vessels to occupy his occupation during the term, he may afterwards remove them. That doctrine was recognized by Lord Holt in *Poole's case* (1 Salk., 368), in favor of a soap-boiler who was tenant for years. He held that the party might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any custom) in favor of trade, and to encourage industry. In *Lawton v. Lawton* (3 Atk. R., 13), the same doctrine was held in the case of a fire-engine set up to work a colliery by a tenant for life. Lord Hardwicke there said that since the time of Henry VII., the general ground the courts have gone upon of relaxing the strict construction of law, is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during the term. He added, "one reason which weighs with me is its being a mixed case between enjoying the profits of the land and carrying on a species of trade; and in considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers." The case, too, of a cider-mill between the executor and heir, &c., is extremely strong, for though cider is a part of the profits of the real estate, yet it was held by Lord Chief Baron Comyns, a very able common lawyer, that the cider-mill was personal estate, notwithstanding, and that it should go to the executor. "It does not differ it, in my opinion, whether the shed be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." In *Penton v. Robert*

(2 East, 88), it was further decided that a tenant might remove his fixtures for trade, even after the expiration of his term, if he yet remained in possession; and Lord Kenyon recognized the doctrine in its most liberal extent.

It has been suggested at the bar that this exception in favor of trade has never been applied to cases like that before the court, where a large house has been built and used in part as a family residence. But the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boiler of one or two stories high, and on whatever foundations he may choose. In *Lawton v. Lawton* (3 Atk. R., 13), Lord Hardwicke said (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. In *Penton v. Robart* (2 East's R., 88), the building had a brick foundation, let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In *Elwes v. Maw* (3 East's R., 37), Lord Ellenborough expressly stated that there was no difference between the building covering any fixed engine, **147*** utensils, and the latter. The only point is whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord Kenyon (*Dean v. Allalley*, 3 Esp. Rep., 11; Woodfall's Landlord and Tenant, 219), is to the same effect.

Then, as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling-house for the family, independently of carrying on the trade, then it would, doubtless, be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well without the presence of many persons, by night as well as by day. It is so in some valuable manufactories. It is not unusual for persons employed in a bakery to sleep in the same building. Now, what was the evidence in the present case? It was "that the defendant erected the building before mentioned with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business." The residence of the family was then auxiliary to the dairy; it was for the accommodation and beneficial operations of this trade.

Surely it cannot be doubted that in a business of this nature the immediate presence of the family and servants, was, or might be, of very great utility and importance. The defendant was also a carpenter, and carried on his business, as such, in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or eva-

sion to conceal another, which was the principal design; and, unless we are prepared to say (which we are not) that the mere fact that the house was used for a dwelling-house, as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it. At most, it would be deemed only a mixed *case, analogous in principle to those [***148** before Lord Chief Baron Comyns and Lord Hardwicke, and, therefore, entitled to the benefit of the exception. The case of *Holmes v. Tremper* (20 Johns. R., 29) proceeds upon principles equally liberal; and it is quite certain that the Supreme Court of New York were not prepared at that time to adopt the doctrine of *Elwes v. Maw*, in respect to erections for agricultural purposes. In our opinion the Circuit Court was right in refusing the first instruction.

The second exception proceeds upon the ground that it was not competent to establish a usage and custom in the city of Washington for tenants to make such removals of buildings during their term. We can perceive no objection to such proof. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it. Cases of this sort are familiar in the books; as, for instance, to prove the right of a tenant to an away-going crop. (2 Starkie on Evidence, Part IV., p. 453.) In the very class of cases now before the court, the custom of the country has been admitted to decide the right of the tenant to remove fixtures. (Woodfall's Landlord and Tenant, 218.) The case before Lord Chief Justice Treby turned upon that point. (Buller's *Nisi Prius*, 34.)

The third exception turns upon the consideration whether the parol testimony was competent to establish such a usage and custom. Competent it certainly was, if by competent is meant that it was admissible to go to the jury. Whether it was such as ought to have satisfied their minds on the matter of fact was solely for their consideration; open, indeed, to such commentary and observation as the court might think proper in its discretion to lay before them for their aid and guidance. We cannot say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose *and [***149** indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense it was within their own province to weigh it as proof or as usage.

The last exception professes to call upon the court to institute a comparison between the testimony introduced by the plaintiff and that introduced by the defendant against and for the usage. It requires from the court a decision upon its relative weight and credibility, which the court were not justified in giving to the jury in the shape of a positive instruction. Upon the whole, in our judgment, there is no error in the judgment of the Circuit Court, and it is affirmed with costs.

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is the opinion of this court that there is no error in the judgment of the said Circuit Court. Whereupon it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—5 Otto, 238.

150*] *ROBERT BOYCE, *Plaintiff in Error*,

v.

PAUL ANDERSON, *Defendant in Error*.

Responsibility of common carriers—Conveyance of slaves.

The law regulating the responsibility of common carriers does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not, and cannot have over them, the same absolute control that he has over inanimate matter. In the nature of things, and in their character, they resemble passengers, and not packages of goods. It would seem reasonable, therefore, that the responsibility of the carriers should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. [155]

The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, its necessity and its policy are admitted; yet it ought not to be carried further or applied to new cases. It has not been applied to living men, and it ought not to be. [155]

The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves. [156]

WRIT of error to the Circuit Court of Kentucky.

The case was submitted to the court on the part of the counsel for the plaintiff in error, *Mr. Rowan*, upon the following brief:

This was an action in the court below against defendants in error, owners of the steamboat Washington, to recover from them the value of four slaves, the property of the plaintiff, who, he alleged, were delivered to the commandants of said boat, to be carried thereon, and who, he alleged, were drowned by the carelessness, negligence, neglect or mismanagement of the captain and commandants of the said steamboat.

The declaration contained two counts, which are in the ordinary form.

Plea, not guilty, and joinder in the usual form.

Upon the trial of the cause the following bill of exceptions was signed by the judges, viz.: "Be it remembered, that at the trial of this cause the plaintiff gave evidence, conducing to prove that the defendants were owners of the steamboat Washington. That the said boat Washington by them was used and employed, on the Mississippi and Ohio rivers, as a common carrier of property and passengers, for freight and reward. That the steamboat

151*] Teche, in descending *the Mississippi, with the plaintiff's agent and the negroes mentioned in the declaration, and others on board,

Peters 2.

was blown up and set on fire, and the passengers escaped from the burning Teche to the shore, about six miles below Natches. That the steamboat Washington was ascending the Mississippi, and passed the burning Teche, and when she came opposite to them, the plaintiff's agent, the negroes, and others who had escaped from the Teche, were on shore; the agent of the plaintiff, with the negroes belonging to the plaintiff, was received into the yawl belonging to the defendants, a tender to the steamboat, for the purpose of conveying the negroes from the shore, on the Mississippi, to the steamboat, to be put on board the steamboat, and that the yawl was upset, the negroes in the declaration mentioned were drowned; and evidence conducing to show that the yawl was upset by ill and imprudent management, in putting the steamboat in motion as the yawl approached, and before the passengers were on board the steamboat."

The defendants, on their part, gave evidence conducing to show that these negroes and other persons, to the number of sixteen, had been passengers on board the steamboat Teche, which had taken fire, and the passengers had been put on shore, about six miles below Natches, from said Teche, in her distress. That these passengers, including the negroes, were taken into the yawl of the steamboat Washington, from their distress, so as aforesaid, from motives of humanity, and without any view to reward, at the request of Captain Campbell, commanding the Teche, or of the agent of the plaintiff. That there was no agreement for hire, reward or freight; none was charged or received. That it was the custom of steamboats in the river not to claim passage money or reward in such cases from persons who were in distress and unable to pay. And to repel the evidence of plaintiff as to negligence, it appeared that there was no contract in this case between the agent of the plaintiff and the owners or officer of the steamboat about reward; but the yawl was sent to shore, and the passengers taken in without any contract or conversation about the carriage, or about any reward.

*The steamboat Teche when she took [*152 fire was descending. The steamboat Washington was ascending.

Upon this evidence the plaintiff moved the court to instruct the jury:

1. That if they find, from the evidence, that the defendants were owners of the steamboat, and by themselves, their officer, or servants of the boat, did actually receive into their yawl, the negroes of the plaintiff, to be carried from shore on board the steamboat, they are responsible for neglect and imprudent management, notwithstanding no reward, or hire, or freight, or wages, were to have been paid by Boyce to defendants.

2. That if they find from the evidence, that the steamboat Washington was owned by defendants, and used by them, on the river, as a common carrier, for wages and freight, and that the slaves of plaintiff were actually received by the agents and servants of the defendants, on board of the yawl, of and belonging to the defendants as a tender of the steamboat, to be carried from the land, and put on board the steamboat, to be therein carried and trans-

ported, that the defendants were bound to the most skillful and careful management; and if the slaves were drowned in consequence of any omission of such skillful and careful management by the agents and servants in the conduct and navigation of the boat and tender, the defendants are answerable to the plaintiffs for the value of the slaves.

3. That if the jury believe the evidence in this case, the defendants would have had a legal right to demand a reasonable compensation for their undertaking to transport said slaves on board their boat; and their afterwards waiving, or declining that right, from motives of humanity, or any other motive, does not change or diminish their legal responsibility as common carriers for hire or reward.

The defendants moved the court "to instruct the jury that if they find from the evidence that the slaves in controversy were taken on board of the yawl at the instance, and in pursuance of the request of the captain of the *Teche*, from motives of humanity and courtesy alone, that the defendants are not liable, unless **153***] they shall be of opinion that *the slaves were lost through the gross neglect of the captain of the steamboat, or the other servants or agents of the defendants."

The court gave the first instruction moved by the plaintiff, with this qualification, "that gross negligence, or unskillful conduct was required to charge the defendants." The second and third instruction moved by the plaintiff, the court refused to give, and instructed the jury, "that the doctrine of common carriers did not apply to the case of carrying intelligent beings, such as negroes: but that the defendants were chargeable for negligence, or unskillful conduct." The court gave the instructions asked for by the defendants.

It is believed and alleged, that the court erred in refusing to give the instructions required by plaintiff, and in giving those required by defendants: and especially, in instructing the jury that the doctrine of common carriers did not apply to the case.

The counsel for the defendants in error, Mr. Bates, stated, that the question in the cause was, whether the law of carriers applies to the transportation or conveyance of slaves.

He contended, that in all its principles the law did not and could not extend. The care which might be exercised over inanimate property, which could be disposed of for its security at the will of the carrier, was not to be exercised on human beings, with the powers and rights of locomotion, and of self-preservation by different means from those which were enjoined on the carriers of merchandise. The responsibility of the carrier of slaves must therefore be limited.

Under the Roman law the condition of slaves was essentially different from that of slaves here. In Rome the power of life and death was vested in the master. Here slaves have rights secured to them; they are protected by law to a certain extent from personal violence, their lives are under the guardianship of the law; and they have even some political power, as they are enumerated in the represented population of the United States. Slaves are here in a mixed character.

The general doctrine of the law of carriers will not, therefore, *apply to them; but [***154** those principles which by that law impose obligations on the carrier not to suffer or commit gross negligence do apply. The facts in this case do not establish gross negligence, and as the carriers of the boat were not bound for "the most skillful care," but only for "usual care," the plaintiff in error has no case.

The proposition in the second instruction is, that the owners of the steamboat *Washington* might have received a compensation for carrying the slaves from the shore to the boat. It is contended that there was no contract, and Lord Mansfield has said, that no compensation is due for a voluntary courtesy. Upon the Mississippi no compensation is ever given for carriage from the shore to the boat; and in this case, the obligations of humanity alone prompted those acts, from which the plaintiffs demand of this court, that the owners of the *Washington* shall be made liable for the slaves lost by the performance of gratuitous kindness. Such a decision would be against policy as well as against justice.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This was an action brought in the Court of the United States for the Seventh Circuit and District of Kentucky, against the defendants, owners, &c.

There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, "that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes."

That doctrine is, that the carrier is responsible for every loss which is not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment, by considerations of policy. Can a sound distinction be taken between a human being in whose person another has an interest, and inanimate property?

A slave has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity *forbid this proceeding, but [***155** it might endanger his life or health. Consequently this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier, for injury which such person may sustain, has never been placed on the same principle with his responsibility for a bale of

goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible farther.

The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried farther, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them.

The directions given by the court to the jury informed them that the defendants were responsible for negligence or unskillful conduct, but not otherwise.

Sir William Jones, in his treatise on Bailments, p. 14, says: "When the contract is reciprocally beneficial to both parties, the obligation hangs in an even balance; and there can be no reason to recede from the standard; nothing more, therefore, ought in that case to be required than ordinary diligence, and the bailee should be responsible for no more than ordinary neglect." In another place (p. 144), the same author says: "A carrier for hire ought, by the rule, to be responsible only for ordinary neglect; **156*** and in the time of Henry *VIII., it appears to have been generally holden, that a common carrier was chargeable in case of a loss by robbery, only when he had traveled by ways dangerous for robbing, or driven by night, or at any inconvenient hour."

This rule, as relates to the conveyance of goods, was changed as commerce advanced, from motives of policy. But if the court is right in supposing that the strict rule introduced for general commercial objects, does not apply to the conveyance of slaves, the ancient rule "that the carrier is liable only for ordinary neglect," still applies to them.

If the slaves were taken on board the yawl to be conveyed in the steamboat, solely in consequence of their distress, and from motives of humanity alone, no reward, hire or freight being to be paid for their passage, as the first prayer of the plaintiff and the prayer of the defendant suppose, the carrier would certainly be responsible only in a case of gross neglect; and the qualification annexed to this construction was correct.

We think that in the case stated for the instruction of the Circuit Court, the defendants were responsible for the injury sustained, only in the event of its being caused by the negligence, or the unskillfulness of the defendants or their agents, and that there is no error in the opinion given.

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

*JULIA THOMPSON, Tenant, *Appellant*,
v. **[*157]**
ALICE TOLMIE ET AL., *Appellees*.

Power of Circuit Court of the county of Washington—proceedings of court of competent jurisdiction—Maryland act as to devises of real estate—bona fide sales by order of Orphans' Court—decisions in Elliott v. Peirsol.

It was assumed on the argument by the counsel on both sides, that the Circuit Court of the county of Washington, in the District of Columbia, is vested with the same power in relation to intestate's estates in that county that is possessed by a county court in Maryland over lands lying within the county. [162]

When the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on a direct appeal. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any suit are to be corrected by some direct proceeding, either before the same court to set them aside, or in an Appellate Court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question. [163]

The Act of the Legislature of Maryland, relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision: that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission, and all the proceedings, should be set out in *hæc verba*. If the substance of the proceedings is recited, it is sufficient. [167]

The law appears to be settled in the States, that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. [167]

The decision of this court in *Elliott v. Peirsol* (1 Peters, 340) was not intended to decide anything at variance with the principles established in this case. [168]

When the jurisdiction of the court on the subject under whose authority lands have been sold, appears on the face of the proceedings, its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally. [169]

THIS case came up by appeal from the Circuit Court for the county of Washington, in the District of Columbia, where a verdict was taken for the appellees, subject to the opinion of the court, upon the following agreed case:

"The plaintiff, to prove title to the premises (lot No. 14 in square No. 290 in the city of Washington), showed a title in Robert Tolmie, regularly deduced by sundry admitted mesne conveyances from David Burnes, one of the *original proprietors of city property, **[*158]** duly executed and acknowledged and recorded to the said premises, accompanied by possession thereof and payment of taxes thereon by the several grantees, according to the titles, down to the year 1805, when the said Robert Tolmie, the last grantee in whom the said title had vested, departed this life intestate, leaving Margaret, Alice, and James Tolmie, his only three children and heirs-at-law, infants at the time of his death, under the age of 21 years;

Criticised—13 Pet., 192.

Cited—3 Woods, 248, 382; 3 Cliff., 421; 1 Abb. U. S., 467; Abb. Adm., 359.

Peters 2.

that the said infants continued in possession of said premises until some time in the year 1814; that Margaret was the eldest of said infants, and that in the year 1812 she intermarried with one Francis Beveridge, and has since died, leaving three children, to wit, Margaret Beveridge, Hannah Beveridge, and James Beveridge, who are named among the lessors of the plaintiff; that James Tolmie aforesaid also died after the death of said Margaret, his sister, intestate, under age and unmarried, prior to the commencement of this suit, leaving Alice aforesaid, his sister, and the said three children of Margaret his heirs-at-law. And the plaintiff also proved that the said Margaret Tolmie was 17 years of age at the time of her said marriage, which was in 1812, and was an infant under the age of 21 years at the time of the sale made by the commissioners hereinafter named; that her husband, the said Francis Beveridge, some time in the year 1814 or 1815, went away, leaving his family residents of the city of Washington; that after some time he returned and lived with his family, and again went away, and has never since returned, and is generally believed to be dead by his family and friends; about three or four years ago he was heard of, and was then sick, and has never been heard of since.

"The defendant has had possession of the premises since 1814, when she became the purchaser thereof (by her then name Julia Kean) at a public sale made by certain commissioners appointed under the Act of the Assembly of Maryland of 1786, c. 45, to direct descents. She entered in pursuance of that sale, claiming the lot under it, and produced in evidence the proceedings of the commissioners, which are made part of the case agreed."

159*] *That record contains a petition in the usual form for partition of the real estate of Robert Tolmie, which purports to be the joint petition of Francis Beveridge and Margaret, his wife, and of Alice Tolmie and James Tolmie, infants, by Margaret Tolmie, their guardian, mother, and next friend. It states that Robert Tolmie died seized, leaving Margaret his widow, and also the following children, his heirs-at-law, viz.: "Margaret, since intermarried with Francis Beveridge, said Alice Tolmie and James Tolmie, which said Alice and James are infants under the age of 21 years." This petition was filed on the 15th of June, 1814, and a commission issued on the same day. On the 17th of June, 1814, the commissioners reported that the estate consisted of a single lot, and could not be divided, without loss, &c., and valued the same at \$1,400. Whereupon, at June term, 1814, the court ordered the property to be sold at public auction on ten days' notice, one-fourth part of the purchase money in cash, and the residue at three, six, and nine months, taking bond with good security to the heirs according to their several interests. On the 5th of July, 1814, F. Beveridge and wife, and Alice and James Tolmie, by their mother, gave notice in writing that they did not elect to take the property at the valuation. On the 3d of July, 1818, the commissioners reported that they had sold the property, on the 30th of July, 1814, to the appellant, for \$1,105, on a credit of three, six, and nine months, one-fourth being paid in

cash, and that she gave due security for the payment of the purchase money, all which has been duly paid; they therefore requested that the said sale might be ratified, and that they might be directed to distribute the proceeds, and make a conveyance to the purchaser. On the same 3d of July, the court "ordered that the report of the commissioners returned and filed in this cause be, and the same is hereby ratified and confirmed, so soon as proper receipts of the parties are produced before one of the judges of this court, and that then the commissioners, or a majority of them, make a sufficient deed in fee to the purchaser." On the 13th of June, 1816, the majority of the commissioners made a deed to the appellant, which recites, that by a decree of the Circuit *Court, sitting as a court of chancery, [***160** David Appler, &c., were appointed commissioners, and they, or a majority of them, were authorized and empowered to sell said lot, the real estate of Robert Tolmie, deceased; and that in pursuance of said decree the said Appler, &c., did, on the 30th of July, 1814, sell the same to the appellant for \$1,070; that the said purchase money had been paid, and that the said Appler, &c., were authorized and empowered by said decree to execute a conveyance of the same, and accordingly the said Appler, &c., conveyed said lot to the appellant and her heirs.

The statutes are the Acts of Assembly of Maryland of 1786, c. 45, s. 8; 1797, c. 114, s. 6, and 1799, c. 49, ss. 3, 4.

This ejectment was brought by Alice Tolmie, and by the three infant children of her sister, Margaret Beveridge; who, since the death of the said Margaret and of the said James Tolmie, have claimed to be entitled to the lot, as heirs of the said Robert Tolmie. The defendant entered under, and relied on, the commissioners' sale above, which the lessors of the plaintiff contended was void. (1) Because none of the heirs of Robert Tolmie had arrived at age at the time of the sale; the Act of 1786 expressly prohibiting a sale until the eldest was of age. (2) Because the sale was never ratified by the court. (3) Because bonds for the purchase money were not taken payable to each representative, according to his proportionable part of the net amount of sales, and (4) because the deed does not recite the commission and all the necessary proceedings thereon to show a good title.

Mr. Wilde and *Mr. Jones*, for the appellant, argued:

1. That the sale of the property of Robert Tolmie was a judicial proceeding, made in a court of competent jurisdiction acting as a court of chancery, and proceeding *in rem*, in the proper exercise of its authority; and was therefore conclusive upon all the world. (*Gelston v. Hoyt*, 3 Wheaton, 246.) But if it were otherwise, the law is, that a sale made under an erroneous judgment is always deemed valid; and in Maryland it has been held that a decree in equity for the sale of lands, to pay debts, or for distribution, is a *proceeding *in* [***161** *rem*, and cannot be questioned. (6 Harris & Johns., 23.)

The principle of law is, that if the jurisdiction of the court attaches to the subject-matter, the proceeding cannot be examined in a col-

lateral manner in another court. If error exist in the proceedings, by the ministerial acts of those who are the agents of the court in the same, although it is admitted those acts should not be strictly conformable to the law of the proceeding, those errors can only be examined before the tribunal from which the authority of the agents emanated. So far as the purchaser of an estate is concerned, it is entirely immaterial whether the agents of the court did their duty; the only remedy is by application to the court. (8 Johns., 361; 1 Cowen, 622; 13 Johns., 97.) In those States where the sales of estates of intestates are under the authority of the courts of probate, the proceedings of such courts have been held conclusive. (2 Doug., 312; 1 Connecticut Rep., 469; 4 Day, 221.)

The purchaser is entitled to claim that all the proceedings shall be presumed to be regular; and if any were not so, proof of the irregularity should be given. When the court ratified this sale, the conclusion is, that before the same was done, all the intermediate steps had been examined, were approved, and were regular.

Mr. Key, for the defendant, stated that the title set up by the plaintiff was derived from particular statutes of Maryland, and the validity of the sale depended on the conformity between the proceedings and the requisites of the law. This has not been the course in the case before the court.

He denied that the sale was by a judicial decree of a court, but by commissioners, under the special statute. The sale having been irregular, was therefore invalid, on the authority of the cases in 4 Wheaton, 79; 3 Cranch, 331; 2 Wash., 382.

The proceedings did not derive their authority from the general powers of the court; and the Circuit Court acted in this case under the special limited powers granted by the Maryland law. It was therefore necessary that all **162*** the facts upon which the power was exercised should appear. (Cowper, 528; 5 Harris & Johns., 42, 130; 1 Peters, 340; 6 Harris & Johns., 258.)

But if the commissioners had power to make the sale, the ratification of the same by the court is essential. No ratification was given, no receipts of the purchase money produced; for the proper evidence of these, is their recital in the deed of conveyance.

Mr. Justice THOMPSON delivered the opinion of the court:

This was an action of ejectment brought in the Circuit Court of the District of Columbia, in the county of Washington, to recover possession of lot No. 14 in square No. 290, in the city of Washington. Upon the trial, the lessors of the plaintiff produced, and proved by sundry mesne conveyances, a title to the premises in question, from David Burnes, one of the original proprietors of city property, to Robert Tolmie, who, in the year 1805, died intestate. And it was also proved that the lessors of the plaintiff are the heirs-at-law of Robert Tolmie.

The defendant claimed title to the premises in question, under a purchase made at a commissioners' sale, by virtue of certain proceedings, had in the Circuit Court, pursuant to the provisions of the laws of Maryland relative to a

division of the real estate of intestates in certain cases. Objections were made to the validity of these proceedings, and a verdict taken for the plaintiff, subject to the opinion of the court upon a case agreed. The court below decided that the commissioners' sale was void, and rendered judgment for the plaintiff for two-thirds of the premises in question, and the case comes now before this court upon a writ of error.

The case, in the Circuit Court, turned entirely upon questions arising upon the proceedings under which the sale was made. It was assumed on the argument by the counsel on both sides, that the Circuit Court in which these proceedings were had, was vested with the same powers in this respect, in relation to intestates' estate in the county of Washington, that is possessed by a county court in Maryland on this subject, over lands lying within the county.

*The exceptions taken to the proceed- **[*163]** ings were:

1. Because none of the heirs of Robert Tolmie were of age at time of the sale.

2. Because the sale was never ratified by the court.

3. Because bonds for the purchase money were not taken, payable to each representative, according to his proportional part of the net amount of the sale.

4. Because the deed does not recite the commission and all the necessary proceedings thereon, to show a good title.

The counsel for the defendant in error have, in the argument, considered these proceedings open to the same examination and objections, as they would be in an appellate court, on a direct proceeding to bring them under review. This, however, is not the light in which we view the questions now before us. These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question.

The first inquiry therefore is, whether it sufficiently appears, upon the face of these proceedings, that the court had jurisdiction of the subject-matter. The law of Maryland under which they took place, (Act of 1786, ch. 45, head 8) declares that in case the parties entitled to the intestate's estate cannot agree upon the division; or in case any person entitled to any part be a minor; application may be made to the court of the county where the estate lies, and *the court shall appoint and issue **[*164]** a commission to five discreet men, who are re-

quired to adjudge and determine whether the estate will admit of being divided without injury and loss to all the parties entitled; and to ascertain the value of the estate. And if the estate can be divided without loss or injury to the parties, the commissioners are required to make partition of the same. And if they shall determine that the estate cannot be divided without loss, they shall make return to the County Court of their judgment, and the reasons upon which the same is formed; and also the real value of the estate. And if the judgment of the commissioners shall be confirmed by the County Court, then the eldest son, child, or persons entitled, if of age, shall have the election to take the whole of the estate, and pay to the others their just proportion of the value in money; and on the refusal of the eldest child, the same election is given in succession to the other children, or persons entitled, who are of age; and if all refuse, the estate is to be sold under the direction of the commissioners, and the purchase money divided among the several persons entitled, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the eldest arrives to age, and the profits of the estate shall be equally divided in the meantime.

The principal objection raised to the title of the defendant below, and indeed the only one that presents any difficulty is, that upon the trial of this cause it was proved that none of the heirs of Robert Tolmie had arrived at age when the sale was made; and how far this will affect the sale will depend upon the question whether the proceedings on the partition, when brought up in this collateral way, were open to an inquiry into that fact. Did the jurisdiction of the court over the subject-matter of the proceedings depend upon that fact; or if true, was it matter of error, and to be corrected only on appeal?

It is to be borne in mind, that no such fact appears on the face of these proceedings; but on the contrary, from what is stated, it may reasonably be inferred that it appeared, before **165*** the court, that one of the heirs was of age. The petition presented to the court for the appointment of commissioners, and which was the commencement of the proceedings, in setting out the parties interested, states that Robert Tolmie died intestate, leaving the following children and heirs-at-law, viz.: Margaret, since intermarried with Francis Beveridge, and Alice Tolmie, and James Tolmie, which said Alice and James are infants, under the age of twenty-one years. Why specially allege that these two were minors if Margaret was also a minor? Every reasonable intendment is to be made in favor of the proceedings; and their allegation in the petition will fairly admit of the conclusion that the petitioners intended to assert, that Alice and James only were under age. The age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law nowhere requires the court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the court had satisfactory evidence before it that one of the heirs was of age. If it was so stated in terms, on the face of the proceedings, and even if the juris-

diction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question, in this collateral way, is certainly not warranted by any principle of law.

But, independent of these considerations, the jurisdiction of the court over the subject-matter of the proceedings sufficiently appears. It did not depend on the fact that one of the heirs was of age. But according to the express terms of the act, it attaches when the ancestor dies intestate, and any of the persons entitled to his estate is a minor. The petition states that Robert Tolmie, late of the county of Washington, died intestate, seized in fee of lot No. 14 in square No. 290, leaving Alice Tolmie and James Tolmie, two of his children, and heirs-at-law, under the age of one and twenty years. And whether Margaret Beveridge, his other child and heir, was of age or not, was immaterial, as it respected the jurisdiction of the court. That fact could only become material [***166** in case the land was not susceptible of a division, without injury or loss to the parties. If it could be divided without injury, the commissioners were required to divide it, although all the heirs were minors. The materiality of the inquiry, whether any one of the heirs was of age, was altogether contingent, and might never arise. And at all events, must depend upon the report of the commissioners, whether or not the property might be divided without injury. This must, necessarily, therefore, be an inquiry arising in the course of the proceedings, and after the jurisdiction of the court attached.

With respect to the other exceptions, it would be difficult to sustain them, if the proceedings were before this court on a direct appeal. No more could be required than to set forth enough to show the jurisdiction of the court, and a substantial compliance with the requirements of the law. In June term, 1814, the court confirmed the report of the commissioners, that the property would not admit of a division, and ordered a sale thereof; prescribing the terms, viz., one-fourth cash, and the other three-fourths on a credit of three, six, and nine months, taking bonds, with good security to the heirs according to the several rights, bearing interest from the day of sale. On the 15th of June, 1815, after the expiration of the time of credit, ordered by the court to be given, the commissioners report a sale of the lot to the defendant below for \$1,105, and that the purchase money and interest had all been paid, and they request that the sale may be ratified, and they directed to distribute the money, and make a conveyance to the purchaser. It is objected that it does not appear that bonds were given to the heirs, according to the order of the court and the directions of the Act of 1799. But this objection cannot certainly be considered of any importance, after the money had been paid by the purchaser, and the report ratified and confirmed by the court, and the commissioners directed to make a deed to the purchaser. But it is said this was a conditional ratification, and not to take effect until receipts from the parties entitled to the money were produced to one of the judges of the court. Suppose this is to be considered a conditional ratification, and the

167*] *purchaser not entitled to a deed until the condition was performed. Where is the evidence that affords any inference that it was not performed? The receipts were to be produced to one of the judges of the court, and was not a matter which the court were afterwards to sanction or pass any order upon. It was not a judicial act, and would not of course be made matter of record. And the deed being afterwards given, affords a pretty fair inference that the order of the court had been complied with.

The last objection is, that the deed does not recite the commission and all the necessary proceedings thereon, to show a good title.

The Act of 1799, in directing the commissioners when to give deeds to purchasers, has the general provision, that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission and all the proceedings should be set out in *hæc verba*; and the substance of them is recited, which is all that could be necessary. So that this exception is not well taken as to the matter of fact.

From this brief notice of the several objections which have been taken to these proceedings, it will be seen that in the opinion of this court the three last are unfounded, and could not be sustained even on a direct appeal; and the first, although entitled to more consideration, cannot, at all events, be raised, when the proceedings are collaterally drawn in question, as they were on the trial of this cause.

The Maryland cases cited in the argument, and reported by Harris & Johnson, Vol. V., 42, 130, and Vol. VI., 156, 258, do not throw much light upon the particular questions drawn under examination in this case. Some of them, however, are very strong cases to show how far the courts of that State will go, to sustain *bona fide* titles acquired under sales made by virtue of these statutes. The rules which apply to, and govern titles acquired under sales made by order of orphans' courts, and courts of probate, in the states where such regulations are adopted, are applicable to the case now before the court. The case of *M'Pherson v. Culliff* (11 Serg. & Rawle, 429), was one of this **168*]** description, and brought *under the consideration of the Supreme Court of Pennsylvania, the effect of a decree of the Orphans' Court, in matters within its jurisdiction, although founded in a mistake of facts. And in the discussion of that question, which is gone into very much at large, rules are laid down which have a strong bearing upon the present case. When there is a fair sale, say the court, and the decree executed by a conveyance from the administrator, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. After a lapse of years, presumptions must be made in favor of what does not appear. If the purchaser was responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look further back than the order of the court. He is not to see whether the court was mistaken in the facts of debts and children. That the decree of an orphan's Peters 2. U. S., Book 7,

court, in a case within its jurisdiction, is reversible only on appeal, and not collaterally in another suit.

In *Perkins v. Fairfield* (11 Mass. Rep., 227), in the Supreme Judicial Court of Massachusetts, it was held, that a title under a sale by administration, by virtue of a license from the Court of Common Pleas, was good against the heirs of the intestate, although the license was granted upon a certificate of the judge of probates, not authorized by the circumstances of the case. The court said the license was granted by a court having jurisdiction of the subject. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence from the Probate Court, yet it is not to be corrected at the expense of the purchaser; who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction. The case of *Elliott v. Peirsol* (1 Peters, 340), decided in this court at the last term, has been referred to by the counsel for the defendant in error, as containing a doctrine that will let in every possible objection that can be made to these proceedings.

The observation relied upon is, "but we cannot yield an assent to the proposition that the jurisdiction of the County Court could not be questioned, when its proceedings were brought collaterally before the Circuit Court." This remark was only in answer to the argument which had been urged at the bar that the Circuit Court could not question the jurisdiction of the County Court. That it was so intended is obvious from what immediately follows. "We know nothing in the organization of the circuit courts of the Union, which can contradistinguish them from other courts in this respect." And the limitation upon the extent of the inquiry, when the proceedings are brought collaterally before the court, is explicitly laid down. "We agree, that if the County Court had jurisdiction, its decisions would be conclusive. When a court has jurisdiction, it has a right to decide every question that occurs in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought in opposition to them even prior to a reversal."

This is the clear and well-settled doctrine of the law, and applies to the case now before the court. The jurisdiction of the court (under whose order the sale was made) over the subject-matter, appears upon the face of the proceedings; and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally, as they were in the Circuit Court.

The judgment of the court below must, accordingly, be reversed, and the record sent back, with directions to the court to enter judgment for the defendant.

Rev'g, 3 Cranch, C. C., 133.

Cited—6 Pet., 730; 10 Pet., 477, 478; 14 Pet., 600, 628; 16 Pet., 87; 2 How., 319, 339, 340-343, 348; 8 How., 554; 18 How., 503; 22 How. 14; 2 Wall., 345; 10 Wall., 316; 12 Otto, 464; 14 Otto, 391; 1 Wood & M., 180; Bald., 272; 1 Cliff., 437; 1 McLean, 225; 2 McLean, 62, 64, 485; 4 McLean, 452; 5 Mason, 335; 12 Bank, Reg., 101; 1 Woods, 5; 2 Sawy., 621; 1 Biss., 270; 1 Story, 553; 4 Dill., 343.

170*] *THOMAS F. TOWNSLEY, *Plaintiff in Error*,

v.

JOSEPH K. SUMRALL, *Defendant in Error*.

Bills of exchange—protest by notary—consideration—statute of frauds—promise of drawee to accept bill of exchange.

Bills of exchange, payable at a given time, after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity. [178]

It is admitted that in respect to foreign bills of exchange, the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence. [179]

It is not disputed, that by the general custom of merchants in the United States, bills of exchange, drawn in one state on another state, are, if dishonored, protested by a notary; and the production of such protest is the customary document of dishonor. [180]

If a person undertake to accept a bill, in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it; and the bill is purchased upon the credit of such promise for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice as well as in law, it ought to bind him. [181]

If A says to B, "Pay so much money to C, and I will repay it to you," it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract. [182]

Damage to the promisee constitutes as good a consideration as benefit to the promisor. [182]

In cases not absolutely closed by authority, this court has always expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises, made by different persons at the same time upon the same general consideration. [182]

It can make no difference in law whether the debt for which a bill of exchange is taken is a pre-existing debt, or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards. In each case, the object of the promise is to induce the party to take the bill upon the credit of the promise. [182]

If the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the drawer, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer, the promise of the drawee to accept the bill constitutes a valid contract between the parties, notwithstanding the failure of the drawer to place funds in his hands. The acceptance of the drawee of a bill, binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance. [183]

171*] *THIS suit was originally instituted by Joseph K. Sumrall, in a State court of Kentucky, and afterwards, on the petition of Thomas F. Townsley, the defendant below, removed into the Circuit Court of the United States for the District of Kentucky, where the

same was tried before a jury, and a verdict rendered for the plaintiff.

The action was upon an alleged verbal promise made by the defendant, as one of the partners of Townsley & Co., that they would accept a certain draft or drafts, to be drawn on them at New Orleans by one Richard S. Waters, in favor of Joseph K. Sumrall; and the cause of action alleged was a failure to comply with the promise. The bill was drawn and remitted to New Orleans, and not being paid, was returned under protest to Kentucky, and this suit was brought.

On the trial of the Circuit Court, various bills of exceptions were taken by the defendant, all of which are stated in the opinion of this court; and in which opinion is also stated the points on which the plaintiff in error sought to obtain a reversal of the judgment of the Circuit Court.

Mr. Coxe, for the plaintiff in error, contended:

1. That a parol promise to accept a non-existing bill does not constitute a contract, for the breach of which an action may be maintained.

He admitted that the acceptance of an existing bill might be by parol; but the allowance of such a principle of law had been regretted by judges. A written agreement to accept a bill not yet drawn, is valid; but there has been no decision which affirmed that a parol acceptance of such a bill is binding; and the leaning of courts has been against it. (Cited, 2 Wheat., 66; 1 East, 98; 4 East, 57; 5 East, 514; 1 Atk., 611; 3 Mass., 10.)

The general principle of our law is, that a verbal promise of this kind will not sustain an action. The provisions of the statute of frauds are infringed by making it otherwise.

The admission of such a parol contract will lead to difficulties and uncertainties; and the danger of such a course is shown in this case, as no one of the witnesses, of three *who [172] were examined, represent the agreement to accept to the same extent.

2. The court were requested to instruct the jury, that if they believed the bill was drawn by Waters to pay a partnership debt, as stated by Waters, they should find for the defendant.

This was accommodation paper, the benefit of which was to enure to the drawer and the payee, to enable them to pay a joint debt. No consideration, in fact, passed for it from the plaintiff to either the drawer or the drawee. He stands in the same situation he would have been in if it had never been drawn.

This prayer, and this view of the case, are put hypothetically to the jury. The facts upon which they are based are detailed in the testimony of Waters, and the jury was to judge of his credit. There was therefore enough to warrant the prayer, and it should have been allowed. So, also, he contended, the next instruction should not have been refused, as it leaves to the jury the decision upon the testimony of Waters.

Upon the question whether, if a bill be drawn in Kentucky, on a person in New Orleans, the protest is, in itself, evidence of demand and refusal, in *Nicholas v. Webb* (8 Wheaton, 326), it was held, that the protest of a foreign bill is sufficient; but a distinction is taken between foreign bills and those instruments in which a protest is not necessary, and therefore not the official act of the officers. In

NOTE.—Bills of exchange, payable at a given time after date, &c., when need not be presented for acceptance.

See notes to *Brown v. Barry*, 3 Dall., 365; *Wilson v. Lenox*, 1 Cranch, 194; *Fenwick v. Sears*, 1 Cranch, 259.

cases of inland bills the protest cannot be read. (*Chesmer v. Noyes*, 4 Camp., 129; 2 Barn. & Ald., 696.)

The Supreme Court of New York have held such bills as this to be inland bills. (*Miller v. Hackley*, 5 Johns., 175; also cited 2 Tucker's Blackst., 467; 5 Cowen, 363.)

Under the English statutes, provision is made to protect inland bills; but the same statutes prescribe that the acceptance shall be in writing.

At common law no protest of an inland bill of exchange was ever made. It was introduced by statute. By the law of Louisiana, an inland bill cannot be protested for non-payment, unless it has been accepted in writing; and the **173*** holder of an inland bill need not protest it. (Livington's Crim. Code, p. 55, art. 318; p. 73, art. 487; p. 99, art. 717.) The form of protest is to be conformable to the custom of the place where it is made. (P. 100, art. 727).

Although the contract was made in Kentucky, yet it was to be executed in Louisiana, and the law of that place must be the law of the contract. (1 Gallis. Rep., 371, 372; *Robinson v. Bland*, 2 Burr., 1077, 1079; 1 Bl. Rep., 256.)

Under the French law which prevails in Louisiana, no acceptance is valid unless it is in writing.

Mr. Nicholas, for the defendant in error, stated that the principal question is whether an agreement to accept a bill to be drawn was binding.

Originally, at common law, a verbal acceptance of a bill was as good as if it had been written; and courts have since gone further, and have made circumstances equivalent to an acceptance.

In *Coolidge v. Payson* (2 Wheaton, 66), this court decided, that a verbal acceptance was as good as one which is written; and whatever may be the law of England, this is now settled law in the United States. All the cases go upon the question whether the promise to accept was the inducement to take the bill.

If a verbal acceptance is as valid as one which is in writing, where is the authority to show that a parol agreement to accept a bill to be drawn is not binding. The objection to such an acceptance, on the ground of inconvenience, would prevail equally against all parol acceptances.

A verbal promise for a good consideration is binding, and the policy of extending the rules to bills to be drawn, to the same extent as it operates to bind the verbal acceptor of a bill drawn, is equal. In Kentucky, if A says to B "let C have four thousand dollars in goods, and I will pay the amount," the promise is good. Notwithstanding the statute of frauds, this is law in that State.

Before the statute of frauds any parol promise was good, even for the conveyance of a freehold; and until it shall be shown, that in the statute of frauds there is a provision against **174*** the contract upon which this suit is brought, it will operate.

The *lex loci* will sustain this contract. It was made in Kentucky, and was to be performed at New Orleans; and the remedy for the breach is to be obtained by the laws of Kentucky. A demand was necessary at New Orleans; but this did not transfer the contract to that place. *Peters* 2.

The law of Kentucky requires that a bill drawn on a person out of the state shall be protested. (2 Littell's Laws, 103, 105.) It not only authorizes a protest, but upon its being made, creates an additional liability for damages. Thus, therefore, the protest is by a statute, by provision, made necessary, and it becomes of course *prima facie* evidence of demand and refusal to pay. Upon principles frequently recognized, this court have decided that the law of Kentucky upon this matter will be respected and enforced here.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Kentucky. The original action was brought by the defendant in error, against the plaintiff in error, as one of the firm of Thomas F. Townsley & Co., to recover the amount of a bill of exchange, drawn at Maysville, in Kentucky, on the 27th of November, 1827, by one Richard S. Waters, on Messrs. Townsley & Co., at New Orleans, at 120 days after date for \$2,000, payable to Sumrall or order, which had been dishonored by the drawees.

The declaration contained various counts, some of which alleged an actual acceptance of the bill and non-payment thereof at maturity; others, a promise by the drawees to accept and pay the bill when drawn, if the original plaintiff would purchase the same from the drawer. The cause was tried upon the general issue, and a verdict was found for the original plaintiff for \$2,860, upon which he obtained judgment. A bill of exceptions was taken at the trial, upon which the questions are presented, which have been argued at the bar.

The bill of exceptions stated that the plaintiff offered in evidence the bill of exchange and the protest of the notary **public*, at [**175** New Orleans, to which evidence the defendant objected, but the court admitted the testimony.

Evidence was then given, by the testimony of John Sumrall, the plaintiff's brother, to show that in a conversation between the plaintiff and the defendant relative to some shipments which Richard S. Waters proposed to make to the firm of Thomas F. Townsley & Co., and bills to be drawn against them; when the plaintiff said he feared the bills would not be honored and paid, Thomas F. Townsley told the plaintiff that the firm would accept the bills of Waters, for \$4,000, and pay them at maturity. The plaintiff stated he wished to pay a debt in Philadelphia with the bills, and the produce to be shipped by Waters might not arrive in time to provide for them; to which Townsley replied, that if Waters would draw a bill or bills to the amount not exceeding \$4,000, such bill or bills should be accepted and paid, whether the produce arrived or not. Waters and the plaintiff had been in partnership before the conversation, but the partnership at the time it took place had been dissolved. Richard S. Waters testified that he had drawn the bill for \$2,000 upon which the suit was brought, and another for the same amount. That in a conversation with the plaintiff before the bills were drawn, the plaintiff wished him to draw for \$4,000; he said he was afraid to draw for \$4,000, and the plaintiff told him

Townsley had said he would pay one draft for \$2,000, whether the produce to be shipped arrived in time or not; and he agreed to draw for \$2,000, and after some hesitation he drew the other bill for \$2,000; both bills being drawn in favor of Sumrall; and it was perfectly understood between them that he had no funds in the hands of the drawees, and that the bills were to be sent to Philadelphia to discharge debts due by the plaintiff and himself as partners, to Toland & Rockhill, and to others; and the plaintiff agreed to help him to meet one of the bills, if he should be unable to pay both. He gave the plaintiff the bills for \$4,000 of partnership goods taken by him at the dissolution of the partnership. That the partnership accounts were not settled; and he received no other consideration for the bills than the receipt **176*** of the \$4,000 of partnership goods. He furnished Thomas F. Townsley & Co. with produce enough to pay one of the drafts, and they paid one of them. Townsley & Co. had no funds or effects in their hands belonging to him. On the dissolution of the partnership, he understood the plaintiff was to wind up the concern and pay the debts.

The defendant then offered in evidence the record of a suit of Toland & Rockhill against Sumrall & Waters, which was objected to, and the objection sustained by the court.

The deposition of Langhorne was then read, stating that in 1819 he heard Waters say, his credit was better abroad than at home, for Townsley had promised to accept for him for \$4,000 for Sumrall, whether his produce got down in time or not,

Evidence was also given to show, that shortly after the bills of exchange were drawn, Waters became totally insolvent.

The deposition of Samuel D. Lucas was read on the part of the plaintiff. He stated that he heard Townsley assure the plaintiff that the drafts of Waters to the amount of \$4,000, which Waters proposed to let the plaintiff have, to be drawn by Waters on the house of Thomas F. Townsley & Co., of New Orleans, at 120 days after date, should be paid. The plaintiff consented to take the drafts with considerable reluctance, for fear of accident; upon which Townsley assured him the drafts should be honored, whether the produce to be shipped by Waters arrived or not. Upon the faith of Townsley's accepting for Waters, the bills were received, and the plaintiff advanced large quantities of merchandise and other articles.

The plaintiff prayed the following instruction to the jury, which was given, and to which the defendant excepted: That if they shall believe from the evidence in this case that the defendant Townsley promised for himself and company, to Sumrall, that they would honor, accept, or pay bills drawn on them by Waters to the amount of \$4,000; and that Sumrall did immediately thereafter, or within a reasonable time, upon the credit of said promise, purchase bills drawn by Waters, accordingly, to the amount of \$4,000, and that the bill in the **177*** declaration mentioned, is one of the bills so purchased, then that the plaintiff, upon the evidence, is entitled to recover; whether the purchase was made before or after the drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and

sold for any other good and valuable consideration.

The defendant then asked the court to instruct the jury: 1. That if they believe from the evidence that the defendant by parol stated that he would accept a bill or bills to the amount of \$4,000, before the bills were drawn, and before the defendant had received the amount or any part of it, under the expectation and belief that the drawer, Richard S. Waters, would put funds into his hands to take up the bills at maturity; and that the plaintiff knew that the said Richard had no funds, but made the promise in anticipation of such funds, and that no funds to take up the bill were placed in the hands of the defendants, or either of them, to take up the bill, nor had the drawer any funds in the hands of the drawee to draw upon, that they should find for the defendant; provided the jury further find that the plaintiff and R. S. Waters, the drawer, were partners in trade, and as such were indebted on their partnership account to Toland & Rockhill; and that the bill was drawn by the said Waters in favor of the plaintiff, with a view to raise funds, or to be passed in direct payment of a joint debt due as aforesaid; and that the said bill, with this object and view, and in pursuance of an agreement between drawer and plaintiff, was passed to the credit of the drawer and plaintiff to Toland & Rockhill.

2. That if they believe the said bill was drawn to pay a partnership debt as stated by R. S. Waters they ought to find for the defendants.

3. That if they believe the bill was drawn by Waters in favor of Sumrall, to be assigned to Toland & Rockhill, in payment of a partnership debt due by Waters & Sumrall to Toland & Rockhill, and that said bill was thus assigned to Toland & Rockhill; and if they also believe that said Waters & Sumrall have not settled their partnership, that then they should find for the defendant.

4. That if they believe from the evidence that the drawer, *Richard S. Waters, [***178** was informed by Townsley, before he drew the bills offered in evidence, that he might draw for \$4,000, and that he would accept and take up \$2,000, whether he, the said Waters, got on in time to take it up or not; and that he would accept and take up the other bill if funds were placed or forwarded to the house in New Orleans to take it up with, and that when the said Richard S. Waters drew the bills, that he hesitated for fear he could not get to New Orleans in time with the means to take up both bills, until it was agreed between Sumrall and him that they would risk both bills; and if Waters was not able to take up both at maturity, that as to the one Townsley would not accept, he, Sumrall, would assist the said Waters with funds to take it up with at maturity; and that Sumrall did, at the time of drawing the bills as aforesaid, state to Waters that Townsley promised him that he would accept one of the bills unconditionally, and the other if in funds; and that Townsley & Co. did accept and pay at maturity one of the bills, and had not funds of Waters or of the plaintiff to pay the other at maturity, that they ought to find for the defendant.

5. That a demand of the amount of said bill at New Orleans was necessary to enable the

Peters 2.

plaintiff to maintain the suit, and that the protest of the notary is not evidence of such demand.

6. That a parol promise to pay a non-existing bill, since the statute of frauds, is not obligatory and binding.

To all which opinions of the court—1. In permitting plaintiff to read said protest; 2. In refusing defendant leave to read said record; 3. In giving the instructions asked by plaintiff; 4. In refusing the instructions asked by defendant—the defendant excepted.

The first question that arises is upon the admissibility of the protest of the notary public at New Orleans, as proof of the dishonor of the bill. The protest is for non-payment for want of funds; and it does not appear that there had been any prior protest for non-acceptance. Bills of exchange payable at a given time after 179*] date, need not be presented *for acceptance at all; and payment may at once be demanded at their maturity. The objection now made does not turn upon this point, but upon the point that the present is not a foreign, but an inland bill of exchange; being drawn in Kentucky, and payable at New Orleans in Louisiana; and that a notarial protest is not in such cases evidence of a demand and refusal of payment. We do not think it necessary in this case to decide whether a bill drawn in one State upon persons resident in another State, within the Union, is to be deemed a foreign, or an inland bill of exchange. Foreign it certainly is not, if by such appellation is understood a bill drawn upon a country under a totally distinct and independent sovereignty and allegiance. Inland it is not, if by that appellation is understood a bill drawn in one part of a territory, on another part, exclusively under the same municipal laws, and exclusively governed by the same sovereign power. It would seem to constitute an intermediate case. Different tribunals in the United States, of great respectability, have, however, differed upon the question; and it may all be left for a final decision, until it constitutes the very turning point of the judgment. (3 Kent's Comm., 63.)¹

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill without any auxiliary evidence. It has been long adopted into the jurisprudence of the common law, upon the ground that such protests are required by the custom of merchants; and being founded in public convenience, they ought, everywhere, to be allowed as evidence of the facts which they purport to state. The negotiability of such bills, and the facility as well as certainty of the proof of dishonor, would be materially affected by a different course; a foreign merchant might otherwise be compelled to rely on mere parol proof of presentment and dishonor, and be subjected to many chances of delay, and some- 180*] times *to absolute loss, from the want of sufficient means to obtain the necessary and satisfactory proofs. The rule, therefore, being

founded in public convenience, has been ratified by courts of law as a binding usage. But where parties reside in the same kingdom or country, there is not the same necessity for giving entire verity and credit to the notarial protest. The parties may produce the witnesses upon the stand, or compel them to give their depositions. And accordingly, even in cases of foreign bills, drawn upon, and protested in another country, if the protest has been made in the country where the suit is brought; courts of justice sitting under the common law require that the notary himself should be produced, if within the reach of process, and his certificate is not, *per se*, evidence. This was so held by Lord Ellenborough in *Chesmer v. Noyes* (2 Campbell's R., 129).

It is not disputed that by the general custom of merchants in the United States, bills of exchange drawn in one State on another State, are, if dishonored, protested by a notary; and the production of such protest is the customary document of the dishonor. It is a practice founded in general convenience, and has been adopted for the same reasons which apply to foreign bills in the strictest sense. The distance between some of these States, and the difficulty of obtaining other evidence, is far greater than between England and France, or between the continental nations of Europe, where the general rule prevails. We think, upon this ground alone, the reason for admitting foreign protests would apply to cases like the present, and furnish a just analogy to govern it. There is as little doubt that such is the custom in relation to bills drawn on New Orleans, where the jurisprudence of the civil law mainly prevails, and under which acts of this sort are generally verified by notaries. The Act of Kentucky of 1798 (ch. 57, 2 Littell's statutes, 101) also recognizes the propriety, if not the indispensable necessity, of a protest, not only in the cases of foreign bills generally, but of all bills drawn on any persons out of a State, or within any other of the United States; providing "that the same being returned back unpaid with a *legal protest, the drawer and all others [*181 concerned shall pay the contents, &c., with legal interest from the time the said bill or bills were protested, the charges of protest, and ten per cent. advance for the damage, &c." The contract for the acceptance and honor of the present bill, was, if made at all, made in Kentucky, and was to be governed by its laws; even supposing that the question whether it amounted to an acceptance or not, was to be governed by the law of Louisiana, where the contract was to be executed. So that in either view of the matter, upon the general custom of merchants, or the *lex loci contractus*, we think the protest was rightly admitted in evidence. Wherever a protest is required to fix the title of the parties, or by the custom of merchants is used to establish a presentment or dishonor of a bill, it is competent evidence between the parties, who contract with reference to the presentment and dishonor of such bill. And there is no doubt that it was material for this purpose under some of the counts in the declaration.

The next objection is to the rejection of the record of the action of *Toland & Rockhill v. Sumrall & Waters*. That was a suit between

1. In the case of *Buckner v. Finlay*, *post*, this question is settled; and a bill of exchange, drawn in one State of the United States, on a person residing in another State, is held to be a foreign bill, so far as to make the protest of non-acceptance and non-payment evidence of the same.

other parties, and falls within the general rule of *res inter alios acta*; and on that account was, in our judgment, rightly rejected.

The remaining objections arise from the instruction given by the court to the jury, on the prayer of the plaintiff, and to the refusal of the court to give the instructions prayed for by the defendant.

The instruction given by the court upon the plaintiff's prayer, is not understood to involve any other difficulty than that it states that the plaintiff would be entitled to recover, "whether the purchase was made before or after drawing of said bills, or whether they were drawn for a pre-existing debt, or drawn and sold for any other good and valuable consideration." We cannot perceive any sound legal objection to this instruction. If a person undertake, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchase to accept it, and the bill is drawn and purchased upon the credit of such promise, for a **182*** sufficient consideration: *such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence that the direct consideration moves to a third person, as in this case to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfillment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A says to B, pay so much money to C and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract. Damage to the promisee, constitutes as good a consideration as benefit to the promisor. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons at the same time upon the same general consideration. (*D'Wolf v. Rabaud*, 1 Peters, 476.) Then, again, as to the consideration, it can make no difference in law whether the debt for which the bill is taken is a pre-existing debt, or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence or be drawn afterwards. In each case the object of the promise is to induce the party to take the bill upon the credit of the promise; and if he does so take it, it binds the promisor. The question, whether a parol promise to accept a non-existing bill amounts to an acceptance of **183*** the bill when *drawn, is quite a different question, and does not arise in this case. If

the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance; and the point whether it was an acceptance or not, does not appear to have been made in the court below.

The instructions prayed for on behalf of the defendant and refused by the court, present several objections to the plaintiff's right of recovery.

The first is, that the plaintiff is not entitled to recover, if he knew that the defendant, at the time of taking the bill, had not funds of the drawer in his hands, and if the defendant's promise was under the expectation of receiving funds, and he did not, in fact, receive them at the maturity of the bill. We are of opinion that this objection is unfounded in point of law. If the drawee have no funds in his hands, and the fact is known to the other party, and yet the inducement to take the bill is the promise of the drawee to accept it, it constitutes a valid contract between the parties; if there is a purchase of the bill upon the credit of such promise. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance.

Another objection is, that the object of taking the bill was to pay the partnership debt of the plaintiff and the drawer (who had been partners in trade); and it was passed in pursuance of an agreement between them, to a creditor of the firm, who subsequently returned it for the dishonor. In what respect this changes the rights of the plaintiff as to the defendant, it is somewhat difficult to perceive. There was evidence in the case to show that the plaintiff was upon the dissolution to discharge the partnership debts; and also that upon the faith of this very promise of the defendant, he allowed partnership property to the full amount of the bill, to pass into the drawer's hands for his own exclusive use. But independently of this evidence, the bill itself was not a partnership bill, though the drawer and the plaintiff had been partners. On the contrary, it was drawn on the sole account and credit of the drawer, and was to be accepted on *that account; and if the plaintiff took [***184** the bill as the sole bill of the drawer, on the credit of the defendant's promise to accept it, for a valuable consideration, the use to which he should apply it, whether in payment of joint debts or otherwise, was nothing to the defendant. It in no respect changed the nature of his own undertaking. The receiving of such a bill, with the intent to apply the same to the payment of a partnership debt, might materially affect the plaintiff; and we see that by the subsequent insolvency of the drawer, and his parting with the partnership effects, it did seriously affect his remedy in respect to his partner. The question is not put, whether, if no loss had been sustained in any way, the plaintiff would have been entitled to recover against the defendant. By becoming an indorser upon the bill, he incurred a responsibility to those to whom he indorsed it, very different from that which he incurred to them as creditors of the partnership. This alone was a sufficient consideration to support the promise to accept. It should be add-

ed, that the application of the bill to the payment of debts constituted no part of the ground of the promise of the defendant.

Another objection is, that the partnership accounts remain unsettled, and therefore the plaintiff ought not to recover. Surely this alone is not sufficient to deprive the plaintiff of his right of action. It is perfectly consistent with this state of facts, that the plaintiff should be a creditor of the firm to an extent far beyond the amount of \$4,000. There is evidence in the record from which the jury might fairly presume that such was the case. But the circumstance that the accounts of the partnership were unsettled, is put as of itself sufficient to defeat the plaintiff's recovery; which it cannot be admitted to be, if in any possible case, consistently with that fact, he might have sustained any loss by taking the bill upon the faith of the defendant's promise.

Another objection, arising out of the fourth instruction prayed for by the defendant, which is very complicated and embarrassing in its presentation, is the effect of the agreement therein supposed between the plaintiff and the drawer to risk both the bills; and if the defendant should not accept *both, then that the plaintiff would assist the drawer with funds to take up the non-accepted bill at maturity. This agreement was not in the slightest degree prejudicial to any rights of the defendant. Its object was to provide funds in the event of a non-fulfillment of the promise of the defendant to accept either of the bills. It did not waive or vary the defendant's contract; and, at most, could be considered only as a collateral agreement of the parties, forming additional private inducements for the drawing of the bill.

The same instruction includes another objection, which is, that if from the evidence the jury should believe that the plaintiff did at the time of drawing the bills state to the drawer, that defendant promised him that he would accept one of the bills unconditionally, and the other, if in funds; and that the drawee did not accept and pay at maturity one of the bills, and had not funds of the drawer or of the plaintiff to pay the other at maturity, that they ought to find for the defendant. This part of the instruction proceeds altogether upon the ground that the mere statement of the plaintiff to the drawer, that the promise of the defendant was conditional, was a bar to the recovery. It does not affect to state, that if in point of fact the promise was conditional, such would and ought to be the result; but, that it was sufficient that the plaintiff so told the defendant, whether the fact were so or not. In our judgment, the rights of the plaintiff are to be decided by the fact whether the promise was conditional or not; and not by the mere assertion of the plaintiff. His assertion might properly be weighed by the jury as part of the evidence, to control or explain it; but their verdict ought to be governed by their belief of the facts, and not their belief that a particular assertion was made.

These are all the objections which have been urged at the bar; and we are of opinion that the court was right in rejecting the instructions prayed for by the defendant.

The judgment is therefore to be affirmed with costs.

Peters 2.

Cited—2 Pet., 200; 15 Pet., 314; 16 Pet., 20; 4 How., 282, 285; 5 How., 63; 22 How., 43; 1 Otto, 414; 12 Otto, 43; 2 McLean, 464, 593; 2 Story, 238.

***LE ROY, BAYARD & CO., [*186**
Plaintiffs in Error,

v.

GEORGE JOHNSON, Defendant in Error.

Competency of a witness—bill of exchange—acceptance—partnership.

In an action originally commenced against A and B as partners, upon an alleged engagement by the firm, and where A who was not found or served with process, was offered as a witness in favor of B., having been released by B., the court said: "It is to be premised that the only ground upon which the objection can be rested is the supposed interest of the witness in the event of the cause; since the suit having regularly abated as to him by the return that he was "no inhabitant," he was no more a party to it than he would have been had his name been altogether omitted in the declaration. As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since the plaintiffs' recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A protected him against any action which A might bring against him for contribution or otherwise." [194]

It is well settled, that if a bill of exchange be drawn by one partner in the name of the firm, or if a bill drawn on the firm by their usual name and style be accepted by one of the partners, all the partnership are bound. It results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known; although the consent of the other partners to the particular contract should not be obtained, or should be withheld. [197]

Third persons are not bound to inquire whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage. The interest of the partner in the joint stock of the concern, and his consequent authority to use the partnership name, raises a presumption that the contract was made for joint account; which is sufficient to bind the firm, unless to the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe that the former was acting on his separate account. [198]

Where in the articles of partnership no name of the firm was mentioned as agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out at their warehouse, in the name of "Hoffman & Johnson," it cannot be questioned but that a name thus assumed, recognized, and publicly used, became the legitimate name and style of the firm; not less so than if it had been adopted by the articles of partnership. [199]

Where a bill of exchange was drawn by A, after the dissolution of his partnership with B, and the proceeds of the bill went to pay, and did pay, the partnership debts of A & B, which A on the dissolution of the firm had assumed to pay; the holder of the bill after its dishonor can have no claim on B in consequence of the particular appropriation of the proceeds of the bill. [199]

It is admitted, that if one of the partners con-

NOTE.—Partners, liability of, on bills and notes.

A partner has power to transact the whole business of the firm, whatever that may be; and, consequently, to bind his partners in such transactions as entirely as himself. *Winship v. Bank of U. S.*, 5 Pet., 529; *U. S. Bank v. Binney*, 5 Mass., 176; *Coote v. Bank of U. S.*, 3 Cranch, C. C., 95; *Babcock v. Stone*, 3 McLean, 172.

As between themselves, the power and authority of partners are regulated by their articles of partnership, as to subjects mentioned. The public, if ignorant of their articles, have a right to deal with

187*] tracted with a third person, in the name *of the firm after the dissolution, but that fact not made public, or known by such third person, the law considers the contract as being made with the firm, and on their credit. But if the partner deal with another in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other to know that the partnership was dissolved, since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was acting, upon his own credit. [200]

AN action of debt upon a bill of exchange for £1,250 sterling, was instituted by the plaintiffs in error, in the Circuit Court for the county of Alexandria, in the District of Columbia, against Jacob Hoffman and George Johnson, alleging them to be partners in trade. By the statute of Virginia, adopted as the law of the county of Alexandria, this form of action is authorized for the recovery of the sum due upon a bill of exchange, and damages for non-payment. The declaration charged the bill to have been drawn by Jacob Hoffman and George Johnson, trading as copartners in Alexandria, under the name of Jacob Hoffman, the same being for the account of the concern; and that the bill was purchased by the plaintiffs, who remitted it to London; where it was presented to the drawers, and was returned protested.

The process was not served on Jacob Hoffman.

Upon the trial of the cause, it was proved that it was generally known in Alexandria, in 1823, that the defendant and Jacob Hoffman were jointly concerned in buying and selling pork; and by the articles of copartnership signed by both partners, and entered into on the 10th of December, 1823, it was agreed, *inter alia*, that the funds necessary for the purposes of the partnerships were to be borrowed from the banks or otherwise, upon the notes of George Johnson, to be indorsed by Hoffman, or in such other shape, as respects the paper of the parties, as might be found suitable to the object intended. The active partner in the business was Jacob Hoffman, who, besides the

business of the concern, carried on that of a sugar refiner, a buyer, seller, and salter of beef, and a tobacconist; and at the same time the defendant, George Johnson, was engaged in the transaction of business on his own account, as a commission merchant and grocer.

*The cashier of the bank of Alexan- [*188 dria proved that an account was opened in that bank on the 3d of December, 1823, which he understood, from both parties, was to comprehend the cash deposits of the joint concern, and the proceeds of notes discounted for the purpose of raising funds for the same. For some years before, Jacob Hoffman kept an account in the bank, until the opening of the new account; upon which the private balance due the bank was transferred to it, and no money could be drawn out of the bank upon the account, but upon the check of Hoffman, drawn by him in his own name. Accounts of a similar character, in the same form, and used in the same manner and for similar purposes, were proved to have been kept at the same period in the Farmers' Bank, and in the Bank of Potomac. These accounts comprehended, indiscriminately, all the deposits of cash kept by Hoffman in the banks, as well as deposits and cash of the joint concern. The same witness also proved that before a note for \$6,000, drawn by the defendant, and indorsed by John H. Ladd & Co., was discounted by the bank, he sent the bill of exchange, which was the foundation of this action, to New York, at the request of Hoffman, to be there negotiated. The bill not being sold immediately in New York, Hoffman went there; and assisted by letters of recommendation from merchants of Baltimore, he negotiated the bill, and out of the proceeds of the same the note for \$6,000 was paid at the bank of Alexandria. The proceeds of the discount of this note were used by the firm. The partnership of the defendant and Jacob Hoffman was advertised in the public papers of Alexandria, the advertisement being subscribed with the names of both persons; during the continuance of the con-

them, upon the general principles and presumptions of partnerships of a like nature; and any special restrictions in the articles do not affect them. *Kimbro v. Bullitt*, 22 How., 256; *Bank of Watertown v. Landon*, 66 Barb., 189; affirmed, 40 How. Pr., 721; *Webster v. Rackett*, 7 Hun., 229.

If promissory notes are offered for discount at a bank, in the usual course of the business of a partnership, by the partner intrusted to conduct the business of the partnership, and are discounted by the bank, and such discount within the ordinary scope of such business; the subsequent misapplication of the money, the holders not being parties or privy thereto, or to the intention to misapply the money, will not deprive them of their right of action against the dormant partners. *Winship v. Bank of U. S.*, 5 Pet., 529.

Where a partner draws notes in the name of the firm payable to himself, and then indorses them to a third party for a personal and not a partnership consideration, the first indorsee, if he is aware of any fraud in their connection, cannot maintain an action upon them against the firm. But a second indorsee who receives them before maturity, in the due course of business, and without any knowledge of the circumstances of their execution, may recover upon them notwithstanding the fraud. *Smyth v. Strader*, 4 How., 404.

If one partner be authorized by the others to take up money on the credit of the partnership, and draw bills therefor on a house at A, and the partner take up money and draw a bill for the same, directing it to be charged to the account of all the partners, but it is signed by himself alone,

equity will enforce the payment of such bill against all the partners, in favor of a payee of the bill who has trusted the joint credit. Such bill is deemed to be guaranteed, as to acceptance and payment, by all the parties. *Reimsdyk v. Kane*, 1 Gall., 360.

Where a partnership is formed only for the purpose of farming, one partner does not possess the right, without the consent of his associates, to draw or accept bills of exchange, in the firm name. *Kimbro v. Bullitt*, 22 How., 256.

A member of a firm who is an indorser of a note made by the firm, is entitled to demand and notice, although the firm was insolvent and he knew it was not paid. *Matter of Graut*, 6 Law Rep., 158.

A dormant partner is liable upon notes made and negotiated for the benefit and business of the firm, and where the money came to the use of the firm. *U. S. Bank v. Blaney*, 5 Mas., 176; *Matter of Warren, Davies*, 320; *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C., 575; See *Palmer v. Elliott*, 1 Cliff., 63; *Re Thomas*, 17 Bank. Reg., 54.

A note commencing "I promise to pay," signed with the firm name by one of the parties, is the note of the firm. *Doty v. Bates*, 11 John., 544.

A note made by a surviving partner, and signed "H., for the late firm of R., H. & F." Held, the note of the firm. *Staats v. Howlett*, 4 Den. (N.Y.), 559.

An accommodation note indorsed by a member of a firm with the firm name, without the knowledge or consent of the others of the firm, and used to pay a debt of the person so indorsing it, is valid against the firm in the hands of a *bona fide* pur-

cern, it was generally known in Alexandria under the style of Hoffman & Johnson; accounts were rendered, and money was paid in that name, and the firm was dissolved on the 10th of January, 1824.

By the terms of the dissolution, Mr. Hoffman was bound to pay the debts of the firm, and this bill was drawn to enable him to comply with this contract.

The defendant was called upon early in June, and informed of the fate of the bills; and cf-
189*] forts were made, without *success, to procure payment out of property which had belonged to Hoffman & Johnson, and which was in the hands of a trustee.

The questions submitted to the jury, and upon which the court were requested to charge in favor of the plaintiffs below, who are plaintiffs in error in this court, were:

1. That upon the evidence of partnership, and that the proceeds of the bill were applied to the payment of the note which had been discounted for the firm—unless the defendant could show a notice of the dissolution of the partnership, either public or private, before the bill was sold, and that the bill was not drawn on partnership account—the plaintiffs were entitled to recover.

2. If the jury, from the evidence, should be of opinion that the bill was drawn in reference to the business of the concern, and to meet the engagements of the same, and the proceeds of the same were so applied, then the defendant is liable to the plaintiffs, unless he proves a dissolution of the firm and knowledge of the same by the plaintiffs before the bill was negotiated.

3. That if the jury believed the name of Jacob Hoffman was sometimes used in relation to the business of the concern, and that the bill was drawn in the name of Jacob Hoffman, and so negotiated for the firm to pay its notes; the plaintiff is entitled to recover, unless the defendant can prove that the bill was not drawn and negotiated on partnership account, or that the partnership was dissolved and the plaintiff

notified thereof, or the dissolution was advertised before the bills were drawn and negotiated.

The court having refused these instructions, and a verdict and judgment having been obtained for the defendant, this writ of error was prosecuted.

The case was argued by *Mr. Swann* and *Mr. Key* for the plaintiffs in error, and by *Mr. Jones* for the defendant.

For the plaintiffs, it was contended that the bill upon which this suit was brought was drawn by Jacob Hoffman on account of himself and the defendant, to provide for the payment of a note discounted for the concern, in the name *used by them in their ar- [*190 rangements of finance; and the proceeds of the sale of the bill having gone to pay the note, the defendant was liable to the plaintiffs for the amount of the bill and damages. It was in fact the bill of the firm.

The evidence on the part of the plaintiffs was sufficient to go to the jury, upon the principles claimed by the plaintiffs. The name of Jacob Hoffman was used as that of the firm, and if several persons act under one name, all are bound. (Montague on Partnership, 32, note).

While it is admitted that the partnership was not bound for all the acts done in the name of Jacob Hoffman, here was a transaction in reference to its concerns, and it is therefore obligatory on all. (Gow on Partnership, 55, 70, 189.)

The language of the bill is in the plural, and thus it is manifest that it was not an individual transaction of Jacob Hoffman. It is thus drawn: "Ninety days after sight of our first of exchange (second, third, and fourth of same tenor unpaid), pay to the order," &c.

That the partnership was dissolved before the bill was drawn is immaterial. The dissolution was secret, as it was not known to the plaintiffs; and they must be supposed to have taken the bill upon the notoriety of the partnership. The difficulties which prevented the early sale of the bill in New York, may have been re-

chaser for value without notice. At. State Bank v. Savery, 82 N. Y., 291.

See further, as to liability of partners on notes and bills, *Donnee v. Parsons*, 45 N. Y., 180; *National Bank v. Salem*, 47 N. Y., 15; *Chemung Canal Bank v. Bradner*, 44 N. Y., 680; *Ross v. Whitefield*, 56 N. Y., 640; *Crocker v. Colwell*, 56 N. Y., 212; *Ontario Bank v. Hennessy*, 48 N. Y., 545; *Hayes v. Baxter*, 65 Barb., 181; *Randolph v. Peek*, 1 Hun., 138; *Sizer v. Daniels*, 68 Barb., 426.

If a partner gives a note in the name of the firm, outside the partnership business, the firm is liable thereon to a *bona fide* holder. *Bank of Chittenango v. Morgan*, 6 Hun., 346; *S. C.*, 73 N. Y., 593; *Church v. Farnham*, 1 Sheld., 393.

By the custom of England, where there are two joint traders, and one accepts a bill drawn on both, for him and partner, it binds both if it concerns the trade; otherwise if it concerns the acceptor only in a distinct interest and respect. *Salk.*, 126, pl. 3; *Pinkney v. Hall*, *Id.* *Raym.*, 175; *Harrison v. Jackson*, 7 Term Rep., 207; 6 Bac. Abr., 580, tit. Merchants and Merchandise; *Williamson v. Johnson*, 1 Barn. & C., 146; *S. C.*, 2 Dow. & Ry., 231; *Laey v. Wolcott*, 2 Dow. & Ry., 458; *Ridley v. Taylor*, 13 East, 175; *Gansevoort v. Williams*, 14 Wend. 133; *Greenslade v. Dover*, 7 Barn. & C., 635; *Green v. Dakin*, 2 Stark., 347; *Arden v. Sharpe*, 2 Esp., 524; *Wells v. Masterman*, 2 Esp., 731; *Emly v. Lye*, 15 East, 7; *Bond v. Gibson*, 1 Camp., 185; *Brown v. Duncanson*, 7 Har. & McHen., 350.

But the authority of one partner to bind another by signing bills and notes in their joint names is only an implied authority, and may be rebutted by *Peters* 2.

express previous notice to the party taking such security from one of them, that the other would be liable for it, or that it is not made for a firm debt, or in the firm business. *Lord Galloway v. Matthew*, 10 East, 254; *S. C.*, 1 Camp., 403; *Shirreff v. Wilks*, 1 East, 48; *Boyd v. Plumb*, 7 Wend., 309; *Poindexter v. Waddy*, 6 Munf., 418; *Noble v. McClintock*, 2 Watts & Ser., 152; 6 Bac. Abr., 581, tit. Merchants and Merchandise.

If a firm, consisting of several parties, carry on business in the name of one of them, the firm will be bound by the indorsement of that individual on bills indorsed for the partnership account. *South Carolina Bank v. Case*, 8 Barn. & C., 427; *Bank of U. S. v. Binney*, 5 Mas. C. C., 176; *Aspinwall v. Williams*, 1 Ohio, 98; *Austin v. Williams*, 2 Ohio, 64.

If a note is indorsed by a firm, notice to one partner is notice to all of them. *Willis v. Green*, 5 Hill, 122; *Bank of Chenango v. Root*, 4 Cow., 126.

When a note is made payable to a firm, or when a note is indorsed to a firm, either of the partners has authority to transfer the instrument by an indorsement of the partnership name. *Cumpston v. McNair*, 1 Wend., 457, 463.

Or, by an indorsement in his individual name. *Everit v. Strong*, 5 Hill, 163; *S. C.*, 7 *Id.*, 585; *Alabama Co. v. Brainard*, 35 Ala., 476; 1 *Parsons' N. & B.*, 123; 1 *Daniel, Neg. Instr.*, sec. 362.

If a bill be drawn upon a firm, the acceptance by one partner, in his own name, or the name of the firm, binds the firm. *Mason v. Rumsey*, 1 Camp., 384; *Wells v. Masterman*, 2 Esp., 731; *Daniel, Neg. Instr.*, sec. 362; *Heenan v. Nash*, 8 Minn., 409; *Dougal v. Cowles*, 5 Day, Conn., 511.

moved by information obtained by the plaintiff in Alexandria, and particularly of the form in which the engagements for the money concerns of the firm were drawn.

The propositions stated by the counsel of the plaintiffs should have been submitted to the jury.

The first requested the court to say, whether the facts proved showed a partnership.

The second, that unless notice of the dissolution was brought home to the plaintiffs, the defendants were liable.

The third, that there was evidence that the parties sometimes used the name of Jacob Hoffman; and the bills were drawn to raise funds for the partnership, and therefore the plaintiffs were entitled to charge the defendant, unless the defendant could prove they were not used for the firm.

191*] *The counsel also cited Gow on Part., 155; 2 Bos. & Pull., 679.

Mr. Jones, for the defendant. The evidence showed a special partnership, to buy and sell pork, and all the transactions of the firm were in the name of Jacob Hoffman and George Johnson. If the name of Jacob Hoffman was used at the banks, it was not so used as the name of the firm, but as the name of one individual of the same; each giving his own name to raise funds for conducting the business.

Nor was the bill taken as that of the firm; the plaintiffs refused it in the first instance, and took it afterwards, when assured of the respectability of the drawer, individually. The law is fully settled, that when it is claimed to make a person liable as a partner, in a firm carried on in the name of one person, it must be shown to be a partnership concern. The defendant is protected by this principle; for although the proceeds of the bill were applied to pay the note discounted for the benefit of the firm, the payment of that note had been assumed by Jacob Hoffman, and he had a right to raise funds on his own responsibility to discharge it.

To bind a partnership, the name of the firm is essential. If it is not used, it must be presumed to be an individual transaction; and if the proceeds of the same are brought into the concern, it is presumed it is done as an individual duty to the firm.

The books show, universally, the difference between a manual act of purchasing goods, which may be done by one partner to bind all, and the binding of all by writing, in which all must act, or he who acts must have authority to bind all. How far the courts have gone in considering that a separate debt, which is contracted by one of a firm, is shown by the following cases: 4 Term Rep., 270; 12 East, 122; Gow on Part., 32; 1 Atk., 223; 1 Marshall's Rep., 249.

It is incumbent on the plaintiffs to prove they dealt with the firm, or with a view to the liability of all the parties to it. Here George Johnson was unknown to the plaintiffs; Jacob Hoffman alone appeared in the transaction, and he drew the bill in his own name, on his own **192***] responsibility, to *obtain the means to carry into effect the terms of the dissolution of the partnership. The court, in refusing the instructions, therefore, acted in conformity with the law, and the facts of the case.

Mr. Justice WASHINGTON delivered the opinion of the court:

The plaintiffs instituted an action of debt under the statute of Virginia, in the Circuit Court of the District of Columbia, for the county of Alexandria, against Jacob Hoffman and the defendant upon a bill of exchange drawn by the said Hoffman, and dated the 3d of January, 1824. The declaration charges, that the said Jacob Hoffman and George Johnson were partners in the business of buying, curing, and selling pork and bacon, and carried on their said copartnership business under the name and firm of Jacob Hoffman, and that the bill of exchange on which the suit is brought, was drawn in the name of Jacob Hoffman, for and on account of the said firm, and was sold to the plaintiffs, who caused it to be presented for acceptance; and that the same was duly protested for non-acceptance and non-payment, of which due notice was given to the defendants, the drawers. The writ being returned "no inhabitant," as to Hoffman, the suit abated against him.

From the evidence disclosed in a bill of exceptions, taken by the plaintiffs to the opinion of the court, the case appears to be as follows:

On the 10th of December, 1823, Jacob Hoffman and the defendant entered into articles of copartnership under their respective signatures, to commence and prosecute, on joint account, during that winter, the business of purchasing, salting up, and smoking pork. The funds necessary to the accomplishment of the objects, intended to be borrowed from the banks, or otherwise, upon the paper of the said George Johnson, to be indorsed by Hoffman, or in such other shape, as respected the paper of the parties, as might be found most suitable to the object intended, Johnson agreeing, in consideration of the extraordinary trouble and experience which Hoffman would devote to the purchase and *putting up [***193** of the pork, to pay two-thirds of the interest arising, or growing out of the loan which should be made for the business contemplated. It was further stipulated, that the business should be carried on as far as the parties should agree, and could command the funds; and that the profits and loss should be equally divided between them. No name or style is agreed upon under which the business of the concern was to be transacted; but evidence was given, that after the parties commenced their operation under these articles, the books of the concern were kept, and the bills and accounts were made out at their warehouse, where the pork was cured and kept, in the joint names of Hoffman & Johnson, and never otherwise; and that they continued to be so kept and made out until the pork was sold. They were generally known in Alexandria as partners in buying, curing, and salting pork, under the name and style of Hoffman & Johnson, in which they acted in relation to the business of the concern, and advertised in the newspapers.

It further appears, that, besides the business of this concern, and during the same period, Hoffman carried on the business of a sugar refiner, of a buyer, salter, and seller of beef, and of a tobaccoconist; and the defendant that of a grocer and commission merchant, in the town of Alexandria.

Notwithstanding what has been stated as to the name by which this firm was known in Alexandria, and in which they did business at their warehouse, it seems that one particular branch of business was conducted solely by, and in the name of Hoffman alone. In December, 1823, an account was opened in the bank of Alexandria, which the cashier understood from both Hoffman and the defendant, was to comprehend both the cash deposits of the said concern in that bank, and the proceeds of notes therein discounted to raise money for the use of the firm. This account was opened on the 3d of the month just mentioned, into which a trifling balance against Hoffman upon his private account, before kept at that bank, was transferred. This new account was so kept that no money could have been drawn out of the bank upon that account, except **194***] upon the check *of Hoffman, in whose name alone all the checks were drawn. Hoffman had likewise long-standing accounts in his own name in two other banks in Alexandria, which were continued in the same name after this concern was formed; in which accounts all cash deposits in those banks respectively, and the proceeds of notes therein discounted, to raise cash for the use of the concern, were entered. These latter bank accounts comprehended, indiscriminately, all the deposits and cash kept by Hoffman in those banks, as well as the deposits and cash of the joint concern.

The partnership between these gentlemen, which commenced on the 10th of December, 1823, was dissolved by mutual consent, on the 21st of the succeeding month; under an agreement by which Hoffman contracted to pay all the debts due by the firm, the defendant binding himself to give the use of his name, either as drawer or indorser, in the renewal of all notes then existing until the bacon should be sold.

On the 30th of January, 1824, the bill of exchange on which this suit is brought was drawn by Jacob Hoffman in his own name, and, as he states in his deposition, on his individual responsibility, in order to enable him to raise money to comply with his part of the above contract, and in particular to enable him to discharge a note for \$6,000 which had been drawn by the defendant, indorsed by John H. Ladd & Co. and Jacob Hoffman, and discounted at the Bank of Alexandria. With much difficulty, and after great personal exertions by Hoffman, and with the aid of a letter from Mr. Colt in favor of his mereantile standing, he succeeded in selling this bill to the plaintiffs, the proceeds of which he immediately applied to the discharge of the above note for \$6,000. In his negotiations with the plaintiffs the name of the defendant was never mentioned.

As a part of the evidence here detailed is taken from the deposition of the before-mentioned Jacob Hoffman, which was offered by the defendant's counsel, it will be proper, in the first place, to dispose of the objection made to the competency of this evidence. The offer to read the deposition, was preceded by the exhibit **195***] bition of a release executed and *delivered by the defendant to the witness prior to his examination. It does not appear that any objection was, or could be made to the form of Peters 2.

the release; and the only question is, whether, in point of law, the defendant could by any release render Hoffman a competent witness.

It is to be premised that the only ground upon which the objection can be rested, is the supposed interest of the witness in the event of the cause, since the suit having regularly abated as against Hoffman, by the return that he was no inhabitant, he was no more a party to it than he would have been had his name been altogether omitted in the declaration.

As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since, if the plaintiffs recovered against Johnson, and obtained satisfaction from him, that would be a bar to their action against Hoffman, and the release of Johnson protected him against any action which Johnson might bring against him for contribution or otherwise.

The general rule of law, in relation to witnesses who are interested in the event of the cause, goes no farther than to exclude them from giving evidence in favor of that party to whom their interest inclines them. If they stand, in point of interest, indifferent between the litigating parties, or if they testify against their interest, the reason of the rule which excludes their testimony no longer exists.

We come now to the instructions to the jury, asked for by the plaintiffs' counsel, and which the court refused to give. The first is, that if the jury believe from the evidence that the defendant and Jacob Hoffman entered into the articles of copartnership offered in evidence, and that an account was kept for the said concern in the Bank of Alexandria, in the name of Hoffman, in which the notes discounted for the use of the partnership, and deposits of money on partnership account, were entered to the credit, and checks drawn for the same in the said Hoffman's name, and that the said Hoffman drew the bills mentioned in the declaration, and sent them to New York to be sold, for the *purpose of raising money [***196**] to pay certain notes which had been discounted in the Bank of Alexandria on partnership account, some of them drawn by said Hoffman, and indorsed by the defendant or other persons, and others drawn by the defendant, and indorsed by Hoffman or others, and that the same was sold to the plaintiffs, and the proceeds thereof applied by said Hoffman to the payment of the said notes, then the plaintiffs are entitled to recover, unless the defendant can show a dissolution of copartnership, and notice thereof, either public or to the plaintiffs, before the bills were sold, or that the said bills were not drawn on partnership account, but on the individual responsibility of Hoffman.

The second instruction which the court was called upon to give, is substantially the same as the first, except that it omits a circumstance much relied upon in the argument—that the bank account of the concern was kept in the name of Hoffman, upon whose checks alone the money was drawn out.

The third instruction states, that if the jury should believe from the evidence that the defendant and Hoffman sometimes used, in relation to the business of the concern, the name

and style of Jacob Hoffman, as representing the firm, and that the bill in question was drawn in that name by the said Hoffman, and negotiated for the purpose of raising funds to pay notes due by the said concern, then the plaintiffs were entitled to recover, unless the defendant could prove that the said bill was not drawn and negotiated on partnership account, but on account of the said Hoffman alone, or that the partnership was dissolved, and the plaintiffs notified thereof, or the dissolution advertised before the bills were drawn and negotiated.

In support of this action, it has been argued by the counsel for the plaintiffs, that the bill in question was drawn in the name of the firm under which the partnership concerns of Jacob Hoffman and George Johnson were transacted; that it was drawn on partnership account, and that the proceeds of the bills were in fact applied by Hoffman to the discharge of a debt due by the concern. These being the facts, it is insisted that the court below ought **197***) to have complied with *the prayer of the plaintiffs' counsel, and instructed the jury, that if they were so understood by them, the plaintiffs were entitled to recover. And if this statement of the facts be correct, and the instructions asked for had been so framed as to present them fairly to the jury, this court entertains no doubt but that such instructions should have been given.

It is well settled, that if a bill of exchange be drawn by one partner in the name of the firm, or if a bill drawn on the firm by their usual name and style, be accepted by one of the partners, all the partners are bound. It results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known, although the consent of the other partners to the particular contract should not be obtained, or should even be withheld. Were it otherwise, the affairs of the concern could with difficulty be carried on; and these persons could seldom, if ever, know when they might safely deal upon the credit of the firm. It follows that such third persons are not bound to inquire, much less to assure themselves that the partner with whom they are contracting is acting on the partnership account, or for his own individual advantage. The interest of the partner in the joint stock of the concern, and his consequent authority to use their name, raises a presumption that the contract was made for joint account, which is sufficient to bind the firm, unless the contrary be shown, and that the person with whom the partner deals had notice or reason to believe that the former was acting on his separate account.

It is now to be seen how these principles of law apply to the case under consideration.

It is quite clear, that the name of this firm is nowhere designated in the articles of copartnership which have been referred to. The mode in which a particular branch of their business was to be conducted, cannot reasonably be construed to give a name to the firm. It manifestly had no allusion to that subject. The stipulation that the funds necessary for the purposes of the concern should be raised

upon the paper of Johnson, to be indorsed by Hoffman, or *in such other shape as [***198** might be found most suitable to the object of the parties, no more designated Jacob Hoffman than it did George Johnson, as the name of the copartnership. If it did, then the name would be lost or changed, as often as the parties should agree to raise funds for the concern in some other mode than the one specified. It is unnecessary to decide whether the omission to agree upon a partnership name in the body of the instrument was, or was not supplied by the signatures of the contracting parties to it, because it was in full and uncontradicted proof, that after the concern went into operation under the articles, their books were kept, and the bills and accounts relating to their business were made out at their warehouse, in the joint names of Hoffman & Johnson, by which name the firm was generally known in Alexandria, and in which they acted in relation to the business of the concern, and advertised in the newspapers. Now, it cannot be questioned, but that a name thus assumed, recognized, and publicly used, became the legitimate name and style of the firm, not less so than if it had been adopted by the articles of copartnership.

Keeping in mind the principles of law which have been stated, and the fact or the evidence of it, in relation to the name of this concern, it will not be difficult to decide the question, whether the instructions asked for by the plaintiffs ought, or ought not to have been given. It is obvious that the court was required by the two first of them, either to assume the fact that Jacob Hoffman and Geo. Johnson carried on their business as partners under the name and firm of Jacob Hoffman, or to lay it down as law to the jury, that it is competent to one partner to bind the copartnership by a bill drawn in his own individual name, even after a dissolution of the partnership, if that fact was not advertised or known to the person taking the bill; provided the object of the partner who draws and negotiates the bill, be to discharge certain debts due by the concern, and the proceeds are afterwards so applied.

Now, the fact which the court was called upon to assume; was all important to be proved to entitle the plaintiffs to recover. It is averred in the declaration, and is in point of *law the foundation of the plaintiff's demand against the defendant Johnson. But what right had the court to assume a fact which was not warranted by any just interpretation of the articles of copartnership, or of any other written instrument which was given in evidence, but which, if it existed at all, was to be deducted from the parol evidence, of which the jury were alone competent to judge.

The court was not called upon to predicate the conclusion of law upon the fact that the defendant and Hoffman traded under the name and firm of Jacob Hoffman; if that fact should be so found by the jury, and unless it was so found, it is quite clear that the bill in question, although drawn for the purpose before mentioned, and although the proceeds were so applied, did not bind the defendant, and consequently, the court was right in refusing to give

these instructions in the form in which they were propounded, unless the fact was that which all the instructions assume, and which formed the basis of the plaintiffs' argument before this court; the plaintiffs contracted in point of law, as they manifestly did in fact, with Jacob Hoffman alone, and upon his sole responsibility, and the use which Hoffman intended to make or did make, of the proceeds of the bill, was quite as unimportant to them and to their cause, as it would have been, had they contracted with Hoffman & Johnson under the name of their firm.

As to the necessity of bringing home to the knowledge of the plaintiffs, in one of the modes stated in the instructions asked for, the dissolution of the copartnership, in order to prevent their recovery against Johnson, we are all of opinion that it did not exist in point of law, unless, in point of fact, the bill was drawn in the name of the firm. We admit that if one of the partners contracted in the name of his firm with a third person, after the partnership is dissolved, but that fact not made public or known by such third person, the law considers the contract as being made with the firm and upon their credit, and this for a reason too obvious to require explanation. But if the partner deal with another in his individual name, and upon his sole responsibility, without even an allusion to the partnership, as the jury **200***] would *have been well warranted in concluding the facts to be in this case, it was unimportant to that other to know that the partnership was dissolved, since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was contracting, and upon his credit.

It only remains to notice the single point of difference between the last and the two preceding instructions. These, as has before been noticed, assume the fact that the partners carried on the business of the concern under the name and style of Jacob Hoffman. That places the plaintiffs' right of recovery upon the circumstance, that the defendant and Hoffman sometimes used, in relation to the business of the concern, the name and style of Jacob Hoffman, as representing the firm, in connection with the other facts stated in the preceding instructions.

But would the court have been warranted in stating to the jury, what this instruction manifestly purports, that whatever may be the name agreed upon by the partners, and in which they generally act, in relation to the business of the concern, still, if they have sometimes used, in that relation, the name and style of one of the partners, bills drawn in that name, and negotiated for the purpose stated in the instruction, would bind the other partner? We clearly think not. The circumstance relied upon in this instruction, as to what the partners sometimes did, was no doubt proper to be left to the jury, as evidence conducing to maintain the averment in the declaration, that Jacob Hoffman and the defendant carried on business as partners in trade under the name of Jacob Hoffman, if the court had been called upon to leave that as a fact to the jury. But it was nothing more than evidence of that fact, upon which it would have been highly improper in the court to predicate any principle of law **Peters 2.**

whatever. This point, we conceive, was fully settled in the case of *Townsend v. Sumrall*, decided a few days ago by this court, *ante*, page 170.

We are, upon the whole, of opinion that the court below was right in refusing to give any of the instructions prayed for, and that the judgment of that court ought to be affirmed with costs.

Cited—5 Pet., 576, 577.

*DAVID HUNT ET AL., *Appellants*, [*201
v.

ROBERT WICKLIFFE, *Appellee*.

Entry in Kentucky land-office—description—possession—absent defendants—parties—practice.

An entry was made in the land-office of Kentucky of one thousand acres, in the name of "John Floyd's heirs," without naming the persons who were the heirs. Upon an objection to the validity of the entry, the court said, that substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are the heirs, was not of such substantial importance as to vitiate the transaction. [208]

An entry was made "so as to join the settlements on the north-east and south sides thereof, so as not to run into the old military surveys which are legal." The old military surveys formed together a parallelogram, and adjoined the lands intended to be described by the entry. It was objected that the limitation on the entry, "so as not to run into the old military surveys which are legal," rendered the whole entry so uncertain as to make it void.

The rules which are settled in Kentucky, would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north-east and south side of the settlement, the whole land to be included by rectangular lines. The old military survey must, therefore, be so contiguous to the settlement as to stop one or two of those lines. A subsequent locator knows where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them. "We consider the last words 'which are legal,' merely as an affirmation that they are so, not as leaving it doubtful; and consequently that they make no change in the entry." [209]

It is well settled, both in the court of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. [212]

Each of the parties held in possession distinct parts of the land in controversy. In this state of things it is well settled, that the party having the better right, is in constructive possession of all the land not occupied, in fact, by his adversary. [212]

The law of Kentucky authorizes their courts of chancery to make decrees against absent defendants, on the publication of an order for two months successively in some paper authorized to make the publication, and on fixing it up at certain public places, prescribed by the act. This publication is considered as a constructive service of the process. The Supreme Court of Kentucky has decided that the publication must be continued for two calendar months. [214]

As the plaintiffs in the Circuit Court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties. The Circuit Court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice. [215]

THIS was an appeal from the Circuit Court of Kentucky, in which court the appellants had filed a bill against the appellee, claiming from him a conveyance of the legal title to certain *lands in the State of Kentucky, [*202 to which the appellee had the legal title; but

by the appellants it was alleged, that they had a prior equitable title, derived under certain entries made in the land-office of that State. The bill was dismissed by the circuit without costs, and from the decree of dismissal an appeal was entered to this court.

The defendant, Robert Wickliffe, claimed the land under patents to John Craig for 2,000 acres, dated 2d of December, 1785, and to A. Fox and John Craig for 2,000 acres, dated on the same day. He also asserted a possession, protected by the statute of limitations. The title under these patents interferes with the entries under which the appellants claimed; and the appellants in the Circuit Court sought to obtain a conveyance of all the interference, and also other portions of the grants to Floyd, not included within the boundaries of Craig's, and Craig and Fox's patents.

The entries under which the heirs of John Floyd and those who hold under them claim the land, were as follows: "1779, October 29. John Floyd this day appeared and claimed a right to a settlement and pre-emption to a tract of land, lying on Four Mile Creek, eight miles north-west from Boonsboro, including a plantation, claimed by the said Floyd, called Woodstock, raising corn on the premises—1776, satisfactory proof being made to the court, that said Floyd has a right to a settlement of 400 acres, including said improvement, and a pre-emption of 1,000 acres adjoining, and that a certificate issue," &c.

Under this certificate for a settlement and pre-emption the entries were made.

"November 3d, 1779. John Floyd enters 400 acres of land by virtue of a certificate, &c., on Four Mile Creek, about eight miles north-west from Boonsboro, including a plantation called Woodstock."

"1780, April 28. John Floyd, assignee of James Taylor, assignee of George Muse, enters 800 acres; as assignee of Lance, 200 acres, upon military warrants, between the lines of David Robinson and John Carter, Andrew Boyd, Thomas Barns, and Jonathan Martin, on Four Mile Creek."

This entry appears to have been located in 203*] two surveys, *and is designated on the plat 245 acres and 240 acres. The latter interferes with the land held by the appellee.

"April 19, 1778. John Floyd, assignee, enters 1,600 acres upon a military warrant, on Boon's Creek, adjoining David Robinson's west line, extending along said line, and westwardly for quantity. A part of this appears to be surveyed in the survey of 246 acres, as represented on the plat."

"May 31, 1783. John Floyd's heirs enter 1,000 acres on a pre-emption warrant No. 1054, joining the settlement at Woodstock on the north-east and north sides thereof, so as not to run into the old military surveys which are legal."

These surveys all adjoin, and were patented in January, 1789, to Mouruing, George, John Floyd, and Jane Breckenridge, wife of Alexander Breckenridge, formerly Jane Floyd, widow of said John Floyd.

The appellants had, under a decree of the Fayette Circuit Court of Kentucky, obtained a conveyance from the patentee of 694 acres, part of the land embraced in these surveys.

The appellee had made no effort to establish the entries under which he claimed, relying upon his elder legal title, and an asserted possession.

Mr. Buckner, for the appellants insisted:

1. That the entries of Floyd were valid, as supported by the testimony in the cause.

2. That by the deposition of J. W. Hunt, a witness in the cause, it was proved that they and those from whom they derive title have had the possession of the land since 1800.

3. The greater part of the survey of 200 acres of the defendant, made in the name of Craig and Fox, is within the claim of the appellants.

4. The bill of the complainants ought not to have been dismissed, but if all who are interested in the claim were not before the court, leave should have been given to make new parties.

He argued that the objects called for in the entries of Floyd were notorious at the time they were respectively made, and he referred to the evidence contained in the depositions of *the witnesses to support the position. [*204 To show that the call to exclude "old military surveys which are legal" did not vitiate the entry, he cited the following cases: *Drake v. Ramsey & Logan* (Hardin's Rep., 34, 383, 386; 2 Marshall's Rep., 395); *Jackson v. Johnson's Heirs* (1 Bibb, 61); *Overton & Reed v. Roberts*, (4 Bibb, 156).

As to the question of possession, relied upon by the appellee, it was insisted that the deposition of Hunt, in relation to the possession of the appellants, was contradicted but by one witness, and was entitled to belief. There was no satisfactory evidence of any possession in the appellee. He also urged, that to enable a party to protect himself under the statute of limitations, upon which the appellee relied, proof of a continued, uninterrupted possession for twenty years should be established, by clear and satisfactory testimony, and this had not been done.

A right of entry is not taken away by a possession without claim of title; and therefore, if the possession of the appellee existed before the date of his patents, it will not avail. The time intended by the statute never commences until the possession is adverse.

If, however, it were conceded that the evidence of the witness examined on the part of the appellee proved that he took possession of any part of the land in controversy prior to the possession of the appellants, no benefit could result to the appellee for the same, beyond the boundary of the portion of the land which the person taking possession of the land intended to adopt. The *quo animo* in which an entry on land is made, will determine the extent of the possession acquired by the entry. He cited *Clark v. Lynn's Heirs* (1 Marshall's Rep., 347).

Admitting the proof of the appellee to be conclusive as to such portion of the land as is within the boundary intended, when the possession was taken, there remained for the appellants a considerable part to which the statute of limitations could not apply.

While he freely conceded that all who should have been made parties to the complainant's bill were not before the Circuit Court, yet, as the entries under which the complainants in

205*] *the bill claimed were valid, and their title had been sanctioned by the decree of the Fayette Circuit Court; and as it was manifest that the appellants had the superior equity, he contended that this court would reverse the decision of the court below, and remand the cause, with leave to amend the bill, and make all persons parties who were required by the rules of chancery, in order for a final decision upon the real merits of the case.

Mr. C. A. Wickliffe, for the appellee, contended:

1. That the presumptive entry of 1,000 acres of Floyd was void, upon the principle well settled by the courts of Kentucky, that every call of an entry which might give it shape or locality, and which are, in the adjudication of those courts, denominated "locative calls," must be proven; and the object called for should have been notorious at the date of the entry.

2. The entry is bad on the face of it. It is vague in the call to adjoin the settlement on the north and south sides, "so as not to run into the old military surveys which are legal."

3. The location, or presumptive entry, is void upon the ground that the land law of Virginia and Kentucky never did authorize an entry to be made in any other way than by the proper names of the person locating.

He argued, that the requisition "to adjoin the settlement on the north and south sides, so as not to run into the old military surveys," was indefinite. The land might adjoin on all sides with equal propriety. A subsequent locator would in vain look for the precise position of such lands. The injunction "so as not to run into old surveys," would give no information of any certain character. What surveys were they? How could anyone know, without the particular survey had been stated, which of the old surveys were good, and which were bad? And yet, this knowledge was essential. He cited, in support of his arguments on these points, 1 Bibb, 10; *Williams v. Taylor* (1 Bibb, 41, 6; 1 Bibb, 35, 127, 135, 6, 138, 29, 30); *Cox v. Smith* (Hardin's Rep., 411); *Grubbs v. Rice* (2 Bibb, 110); *Walker v. Montgomery* (2 Bibb, 259); **206***] *Kincaid v. Blythe* (2 Bibb, 479, *476); *Thomas v. Bowman* (3 Bibb, 128, 132); also 3 Bibb, 162, 543; 4 Bibb, 132; *Howard v. Todd et al.*, in 1 Marshall's Reports.

He also urged that the entry in the name of "the heirs of John Floyd" was indefinite, and therefore void; as those terms did not designate the person to take, the same having been made in 1783, before the law abolishing primogeniture. The land therefore descended to the heirs-at-law, and it is not shown who is such heir. The complainants in the Circuit Court did not show any title to the land claimed by them, derived from the persons who are alleged to have been the proprietors as heirs of John Floyd.

The appellants must not only show an equitable title out of the appellees, but they must connect themselves with it. Upon the evidence on the record, there are parties who have or had an interest in the land as heirs, or under the heirs of John Floyd; and those persons were not before the court, or the proper course pursued to authorize a decree against them in their absence. Breckenridge's heirs were not legally called upon, and the Circuit Court rightfully dismissed the bill,

Peters 2.

It was also contended that the appellants are not entitled to relief upon the further grounds that the patents to Craig, and to Fox and Craig, were more than thirty years old before the commencement of the suit. That there is proved an actual adverse possession of more than twenty years before the commencement of the suit by the appellee, and those under whom he claims; and that the evidence upon the record fully established these positions; and the counsel to prove the same went fully into an examination of the deposition of the witnesses.

He also said, that the appellee had the first legal possession within the interference. And although that possession was by a tenant and purchaser, it extended itself to the limits of the elder title of the appellee, unless it can be shown to have been restricted by limits. (*Kendall et al. v. Slaughter*, 1 Marshall, 376.)

In *Miller v. Humphries* (2 Marshall, 448), it was held that if there was an entry of an elder patentee, on an interference *before [**207** the entry of his adversary, the elder patentee is in possession to the extent of the claim, and the subsequent entry of the junior patentee is an ouster only to the extent of the claim of the junior grantee. Also cited, *Green v. Liler et al.* (8 Cranch, 229; 2 Wheaton, 229).

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a suit in chancery, brought by the plaintiffs in the court of the United States for the Seventh Circuit and District of Kentucky, to obtain a conveyance of lands, to which the defendant has a legal title, but to which the plaintiffs claim the equitable title, under prior entries which they allege to be valid. At the hearing, the bill was dismissed with costs. From this decree the plaintiffs have appealed to this court.

The plaintiffs derive their title from John Floyd, deceased. As the patent of the defendant is anterior to that under which the plaintiffs claim, their equitable title cannot be sustained, unless it be founded on prior valid entries. These entries, therefore, must be examined.

In 1779 John Floyd obtained a certificate for a settlement right of 400 acres and a pre-emption right to 1,000 acres to adjoin his settlement. On the 3d of November, 1779, he made an entry of this 400 acres to include a plantation called Woodstock. The validity of this entry is not controverted, nor is it otherwise important than as it may serve to establish the entry of the pre-emption warrant so far as that entry depends upon the settlement.

On the 31st of May, 1783, John Floyd's pre-emption warrant was entered in the following words:

"John Floyd's heirs enter 1,000 acres of land on a pre-emption warrant, No. 1054, joining the settlement at Woodstock, on the north, east, and south sides thereof, so as not to run into the old military surveys, which are legal."

Two objections have been made to this entry; the first is that it is made in the name of the heirs of John Floyd, without naming them.

That there is less precision and certainty in this description, *then, if the heirs were [**208** named must be admitted, but the court is not prepared to say that the entry is on that ac-

count a nullity. No case has been adduced in which the courts of Kentucky have so decided; and as the description is sufficiently certain to identify the persons entitled under it, we should feel great difficulty in declaring it to be void.

In considering this question, the peculiar situation of Kentucky at the time cannot be overlooked; warrants had been issued for more land perhaps than was to be found in the country; certainly for more than was valuable. These warrants had been most generally placed in the hands of locators by the proprietors, who resided in the Atlantic States. The communication between the principal and agent was tedious and uncertain. The holder of the warrant might often hear of the death of its proprietor at a critical moment, when its immediate location was very interesting to the family of the deceased; and when he was not informed of the names of the persons entitled to the warrant. To delay in making the entry until this information could be gained, might and probably would be very injurious to the family of the deceased; and no injury could result to any from making it in the name of the heirs generally. If they were not all entitled they would all be trustees for those who were. The entry is an incipient step towards obtaining a title. Its object is at the same time to appropriate the land it covers and to give notice to others that the land is appropriated. We do not think the technical objection to substituting a legal description which cannot be misunderstood, for the more definite description by the proper names of the persons who are heirs, is of such substantial importance as to vitiate the transaction. We are confirmed in this opinion by the fact that the survey was made in pursuance of the entry in the name of the heirs of John Floyd generally, and that the patent was issued on this survey. Several other entries and surveys were made for the heirs without specifying their names and patents issued on them all. The objection was certainly not deemed valid by the officer who was entrusted with the power of granting titles to land.

A second and more serious objection has **209***] been taken to *the language of the entry. It is to join the settlement on the north, east, and south sides thereof, so as not to run into the old military surveys which are legal.

The old military surveys, forming together a parallelogram, adjoined Floyd's settlement on the north-west, making an acute angle with its northern line; so that the portion of his pre-emption warrant which adjoined his settlement on the north could not be extended the whole length of the northern line without interfering with them. It is contended that this limitation on the entry, "so as not to run into the old military surveys which are legal," renders the whole so uncertain as to make it void.

We do not think so. The rules which are settled in Kentucky would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north, east, and south sides of the settlement; the whole land to be included by rectangular lines. The old military surveys, therefore, must be so contiguous to the settlement as to stop one or two of these lines. A

subsequent locator knew where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them. The evidence is that they were well known; and that the lines were plainly marked so as to be traced without difficulty.

We consider the last words of the entry, "which are legal," merely as an affirmation that they are so, not as leaving it doubtful; and consequently that they make no change in the entry. Understanding them in this sense, we perceive no sufficient objection to the entry. We cannot perceive any reason why the line might be stopped by an old military survey which is well known as well as by any other well-known object. The shape and form of the land, independent of this reference, being given by the settled rules in Kentucky, the position of the old military surveys must be such as to vary that shape. A subsequent locator could find no real difficulty in fixing the form of the entry. But if this restriction be entirely disregarded, and the entry be surveyed without regard to the old military surveys, it will make very little difference in the degree of interference between *the claims of the parties, [***210** and no difference in the decree which will be made by this court. It will, therefore, not be necessary to decide at this time in what manner this entry ought to be construed.

The lands held by the defendant also interfere with another entry made by Floyd.

On the 29th of April, 1780, John Floyd entered 1,600 acres upon a military warrant on Boon's Creek adjoining David Robinson's west line, extending along said line and westwardly for quantity.

David Robinson had a survey made in 1776, on a military warrant. He afterwards entered a settlement and pre-emption warrant to adjoin this military survey; and surveyed them in September, 1780. The counsel for the defendant object to the legality of this entry, because it does not designate the tract for the west line of which it calls; and because David Robinson's survey had not sufficient notoriety to inform a subsequent locator on what part of Boon's Creek he was to search for it.

The first objection is certainly not well founded. Floyd's entry was made before David Robinson's settlement and pre-emption were surveyed; possibly before they were entered. But were it otherwise this settlement and pre-emption form one tract with his military survey so as to have the same west line.

There is more weight in the second objection. The testimony to establish the notoriety of Robinson's survey is far from being conclusive. John Bradford deposes that he was conversant in the quarter in which these lands lie in November, 1779; that he had no knowledge of the military surveys of David Robinson, but from the record, except from common conversation, but does not know at what time he first heard it spoken of. He knows that Robinson and Hickman have military surveys in that neighborhood, but never understood their precise situation. He believes the M'Gees, at M'Gee's station, knew and could show the lands of David Robinson, but of this he is not certain.

Robert Boggs deposes that he was at the making of David Robinson's military survey, and that he has been conversant *in the [***211**

neighborhood from the year 1775 to the time of giving his deposition. To the question, "from your first knowledge of these surveys (Robinson and others) were they known and familiarly spoken of by the names of their proprietors as aforesaid?" he answers, "he thinks they were, shortly after." He says, "he thinks the lines of Robinson's and Martin's surveys could have been found by reasonable inquiry, at any time after they were made, for they were plainly marked." He left Kentucky, and returned in the year 1779. He left it again in the fall of 1780, and returned in 1783. He is not certain that any person was acquainted with the lines of David Robinson's military survey on the 29th day of April, 1780, except David and William Robiusion, David M'Gee, John Haye and Jacob Boughman. The Robinsons and Boughman lived in Virginia, McGee at his station, about one and a half or two miles from the survey. The body of the land was spoken of, and he believes was known by many.

In estimating the weight of this testimony, it must be recollected that the depositions were taken more than forty years after Floyd's entry was made. Few persons who were alive and in the neighborhood at the time, now survive. A fact resting mainly in memory, which might have been established with ease in 1780, would be ascertained with difficulty in 1825. Examining the testimony under this aspect of circumstances, we think, although it may not be conclusive, it is sufficient to sustain the entry. John Bradford had no personal knowledge of Robinson's survey, but intimates that he was acquainted with it from the records and from common conversation. His deposition is not explicit as to time. His deposition, however, appears rather to refer to a remote time. The people at that time were in stations, and the nearest, certainly one within two miles of the place, was M'Gee's. He believes, but is not certain, that the M'Gees knew and could have shown the land. Robert Boggs was present at the survey. It was known and spoken of as Robinson's shortly afterwards. Though he mentions only five persons who, in addition to himself, knew the lines, three of whom resided in Virginia; still, he says the body of the land was spoken of, and he believes was known by many.

212*] *A military survey, made before the land-office was opened, must have attracted the general attention of those in the neighborhood; and after the office was opened, must have excited general inquiry. Those surveys were established by law; and it was consequently an object with locators, to obtain exact information respecting them, in order to avoid them. Robinson's survey was spoken of at M'Gee's, the very place where inquiry would be made. Other witnesses whose knowledge of that part of the country commenced five or six years afterwards, speak of Robinson's survey as having then acquired general notoriety. There is, then, strong reason to believe that a subsequent locator, having Floyd's entry in his hands, could, with reasonable inquiry, have found the west line of Robinson's entry.

The defendant also relies on an adversary possession in himself and those under whom he claims, for more than twenty years. His proof

of this fact is sufficient; and it is well settled both in the courts of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity. But in this case, the plaintiffs also have been in possession. John W. Hunt deposes that he took possession of the tract of land in controversy, for the plaintiffs, leased it out for a number of years, and accounted with them for the rent. He exhibits the copy of an agreement made with Isaac Johnson and Thomas Coleman, on the 12th day of August, 1800, for three years; and says that other tenants succeeded them, who continued to pay him the rent for the plaintiffs, until the year 1815. The rent he received in that year was, he believes, for the year 1814. Each of the parties, then, has held possession of distinct parts of the land in controversy. In this state of things, it is well settled (*Green v. Litter* 8 Cranch, 229) that the party having the better right, is in constructive possession of all the land not occupied in fact by his adversary. If, then, the plaintiffs in this case have the better title, that title is barred by the possession of the defendant, so far as that possession was actual, but not farther.

No question can arise in this case, under the act which *makes the possession of seven [***213** years a bar, because the plaintiffs were in actual possession of part of the land until the year 1815, and this suit was instituted in April, 1820.

If, then, the title of John Floyd is regularly vested in the plaintiffs, we perceive no sufficient obstacle to their recovering at least a part of the land in controversy.

The plaintiffs claim 694 acres of land, part of the entries which have been considered; and charge generally in their bill, that they have regularly obtained a conveyance for the same from the heirs of the said Floyd, by metes and bounds, without specifying the persons through whom the title is derived.

The will of John Floyd, proved and admitted to record in Jefferson county, in March, 1794, is among the exhibits in the cause. In that will he devised his tract of land called Woodstock (which includes the land in controversy) to his daughter, Mourning Floyd, and to his son, George Floyd. Patents issued on the entries and surveys for the lands in dispute, to Mourning Floyd, John Floyd, George Floyd, and Jane Floyd, widow of the said John Floyd, as tenants in common.

It appears, from another exhibit in the cause, that in the year 1815 the plaintiffs with others filed their bill in the Circuit Court of Fayette county, in the State of Kentucky, sitting in chancery, against the heirs and devisees of Thomas Turpin and of John Floyd, deceased, praying for a conveyance of 699 acres of land, part of the Woodstock tract.

The bill states that in January, 1798, Thomas Turpin sold to John W. Hunt and Abijah Hunt 699 acres of land, part of John Floyd's survey, called and known by the name of Woodstock Tract; and on the same day executed his bond to them in the penalty of \$4,000.00, with a condition for the conveyance thereof, on or before the first day of March thereafter. The said Abijah Hunt and Thomas Turpin both departed this life, no conveyance of the land being made. Abijah Hunt, by his last will, devised his interest in the land to the plaintiffs; and the

legal estate of Thomas Turpin descended to his heirs.

The bill farther states that John Floyd de-
214*] vised his tract of *land called Wood-
stock, consisting of 4,000 acres, of which the
land sold by Thomas Turpin was part, to his
daughter, Mourning Floyd, since intermarried
with John Stewart, and his son, George Floyd,
to be equally divided between them; that the
said Stewart and wife did execute a deed for
the said 669 acres of land to Thomas Turpin
in his life-time; but they are informed that the
same was burnt in the office of the County
Court of Fayette, when the same was destroyed
by fire.

A subpoena issued on this bill, which was
not executed on several of the defendants,
among whom were included John Stewart, and
Mourning, his wife, they being no inhabitants
of the country.

In February, 1815, the court ordered that un-
less the non-resident defendants shall appear
and answer on or before the first day of the
next June term, the bill should be taken for
confessed against them; and that a copy of the
order be inserted in some authorized newspa-
per of the Commonwealth, for eight weeks in
succession, agreeably to law.

It appearing that this order was published,
and that process was served on the resident de-
fendants, the court, in June term, 1816, decreed
that the bill should be taken for confessed, and
that a commissioner appointed by the court
should convey the title of the defendants to the
plaintiffs.

The plaintiffs in this suit claim title to the
lands in controversy under the conveyance exe-
cuted in pursuance of this decree. The defend-
ant insists that no title passes by it, because
Floyd's heirs were not parties to the suit.

The laws of Kentucky authorize their courts
in chancery to make decrees against absent de-
fendants, on the publication of an order, such
as was made in this cause by the Circuit Court
of Fayette county, for two months successively,
in some paper authorized to make the publica-
tion, and on fixing it up at certain public places
prescribed by the act. This publication is con-
sidered as a constructive service of the process.
The court of Fayette county obviously sup-
posed a publication for eight weeks to be a
compliance with this law; but we understand
that the Supreme Court of the State has deter-
mined otherwise. That tribunal has decided
215*] *that the publication must be continued
for two calendar months. Under this con-
struction of the act, the heirs of John Floyd
were never before the court, and the decree
was made against persons who were not parties
to the suit. It cannot affect them. (Pract. Reg.
in Ch., 125; Ca. Chan., 48; Com. Dig. tit. Chan-
cery, Y. 3.) The court therefore has no evidence
that the legal or equitable right of Floyd's de-
visees has been acquired by the plaintiffs. They can-
not be allowed to assert the equity of those de-
visees against the defendant, without making
them parties to the suit.

But as the plaintiffs claimed under a con-
veyance made in pursuance of a decree of a
court of competent jurisdiction, we do not
think their bill ought to have been dismissed.
The Circuit Court ought to have given leave to
make new parties; and on their failing to bring

the proper parties before the court, the dismis-
sion should be without prejudice.

The decree of the circuit is reversed, and the
cause remanded; with directions that the plain-
tiffs have leave to amend their bill, and make
new parties.

This cause came on to be heard on the tran-
script of the record from the Circuit Court of
the United States for the District of Kentucky,
and was argued by counsel; on consideration
whereof, it is considered, ordered and decreed
by this court, that the decree of the said Circuit
Court in this cause be, and the same is hereby
reversed and annulled; and that this cause be,
and the same is hereby remanded to the said
Circuit Court, with directions that the plain-
tiffs have leave to amend their bill and make
new parties.

Cited—14 Pet., 603; 24 How., 206; 13 Wall, 86.

*WILLIAM PATTERSON, Plaintiff [*216
in Error,
v.

THE REV. WILLIS JENKS ET AL., De-
fendants in Error.

*Indian treaty, construction of, by Georgia—validi-
ty of land grant—jury—grant void in part—
case of Danforth v. Wear confirmed.*

Construction of the provisions of the treaties
with the Indians, made by the State of Georgia
relative to boundaries; and of the acts of the Legis-
lature of that State, relative to grants of lands
within its territorial limits, and which were not
within the Indian boundary line, as defined by the
treaties, and as recognized by those acts.

Undoubtedly, the presumption is in favor of the
validity of every grant issued in the forms pre-
scribed by law; and it is incumbent on him who
controvers it to support his objections. The whole
burthen of proof lies on him. But if his objections
depend on facts, those facts must be submitted to
a jury. If opposing testimony be produced, that
testimony, also, must be laid before the jury; and
the court may declare the law upon the fact, but
cannot declare it on the testimony. [227]

If the State of Georgia have construed their
treaty with the Cherokee Indians, by any subse-
quent acts manifesting an understanding of it, this
court would not hesitate to adopt that construc-
tion. [230]

If the State of Georgia has practically settled the
limits of Franklin county, such settlement ought
to have been conclusive on the Circuit Court. [232]

In the nature of things, we perceive no reason
why the grant of the land in controversy should
not be good for land which it might lawfully pass;
and void as to that part of the tract for the grant-
ing of which the office had not been open. It is
every day's practice to make grants for lands which
have in part been granted to others. It has never
been suggested that the whole grant is void be-
cause a part of the land was not grantable. [235]

The principle, that a patent conveying lands
lying partly within and partly without the territory
retained by the Indians, was void as to so much as

NOTE.—Grants good in part.

Where the objection is that the power making
the grant had not a right to give a part of the
lands described, the grant may be held void as to
such part, but valid as to the residue. The whole
grant is not void, because a part of the land was
not grantable. There is a distinction between a
grant comprehending lands which may be granted
with lands which may not, and a grant made on a
fraudulent representation, or an illegal considera-
tion, which vitiates the whole instrument. Pat-
terson v. Jenks, *supra*; Danforth v. Wear, 9
Wheat., 673; Winn v. Patterson, 9 Pet., 663; United
States v. Bradley, 10 Pet., 343.

lay within it, and valid for the residue, was settled by this court in the case of *Danforth v. Wear* (9 Wheaton, 673). This decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia. [236]

THIS cause came up on a writ of error to the Sixth Circuit Court of the United States for the District of Georgia. It was tried in Mill-edgeville at May term, 1827. In the course of the trial, a number of questions were raised, on some of which, the judges, being divided in opinion, refused to give the jury the instruction prayed by the plaintiff; and a verdict and judgment were rendered for the defendants. The present writ of error was brought to reverse this judgment.

In the court below, the plaintiff, to sustain his case, gave in evidence a grant from the **217*** State of Georgia to Basil Jones, *for 7,160 acres of land, in Franklin county, on the waters of the south fork of the Oconee River, since called the Appalachie, bearing date the 24th day of May, 1787, and deduced his title to the disputed premises regularly from the grantee.

On the part of the defendants, it was contended that this grant was void:

1. Because the land attempted to be granted was without the temporary boundary line of the State, and within the Indian hunting-ground.

2. Because the survey wanted the line and station trees required by law; the surveyor had omitted to note on his plat the beginning corner; had laid down the water-courses inaccurately; and had been guilty, as was alleged, of various other acts of fraud, negligence, irregularity, or ignorance, in making and platting the survey, prior to the emanation of the grant.

Evidence was also given on behalf of the plaintiff, to establish the lines, and to prove the possession of the defendants within them.

The first exception stated, that the plaintiff gave evidence conducing to prove that the south fork of the Oconee River, known as the Appalachie, runs through the land described by the grant and plat aforesaid, under which the plaintiff derives title; and that all the lands within the said grant, which are in possession of the defendants in this action, are on the north and east side of the said south fork of the Oconee River, and within the territorial limits of the State of Georgia, as defined by Hawkins's line, which said line was run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the State of Georgia and the Creek Indians; and that all the lands included within the aforesaid grant are situated on the waters of the said south fork of the Oconee River. And thereupon, the counsel for the plaintiff moved the court to instruct the jury, that the grant from the State of Georgia to Basil Jones, under which the plaintiff derives title to 7,160 acres of land in Franklin county, in the said State, **218*** *was a legal and valid grant; which instruction the court, being divided in opinion, refused to give.

The second exception stated, that the counsel for the plaintiff also moved the court to instruct the jury, that, upon the aforesaid evidence, taking the same as true, the said tract of land, so granted to Basil Jones, was, at the time of Peters 2.

the survey and grant thereof, within the territorial limits of the State of Georgia, as ascertained by laws and treaties; within the limits of Franklin county, as by law defined; and not within the Indian boundary line; which instruction the court, being divided in opinion, refused to give.

The third exception stated, that the counsel for the plaintiff also moved the court to instruct the jury, that the said grant to Basil Jones, under which plaintiff derived title, was a legal and valid grant, for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, including all the waters of the same; which instruction the court, being divided in opinion, refused to give.

The fourth exception stated, that the counsel for the plaintiff moved the court to instruct the jury, that the said grant to Basil Jones, under which the plaintiff derives title, was a legal and valid grant, for all the lands exhibited on the plats as lying north and east of the south fork of the Oconee River, called Appalachie; which instruction, the said court, being divided in opinion, refused to give.

The fifth exception stated, that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines, of the said tract of land, granted to Basil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee River, in the possession of the defendants. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in platting the water-courses, nor any fraud, irregularity, negligence, or ignorance of the *officers of government, prior to [**219** the issuing of the grant to Basil Jones, under which the plaintiff derives title; did, or could, legally affect the right of the plaintiff to recover; that the existence of the grant is, in itself, a sufficient ground to infer that every prerequisite has been performed; and that as to all irregularities, omissions, acts of fraud, negligence, or ignorance of the officers of government, prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them; which instruction the court, being divided in opinion, refused to give.

The sixth exception stated, that the plaintiff moreover gave evidence conducing to prove that the title of Basil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessee of the plaintiff in this action, before the commencement thereof; and that all the lands in the possession of the defendants, and each of them, at the time of the service of the process in this action, were within the lines described by the said grant to the said Basil Jones, and were on the north and east side of the said south fork of the Oconee River. And thereupon, the said counsel for the plaintiff moved the court to instruct the jury, that, upon the aforesaid evidence, if the jury believed the same, the plaintiff was, by law, entitled to recover the premises in dispute; which

instruction the court, being divided in opinion, refused to give.

On the part of the plaintiff in error, also plaintiff in the original action, two points were made:

1. That the grant to Basil Jones is a good and valid grant, in toto.

2. That, if not good for the whole it is so at least in part, including all the premises disputed in the present action.

To maintain these propositions, it was insisted:

1. That, at the time of the emanation of the grant to Basil Jones, under which the plaintiff desires title, the lands lying on the south fork of the Oconee River, including all the waters of the same, were within the territorial limits of **220*** the State of Georgia, within the limits of Franklin county, as by law defined, and not within the temporary Indian boundary line; and that the said grant to Basil Jones was, and is, a good and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, including all the waters of the same.

2. That a large part of the land embraced in the said grant lies north and east of the south fork of the Oconee River, now called Appalachie, being the branch designated by the United States commissioner, Hawkins, as the temporary Indian boundary line; and was, consequently, at the time of the issuing the said grant, within the acknowledged limits of the State of Georgia. As to so much of the said land, therefore, the grant is valid; and, since this comprehends all that was in possession of the defendants at the commencement of the present action, the plaintiff is entitled to recover.

3. That neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in his platting the water-courses, nor any fraud, irregularity, negligence, or ignorance of the officers of government, prior to the issuing of the grant to Basil Jones, under which the plaintiff derives title, did, or could, legally affect the right of the plaintiff to recover; that the existence of the grant is, in itself, a sufficient ground to infer that every prerequisite has been performed; and that, as to all irregularities, omissions, acts of fraud, negligence, or ignorance of the officers of government prior to the emanation of the grant, the government of Georgia; and not the plaintiff claiming under her grant must bear the consequences resulting from them.

The case was argued by *Mr. Wilde* and *Mr. Berrien* for the plaintiff, and by *Mr. Haynes* for the defendant.

For the plaintiff in error it was contended,

That the plaintiff, having made out a regular title from the grantor, and the defendant being **221*** in possession of the land *covered by the title, the only question was upon the validity of the grant; and the decision of this inquiry will depend upon which was the temporary boundary line between the State of Georgia and the Indian tribes in 1787, the grant having issued at that period.

A grant of lands, the Indian title to which

has not been extinguished, is not void for that cause alone, independent of statutory regulations. (3 Johns., 365; 6 Cranch, 87.)

This grant is not avoided by any statute of the State of Georgia which can legally operate upon it. Statutes posterior to the emanation of this grant cannot affect it. If the grant issued legally, it created a vested right which could not be divested. This grant is dated 24th of May, 1787, and these principles dispose of all the Acts of the Legislature posterior to that date. The Acts of 1780, Prince's Dig., 263, sect. 20, and 1783, Prince, 268, 5, are all retrospective in terms.

Penal statutes must be construed strictly; and of this kind is the Act of 1787, Prince's Dig., 278, secs. 2, 3; and it applies to lands granted and surveyed at the date of the law. The plaintiff's survey was before; his grant was after the date of this Act.

The third article of the treaty of August, 1787, between the Creeks and the State of Georgia, *Marbury v. Crawford* (Prince, 605), provides that a new line shall be drawn without delay between the present settlements in the said State, and the hunting-grounds of the said Indians, to begin on Savannah River, where the present line strikes it, thence up the said river to a place on the most northern branch of the same, commonly called Keowee, where a north east line to be drawn from the top of the Oconee mountain shall intersect; thence along the said line in a south-west direction to the said mountain; thence in the same direction to Tugalo River, thence to the top of the Currohec mountain, thence to the head of the most southern branch of the Oconee River, including all the waters of the same; thence down the said river to the old line.

The same boundary is recognized in the 11th article of the Gulphinton treaty (C. & M. Digest, 508). The treaty of 1786 *with **222** the Creeks, declares that, "the present temporary lines reserved to the Indians for their hunting-grounds shall be agreeable to the treaties of Augusta and Gulphinton;" and it provides that the lines shall be marked as soon as the Indians can attend to see it done. (C. & M. Dig., 619.)

The Land Act of 1784, sec. 1, defines the lines of the Indian hunting-ground in the terms of the treaty, and lays off two new counties, Franklin and Washington (C. & M. Dig., 330); and the 10th section of the Act of 1785 (C. & M. Dig., 336), shows the construction which the Legislature put on the treaty.

The adoption of a waving boundary line, "including all the waters," is in conformity with the example and practice of the United States in her numerous Indian treaties.

The counsel referred to 4 art. Treaty with the Cherokees in 1785; Treaty with the same in 1791, 1807; 1 art. in the treaty with the Peoria tribe in 1819, with the Choctaws in 1805, with the Chickasaws in 1786, and other treaties.

All the land covered by the plaintiff's grant was, at the time of the execution of the survey, and the emanation of the grant, within the limits of the State of Georgia, and within the body of the county of Franklin; and if the same was subsequently retroceded to the In-

dians, such retrocession would not divest the vested rights of the grantee. Its utmost effect would be to subject the title in fee to the Indian title of occupancy, and the former would cease to be incumbered whenever the latter should be removed.

If further proof were necessary to show that the lands on the waters of the south fork of the Oconee left out by the line of 1798, were within the limits of the State of Georgia, and had been ceded by the Indians and granted by the State, that proof is supplied by an express recognition of the fact by the joint act of Georgia and the United States. (Articles of agreement or cession in 1802; 4 article, Prince's Ab., 527.)

As to the proposition that part of the land in the grant is within the Indian boundary and void, and that consequently the whole grant is void, the decision of this court in *Dunforth v. Wear* (9 Wheaton, 673) establishes a contrary **223*** doctrine, and is conclusive in favor of the plaintiff in error on this point.

For the defendants in error, *Mr. Haynes* maintained:

1. That the grant to Basil Jones was void, and that no title under it could be valid; the survey and grant lying beyond the temporary boundary line of the State of Georgia; and that all surveys and grants located on the Indian hunting-ground beyond the then temporary boundary line of the State, were prohibited by the statute laws of Georgia, and declared to be null and void, and inhibited from going to the jury as evidence.

2. That the warrant, survey and grant, purported to be for land stated to be in the county of Franklin, and the land embraced in the survey extended across the western line of the county of Franklin; and all surveys and grants not lying in same county, not laid out, are by law declared to be null and void.

3. That if the expression, "waters of the south fork of the Oconee River," contained in the plat, mean the south fork of the Oconee itself, or the Appalachie River, the grant is void on its face; as the survey and grant are in direct violation of the statutes of the State.

4. That waters of the south fork of the Oconee River "do not mean the south fork of the Oconee itself, or Appalachie, but only tributary streams of that river; and that the survey and grant are void for the suppression of the fact that one of the streams marked in the plat was the south fork of the Oconee or Appalachie, and for the suggestion of the falsehood that the land lay within the county of Franklin when in truth a great part of it lay without that county. By this suppression of truth, and suggestion of falsehood, the State was deceived; and by the fraudulent deception practiced by the grantee, the survey and grant are void in law; and particularly so in this case, as the grantee, Basil Jones, was the surveyor who committed the fraud on the State for his own benefit.

In support of the first point, the treaties with the Indians, and the construction given to them **224*** by the Legislature of Georgia, were relied upon. The treaty of Augusta in 1783 (Marbury & Crawford's Digest, 604, 605), calls for "the most southern branch of the Oconee River;" and the Act of the Legislature of

Georgia in defining the line of the State, adopts the same language. (Prince's Dig., 270.)

An enlarged construction of the treaty was attempted, but this was not authorized by the Legislature, when defining the boundaries of the county of Franklin, the Act declaring the boundaries to be "the most southern stream of the Oconee River."

This definition of boundary is referred to in subsequent treaties, and the terms of description in those treaties are retained. (M. & C. Dig., 607.)

Georgia has always, both in her treaties with the Indians and in her legislative enactments, respected this boundary line; as well from a sense of justice to the Indians, as from a regard for her own dignity; and she has never admitted that the temporary boundary extended west of "the south fork of the Oconee."

A particular examination of the treaties with the Indians will show conclusively, that "the south fork of the Oconee," mentioned in the treaties of 1783, is Appalachie River, as known in the laws, and to the citizens of Georgia. (M. & C., 619; Watkins's Dig., 364; Prince's Dig., 263, 268, 275, 278, 304; Watkins, 363, 551.) These treaties and statutes of the State show, beyond controversy, that the grants within the boundary of the Indian lands were void.

Upon the second point it was urged, that the Act of 1784, passed soon after the treaty of 1783, made at Augusta, made the grants beyond the line of Franklin county, established by that law, absolutely void. (Prince's Dig., 270.)

The warrant calls for land in the county of Franklin, and the survey says the land does lie there; and the grant is issued accordingly. Taking the Appalachie as the western boundary of the county, the land does not lie within the county. The surveyor who stated the fact to be otherwise, committed a deception on the State.

By the laws of Georgia, a grant of land not in the counties *laid out by the State [**225** is void. Such grants are to be declared null and void. (Prince, 263, 271, 275, 278.)

The third proposition of the defendant in error was considered as established by the treaties and statutes referred to; and in maintaining the fourth, it was urged by the counsel, that the representation of Basil Jones, in returning the survey, was an intended deception on the State, and no title to the land could be derived through the same. (Cited, 7 Bae. Ab. 64, 4; 4 Com. Dig., 307, 308; 2 Coke's Rep., 33; 2 Wilson's Rep., 347; 10 Johns., 23; 9 Cranch, 99, 101; 10 Johns., 23; 5 Wheaton, 293; 1 Wheaton, 115, 155.)

In answer to the claim of the plaintiff in error, that the grant was good for that part of the land which was admitted to lie within the county of Franklin, although it might be void as to the part beyond the same, the counsel for the defendants contended, that the law is fully settled, that an instrument void in part is void altogether. (Cited 1 Plowd., 54; 3 Taunton, 236; Cro. James, 34; 3 Coke's Rep., 77; 14 Johns., 454, 458; 4 Com. Dig., 307; 1 Co. Rep., 26; 11 Co. Rep., 89; 9 Wheaton, 673.)

The attempt to obtain relief from the weight of these authorities, by urging, that while acts prohibited by statute vitiate all proceedings connected with them, the same principle does

not extend to an Act contrary to the common law, is opposed by authorities; and if this were not so, the grant to Basil Jones is prohibited by express statute. (Act of 1778; M. & C., 401.)

These Acts were not *ex post facto*, upon the authority of *Calder v. Bull* (3 Dall., 386.)

When an act is declared void, either by statute or common law, it is considered not to have had any legal existence; nor can it be set up and made valid in the hands of any third person. (2 Bl. Com., 63; Douglass, 736.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered in the court of the United States for the Sixth Circuit and District of Georgia, in a case in which the plaintiff in error was plaintiff **226*** in ejectment. The plaintiff derived title from a grant dated in May, 1787, which was issued by the Governor of Georgia to Basil Jones. At the trial, the counsel for the plaintiff moved the court to instruct the jury on several points, on all which the judges were divided, and therefore the instructions were refused; to which refusal exceptions were taken. The verdict and judgment were rendered in favor of the defendants; and the plaintiff has sued out this writ of error, by which the record is removed into this court. The opinions refused by the court, and the exceptions taken by counsel, will be severally considered.

The first is in these words:

The plaintiff moreover gave evidence conducing to prove that the south fork of the Oconee River, known as the Appalachie, runs through the land described by the grant and plat aforesaid, under which the plaintiff derives title; and that all the lands within the said grant, which are in possession of the defendants in this action, are on the north and east side of the said south fork of the Oconee River, and within the territorial limits of the State of Georgia, as defined by Hawkins's line, which said line was run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the State of Georgia and the Creek Indians; and that all the lands included within the aforesaid grant are situated on the waters of the said south fork of the Oconee River. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that the grant from the State of Georgia to Basil Jones, under which the plaintiff derives title to 7,160 acres of land in Franklin county, in said State, was a legal and valid grant; which instruction the court, being divided in opinion, refused to give.

This prayer is expressed in such terms that the court could not with propriety have granted it without explanation; whatever opinion on the law of the case might have been entertained. Without stating a single fact, or placing the prayer on the belief of the jury that the evidence proved any fact, the court is asked to say positively, that the grant to Basil Jones is legal and valid. Undoubtedly the presumption **227*** is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it, to support his objections. The whole burthen

of proof lies on him; but if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony also must be laid before the jury; and the court may declare the law on the fact, but cannot declare it on the testimony. In this case, the prayer states that the plaintiff offered testimony conducing to prove certain facts which were deemed essential to the validity of the grant, and asked the court to say, not that if the testimony was believed, or if those facts were proved, the grant was valid, but positively that the grant was valid. The court did not err in refusing to give this instruction.

The second exception states that the counsel for the plaintiff also moved the court to instruct the jury, that, upon the aforesaid evidence, taking the same as true, the said tract of land, so granted to Basil Jones, was, at the time of the survey and grant thereof, within the territorial limits of the State of Georgia as ascertained by laws and treaties, within the limits of Franklin county as by law defined, and not within the Indian boundary line; which instruction the court, being divided in opinion, refused to give.

This prayer is made on the admission of the testimony stated in the first, and on its sufficiency to prove that the tract of land granted to Basil Jones was situated on the waters of the south fork of the Oconee River; and that the land in controversy lay on the north and east side of that fork, and within the territorial limits of the State of Georgia, as defined by the line run by Benjamin Hawkins, under the authority of the United States, to define the temporary boundary line between the State of Georgia and the Creek Indians.

From these facts the court is asked to draw the conclusion that the tract of land was, at the time of the survey and grant thereof, within the territorial limits of the State of Georgia, and within the limits of Franklin county, as by law defined; and not within the Indian boundary line.

This prayer requires the court to say what was the boundary *between that part of [***228** the State of Georgia, to which its jurisdiction was extended, and the Indians; and also what were the limits of Franklin county. As it requires an instruction respecting the whole tract, the court was bound to inquire whether the whole tract was within those limits. To ascertain these boundaries, the laws of Georgia, and the treaties of that State with the Creek and Cherokee Indians, must be examined.

On the 31st day of May, in the year 1783, a treaty was made at Augusta, between the State of Georgia and the Cherokee Indians, describing the line which should thereafter separate the settlements of the whites from the hunting-grounds of the Indians. This line commences on the Savannah River, and is of no importance in this case until it reaches the top of the Currohee Mountain. It is to proceed "thence to the head or source of the most southern branch of the Oconee River, including all the waters of the same, and thence down the middle of the said branch to the Creek line."

On the first day of November in the same year, the State of Georgia formed a treaty with the Creek Indians, for the purpose of drawing the line between the settlements of the whites

and the hunting-grounds of the Indians. This line also commences on the Savannah River, and runs as described in the treaty to the top of the Currohee Mountain. It proceeds "thence to the head or source of the most southern branch of the Oconee River, including all the waters of the same, thence down the said river to the old line."

A subsequent treaty was held with the Creeks on the 12th of November, 1785, at Galphinton. The 4th article of this treaty declares, that "the present temporary line reserved to the Indians for their hunting-ground, shall be agreeable to the treaty held at Augusta in the year 1783.

On the 28th of November, 1785, the commissioners of the United States held a treaty with the Cherokees at Hopewell, in which it was agreed that the boundary line should run from the top of the Currohee Mountain "to the head of the south fork of Oconee River."

The treaty at Shoulder-bone, concluded in 229*] the year 1786, *confirmed the line as established in the treaties of Augusta and of Galphinton. All the treaties between Georgia and the Indians, stipulate that the lines shall be marked as soon as possible; but it does not appear that they were ever marked. A treaty was afterwards entered into at New York, between the United States and Creek Indians, on the 7th day of August, in the year 1790, which fixes the boundary line from the top of the Currohee Mountain, "to the head or source of the main south branch of the Oconee River, called the Appalachie, thence down the middle of the said south branch to its confluence with the Oakmulgee."

In pursuance of this treaty, the line from the Currohee Mountain to the head or source of the main south branch of the river Oconee was run by Benjamin Hawkins.

Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest between Georgia and the Creeks, might claim a construction favorable to the pretension of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words. The line is to run "to the source of the most southern branch of the Oconee River, including all the waters of the same." The source of the most southern branch is the source of the main stream of that branch. It is a point to which the line is to be run from the top of the Currohee Mountain. This line, if the treaty gave no directions respecting its course, would be a straight line. But the treaty directs it to be so run as "to include all the waters of the same;" that is, "all the waters" of the most southern branch. The line must, therefore, be drawn from the one given point to the other, in such direction as to include all the waters of the most southern branch of the Oconee. It must, therefore, instead of being straight, pass round the sources of all those streams which empty into the south fork on its northern side, and are between the points of commencement and of termination. But it is obvious that no line from the top of the Currohee Mountain to 230*] the *source of the most southern branch Peters 2.

of the Oconee River, can include the waters which empty into it on the southern side.

To obviate this difficulty, the defendants insist that the line shall pass round the main branch of the south fork of the Oconee to the source of the lowest stream which empties into it on the south side, and proceed down that stream.

This line would include all the waters of the south fork, but is attended with other difficulties of no inconsiderable magnitude. The words of the treaty seem to require that the line should stop at the source of the main stream, not at the source of an inconsiderable rivulet. From this source the line is to proceed down the river. It is reasonable to suppose that it proceeds down the river from the source of the river, not from the source of a small branch. It is to include all the waters, that is, all the tributary streams of that at whose source it stops. But this construction requires it to stop at the source of a stream, which is itself tributary to the very river which is spoken of as one of its waters.

If this construction be admitted, and the source of the lowest stream on the south side be substituted for the source of the main stream, still the line must run down that lowest water course to the south fork, and down the south fork to the old line. The case does not inform us that even this line would include the whole tract granted to Basil Joues. That tract is stated to lie on the waters of the south fork, but not on the Georgia side of the most extreme of those waters. So much of it as may be situated on the Indian side of that water-course, would be within the Indian hunting-grounds.

The treaty made with the Cherokees at Augusta on the 1st day of June, 1783, is apparently intended to establish the same line which was afterwards adopted in the treaty with the Creeks. The only variance in the language is, that in the treaty with the Cherokees the line from the source of the southern branch of the Oconee River is to run "down the middle of the said branch;" in the treaty with the Creeks, it is to run "down the river." It is not probable that different lines could have been intended.

If the State of Georgia has construed this treaty by any *subsequent acts manifest-[*231 ing her understanding of it, we should not hesitate to adopt that construction in this case. But the bill of exceptions contains no fact showing that Georgia has adopted a construction of her treaties with the Indians which would establish the boundary claimed by the plaintiff. On the contrary, in February, 1787, an Act was passed "for the appointment of commissioners to run the line designating the Indian hunting-grounds." This Act directs the commissioners to proceed in conjunction with those to be appointed by the Creek nation, to trace and mark "the temporary boundary line, as heretofore established; that is to say, from the Currohee Mountain, in the direction of the present temporary line from Zugalo River, till the same shall strike the head or source of the main direct stream of the south branch of Oconee River, called also Appalachie, by which is to be understood the main fork of Oconee River, next above Little River."

This Act seems to reject all claim, on the part of Georgia, to lands lying south of the main

stream of the south branch of Oconee, and to adopt the construction of the treaties at Augusta, which appears to have been adopted by the commissioners of the United States, at the treaty at Hopewell, in 1785.

The prayer we are considering, also requested the court to instruct the jury that the tract of land granted to Basil Jones was within the limits of Franklin county as by law defined.

In February, 1784, the Legislature passed an Act for laying off two more counties to the westward. One of these was the county of Franklin.

The first section declares, "that the present temporary line, circumscribing the Indian hunting-ground, shall be marked by a line drawn from that part of the north branch of Savannah River, known by the name of the Owee, which shall be intersected by a line north-east from the Oconee mountains; thence in the same direction to Zugalo River; from thence in a direct line to the top of Currohee Mountain; thence to the head or source of the most southern stream of the Oconee River, including all the waters of the **232**"] *same; thence down the said river to the old line, thence along the old line."

The only difference between this legislative description of the line, circumscribing the Indian hunting-ground, and that in the treaty, is in the substitution of the word "stream" for the word "branch." In the treaty, "the branch," and in the law, "the stream," appear to be considered as "the river." The line is to run from its source "down the said river." This language would seem to indicate that a considerable, or main branch, or stream, one which had acquired the name of river, not a small rivulet, was in the mind of the Legislature. The line which runs to it from the top of the Currohee Mountain is subject to all the uncertainty which attends the same line, as described in the treaty of Augusta.

The 2d section of the Act proceeds to define the exterior lines of the county of Franklin. They run from the Savannah River to the south branch of the Oconee River; thence up the said river to the head or source of the most southern stream thereof; thence along the temporary line separating the Indian hunting-ground, to the northern branch of the Savannah, &c.

The southern boundary of Franklin county, from the place where the line from the Savannah strikes the most southern branch of the Oconee River, is up that river to the head or source of the most southern stream thereof. You find the head or source of this most southern stream, by proceeding up the river.

It may well be doubted whether this description will admit of leaving the river for any of its small rivulets. The words, the most southern stream of the south branch of the Oconee, whose source is to be found by proceeding up the river, may be satisfied, either by pursuing the most southern stream which has acquired the name of river, or the most southern stream which empties into the river. It can scarcely be imagined that Georgia has not settled practically the limits of Franklin county; and any such settlement ought to have been conclusive with the Circuit Court. But no such settlement is stated in the record, and the court is **233**"] required *to say in what manner its boundary lines are to be drawn, in pursuance

of the Act of Assembly by which it was constituted. The court is relieved from the difficulty by the same circumstance which made it unnecessary to determine the line which circumscribed the Indian hunting-grounds. The statement of fact on which the opinion of the court is asked, does not affirm that the land lies on the northern, or Georgia side of the most southern stream, but that it lies on the waters of the south branch of the Oconee River. For this reason this instruction ought not to have been given as asked.

The third exception states that the said counsel for the plaintiff also moved the court to instruct the jury that the said grant to Basil Jones, under which plaintiff derived title, was a legal and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, including all the waters of the same; which instruction the court, being divided in opinion, refused to give.

The court understands the words, "including all the waters of the same," to mean waters north and east of the south fork of the Oconee River. This application, like the second, is supposed to be made on the assumption that the facts stated in the first are true. If they are, then all the land contained in the patent, lying north and east of the south branch of Oconee, is on the Georgia side of the line circumscribing the Indian hunting-ground, and within the county of Franklin, as described by law. The application supposed to be made to the court, is to instruct the jury that the grant is good for so much land as lies within the county of Franklin, although part of the tract may be without that county and within the Indian boundary. The counsel for the defendants insist that, under the laws of Georgia, the whole patent is void if any part of the land it purports to grant be within the Indian boundary. The counsel for the plaintiff contends that the laws, so far as they have declared patents to be void, are entirely retrospective; and that prospectively they only inflict penalties on persons who shall make surveys in contravention of the statute.

*In January, 1780, an Act was passed [***234** "for the more speedy and effectual settling of this State." The 19th section enacts "that no warrant, survey or plat, made or laid out in the lands yet within the lines of the Indians, shall be held valid, and the same is hereby declared null and void to all intents and purposes whatever; nor shall any grant which may hereafter be surreptitiously obtained, be deemed legal or of any effect."

We do not think the language of this section entirely retrospective. The words "made or laid out" may apply to the future as well as the past, and comprehend warrants and surveys which shall be, as well as those which have been made or laid out in the lands yet within the lines of the Indians.

In February, 1783, Georgia passed an Act for opening her land office. The 11th section of this act is retrospective so far as it annuls surveys and grants. Its prospective provisions only inflict penalties on the persons who shall make surveys or attempt to obtain a grant. But the 13th section, after describing the limits of the State, provides "that nothing herein-

before contained shall extend, or be construed to extend, to authorize or empower any surveyor, or other person or persons whatsoever, to survey, run or make lines upon the lands before described as being allowed to the Indians for hunting-ground, or any part or parcel thereof, before or until permission for that purpose shall be granted by the Legislature and made known by proclamation."

In consequence of this proviso, the land-office could not be considered as opened for lands within the Indian boundary.

The 5th section of the Act of 1785, which has been relied on, is retrospective.

The Act of February, 1787, for the appointment of commissioners to run the line designating the Indian hunting-ground, inflicts additional penalties on those who shall thereafter survey or cause to be surveyed, or obtain grants for any lands beyond the temporary line designating the Indian hunting-ground. The 3d section is in these words. "whereas, notwithstanding the most positive laws to the **235***] *contrary, many persons, from design or accident, have run large quantities of land and obtained grants for the same, southward of the present temporary line between the good citizens of this State and the Indians, and expect to hold the same when a cession of said land can be obtained. Be it therefore enacted, that the surveys or grants for such land be considered, and they are hereby declared to be null and void, and of no effect whatever."

This enactment is undoubtedly retrospective. It manifests, however, unequivocally the opinion of the Legislature, that all the surveys and grants which are declared void, had been made and issued contrary to the most positive laws. However these laws may be construed, it is, we think, obvious that the office was not opened for lands situated within the Indian hunting-grounds, and that grants for them were not authorized.

But is the whole grant a nullity because it contains some land not grantable?

In the nature of the thing, we perceive no reason why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract for the granting of which the office had not been opened. It is every day's practice to make grants for lands, which have in fact been granted to others. It has never been suggested that the whole grant is void because a part of the land was not grantable.

The Act of February, 1807, after stating "that many persons had run large quantities of land, and obtained grants for the same southward of the present temporary line between the good citizens of this State and the Indians," enacts "that the surveys or grants for such lands shall be considered null and void;" and the survey in this case was made in September, 1786.

This enactment might with as much propriety be construed to apply to those surveys only which were made entirely within the Indian boundary, as to that part of a survey which lies on the Georgia side of that boundary. Neither construction would probably pursue the real intent of the Legislature. Georgia **236***] was willing to grant all the lands as far as the Indian boundary, but unwilling to pass Peters 2.

that line. The sole object of the enactment was to restrain her citizens from passing it, by making void all surveys and grants of lands beyond it. It is therefore a reasonable construction of the Act to consider it as applying to surveys and grants so far only as they were contrary to law. There is a plain difference between a grant comprehending lands which may, with lands which may not be granted, and one made on a fraudulent misrepresentation or illegal consideration which extends to, and vitiates the whole instrument. Understanding this prayer as involving the validity of the grant, so far only as respects its extending in part into the Indian country, we think it ought to have been granted.

The 4th prayer, if not a repetition of the 3d, varies from it only by omitting the words "including all the waters of the same;" consequently, the opinion which has been expressed on the third, is applicable to this.

The principle that a patent conveying lands lying partly within and partly without the territory retained by the Indians, was void as to so much as lay within it, and valid for the residue, was settled by this court in the case of *Danforth v. Wear* (9 Wheaton, 673). That decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

The 5th prayer states, that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines, of the said tract of land, granted to Bazil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee River, in the possession of the defendants. And thereupon, the counsel for the said plaintiff moved the court to instruct the jury, that neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in platting the water-courses, nor any fraud, irregularity, negligence, or ignorance of the officers of government, prior to the issuing of the grant to Bazil Jones, under which the *plaintiff derives title, did, or could, [***237** legally affect the right of the plaintiff to recover; that the existence of the grant is, in itself, a sufficient ground to infer that every prerequisite has been performed; and that as to all irregularities, omissions, acts of fraud, negligence, or ignorance of the officers of government, prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them; which instruction the court, being divided in opinion, refused to give.

This prayer is, in some of its parts, unexceptionable. In others, it is expressed in such vague and general terms as to make it unsafe for any court to grant it. In the case of *Polk's Lessee v. Wendell* (9 Cranch, 87; 5 Wheaton, 293), this court decided that a grant raises a presumption that every prerequisite has been performed; consequently, that no negligence or omission of the officers of government anterior to its emanation can affect it. The part of the prayer which respects the defects supposed to be in the plat, speaks of the want of the line

and station trees required by any law, without specifying the laws alluded to, and the omission of the surveyor to note on his plat the beginning, and of any mistake in platting the water-courses.

The Act for opening the land-office contains no particular rules respecting plats; and the Act which requires surveyors to note the beginning corner of their surveys, passed in December, 1789, long after the emanation of this patent. It would seem that the officer by whom the patent was issued, was the proper judge of all things apparent on the face of the plat, and that the patent itself presupposes that the plat was sufficient in law as to those requisites of which he could judge by inspection. This part of the instruction might have been given. But it is connected with a request that the court would instruct the jury that no fraud on the part of the officers of government could affect the plaintiff's title. It is not easy to perceive the extent of this instruction; and it could not, we think, have been safely given.

238*] *The 6th exception states, that the said plaintiff moreover gave evidence conducing to prove that the title of Basil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessor of the plaintiff in this action, before the commencement thereof; and that all the lands in the possession of the defendants, and of each of them, at the time of the service of the process in this action, were within the lines described by the said grant to the said Basil Jones, and were on the north and east side of the said south fork of the Ocoee River. And thereupon, the said counsel for the plaintiff moved the court to instruct the jury that, upon the aforesaid evidence, if the jury believed the same, the plaintiff was, by law, entitled to recover the premises in dispute; which instruction the court, being divided in opinion, refused to give.

This prayer states more explicitly the facts contained in the 3d and 4th, and is understood to come completely within the opinion of the court on them.

It is the opinion of this court that the Circuit Court erred in not instructing the jury that the grant under which the plaintiff made title was valid as to the lands in possession of the defendants; and that for refusing to give this instruction the judgment of the said Circuit Court ought to be reversed and the cause remanded, that a *venire facias de novo* may be awarded.

Cited—9 Pet., 680, 733; 12 Pet., 746; 14 Pet., 18, 376, 389; 15 Pet., 88.

239*] *J. HARPER, *Plaintiff in Error*,

v.

ANTHONY BUTLER, *Defendant in Error*.

Rights of assignee under law of Mississippi.

By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that State.

ERROR to the District Court of the United States for the District of Kentucky.

The only question submitted to the court was, whether the assignee of a chose in action, assigned by an executor in the State where he had proved the will and taken out letters testamentary, where the debt was contracted, and where the testator lived and died, could maintain an action in another State, without a new probate and new letters testamentary taken out in the State in which the action was brought.

The question arose on the demurrer of the defendant to the plaintiff's replication, setting out the probate, letters testamentary, assignment, &c. The District Court sustained the demurrer and decided against the plaintiff's right of action.

The causes of demurrer shown by the defendant in error, were:

1. That the replication does not allege and set forth that the will of the testator was proved, and that letters testamentary were granted to the executor in the State of Mississippi.

2. That the replication does not show that the will of the testator was proved, and probate thereof granted to the executor or any other person within the jurisdiction of the court; nor that it was granted by a tribunal of competent jurisdiction.

Mr. Jones, for the plaintiff, contended that the assignment being consummate in the jurisdiction where the executor's *authority [*240] was indisputable, operated a complete transfer of the chose in action there; and carried with it a right of action everywhere; to which no new probate, or letters testamentary, could have added any validity whatsoever.

No counsel appeared for the defendant.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is an action of debt brought by the plaintiff in error, in the Court of the United States for the District of Mississippi, as the assignee of Henry Clay, executor of James Morrison, deceased. The defendant pleaded in abatement, that the will of James Morrison had not been proved or recorded in the State of Mississippi, nor had letters testamentary therein been granted to Henry Clay, the executor. To this plea there was a replication, which set out the probate of the will in the State of Kentucky, the letters testamentary to the executor, and the assignment, in the State of Kentucky, of the note on which the action was brought to the plaintiff in error. To this replication the defendant demurred. The court gave judgment for the defendant, and the plaintiff has sued out this writ of error.

The District Court proceeded on the idea that the executor could not transfer a chose in action in Kentucky, because the obligor did not reside in that State. This court supposes the law to be otherwise. The assignment in Kentucky could not enable the assignee to sue in the courts of Mississippi, unless the law of the court authorized an assignee to sue in his own name. But since this is permitted in the courts of Mississippi, the plea in abatement cannot be sustained.

The judgment is reversed, and the cause remanded to the District Court with directions to overrule the demurrer.

Overruled—6 Pet., 301.
Cited—5 Sawy., 591.

241*] *LESSEE OF WILLIAM A. POWELL ET AL.

v.

JOHN HARMAN.

Construction of Tennessee statute of limitations.

Under the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; and a void deed is not such a conveyance as that a possession under it will be protected by the statute of limitations.

THIS case came before the court from the Circuit Court of Western Tennessee, on a certificate of division from the judges of that court.

In the court below, the lessor of the plaintiff showed a regular title to the lands in question, under a grant from the State of North Carolina; and proved that the defendant was in possession of the land in dispute.

The defendant proved that he had been in peaceable possession of the land for more than seven years, holding adversely to the plaintiff, under a deed from the sheriff of Montgomery county, dated the 14th of April, 1808, founded upon a sale for taxes; but which sale was admitted to be void, because the requisites of the law in regard to the sale of lands for taxes, had not been complied with.

Upon the trial of this cause, it occurred as a question, whether, under the statute of limitations of Tennessee of 1797, a possession of seven years is a protection only when held under a grant or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; or whether a possession under a void deed is such a conveyance as that a possession under it will be protected by the statute of limitations. The judges being opposed upon this question, it was referred to this court for their opinion.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The question now referred to this court differs from that which was decided in *Patton's 242*] Lessee v. Easton* (1 Wheat., *476) in this, that the defendant who sets up a possession of seven years in bar of the plaintiff's title, endeavors to connect himself with a grant. The sale and conveyance, however, by which this connection is to be formed, are admitted to be void. The conveyance being made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant. We are therefore of opinion that the law is for the plaintiff, and that this be certified as the opinion of this court.

This cause came on to be heard on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of West Tennessee, and on the questions and points on which the said judges of that court were divided in opinion, and which have been certified to this court, and was argued by counsel; on consideration whereof, this court is of opinion, that under the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection only when held under a grant or under valid mesne conveyances, or a Peters 1.

paper title, which are legally or equitably connected with a grant; and that a void deed is not such a conveyance as that a possession under it will be protected under the statute of limitations; all which is directed and ordered to be certified to the said Circuit Court of the United States for the Seventh Circuit and District of West Tennessee.

Overruled—6 Pet., 293, 801; 1 Wall., 212; 1 McLean, 19.

***JOHN T. RITCHIE, Appellant, [*243**

v.

PHILIP MAURO AND JOSEPH FORREST, Appellees.

Guardian's interest—right of appeal.

The value of the interest a guardian has in the minor's estate, is not the value of the estate, but that of the office of guardian. This is of no value, except so far as it affords a compensation for labors and services; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot be considered as amounting to a sufficient sum to authorize an appeal to this court, from a Circuit Court of the District of Columbia.

THIS was an appeal from the Circuit Court of the county of Washington; in which court the proceedings of the Orphans' Court of that county, appointing a guardian to the estate of a minor, had been reversed on appeal, and the court had proceeded to pass such a decree as it adjudged the Orphans' Court should have passed. From this decree of the Circuit Court, the appellant came before this court, and he sought to sustain the decision of the Orphans' Court.

The appellant, under an order of the Orphans' Court, had been appointed the guardian of John W. Ott; and had, in pursuance of the same order, entered into a bond, as guardian of the said John W. Ott, in the penal sum of \$10,000, with sureties.

The case was argued upon the whole of the matter contained in the decree, by *Mr. C. C. Lee* and *Mr. Chambers* for the appellant, and by *Mr. Bradley* for the appellees. As the court did not decide but upon one of the points in the case presented by the counsel, the arguments upon the others are omitted.

An objection was made by the counsel of the appellees, that the amount in controversy was not sufficient to authorize an appeal from the Circuit Court of Washington county to this court. The whole question to be decided on this appeal was, whether the appellant or the appellees were legally entitled to the guardianship of the person and estate of John W. Ott, a minor; whose estate, it was admitted, was of considerable value. It was also admitted, that neither the appellant nor the appellees [*244 had any interest in the estate, except that which would be obtained from the compensation they might derive for their labors and responsibilities, as guardians of the minor.

The counsel for the appellant contended that the right of appeal was complete, as the property which would come into the hands of the guardian exceeded \$2,000; and the bond given by him, by order of the Orphans' Court, was in the sum of \$10,000.

The law is well settled, that a trustee may appeal when the property under his charge is of sufficient amount, although he has no interest whatever in the trust estate. A guardian is a trustee, and should be considered in the same relations to the property of his ward.

Mr. Bradley, for the appellces, submitted the question of the right of appeal to the court, presenting only the suggestion that the pecuniary benefit of the appellant from the estate, could not, under any circumstances, amount to \$1,000. Whatever claims on the estate of his ward the appellant might have, for services to be rendered hereafter, in the state of things at the time of the appeal, as he had never acted as guardian, he had no pecuniary claims whatsoever.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

In the present case, a majority of the court are of opinion that this court has no jurisdiction in the case, the value in controversy not being sufficient to entitle the party by law to claim an appeal. The value is not the value of the minor's estate, but the value of the office of guardian. The present is a controversy merely between persons claiming adversely as guardians, having no distinct interest of their own. The office of guardian is of no value, except so far as it affords a compensation for labor and services thereafter to be earned.

Cited—Woolw., 336.

245*] *THOMPSON WILSON ET AL.,
Plaintiffs in Error,
v.

THE BLACK BIRD CREEK MARSH
COMPANY, *Defendants.*

Practice—Constitutionality of a Delaware Act of Assembly.

This court has frequently decided that, to sustain its jurisdiction in appeals and writs of error, it is not necessary to state, in terms, upon the record that the Constitution, or a law of the United States, was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the record shows that the Constitution, or a law of the United States, must have been misconstrued, or the decision could not have been made; or that the constitutionality of a State law was questioned, and the decision was in favor of the party claiming under such law. [250]

The Act of the Assembly of the State of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep, level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the States. But the measure authorized by this Act

stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. [251]

If Congress had passed any Act, in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect this question. [252]

THIS was a writ of error to the High Court of Errors and Appeals of the State of Delaware.

The Black Bird Creek Marsh Company were incorporated by an Act of the General Assembly of Delaware, passed in February, 1822; and the owners and possessors of the marsh, cripple and low grounds in Appoquinimink Hundred, in Newcastle county and State of Delaware, lying on both sides of Black Bird Creek, below Matthews' Landing, and extending to the river Delaware, were authorized and empowered to *make and [*246 construct a good and sufficient dam across said creek, at such place as the managers or a majority of them shall find to be most suitable for the purpose; and also to bank the said marsh, cripple and low ground, &c.

After the passing of this Act, the company proceeded to erect and place in the creek a dam, by which the navigation of the creek was obstructed; also embanking the creek, and carrying into execution all the purposes of their incorporation.

The defendants being the owners, &c., of a sloop called the Sally, of 95 9-95 tons, regularly licensed and enrolled according to the navigation laws of the United States, broke and injured the dam so erected by the company; and thereupon an action of trespass, *vi et armis*, was instituted against them in the Supreme Court of the State of Delaware, in which damages were claimed, amounting to \$20,000. To the declaration filed in the Supreme Court, the defendants filed three pleas; the first only of which being noticed by the court in their decision; the second and third are omitted.

This plea was in the following terms:

1. That the place where the supposed trespass is alleged to have been committed was, and still is, part and parcel of said Black Bird Creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and reflowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway, for all the citizens of the State of Delaware and of the United States, with sloops or other vessels to navigate, sail, pass and repass, into, over, through, in and upon the same, at all times of the year, at their own free will and pleasure.

Therefore, the said defendants, being citizens of the State of Delaware and of the United States, with the said sloop, sailed in

Peters 2.

NOTE.—As to the jurisdiction of the Supreme Court of the United States, to review final judgments of the State courts in which is drawn in question the Constitution, treaties, or laws of the United States, &c., see notes to *Matthews v. Zane*, 4 Cranch, 3-2; *Martin v. Hunter*, 1 Wheat., 304; *Houston v. Moore*, 3 Wheat., 433; *Gibbons v. Ogden* 6 Wheat., 448; *Cohens v. Virginia*, 6 Wheat., 264.

and upon the said creek, in which, &c., as they lawfully might for the cause aforesaid; and because the said gum piles, &c., bank and dam in the said declaration mentioned, &c., had been wrongfully erected, and were there wrongfully continued standing, and being in and across said navigable creek, and obstructing the same, **247***] so that without pulling up, *cutting, breaking and destroying the said gum piles, &c., bank and dam respectively, the said defendants could not pass and repass with the said sloop, into, through, over and along the said navigable creek. And that the defendants, in order to remove the said obstructions, pulled up, cut, broke, &c., as in the said declaration mentioned, doing no unnecessary damage to the said Black Bird Creek Marsh Company; which is the same supposed trespass, &c.

The plaintiffs, in the Supreme Court of the State, demurred generally to all the pleas; and the court sustained the demurrers, and gave judgment in their favor. This judgment was affirmed in the Court of Appeals, and the record remanded, for the purpose of having the damages assessed by a jury. Final judgment having been entered on the verdict of the jury, it was again carried to the Court of Appeals, where it was affirmed, and was now brought before this court, by the defendants in that court, for its review.

The case was argued for the plaintiffs in error by *Mr. Coxe*, and by *Mr. Wirt*, Attorney-General, for the defendants.

Mr. Coxe insisted that the record contained a case in which the constitutionality of a law of the State of Delaware had been brought into question; and the decision of the highest tribunal of the State had been in favor of its constitutionality. Under the provisions of the 25th section of the judiciary law, this case is, therefore, protected before this court.

It may be admitted that other questions were presented to the courts of Delaware. As the act incorporating the defendants in error was subsequently, in part, repealed, those courts had before them other questions arising under the repealing statute. But he contended that, upon the authority of many cases decided in this court, there was sufficient apparent on the record to show that the constitutionality of the law to which the plaintiff in error objects must have been decided before those tribunals.

It has been repeatedly held that, to give this court jurisdiction, it is not necessary that the constitutionality of the law shall have been specially questioned before the State Court. **248***] *If, upon examination of the record, it shall be found that, unless the court should have held the law to be constitutional, they could not have given the judgment presented by the record, it is sufficient to maintain the jurisdiction here under the Act of Congress.

Mr. Coxe contended that the judgment of the High Court of Errors and Appeals was erroneous, because the Act of the General Assembly of the State of Delaware, so far as the same authorized the company to shut up and embank across a navigable stream, below the ebb and flow of the tide, is repugnant to the Constitution of the United States, and conferred no valid authority upon the company to

destroy the navigation of the creek. He also considered the second Act of the Legislature of Delaware as a repeal of the provisions of the first law. The court not having noticed this point in their decision, the arguments of counsel upon it are omitted.

The first plea having stated the river to be navigable, it is against the principles of the common law to obstruct it. (10 Mass. Rep., 70.) The rights of navigation are public rights, belonging to all the citizens of the United States. The use of them is necessary for the purposes of commerce to the whole people of the United States.

Navigable streams are the waters of the United States. (9 Wheaton, 187.)

He urged that the constitutional power of Congress to regulate commerce includes navigation; and the States are by this provision deprived of the power of closing a navigable river. In this case the sloop was a licensed and enrolled vessel to carry on the coasting trade, and she was unlawfully and unconstitutionally impeded in the use of her license by the dam erected by the defendants, under the unconstitutional Act of the Assembly of Delaware.

The statute of Delaware does not look to the preservation of the health of the citizens of the State, but to private emolument.

Upon the right of navigation being *jus publicum*, *Mr. Coxe* cited Coop. Justinian, 68; Angel, 15; Vattel, 178, Lib. I., sec. 234, &c.; *1 Halstead, 72, 76; Angel, 167; [***249** Hargrave's Collection, 36, 72, 87. He relied on the decision of this court in *Gibbons v. Ogden* (9 Wheaton, 187) as a conclusive authority for the plaintiffs in error.

If Delaware has no right to restrain particular vessels from using her navigable streams, she cannot stop the navigation of those streams.

Mr. Wirt, for the defendants, contended that the record does not present a case in which this court has jurisdiction. The courts of Delaware might have decided in favor of the defendants in error without sustaining the constitutionality of the Act of incorporation; and this court will not assume that the question was decided, if upon other grounds the opinion of the State Court could be maintained. In *Mathews v. Zane*, the court held that the question of constitutionality must have arisen inevitably. Does the Act authorizing the erection of this dam violate the Constitution of the United States? It is admitted that the creek was navigable; and that the stream was a public highway. But it is asked whether the Legislature of a State may not stop up a public highway within the territories of the State. Parliament, in England, exercises the power to stop up streams, which are public highways. (4 Barn. & Cress., 589.)

It cannot be urged that the power to regulate commerce can interfere with the rights of the States over the property within their boundaries. While the waters of the United States belong to the whole people of the nation, this creek continued subject to the power of the State in whose territory it rises. It is one of those sluggish reptile streams, that do not run, but creep, and which, wherever it passes, spreads its venom, and destroys the health of

all those who inhabit its marshes; and can it be asserted that a law authorizing the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigor, is unconstitutional?

The power given by the Constitution to Congress to regulate commerce, may not be exercised **250**]* to prevent such measures; *and there has been no legislation by Congress under the Constitution, with which the proceedings of the defendants under the law of Delaware have interfered.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The defendants in error deny the jurisdiction of this court, because, they say, the record does not show that the constitutionality of the Act of the Legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the Act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the Act was the question, and the only question which could have been discussed in the State Court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the Act of Assembly. Their declaration is founded upon that Act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the Act of Assembly.

The plea does not controvert the existence of the Act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the Act; and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to the Constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter's Lessee* **251**]* (1 Wheaton, 355); **Miller v. Nicholls* (4 Wheaton, 311), and *Williams v. Norris* (12 Wheaton, 117), are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the record show that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a State law was questioned, and the decision has been in favor of the party claiming under such law.

The jurisdiction of the court being established, the more doubtful question is to be con-

sidered, whether the Act incorporating the Black Bird Creek Marsh Company is repugnant to the Constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The Act of Assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes *in conflict with the [***252** power of the United States "to regulate commerce with foreign nations and among the several States."

If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is affirmed.

This cause came on to be heard on the transcript of the record from the High Court of Errors and Appeals of the State of Delaware, and was argued by counsel; on consideration whereof this court is of opinion, that there is no error in the judgment of the said High Court of Errors and Appeals of the State of Delaware; whereupon it is considered, ordered and adjudged by this court, that the judgment of the said court in this cause be, and the same is hereby affirmed with costs.

Criticised—7 How., 283, 397.

Cited—3 Pet., 302; 4 Pet., 429; 6 Pet., 48; 10 Pet., 396; 11 Pet., 149; 14 Pet., 592; 5 How., 583, 584, 604,

Peters 1.

605, 625; 7 How., 397, 500, 556, 560; 12 How., 319, 324; 13 How., 566, 585, 586, 599; 22 How., 243; 3 Wall., 727, 743, 793; 16 Wall., 482; 17 Wall., 569; 5 Otto, 634, 488, 514, 516; 6 Otto, 387; 9 Otto, 643; 12 Otto, 700; 1 Wood. & M., 409, 415, 424, 426, 484, 500; 1 Abb. U. S., 163; 2 Abb. U. S., 343; 6 McLean, 216; 2 Paine, 431; 4 Blatchf., 408, 412; 11 Blatchf., 286-288; 1 Brown, 197; 1 Biss., 551; 5 Biss., 424.

253*] *JAMES FOSTER AND PLEASANTS

ELAM, *Plaintiff's in Error*,

v.

DAVID NEILSON, *Defendant in Error*.

Treaty of Paris, 1803—title to land in disputed territory—function of judiciary—relations between judiciary and other departments of government—construction of treaty.

By the treaty of St. Ildefonso, made on the 1st of October, 1800, Spain ceded Louisiana to France; and France, by the treaty of Paris, signed the 30th of April, 1803, ceded it to the United States. Under this treaty the United States claimed the country between the Iberville and the Perdido. Spain contended that her cession to France comprehended only that territory which at the time of the cession was denominated Louisiana, consisting of the Island of New Orleans, and the country which had been originally ceded to her by France, west of the Mississippi.

The land claimed by the plaintiffs in error, under a grant from the crown of Spain, made after the treaty of St. Ildefonso, lies within the disputed territory; and this case presents the question, to whom did the country between the Iberville and Perdido belong after the treaty of St. Ildefonso?

Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the Province, cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself. [306]

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and it they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. [307]

However individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the Legislature, if that will has been clearly expressed. [307]

After the acts of sovereign power over the territory in dispute, which have been exercised by the Legislature and government of the United States, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. [309]

If a Spanish grantee had obtained possession of the land in dispute so as to be the defendant, would a court of the United States maintain his title under 254*] a Spanish *grant, made subsequent to the Peters 1.

acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the Legislature and judicial departments, and mark the limits of each. [309]

The sound construction of the 8th article of the treaty between the United States and Spain, of 22d February, 1829, will not enable the court to apply its provisions to the case of the plaintiff. [314]

The article does not declare that all the grants made by His Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and it would have repealed those Acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the Act of the Legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject. [314]

A treaty is in its nature a contract between two nations, not a legislative Act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. [314]

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court. [314]

IN error to the District Court of the Eastern District of Louisiana.

The plaintiffs in error filed their petition in the District Court, setting forth that on the 2d of January, 1804, Jayme Joydra purchased of the Spanish government, for a valuable consideration, and was put in possession of a certain tract or parcel of land, situated in the District of Feliciana, thirty miles to the east of the Mississippi, within the Province of West Florida, containing forty thousand arpents, having the marks and boundaries as laid down in the original plat of survey annexed to the deed of sale, made by Juan Ventura Morales, then intendent of the Spanish government, dated January 2d, 1804, which sale was duly confirmed by the *King of Spain, by [*255 his resolves dated May 29th, 1804, and February 20th, 1805.

May 17, 1805, Jayme Joydra sold and conveyed six thousand arpents, part of the said forty thousand, to one Joseph Maria de la Barba; and upon the same day, Joseph Maria de la Barba sold and conveyed three thousand arpents, parcel of the six thousand so purchased on the same day of Jayme Joydra, to one Francoise Poinet, for the consideration of \$750. These three thousand arpents, situated in the District of Feliciana, about thirty miles east of the Mississippi; bounded on the north by the line of demarcation between the United States and the Spanish territory; on the west by lands of Manuel de Lanzos; on the east by the lands of the said Jayme Joydra; and on the south by the lands of the said Joseph Maria de la Barba.

In June, 1811, Francoise Poinet, by her

attorney, Louis Leonard Poinet, sold to the petitioners the said three thousand arpents, for the sum of \$3,200.

The petition then avers, that the three thousand arpents of lands justly and legally belong to them; and that nevertheless, David Neilson, the defendant, a resident of the parish of East Feliciana, in the State of Louisiana, had taken possession of the same, and refuses to deliver the same up.

On the 23d of March, 1826, the defendant in the District Court filed exceptions to the petition; and the questions before this court arose out of the third exception, which was as follows:

That the petition does not show any right in the petitioners to the land demanded, which they aver lies in a district formerly called Feliciana, in the province of West Florida; and they claim under a grant made at New Orleans on the 2d of January, 1804, and regularly confirmed by the Spanish government: whereas, as defendant pleads, all that section of territory called Feliciana was, long before the alleged date of said grant, ceded by Spain to France, and by France to the United States; and the officer making said grant had not then and there any right so to do, and the said grant is wholly null and void.

The judgment of the District Court is founded **256*** on this exception; *and decides that the grant under which the plaintiffs claim, was made by persons having no authority, at the time of the grant, to grant lands within the territory within which the lands are situated, and dismisses the petition.

On behalf of the petitioners, the plaintiffs below, it was contended:

1. That Spain possessed full right and title, at the period of the date of the grant under which they claim, to grant the lands in question.

2. That the title of the petitioners is guaranteed and confirmed by the treaty between the United States and Spain of February 22d, 1819.

The case was argued by *Mr. Cove* and *Mr. Webster* for the plaintiffs in error, and by *Mr. Jones* for the defendant.

Mr. Cove, for the plaintiffs in error.

This is a petitory action, in the nature of an ejectment, brought by the plaintiffs in error to recover a tract of land in the parish of East Feliciana, in the State of Louisiana. The territory within which this property lies, may be designated in general terms as included between the Mississippi and Iberville to the west, the Perdido to the east, and south of the thirty first degree of north latitude.

No objection has been interposed to the regularity, in point of form, of the original grant under which plaintiffs claimed title, or of the mesne conveyances from the original grantee to them. No title has been exhibited by the defendant; but having acquired the possession, he has rested his defense on the single ground of denying the validity of the grant, which lies at the foundation of the plaintiffs' title; and this objection is confined to the single point, that the authority of the Spanish government, from which that grant emanated, had terminated within the district of country, the boundaries of which have been indicated, anterior to the date of the grant.

The grant bears date in the years 1804 and 1805, and it is contended that, by the treaty of St. Ildefonso between Spain and France in the year 1800, and the treaty between *France and the United States, of [***257** April 30, 1803, the territory in question became vested in the United States as a component part of Louisiana.

Whether such be the true interpretation and effect of these treaties, is the first question presented for consideration. It is a question which has for years been diplomatically discussed between the governments of Spain and the United States; and now comes before this court to be finally settled judicially.

Much of the history of the early settlements of the territory in question, and the grounds upon which the claims of England, France and Spain rested, were presented and discussed in the cases of *Henderson v. Poindexter* (12 Wheat., 530), and *Harcourt's Lessee v. Gaillard*.

It may, however, be proper to remind the court, that in point of fact, it appears that the earliest actual settlement made by the French in this district, was made under D'Iberville, at Dauphin Island in the year 1699; and that at that period, and for some years previous, the English had formed settlements between the Mobile and the Mississippi. (4 N. Am. Rev., 76, N. S.) Anderson's History of Commerce, Vol. III., 195, fixes it at 1698. On the 30th of June, 1677, Charles II. made his second grant to the Earl of Clarendon and others, which included this territory. (1 L. U. S., 465; Land Laws, 81.)

The grant from Louis XIV. to Crouzat bears date September 14th, 1712, thirty-five years subsequent to the English patent; and it sets forth that the original possession was taken of the territory in 1683, which is six years subsequent to the English grant. It may be remarked, however, that the possession to which allusion is made, was nothing more than a transient and rapid passage down the Mississippi, and vague as it was, in point of fact, did not extend beyond the banks of the river.

This grant to Crouzat seems to have been generally considered as comprehending this debatable ground, but apparently without much reason. It distinctly limits the eastern extent by the lands of the English Carolina; and not only the grant of the Carolina, but the actual settlements under it *extended much to [***258** the westward of the line to which France subsequently claimed to extend the eastern boundary of Louisiana.

The irreconcilable claims of England and France, in reference to the extent of their American possessions, gave rise to many and bloody controversies; and particularly to the war of 1756. Numerous discussions took place between the two crowns upon this subject, which it will be unnecessary to examine earlier than the war which terminated in their adjustment and settlement. In the negotiations which preceded the treaty of 1763, which are stated in 3 Jenkinson, 1174, it seems that France preferred her claim as far as the Perdido; and the answer of the British government to this claim will be found in its reply to the French ultimatum, September 1st, 1762, sec. 2. (3 Jenkinson, 148.) It was deemed utterly inadmissible, because it would com-

prise extensive countries and numerous nations of Indians, who have always been reputed to be under the protection of the King.

This court, in *Johnson v. M'Intosh* (8 Wheat., 581), has remarked, in reference to the controversies between France and Spain in relation to this same district of country, that "the contest between the cabinets of Versailles and Madrid respecting the territory on the northern coast of the Gulf of Mexico were fierce and bloody, and continued until the establishment of a Bourbon on the throne of Spain produced such amicable dispositions in the two crowns as to suspend or terminate them." And after giving a summary of those which occurred between France and England, it is observed that "these conflicting claims produced a long and bloody war, which terminated by the conquest of the whole country east of the Mississippi."

Pending that war, in which Spain had been induced to take part with France, the celebrated treaty was concluded between these two powers, which is entitled to notice in the present investigation. It was styled "Pacto de Familia," or "Parte de Famille"; and is usually known in England and the United States under the appellation of the "Family Compact." It was signed August 15, 1761; ratified by France, August 21, 1761; and by Spain, August 25, 1761. (1 *Collección de Tratados*, 115; Marten's *Recueil des Traités*, Tom. I., p. 1; 3 Jenk., 70.)

The 4th article embraces the great object of the treaty "qui attaque une couronne, attaque l'autre;" and the 18th carrying it out into detail, provides that, "en conformité de ce principe et de l'engagement contracté en conséquence, leur majestés très chrétienne et catholique, sont convenues que lorsqu'ils s'agira de terminer par la paix la guerre qu'ils auront soutenue en commun, elles compenseront les avantages que l'une des deux puissances pourroit avoir eus, avec les pertes que l'autre auroit pu faire; de manière que sur les conditions de la paix, ainsi que sur les opérations de la guerre; les deux monarchies de France et de l'Espagne, dans toute l'étendue de leur domination, seront regardés et agiront si elles ne formoient qu'une seule et même puissance." This provision is necessary, to enable us to comprehend with precision the motives which induced, and the construction which is to be given to subsequent acts.

The preliminary articles of the treaty of peace, between Great Britain, France and Spain, were signed November 3d, 1762. On the same day, another treaty was executed between France and Spain, originating in, and designed to fulfil the stipulations of the 18th article of the family compact. Roch, in his *Traité de Paix* (Tom. III., p. 109), furnishes the following statement of it: "La Nouvelle Orleans, avec la Louisiane, située à l'ouest du fleuve Mississippi, fut cédée aux Espagnols, par une convention secrète entre les deux cours de Versailles et de Madrid, signée le 3 de Novembre, 1762, et qui n'a jamais été imprimée. Cette cession avoit pour motif de dedommager l'Espagne de la Floride, qu'elle abandonnoit à l'Angleterre par la traité des preliminaires de Paris, signée le même jour. Les habitans François de la Louisiane n'eurent connoissance de

cette cession que le 21 Avril, 1764. Ils adresserent à le sujet à la cour de France les plus vives reclamations, qui n'empecherent pas les Espagnols *de pendre possession de [*260 cette colonie le 18 Aout, 1769."

This cession then grew out of the provisions of the preliminary treaty of the same date, and was designed to compensate Spain for the loss of Florida. It must be construed subordinate to that general treaty, and cannot modify or control its provisions.

Keeping these considerations in view, we may proceed to examine the preliminary treaties of the same date, which were finally consummated by the definitive treaty of February 10, 1763. (*Collección de Tratados*, 145; 2 Marten, 17; 3 Jenkins, 166.) The first fourteen articles relate to France and Great Britain; the six succeeding to Great Britain, her ally Portugal, and Spain. The sixth article establishes the boundaries between the English and French possessions, in the neighborhood of the Mississippi, and so far as is material to this case, in the following words: "The confines between the dominions of Great Britain and Spain, on the continent of North America, shall be irrevocably fixed by a line drawn along the middle of the river Mississippi, to its source, as far as the river Iberville; and from thence, by a line drawn along the middle of this river, and of the lakes Maurepas and Pontchartrain to the sea; and to this purpose the Most Christian King cedes in full right, and guarantees to His Britannic Majesty the river and port of Mobile, and everything which he possesses on the left side of the river Mississippi; except the town of New Orleans, and the island on which it is situated, which shall remain to France." By the 19th article, "His Catholic Majesty cedes and guarantees, in full right, to His Britannic Majesty, all that Spain possesses on the east or the south-east of the river Mississippi."

A reasonable interpretation of these two treaties seems to conclude this question. Each party had been, nearly from the commencement of the century, claiming an almost interminable extent of territory; their claims were bringing them into constant collision with each other; these collisions had engendered the war which was about to be terminated. The parties had agreed that their relative rights should be definitively *and irrevocably adjusted, [*261 and natural boundaries were agreed upon, which it was supposed would preclude all future difficulty. England had been triumphant in the conflict; she had attained the objects for which she had commenced and had continued hostilities. During the negotiations for peace, she had avowed her determination. (3 Jenkins, 117.) "The limits of Canada with regard to Louisiana shall be clearly and firmly established, as well as those of Louisiana and Virginia; in such manner, that after the conclusion of peace there may be no more difficulties between the two nations with respect to the construction of the limits with regard to Louisiana, whether with respect to Canada or the other possessions of England." In accomplishing this design, France relinquished the pretensions upon which she had before insisted to extend the limits of Louisiana to the eastward of the Mississippi; England yielded her empty and valueless claim, to carry the bounds of her Atlantic

colonies to the Pacific; and to close all ground for future controversy, Spain ceded her possessions; and Great Britain became the unquestioned proprietor of all the territory lying to the eastward of the line designated in the 6th article.

France then, in ceding Louisiana to Spain, ceded a country which, with the exception of the island of Orleans, lay exclusively to the westward of the Mississippi; she cedes it as Louisiana, and it is accepted as such. Both of these powers were estopped by these solemn acts from contending that Louisiana embraced the territory now the subject of consideration.

This treaty has received the consideration of this court in *Harcourt v. Gaillard* (12 Wheaton, 524), where it was observed, "the country of Florida, south of the 29th degree, was a conquest by Great Britain; and north of the 29th degree, and up the Mississippi was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary."

After England had thus acquired the title to Florida, and had adjusted by solemn compact the disputes as to boundary, she immediately erected these acquisitions into two governments, and designated them by the names of East and **262** West Florida; the boundaries of which are indicated in the proclamation of the British King in 1763. From that period until after the United States acquired Louisiana, this question was considered as at rest. The territory to the eastward of the Mississippi and the Iberville, the lakes Maurepas and Pontchartrain, were uniformly recognized as East and West Florida; that to the westward of the same line as Louisiana.

During the peace which preceded our revolutionary war, no question, or ground for question, existed. About the year 1781, Spain acquired by conquest possession of West Florida, which she retained under that name, not as part of Louisiana which then belonged to her, but as a territory which she had acquired by conquest from England, the lawful proprietor, known only by the appellation of West Florida.

This possession thus acquired, was thus continued, *jure belli*, until the termination of the war. By the 3d article of the preliminary treaty of peace, it was stipulated that His Britannic Majesty should cede East Florida, and His Catholic Majesty should retain West Florida. So, also, by the 5th article of the definite treaty of September 3d, 1783, His Britannic Majesty cedes, in absolute property, to His Catholic Majesty, as well East as West Florida, guaranteeing them. No boundaries are mentioned. The Floridas, known as such by both parties to the compact, are ceded by words of express grant. It is not an adjustment of disputed boundaries, but a cession of an absolute and perfect right.

The treaty of 1763, then, which this court has considered as merely fixing a disputed boundary, still continued in force. The war had not affected this portion of its stipulations. "Where treaties contemplate a permanent arrangement of territorial and other national rights, it would be against every principle of just interpretation to hold them extinguished by the event of war." (*Society, &c., v. New Haven*, 8 Wheaton, 494.)

We may now briefly review some of the leading acts of all the powers concerned in the treaties of 1763 and 1783; to show that, uniformly and without exception, such has been their understanding of these compacts.

*1. France considered the cession [**263** made by her to Spain as comprehending the entire province of Louisiana. The first public intimation of that cession is contained in the letter of the French King to Monsieur L'Abbadie (1 Laws of United States, 442), dated April 21st, 1764. It commences with these words: "Monsieur L'Abbadie:—By a special act done at Fontainebleau, November 3d, 1762, of my own will and mere motion, having ceded to my very dear and best beloved cousin, the King of Spain, and to his successors in full, property, purely and simply, and without any exceptions, the whole country known by the name of Louisiana, together with New Orleans and the island on which the said city is situated; and by another Act done at the Escorial, November 13th, in the same year, His Catholic Majesty having accepted the cession of the said country of Louisiana, and the city and island of New Orleans, &c." This contemporaneous exposition of both parties to the treaty, before any other interests or rights had intervened, is entitled to grave consideration.

2. So in regard to Spain. She had previously, as had England, endeavored to confine French Louisiana to the western shore of the river; she had accepted a cession of that territory as comprehending "the whole of Louisiana," and from that period to the present has always so esteemed it. After she obtained possession of her newly acquired territory, she continued to hold it under the same name by the same limits. When, by the treaty of 1783, she acquired the Floridas from England, it was under a new and distinct title, wholly independent of that by which she held Louisiana. The treaty designates it as East and West Florida. In all the subsequent controversies between Spain and the United States the same names are preserved. To many purposes it was a distinct government from that of Louisiana, though both belonged to the same monarch; it was sometimes a dependency upon Cuba (Land Laws, 46); and when annexed, as it appears occasionally to have been, to the government of Louisiana, the executive [**264** magistrate was styled the Governor of Louisiana and of West Florida.

In the treaty of October 27, 1795, between Spain and the United States, the same distinction is recognized and retained. The 2d article thus declares: "The southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, &c." Art. 4th. "It is likewise agreed that the western boundary of the United States which separates them from the Spanish Colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of the said States to the thirty-first degree of latitude north of the equator." The 5th article is to the same purport.

Subsequently to the transfer of Louisiana to the United States, Spain has uniformly asserted the same principles; and has protested, in

the most decided terms, against the pretensions of the American government, to extend their purchase to the Perdido. Governor Folch's letter to Governor Claiborne, dated Pensacola, May 1, 1804, assumes the ground which has been uniformly maintained throughout the diplomatic discussions of this question.

3. It is scarcely necessary to recapitulate the various acts of Great Britain, by which she manifested and maintained her right to restrict the limits of Louisiana to the western shore of the Mississippi. Long before the treaty of 1763, this had been a fruitful source of discord between herself and France. The war of 1756 had grown out of the attempt of the latter to extend her two colonies of Canada and Louisiana. (1 Marsh. Wash., 372, 383.) The grounds assumed by her in her subsequent negotiations, and the manner in which she succeeded in establishing them, have been already considered.

4. In this controversy, conducted in an American tribunal, it may well be deemed important to ascertain the views which have been taken and acted upon by our own government; and the result of this inquiry will show that the **265*** United States have been as distinct as any nation, in asserting the principles for which the plaintiffs in error contend.

As early as the year 1779 the importance of this question was perceived. In the instructions then framed for Mr. Jay, to conduct the negotiations with Spain which were entrusted to his charge, there is a distinct recognition of the Floridas, and an implied one of their extending to the Mississippi. (2 Pitk. Hist., 511.) In the following year, Congress prepared a statement of the claim of the United States to the western country as far as the river Mississippi (2 Pitk. Hist., 512), in which the subject is discussed, and the points now insisted upon strongly urged. The minister was instructed "to insist upon the navigation of the Mississippi for the citizens of the United States, in common with the subjects of His Catholic Majesty, as also on a free port or ports below the northern limit of West Florida." Reference is made to the treaty of 1763, as having fixed the river Mississippi as the boundary between the United States and the Spanish settlements; and it is strongly urged, that the United States are entitled to the benefit of the cession made by Spain to Great Britain. In 1791, the Secretary of State made a report on the subjects of controversy between the two governments, in the course of which these matters are again considered and pressed. (1 Diplom. of the United States, 236.) "Our right to navigate the Mississippi, from its source to where our southern boundary strikes it, is not questioned. It is from that point downwards only, that the exclusive navigation is claimed by Spain; that is to say, where she holds the country on both sides, to wit, Louisiana on the west, and Florida on the east." Again, "Florida was ceded by Spain (by the treaty of 1763), and its extent westwardly was fixed to the lakes Pontchartrain and Maurepas and the river Mississippi." "We had a common right of navigation in the part of the river between Florida, the island of Orleans, and the western bank." "If we appeal to the law of nature and nations, as expressed by writers on the subject, it is agreed by them, **266*** that were the river, where it *passes

between Florida and Louisiana the exclusive right of Spain," &c.

Reference has been already made to the provisions of the treaty of 1795, as conclusive upon both governments; and it may be added, that in the negotiations, which preceded that treaty, as well as in the measures of both nations in carrying its stipulations into execution, by running the line agreed upon, West Florida, as belonging to Spain, is uniformly considered as extending to the Mississippi, and Louisiana as confined to the western side of the line designated in the treaty of 1763.

It thus appears that from the earliest periods of colonial history, Great Britain and Spain had insisted that Louisiana did not extend eastwardly beyond the Mississippi; that France finally yielded her pretensions by the treaty of 1763; and that from that period this question had been considered as settled, and at rest, not only by all the parties to that compact, but especially by the United States.

The next important document to be examined is the treaty of St. Ildefonso, of October 1st, 1800, between Spain and France. One article of this treaty alone has been communicated to the public, and that will be found recited in the treaty between France and the United States, of April 30th, 1803 (Land Laws, 42; 1 Laws United States, 134), the first article of which is in these words: "Whereas, by the article the third of the treaty concluded at St. Ildefonso the 9th Vendemiaire, an. 9, (1st October, 1800,) &c., it was agreed as follows: 'His Catholic Majesty promises and engages on his part to retrocede to the French Republic, &c., &c., the Colony or Province of Louisiana, with the same extent it now has in the hands of Spain, and that it had when France possessed it, and such as it should be (*telle qu'elle doit être*) after the treaties subsequently entered into between Spain and other States.' And whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestable right to the domain and to the possession of the said territory; the first consul of the French Republic desiring to give to the United States a strong proof of his friendship, [***267** doth hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty concluded with His Catholic Majesty."

It will not be pretended that this language is free from ambiguity; and the probability is, from an anecdote related by one of the negotiators, Barbé Marbois, in his recent work on the subject of Louisiana, that it was not accidental. It is now contended that this article re-opens all the questions settled by the treaty of 1763, and acquiesced in by all parties from that period. Louisiana is no longer confined within the limits there prescribed, and Florida is to be reduced down to what France and England had before insisted was properly included within that name.

It will be remarked that France cedes to the United States what Spain had retroceded to her, upon the same conditions and subject to the same stipulations which were contained in

the treaty of St. Ildefonso. To that treaty reference must therefore be had to ascertain the extent of this cession. The term retrocede would seem to limit it to what had been before ceded; such is the natural and most obvious signification of the term. In this sense it is used by this court in *Johnson v. McIntosh* (8 Wheaton, 584), where it is said, "France ceded Louisiana to Spain, and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, &c."

But it was the province of Louisiana. Was it ceded as France claimed it prior to 1763, with an extension of limits dictated by political ambition and future aspirations, rather than by actual occupancy; with vague and undefined boundaries, which had been contested by Spain in one quarter and by England throughout nearly their whole extent, or with the boundaries solemnly and deliberately settled and recognized by treaty, the concurrent act of all the parties interested? Was it that Louisiana which an ambitious monarch claimed to extend so far **268***] to the north and east as to be intimately connected with the Canadas, and to confine the English possessions between the ocean and the Alleghany; or such as it was admitted to be when these lofty pretensions were abandoned, and its limits clearly and for the first time defined? Had the subsequent transfer to the United States never been made, our interest and our policy would have dictated an answer to these interrogatories, which reason would have sanctioned, and which argument would have confirmed. We never for a moment should have yielded to a pretension which went to unsettle our western boundary and title throughout the whole extent of the Ohio and Mississippi. But the whole character of the controversy was changed by our acquiring a new interest; and we, by virtue of the cession of Louisiana to us, claimed to the full extent of the wildest pretensions of France when in the plenitude of her power; pretensions obsolete, unwarranted, and long since formally surrendered.

But these several forms of specification are annexed to the terms of cession, and these specifications, it is submitted, were introduced with a view to limit and restrict, not to extend the generality of the previous language. 1. With the same extent that it now has in the hands of Spain. 2. And that it had when France possessed it. 3. And such as it ought to be after the treaties subsequently entered into between Spain and other countries. Such is the language of the treaty of St. Ildefonso, to which the United States was no party.

1. With the same extent that it now has in the hands of Spain. We have seen that Spain from a very early period resisted the extension of Louisiana to the eastward of the Mississippi; that she was a party to the treaty of 1763, with England, then owning the Floridas, which in this country has been judicially and diplomatically considered as fixing the limits of that Colony. She had acquired possession of Louisiana, in 1769,—of the whole country having that appellation; but still with the boundaries which had been settled. When she acquired the Floridas in 1783, no change of limits was introduced. In her treaty with the United States, in 1795, they are recognized by both

parties as still subsisting. *When, then, [**269** did Spain possess the territory in question, under the name of Louisiana? Never. The first specification, then, fails our opponents; and these three clauses must be considered as cumulative and concurrent; all must be complied with.

2. That it had when France possessed it. What period is referred to? Did it mean at the period when the enterprising La Salle first descended the Mississippi, which the French considered the first possession; or when a few adventurers endeavored to establish a settlement at Biloxi, which was speedily abandoned; or when her restless monarch, stretching his influence from the northern lakes to the Gulf of Mexico, was laboring to effectuate his gigantic project of attaining the ascendancy over the entire continent? Or, was that period referred to when, compelled to surrender these lofty pretensions, she compromised with her opponents, and fixed irrevocably the bounds of her American dominions? Unquestionably, the latter. Such were the limits fixed by all the parties in interest, in 1762, 1763. It has been objected that France never did possess Louisiana to this limited extent; that she ceded it to Spain on the same day on which the preliminaries were signed, and consequently never had any title to the country with these defined boundaries. But the cession to Spain was made by a secret treaty, which has never to this day been published to the world, and which was not known to be in existence until April, 1764, nor carried into execution by the transfer of possession, until August, 1769. From the autumn of 1762, until August, 1769, a period of near seven years, France was in possession of Louisiana, with these ascertained and settled limits; and at no other period of time were the bounds either of her settlements or her claims defined, even by herself. To this period, then, this clause of the treaty must have had reference, and this construction, and this alone, will reconcile the different clauses with each other; with what is reasonable, or what is honest.

3. Such as it ought to be after the treaties subsequently entered into between Spain and other countries. It may well be doubted whether this phrase has, or was intended to *have any reference to the subject of [**270** boundary. It may more reasonably be understood to look to those stipulations which Spain had made with other nations, particularly with the United States; conceding to us the free navigation of the Mississippi, and a right of deposit at New Orleans.

If, however, it be considered as referring to the subject of boundary, what construction can it receive? Subsequently to the possession of France, Spain had entered into but two treaties which can in any manner affect the question: That of 1783, in which Great Britain ceded the Floridas to her, by virtue of which in her negotiations with the United States she claimed to carry her rights up the Mississippi, as far north as the mouth of the Yarrow; but never urged, as the proprietor of Louisiana, any rights to the eastward of the Mississippi. The treaty of 1795, already cited, was the second treaty which Spain had made, and that, as has been shown, expressly recognizes the Mississippi as

the common boundary of Louisiana and West Florida.

With these three clauses of description, of limitation, not of enlargement, was this territory ceded to France in 1800. Should doubts still exist as to its extent, it is reasonable that we should be allowed to remove them, by reference to the cotemporaneous acts of all parties. The treaty of St. Ildefonso appears to have been signed on the 1st of October, 1800. The diplomatic history of our own government shows that the negotiations with France, which terminated by our acquisition of Louisiana, commenced in January, 1803, and that the result was not known in the ceded country until a late period in that year. The royal order from the King of Spain for the delivery to France, was issued at Barcelona, October 15, 1802. It directs the delivery to be made to General Victor or other officer authorized by the French Republic; and he is to be put in possession of "the Colony of Louisiana and its dependeneies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my royal crown, and such as it ought to be after the treaties, &c." On the 18th of May, 1803, Don Manuel de Salcedo, the Governor of the provinces of Louisiana and West Florida, **271** and the Marquis *de Casa Calvo, who were the commissioners to deliver the possession to the French authorities, issued their proclamation announcing the fact of cession, and that the treaty was to be "executed in the same terms that France ceded it to His Majesty, in virtue of which the limits on both shores of the river St. Louis or Mississippi shall remain as they were irrevocably fixed by the 7th article of the definitive treaty of peace, concluded at Paris on the 10th of February, 1763, according to which the settlements from the river Manchac or Iberville, to the line which separates the American territory from the dominions of the king, are to remain under the power of Spain, and annexed to West Florida."

The final Act of delivery to the French commissioner, is dated November 30, 1803, and purports to transfer the possession "of Louisiana and its dependencies, as also of the city and island of New Orleans, to the same extent which they now possess, and which they had in the hands of France when she ceded them to the crown of Spain." These three documents have recently been submitted to Congress in a communication from the President, and will shortly constitute a part of the history of the nation. The two first, which are very explicit, bear date when it was not supposed that this country would have an interest in the subject. They may be regarded as the contemporaneous exposition by both France and Spain of the language of the treaty of cession. No other power deriving interests under them, or either of them, can question the construction which they have agreed to place upon their own agreement.

But the United States did accept a delivery of this same country as a full and complete execution of the treaty with France, and recognized by the public act of their commissioners, of December 20, 1803, the full performance by Spain of the treaty of St. Ildefonso, and by France of her engagements in the treaty of

the preceding April. Two separate conventions between the United States and France were executed on the same day with the treaty of cession. The first of these (1 L. U. S., 140) stipulates for the payment of the consideration money for the purchase of Louisiana. The second article of this convention, and the third of the second, *make the payments to [***272** fall due after the possession of Louisiana shall be given. By making the payments, we acknowledged that France had fully complied with the engagements to put us in possession.

The general principles of law may with propriety be referred to, as furnishing the best and safest guides in the interpretation of public as well as private compacts. Both France and Spain have derived their jurisprudence from the civil code, and among all of them this general rule will be found. "The obscurities and uncertainties of obligatory clauses, are to be interpreted in favor of the party who obliges himself; and the obligation must be restricted to the sense which lessens the obligation; for he who obliges himself, does it as little as he can, and if the other party is not satisfied, he is bound to require a clearer and fuller explanation of the meaning of the clause. (Domat, Lib. I., tit. 1, Sec. 2, No. 15; 1 Pothier ou Oblig. [*En. Ed.*] 52, 7th rule.)

The conclusion, then, to which we are brought by all these different views of the subject is the same; and it is confidently submitted, that by no fair interpretation of the language of the treaty of St. Ildefonso, can it be understood to have conveyed to France any portion of what was known and occupied as West Florida; and that no portion of it was ceded to the United States under the name of Louisiana.

Should it appear, however, that we have misapprehended the force of the arguments which have been presented, we claim the judgment of the court upon other grounds.

From the year 1804, the United States claimed to give such a construction to the two treaties that have been considered as would pass the title to the country east of the Mississippi as far as the Perdido. This claim was, however, confined to diplomatic discussion; it was not made public, no notice of it was communicated to the world, nor was it manifested by any overt act or proceeding. Until the year 1810 nothing was done to enforce this claim. During this interval, while Spain continued in the full and entire exercise of her sovereign authority over this territory, unquestioned, so far as the world could know, the grant in question *was concluded; [***273** the title of the plaintiffs emanated from this sovereign, *de facto*. In our recent controversy with Great Britain, in relation to the north-eastern boundary, it appears to have been agreed by both parties to be a fundamental principle of public law and of common justice, that the acts of a sovereign power over the territory which it has ceded, are lawful until possession has been transferred. (Mr. Clay to Mr. Vaughan, 17th March 1828.) This principle has been recognized by various Acts of Congress, which admit the validity of grants made by France and Spain, both in the lower and upper Louisiana, up to the day when formal possession was taken by the American authorities. Upon this principle the validity of

this title might be safely placed. It would be the height of injustice, for the government of the United States to annul all grants made by the Spanish functionaries, during the time that Spain occupied the country, virtually by our permission and under a claim of right.

In the year 1810, after Spain had become the scene of turbulence and revolution, and the reins of government over her colonies had dropped from her hands, when various movements were made in the Floridas, which threatened danger and inconvenience to us, the President of the United States issued a proclamation, by virtue of which this territory was occupied by the American troops. This proclamation, dated October 27, 1801 (5 Wait's State Papers), although it asserts the right of the United States to the territory in question, represents it as a subject of discussion and controversy between the two governments; places the Act upon the ground of an amicable proceeding, rendered necessary by the subversion of the Spanish authority; and asserts, that in the hands of the United States it would still continue "the subject of fair and friendly negotiation and adjustment." It did continue the subject of much discussion, until all the differences between the two nations were terminated by the treaty of February 22, 1819. (Laud Laws, 53.) By the second article of this treaty, His Catholic Majesty cedes to **274** *the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. By the 8th article, all the grants of lands made before the 24th January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty.

This is by its terms, so far as relates to these articles, a treaty of cession. The first article so purports to be; the second purports to fix limits, but its provisions are expressly confined to the territories west of the Mississippi. The preamble sets forth, that the two parties have agreed "to settle and terminate all their differences and pretensions by a treaty."

One of the most interesting of these differences respected the country lying between the Mississippi and the Perdido. Each party had pretensions to it; those pretensions had been warmly urged; numerous private rights were dependent upon the decision of them. All these matters were either settled by the treaty, or they still remain open. If settled, it is by the general terms of cession; they are sufficiently comprehensive; they embrace "all the territories which belonged to the King of Spain eastward of the Mississippi, known by the name of East and West Florida."

Had this territory continued under the power of Spain, had the United States not in 1810 occupied it by force of arms, no room for controversy would have existed. Can that act of occupation, preceded by the proclamation of Mr. Madison, followed up by similar declarations, that it was not in any manner de-

signed to preclude discussion, but to leave the question of title for subsequent adjustment unaffected by this procedure, in any manner change the relative rights of the parties, or vary the construction to be given to the treaty of 1819? Nor can our own municipal proceedings be resorted to, to aid in interpreting the treaty. Spain is not to be affected by our legislative or executive acts; *and if **[*275]** anything of that kind is resorted to for the purpose of affecting the interests of her, or of her grantees, this government will stand condemned as guilty of a gross breach of good faith, and of a positive fraud upon the other contracting party.

A reference to the correspondence between the parties to the negotiation will show that such was not their design. On the 24th October, 1818, Don Luis, the Spanish Minister, communicated to Mr. Adams, the American Secretary of State, his project for this stipulation in the treaty, and he proposed to cede, "in full property and sovereignty, the provinces of East and West Florida, with all their towns and forts such as they were ceded by Great Britain in 1783, &c." The answer of Mr. Adams to this communication is not published among the documents transmitted to Congress on the 7th December, 1818, but was afterwards made public. It will be found to contain the following explicit language: "The uselessness of any stipulation on the subject of this first proposition is further demonstrated by the nature of the second, in which you announce your authority to cede all the property and sovereignty possessed by Spain in and over the Floridas. The effect of this measure being necessarily to remove all causes of contention between the contracting parties with regard to the possession of those territories, and to everything incidental to them, it would be worse than superfluous to stipulate for restoring them to Spain in the very treaty by which they are to be ceded in full sovereignty and possession to the United States." And in a subsequent part of the same communication it is also said in reference to the stipulations of a former treaty, "whatever relates in them to limits or to the navigation of the Mississippi has been extinguished by the cession of Louisiana to France, and by her to the United States, with the exception of the line between the United States and Florida, which will also be annulled by the cession of Florida, which you now propose."

The project of the treaty delivered by Don Onís under date of the 9th February, 1819, and the counter project of Mr. Adams on the 13th of the same month, will be found in *the papers communicated by the President to Congress on the 7th December, 1819; and in p. 50 of the same documents will be found the remarks of M. de Nenville, who was active in his efforts to bring the parties to a settlement. "It is agreed by both parties that the articles stipulating the cession of the Floridas shall be so framed as to cover the honor of both parties and prove that the treaty is an amicable convention, divested of all mental reservations, disguise or recrimination.

But the language of the treaty would seem to preclude all possibility of question. The session by the King of Spain of "all the ter-

ritories which belonged to him, situated to the eastward of the Mississippi, known by the name of East and West Florida," by its terms embraced the territory in question. That was known by both countries, and repeatedly called West Florida. In fact the two Floridas received their names by the same Act which fixed their limits—the proclamation of 1763. In retaining those names the same boundaries were preserved and were never departed from. Spain is equally precluded from gainsaying the words of cession as the United States from questioning the words of description. By adopting any limitation, the treaty would not do what it purported to do; all the differences between the two nations are not composed; all the territory known by the name of East and West Florida was not ceded; mental reservations must have been made; disguises must have been assumed, and recriminations must ensue.

If this, then, be the true exposition of the treaty, the language of the 8th article would seem conclusive upon the case. That provides that "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." No distinction is made between that part of West Florida which we occupied in 1810, and that which still **277***] continued under the authority of Spain. All are put upon the same foot; all is ceded; and all grants throughout the whole are confirmed. In *De la Croix v. Chamberlain* (12 Wheat., 599), this court remarked, "if the United States and Spain had settled this dispute by treaty before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities within the disputed territory while Spain was in the actual possession of it, and concessions of a similar character within the acknowledged limits."

It was strenuously insisted in the court below, and we are apprised that the same point will be again pressed, that the judicial tribunals of the United States are precluded from investigating this question, and giving a different construction to these treaties from that which they have received from the executive and legislative departments of the government. We apprehend that the question before the court is one of a purely legal kind. In a recent correspondence between the Spanish Minister and our own executive upon the subject of these grants, the former was especially referred to these tribunals as alone competent to investigate and decide upon the question of right. An American citizen has a right to demand protection from the courts of his country against the lawless acts of the executive, and the unconstitutional proceedings of the Legislature. In the decision of this question the plaintiffs invoke the aid of treaties. They place their claim upon the language of treaties which the Constitution has made the law of the Peters 2.

land, and which cannot be annulled by the executive or by the Legislature.

But have these departments of the government assumed ground which will in case of a favorable decision involve them in controversy with the judiciary? We have endeavored throughout the whole argument to show that in every step we have taken we are sustained by the executive. We submit as conclusive upon the subject the executive construction *of the treaty of 1819, in relation to [***278** the grant made to Don Pedro de Vargas. This grant included all the land previously ungranted to the westward of the Perdido, "comprehending all the waste lands which belong, or may belong to Spain, and are in dispute or reclamation with the United States according to the tenor of treaties. (Land Laws, 72.) This was one of the three large grants of which our government demanded and obtained from Spain, an express act nullifying and avoiding them as made in fraud of the 8th article of the treaty. Upon what principle was this done unless upon the admission that the lands were grantable by Spain, and that if the date was anterior to the period prescribed in the treaty the concession would be valid to pass the title?

In reference to the Acts of Congress it may well be questioned whether any mere municipal act of domestic legislation can be legitimately appealed to for the purpose of aiding in the interpretation of treaties. They were unknown to Spain; she was in no manner bound by them, nor ought they to possess this effect.

But it is by no means apparent that any such language was used, or any such intention entertained by Congress. Nearly all their legislation on the subject grew out of the Act of occupation in 1810, and should be construed in subordination to the language of the President's proclamation. A careful examination of these acts will show a cautious and guarded avoidance of this question. The Act of March 26th, 1804 (3 Laws United States, 603, sect. 1), declares "that all that portion of country ceded by France to the United States under the name of Louisiana, which lies south of the Mississippi Territory, and of an east and west line to commence on the Mississippi River at the 33d degree north latitude and to extend west to the western boundary of said cession, shall constitute a territory of the United States under the name of the Territory of Orleans." Sect. 12. "The residue of the Province of Louisiana shall be called the District of Louisiana."

The Act of February 20, 1811, provides in the first section, "That the inhabitants of all that part of the county or territory *ceded under the name of Louisiana, [***279** &c., contained within the following limits:" the first lines are to the westward of the Mississippi, which river is reached at the 33d degree north latitude; "thence down the said river to the river Iberville, and from thence along the middle of the said river and lakes Maurepas and Pontchartrain to the Gulf of Mexico."

The Act of April 8, 1812, for the admission of the State of Louisiana into the Union, in its first section prescribes the same limits.

The act of April 14, 1812, is the first which professes to legislate directly upon this tract of country, and in enlarging the limits of Louisiana so as to embrace a portion of it, it styles

it "all that tract of country comprehended within the following bounds," no longer employing the phraseology before applied to the undisputed country; "all that part of the territory or country ceded under the name of Louisiana."

The Acts annexing other portions of this territory to Mississippi and to Alabama are equally guarded in their terms; nor am I aware of any one Act of Congress which in precise and positive language calls this country a part of that which was ceded to us under the name of Louisiana.

This great and interesting question which has heretofore been discussed diplomatically between the representatives of the two nations, where interests were involved in it, upon grounds of policy and national interest, is now presented for decision as a merely legal question. It has ceased to be a national controversy, and has assumed a shape peculiarly fitted for this tribunal.

The *ultima ratio legis* is to be the arbiter, instead of the *ultima ratio regum*. No department of the government can take exception at a decision in favor of the plaintiffs, and it is confidently hoped that if the treaties according to their fair construction (the supreme laws of the land) by a just interpretation can sanction their title, it will here find its confirmation.

Mr. Jones, for the appellees.

This case comes up for decision on the third **280*** exception, *taken by the respondent in the court below, which was sustained in that court, and the petition of the appellant there discussed.

That exception was as follows:

"For that the petitioners do not set forth any right of recovery of the land demanded by them, for that they allege that the land demanded by them lies in a district formerly called Feliciana, within the late Province of West Florida, and petitioners claim under a grant made by the Spanish Governor of land situated in said district, to the person under whom they allege that they derive title, at New Orleans, on the 2d of January, 1804, and subsequently confirmed by the Spanish government; whereas, all that section of country which was formerly called Feliciana, was long before the alleged date of said grant, ceded by the government of Spain to the government of France, and by the government of France to the United States; and the grant aforesaid is null and void, and has no effect whatever, and the officers making the same had not then and there any right or authority so to do."

The point, then, for the decision of the court is, whether the plaintiffs, by their petition and the documents annexed, exhibit a *prima facie* right and title to the lands demanded by them; or according to the specific objection made by the defendant, had the Spanish Governor of Louisiana any right on the 2d of January, 1804, at New Orleans, to make this grant to Jayme Jorda, of 40,000 arpents, or is it in any way confirmed by any laws of the United States or of the State of Louisiana?

This question is to be solved by deciding what were the limits or boundaries of the territory ceded by Spain to France in 1800, and by France to the United States in 1803, under the name of Louisiana.

The district of country within which the lands claimed are situated, did not form part of the territory erected into a State, under the name of Louisiana. This Act passed February, 1811. In April, 1812, Congress passed an Act enlarging the limits of the State; and the parish of Feliciana, within which these lands are, forms a part of this district.

*This has more the appearance of a [**281** question of fact than of law; but the parties have treated it as of the latter character, as resting on facts of a public and notorious nature, of which courts will take notice without proof. The divisions, districts and boundaries of a country, are as much a matter of law as the existence of the government, and of the court itself. (*Starkie's Ev. Part. III.*, 410-428; *Part. II.*, 164.)

The question raised seems, moreover, to belong rather to politics than law; it rests upon the construction of a treaty, and of the construction of a treaty as a general question, the government is the best judge; and where the government has decided upon a line of construction, there would be great embarrassment, and ought to exist very paramount reasons, even with all the power and control given to courts under our very peculiarly organized federation, to warrant their departure from the construction given by the government.

The defendant then insists, and it is the first line of defense which he raises against the attack of the plaintiffs:

1. That it has been long since settled and established by the government of the United States, that the territory in question was ceded by Spain to France in 1800, by France to the United States in 1803; and that the courts of the United States are bound by this interpretation of that treaty.

The Act authorizing the President of the United States to take possession, or the Act erecting Louisiana into a territory, cannot of themselves, and without the aid of extrinsic facts, decide the matter, because they nowhere recognize any specific limits of Louisiana; but by what authority other than the treaty of 1803, and the construction contended for by the appellee, and adopted by the government, was Mobile taken possession of in 1804, and erected into a separate revenue district, immediately on the ratification of the treaty? (Act of Congress of 24th February, 1804, sect. 11: Proclamation of the President, 27th October, 1810; *State Papers*, Vol. V.)

Again, when in 1812 Congress annexed this very territory to Louisiana, then already a State, could anything more decisively mark and ascertain the clear construction and interpretation *of Congress, that this district of [**282** country was ceded by Spain to France in 1800, and by France to the United States in 1803—can the courts of the United States, after such conclusive evidence of the acts of the government, consider the question as open, whether this territory was thus ceded or not?

From the acquisition of Louisiana in 1803, to the period of the conclusion of the treaty with Spain, by which Florida was ceded to the United States, there has been an uninterrupted series of legislative acts affecting the territory, which the appellants say remained the property of Spain until the Florida treaty. (Cited,

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Acts of Congress 2d March, 1805; 21st April, 1806, 3d March, 1807; 3d March, 1811; 12th December, 1811; 25th April, 1812; 12th and 18th April, 1814; 3d March 1819; 11th May, 1820; 8th May, 1822; 27th February, 1814.)

All these various Acts of Congress clearly recognize the interpretation, that the territory in question was ceded to the United States by the treaty of Paris in 1803; and the Act of 25th April, 1812, legislates on the subject of this identical territory by description, viz., territory east of the island of Orleans, and west of the Perdido; and yet the position taken by the plaintiffs in this case, calls upon this court to decide that this territory formed no part of the United States until it was annexed to it by the treaty of Washington of 22d February, 1819. Hundreds if not thousands of certificates have been issued by the land commissioners to individuals under the Acts of 1819, 1822, and 1825, conferring titles, as against the United States, to lands lying within this territory, and covered by grants similar to the plaintiff's. The plaintiffs demand that all this solemn legislation, and all these judicial proceedings, are to be considered as so much usurpation on the part of the government of the United States on the rights of His Catholic Majesty and his subjects. It will surely require some very cogent arguments, and a very imperious necessity of duty, to induce this court to decide in contradiction to such a series of acts of the government. The States of Alabama and Mississippi were created **283*** in 1817, and they also, according to the doctrine contended for by the plaintiffs, were made up of large portions of His Catholic Majesty's dominions; for such is the direct consequence of maintaining that the territory east of the island of Orleans and west of the Perdido was not ceded to the United States by the treaty of 1803, but only by the treaty of 1819. It is left to the court to imagine the consequences of such a conclusion.

The question involved in this case has been raised and decided in the State courts, viz., in *Newcombe v. Skipwith* (1 Martin's Reports, 151).

The general principle and rule of decision that courts follow the construction put upon treaties by their governments, is laid down in *The United States v. Palmer* (3 Wheat., 610); *The Divine Pastora* (4 Wheat., 52); *Williams v. Armroyd* (7 Cranch, 433, 434); where this court expressly declares that it follows the opinion of the government on a question of political law. Indeed, the principle is too obviously a necessary corollary of the connection of courts of justice with the government under which they are established to require elaborate illustration. Under this point of view it is conceived that this court is concluded from entertaining any other opinion than that which has already been expressed by the government and all its citizens, except those few whose private interest induces them to cling to an exploded fallacy.

2. It is now secondly urged that the plaintiffs are estopped by their own petition from alleging that the territory in question was not ceded by the treaty of 1803. In order to give jurisdiction to the court they were obliged to allege that the parish in which the immovable claimed by them lies, is within the State of Louisiana, which is the jurisdictional limit of the court. If within its jurisdictional limits, Peters 2.

how and when did it become so? Feliciana was, as defendant insists, made part of Louisiana in 1812; but if not ceded till 1819 no law or Act has been passed since that time, annexing it to, and constituting it part of the State of Louisiana, and the court below had not jurisdiction over the *subject. The [***284** allegations of the plaintiff and his reasonings are thus destructive of each other.

3. The defendant contends that if the question is gone into, historical facts and the official acts of the French and Spanish governments, and a just interpretation of the treaties of 1800 and 1803, establish conclusively that the Colony or Province of Louisiana was ceded to the United States, with an extent which reached on its eastern boundary to the river Perdido, and included the district in which the lands that plaintiffs claim is situated. The State papers containing the correspondence of our ambassadors, Mr. Pinkney and Mr. Monroe, with the Spanish ministers, embrace nearly all that can be said upon the subject (See *State Papers*, Vol. XII., p. 15 to 81, and 197 to 280.) To reduce the matters there stated to some order, and to add what has since transpired, is all that will be undertaken. The object of any deduction of facts on this subject is to show that France at some time possessed the territory in question under the name of Louisiana; if this point is established there is an end of the controversy, for Spain was bound by the treaty of St. Ildefonso, made in 1800, to restore to France whatever territory was in her possession, which France had at any time held under the name of Louisiana. This is too obviously its meaning to require to be dilated upon. The words of that treaty are: "His Catholic Majesty promises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to His Royal Highness the Duke of Parma, the Colony or Province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States." The French text is: "Sa Majesté Catholique promet et s'engage de son côté, à rétrocéder à la République Française, six mois après l'exécution pleine et entière des conditions et stipulations ci-dessus, relatives à son altesse royale le Duc de Parme, la colonie ou province de la Louisiane, avec la même étendue qu'elle a actuellement entre les mains de l'Espagne, et qu'elle avait lorsque la France la possédait, et *telle qu'elle doit être, [***285** d'après les traités passés subséquentement entre l'Espagne et d'autres états.

It was ceded by France to the United States in the same terms.

Did France, then, at any time, ever possess any territory as far or farther to the east of the island of Orleans as the present parish of Feliciana, viz., the territory between the river Mississippi and the eastern branch of Pearl River?

The discovery of Louisiana by La Salle in 1682; his unsuccessful attempt to form a settlement at Rio Colorado de Texas in 1685; the expedition and settlement of Iberville in 1699, at Dauphin Island and Biloxi, where he remained

Governor for twenty-three years, and exhibited a character for enterprise and perseverance which has not been surpassed, are clothed with the character of historical events; and this spot, far eastward of the present State, was the first to receive the name of Louisiana. It was twenty-three years after the period of the settlement of the French at Dauphin Island and Biloxi, before the headquarters of the province were moved to the banks of the Mississippi. At the barren and inhospitable Biloxi, Iberville, constrained by orders, maintained his government long after his own judgment was convinced that the fertile bank of the Mississippi was destined to be the site of an immense metropolis. These events, and the general settlement of the country, are minutely detailed in a recent publication, and the authorities from which they are taken are referred to. (Martin's History of Louisiana, Vol. I., from page 122 to page 300, who cites Charlevoix, Laharpe, Vergennes, Dupratz, and the records of the country.)

That France always gave a limit to Louisiana which embraced the territory in question, may be further seen by the grant to Crozat, made in 1712, in which Crozat is appointed solely to carry on trade, "in all the lands possessed by us, and bounded by New Mexico and the lands of the English Carolina, all the establishments, ports, havens, rivers, and principally the port and haven of the island of Dauphin, heretofore called Massacre; the river of St. Louis, heretofore called Mississippi; from the edge of the **286** sea, as far as Illinois, *together with the river of St. Philip, heretofore called the Missouri; and of St. Jerome, heretofore called Ouabache; with all the countries, territories, lakes, within land, and the rivers which fall directly and indirectly into that part of St. Louis."

The manner in which France dispossessed herself of Louisiana in favor of Great Britain and Spain by the treaty of 1763, ceding the part of Louisiana east (to the left) of the island of Orleans to Great Britain, and the island of Orleans and the part of Louisiana west of the Mississippi to Spain; the consolidation of the part of Louisiana thus acquired by England with other territory ceded to her by Spain in 1763, which consolidation constituted the Province of West Florida; and the subsequent acquisition by Spain of West Florida, thus embracing part of Louisiana, in 1783, are so fully and explicitly detailed in the correspondence of our ministers, contained in the State papers at the place cited, in the reasons given for the judgment of the court, and in the extract from the treatise on American diplomacy, that it would only lead to repetition to anticipate them. For the same reason the court is referred to these extracts for a critical analysis of the language of the treaty, from which it will be found that to consider the territory in question as ceded by Spain to France, and by France to the United States, is the only key to the peculiar and otherwise inexplicable phraseology of these treaties. That this peculiar phraseology applied to the dimensions of the territory to be ceded rather than to any other modifications it had undergone by treaty, is clearly deduced from the terms used. His Catholic Majesty retrocedes to France

"the Colony or Province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States."

The words *the same extent* are to be understood as applying to each member of the sentence, viz., with the same extent that it now has in the hands of Spain, and with the same extent that it had when France possessed it, and with such extent as it has or ought to have after the treaties subsequently entered [***287**] into between Spain and other States; this is obviously the meaning of this peculiar phraseology, and it is confirmed by adverting to the French text, where the word *telle* is placed in the feminine to accord with *étendue*, the last preceding substantive. From these premises there can be no doubt that the learned judge of the court of the first instance is fully borne out and supported in the conclusion that the country east of the island of Orleans, including Mobile, &c., to the Perdido, was from 1682 to 1763 in possession of France under the name of Louisiana; that it was ceded and intended to be ceded to her again by Spain in 1800, and by France to the United States in 1803. The arguments *pro* and *con* on this subject are well summed up in a publication entitled, "Diplomacy of the United States." From this work it appears that during the negotiations which ended in the peace of 1763, at an unsuspecting moment, Spain herself admitted that the country bordering on the east side of the Mississippi, previous to the war of 1755, belonged to France.

This law lays down the principle, that where there are two purchasers from the same vendor, who have both paid the price, he who gets first into possession is to be maintained in the title. To prepare for the application of this law, it is laid down, that nations are mere moral beings, and that they are to be governed in all the contracts which they enter into among them, by the same rules by which contracts of the same nature are governed, when entered into between private persons.

It is further assumed, that the United States are a mere purchaser from France; and plaintiffs' grantee, in like manner, a purchaser from Spain, who was in the actual administration of the country. It is next asserted, or sought to be inferred, that plaintiffs' grantee was put in actual possession of his grant before the United States took actual possession, in December, 1803, and therefore, under the aforementioned rule of law, has a better title than the United States, or any persons deriving claim under them.

The sophistry of comparing a cession by treaty, between nations, to an ordinary bargain and sale, and applying the *rules of law [***288**] as to property among individuals to the transactions among nations, is almost too obvious to require refutation.

An Act, erecting Louisiana into two territories, passed 26th March, 1804.

The 14th section of that Act annuls all grants made within the ceded territory, subsequent to the treaty of St. Ildefonso, except to actual settlers, &c.

No law of the United States has passed ex-
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emptying grants such as that under which plaintiffs claim, from the nullity with which they are struck by this section of that law. For,

1. This grant violates the usual powers vested in a Governor, and the laws, usages and customs of the Spanish government on this subject, in granting so large a quantity of land; and hence the ratification of the king was sought and obtained, but at too late a period to confer a title.

2. No actual settlement is pretended or alleged.

3. The grant exceeds a league square.

It is not a little singular for the good faith of these large grants, that they are all located precisely between the Mississippi and the Perdido, all hurried through with the speed of lightning, compared with the usual pace of Spanish authorities, and made about the same period of time. That the payments are not in money, but in certificates of credits issued by the Minister of Finance.

That the grant itself expressly declares the land to be within the Province of Louisiana, for the caption is, *Louisiana, Distrito de Baton Rouge*; that it is issued by Morales, while he yet remained at New Orleans. With these concurring facts, it is not surprising that the government of the United States have refused to confirm eight or ten grants, which embrace 500,000 acres of land.

After the liberal course of proceeding on the part of the United States, in relation to grants, up to the very period that possession was taken by her, after the long usurped retention of it by Spain, the court, or anyone else, can feel no commiseration either for the original grantees, parties to such gross frauds, or for speculating purchasers of doubtful titles. Technicalities **289** sometimes serve as handmaids to justice; they may also be wisely used to defeat fraud; and the claim of the plaintiffs is of such a nature, and entitled to so little favor, that the court would decide against it, even if they were obliged to rest their decision on a rigid technicality. Even if it were necessary to resort to *summum jus* to extinguish it, it would work nothing but *summa justitia*. But this is not necessary. The plaintiffs' title vanishes on the application of the plainest principles of law, and the most ordinary rules of decision.

To any argument predicated on the ground that Spain, being in actual possession, had a right to make grants, it may be answered,

1. That from the 1st of October, 1800, the country belonged to France, who transferred it to the United States in 1803, as she received it by cession from Spain. If France permitted it to be governed by Spanish authorities, from want of ability to take possession, or motives of convenience, the Spanish authorities could not go beyond mere acts of administration, viz., such as were necessary to maintain the bond of society; they were not at liberty to dispose of the public domain at their own will and pleasure; or to fill their coffers by its sale. To this extent alone, is any succeeding government held by the general principles of political law (independent of special conventions), to recognize the acts of their predecessors, who have acted the *de facto* without being the *de jure* government. The United States succeeded to the rights of France, and France was not bound to

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recognize acts similar to these, done after the date of the acquisition. It is not considered that the 3d article of the treaty, which secures the protection and enjoyment of property, is any limitation on the first article, which transfers the Province as fully, and in the same manner in which France received it from Spain. But even had it been justice and equity to recognize all ordinary acts of administration, still every act which was in fraud of the real owner, he might disavow and refuse to ratify; these large grants of land, so unusual, and at variance with the ordinary Spanish regulations on this subject, carry too strongly on their front their character, to entitle them to any favor. *The government of the United States [***290** has, as we have seen, gone very far in recognizing every species of title which had the presumption of fairness, that emanated from the Spanish authorities, prior to the taking possession of the country, on the 20th of December, 1803, and even up to 1810; but they have guarded their liberality from abuse, by imposing various reasonable conditions, within which the plaintiffs' claim does not come.

The acquisition of the United States was made in April, 1803, and no step was taken towards originating this title till October, 1803, long after we may fairly presume the knowledge of the transfer was made public. The United States had the right, and they have exercised it, to refuse to ratify every such grant made after their title was acquired, and *a fortiori* after it was known; and they have always refused to give any color or shadow of legal right to claims of the magnitude of that under the wings of which plaintiffs seek to cover the tract of land in dispute, conceiving them to have been issued in fraud of their rights of sovereignty.

The circumstance therefore of the petition and order of survey being made anterior to the taking possession by the United States, but posterior to the cession and while Spain was in actual possession, cannot confer on the plaintiffs any right, if the United States, as they have uniformly done, refuse to ratify an incomplete title, which as sovereign they may refuse to do.

2. As to all titles which emanate from the sovereign, and are set up against the sovereign himself, it is the government alone which can, through its tribunals, determine on such claims.

The United States have instituted tribunals to decide all claims to lands, of whose want of liberality in confirming titles there has been no complaint; except by a few individuals whose claims are judged to have originated in fraud of the rights of the United States. The claim of the plaintiffs has been presented for record and confirmation; but it has not been approved or confirmed by the commissioners, or we should have heard such approval and confirmation alleged in the petition. The United States have given away *these very lands, and [***291** by doing so have not only manifested their liberality and wise policy, but conferred rights and created interests which, from the extent and variety of persons interested, ought not now to be affected; unless, indeed, the strictly impartial scale of justice preponderates against them, when indeed they must be extinguished even if the sword of justice be necessary to enforce the decree. Of such a result we have little apprehension, sustained as we are by such a mass of leg-

isolation, and the substantial rules of political law.

The question submitted in this case was glanced at in *De la Croix v. Chamberlain* (12 Wheaton, 599). That case was decided on the technical ground that an imperfect title could not sustain an action of ejectment. The same objection might exist in this case, if the acts of the Spanish Governor and King are considered as without authority over the territory described after 1803. But the case is adverted to, principally with a view to an opinion advanced, as we presume by the deciding judge; for it is not a necessary reason for, or pivot of the decision of the court.

The references to the Acts of Congress already given, show with what limitations the United States have confirmed titles which had their commencement after October, 1800, viz., the date of the treaty of St Ildefonso; that it is only grants limited as to quantity, viz., a league square, and which were accompanied by settlement, and considered by the commissioners to have commenced in good faith, which were thus confirmed. As to any grants which originated after October, 1800, conferring titles to land to an extent exceeding a league square, the 14th section of the Act of 1804 at once annuls them, and no subsequent law has withdrawn its withering effect. This and the subsequent Acts clearly show that the United States considered that the cession by Spain to France put an end to the power of Spanish officers, to make grants of land; and this doubtless was the strict law of the case. The possession of Spain after 1800 was not a possession as owner. Her officers could therefore only do administrative and conservative acts, and not acts of pure sovereignty. It is respectively **292***] fully insisted, that the United States drew a clear distinction as to dates, permitting grants, prior to 1800, to rest on their proper legality for validity; but constituting themselves into judges of all grants made subsequent to that period. They have confirmed all acts done, or grants made after October, 1800, up to 1803; where, from the minuity or contracted dimensions, they carried presumptive proof that they were made in the ordinary exercise of sovereignty, and in good faith, at least on the part of the grantees. They have even carried this liberality in favor of such grants, made prior to 1810, when the country was actually taken possession of. Joydra's patent comes within no one of the confirming acts.

The plaintiffs must either succeed in establishing that Louisiana was bounded on the east by the Iberville and the lakes, or their grant falls to the ground. When the plaintiffs invoke the aid of the treaty of 1819, it is by assuming that the ground of dispute was not included in Louisiana, under the cession of 1803. We have, as we apprehend, clearly refuted this position. The treaty of 1819 has substance enough for its application, in the use of the terms, West Florida, in the territory actually ceded, viz., the portion of West Florida between the Perdido and the Apalachicola, to render unnecessary the establishment of a principle which would stamp with usurpation and injustice so large a portion of federal legislation, and annihilate the original legality of the

rights of thousands in the States of Alabama, Mississippi and Louisiana.

It is not therefore on such a title as the one presented by plaintiffs, predicated on a petition and order of survey for forty thousand arpents of land, made after the cession, which took place in April, 1803, and of which the title was not completed till January and May, 1804 and 1805, unaided by any sanction of the government of the United States, and in the very teeth of its laws, that the plaintiffs can recover. In the words of the exception, the grant or patent was made by persons who had not at the time any authority to grant lands within that district. The plaintiffs show no legal title to the lands claimed by them.

Subsequent Acts of Congress have established land-offices in the territory of Florida, [***293** westward of the Perdido; but the disputed territory remains part of the States of Mississippi, Alabama, and Louisiana, under Acts of Congress which recognize it as ceded by the treaty of 1803. There is certainly manifested in the pretensions of the plaintiffs in setting up this title, a gratifying instance of the latitude of legal discussion permitted under our free institutions; but there is something hopeless in the supposition that courts of justice might by possibility entertain an opinion different from the one so early taken and so long persevered in by the government, and by which no palpable contradiction or absurdity is maintained; the judiciary must be considered as bound to follow the twenty years' interpretation given by their government to a treaty made by them. Even under our very peculiar form of government, it would be a singular instance of *imperium in imperio* if the judiciary and the government were found deciding such a question in different ways.

Mr. Webster, for the appellants, in reply:

The question for the decision of the court is, whether the lands sued for by the petitioners are a part of the Province of Louisiana, as that Province was ceded by France to the United States; or are a part of West Florida, as that Province was ceded by Spain to the United States. If a part of Louisiana, then the lands were public domain, and now belonged to the United States or her grantees. If a part of Florida, then the grant under which the plaintiff derives title is good, and he is entitled to recover.

Louisiana, as the United States received it from France, was bounded on the east, either by the Iberville and the lakes, or by the Perdido; no other or intermediate boundary is set up. If the United States obtained their title from France, they have both soil and jurisdiction; if under Spain, they have the jurisdiction, but not the soil.

What was the extent, then, of the grant from France to the United States of April 30th, 1803? The grant was of the Province of Louisiana; it stated no boundaries, nor limits, but it referred to the title of France, that is, to the treaty of St. Ildefonso. The words of this treaty have been frequently repeated in the [***294** course of the argument. That treaty, then, is to be looked at and considered.

That treaty retrocedes to the Colony or Province of Louisiana. 1. With the same extent which it now has in the hands of Spain. 2. That it had when France possessed it. 3. And

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such as it ought to be, after the treaties subsequently entered into between Spain and other States.

How, then, is this treaty to be construed?

1. In the first place, we must look at the condition and state of the country as they then were. From November, 1762, a period of thirty-eight years, Spain had owned Louisiana; she had been in the actual possession of it from 1769, a period of thirty-one years. During all this time, she had possessed it as bounded on the east side by the lakes. From 1763 to 1783 England had owned the territory on the left bank, under the appellation of Florida. For twenty years England and Spain occupied, respectfully, each its own territory, with boundaries settled by treaty and well understood. In 1783 Spain obtained the territory on the left bank from England, but she obtained it as Florida. As such it was ceded to her, and as such she received it. From 1783 to 1800, seventeen years, she owned both banks; but she owned one as Louisiana, and the other as Florida. This is perfectly clear as matter of fact; and the provinces were as well known, and divided by lines as certain, as are the provinces of Spain at home.

For forty years not one foot of land east of the Iberville had been treated by her as part of Louisiana. Her laws, her ordinances, her colonial governments, her archives, her administration, all recognize the distinction between Louisiana and Florida.

This is the great leading consideration; it is entirely unquestionable as matter of fact, and quite important in the argument.

Louisiana, then, at that time was as clearly defined in its boundaries, at least on the east, as Estramadura or Andalusia. All this was known to France: 1st, because it was known to everybody; and 2nd, because these were the limits with which France herself had ceded Louisiana to Spain.

295*] *Under these circumstances, the treaty of St. Ildefonso was made.

1. It cedes "the Colony or Province of Louisiana." This of itself is a sufficient description; if nothing more had been said, the Colony would have passed, with its then known and established boundaries, as much so as if it had been Castile or Arragon. If it had stopped here, would there have been any doubt? Certainly none.

This is very important; because if the grant thus far is clear, then it is not to be affected by anything in itself less clear; if all that follows, taken together, be ambiguous, then it ought not to control the preceding, which is free from ambiguity. That would be worse than to illustrate the obscure by the obscure; it would be to obscure the clear by the obscure. Vattel, Book II., Ch. XVII., upon the interpretation of treaties, interprets the obscure, so that it agrees with what is clear and plain. Therefore, if all that follows, taken together, is doubtful, it is all to be rejected.

2. But properly considered, what follows is not doubtful.

There are two ways in which these three modes of description may be considered; and each will lead to the same result. 1. They may be viewed as explanatory of each other, or as synonymous phrases. This probably is the **Peters 2.**

true mode of regarding them. 2. Or as qualifying and limiting each other.

1. It is natural to consider them as synonymous. They are copulative; they are evidently used as synonymous. Take the two first: "Louisiana is to be ceded as Spain now holds it, and as France held it." Does not this form of expression imply that the extent was the same in both cases? If the extent was different, then both could not be true. Yet both are used, and the inference therefore is, that they were used as synonymous.

If the extent had been different, then the language would have been not as Spain now holds it, but as France held it.

The fair import of the expression is, that they mean the same thing; or were intended to express the same thing. Now, if these expressions appear in any degree inconsistent with themselves, what is the rule to be applied to them? *Clearly, it is to find out, if [***296** we can, one which is clear and certain, and make the rest conform to it. This is the rule of common sense. Now, there is one of these descriptions perfectly clear, unambiguous, and free from doubt; and that is entitled to control all the rest. Because it corresponds precisely with what precedes in the treaty; because it is first, and leading in the order of arrangement; because in itself it is perfectly distinct and intelligible.

There is no doubt how the treaty would have stood if it had stopped there.

The doctrine contended for on the other side, overrules the plain expressions of this provision. They contend Louisiana shall not have the same extent as in the hands of Spain; they control what is clear by what is doubtful.

But it is further evident that two of these clauses completely agree, the first and the last; "such as Spain now holds it," and "such as it ought to be after the treaties made by her;" these are precisely the same thing.

Then, if these expressions were used as mutually explanatory, as different modes of expressing the same thing, how are two of them which are clear, and which do agree, to be explained away by the third, which is doubtful? These two are almost identical, "such as Spain now holds it," and "such as it ought to be after the treaties made by her."

Then we come to what has raised the doubt: "or as it was when France possessed it." Now, this expression may be doubtful, or might be if it stood alone, especially if it be admitted that France possessed Louisiana a long time, and that at different periods it had a different extent in her hands.

The object is to fix the period of her possession to which this refers.

Let it be admitted, for the present, that it had a different extent at different periods. Was there any period when, by acknowledgment, she held it bounded east by the Mississippi? There certainly was; viz., the moment of its actual delivery to France in 1769. For seven years it had no other boundary but the Iberville.

But it is enough to say she so possessed it in 1762 and *1763; and so ceded it, [***297** when she held the whole of Louisiana. It is, then, to that moment that these words are to refer; it then went into the possession of

France to the full extent now claimed by the petitioners; because in this way the article is reconciled in all its parts.

But there is a stronger ground. It is quite clear, from the treaty itself, that it refers to the possession of France at the moment after the cession. The third clause makes this manifest: "and such as it ought to be, after the treaties subsequently made by Spain," &c.

Now, here are treaties spoken of as made by Spain, subsequent to this possession of France. Not treaties by France and Spain, but treaties by Spain alone. This necessarily fixes the period to be that of the cession; for before that time Spain could not affect Louisiana by treaties.

Does the treaty mean after the treaties entered into by Spain, subsequent to LaSalle's voyage in 1682; or the primitive possession of France?

It is therefore confidently asserted that it is not only an admissible, but the only admissible construction of the clause, as the time of possession by France referred to in the treaty was the moment of her cession. But there is another mode of considering these clauses, and that is not to regard them as synonymous, but as qualifying and limiting each other; and this will lead the court to the same result.

Thus far the subject has been considered as if there were three clauses or phrases of description.

But it is suggested that there are but two, the two first being in fact but one. The form of expression justifies this construction: "with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it ought to have been by subsequent treaties."

The first sentence states the same thing, and the last qualifies it. The meaning is, take the Colony as you hold it, and as I receive it from you, subject to any treaties since made by me. The punctuation shows this, as well as the phrase and manner of expression.

If this construction, which appears to be the **298***] right one, *be adopted, the result will be the same—viz., that the time of possession referred to was the time of the cession to Spain.

But we may go further and contend that no reasonable argument can be found for carrying back this possession to early history; in short, that France never did possess West Florida, as part of Louisiana, within the meaning of words used as these words are.

She claimed it, indeed, but she never possessed it. She had a settlement here and there, with an undefined claim. She claimed it, but no treaty acknowledged it, and it was always disputed until 1763. (12 Wheaton, 522.)

It was certainly one object of that treaty to settle the limits of Nova Scotia; and the fair construction of the article is, that it fixes boundaries; and that it purports to cede territory, does not alter the nature or intent of it. There were words of cession, because France had a settlement at Dauphin Island. On the 3d of November, 1762, by private treaty, France ceded Louisiana to Spain—all Louisiana; and by a treaty with England, she ceded the country east of the Mississippi to England.

At the time of the definitive treaty of 10th February, 1763, Spain owned Louisiana under the treaty of November preceding; and now

she cedes Florida to England, and all her possessions east of the Mississippi. This was certainly a designation of limits.

How did the parties understand the treaty of 1763? The letter to L'Abbadie (1 Laws U. S., 442) shows that it was considered that the whole of Louisiana was the property of Spain; and then, 1763, it was admitted that the whole of Louisiana lay west of the Mississippi; and in 1763 Spain, recovering the left bank of the river from England, received it as Florida. It may be emphatically inquired whether it is reconcileable to sound principles to go back to the times of uncertain and contentious claims, or to the time of fixed and acknowledged rights. A contemporaneous exposition of the treaty of St. Idelfonso is obtained from the acts of the parties to that treaty. When on the 30th November, 1803, Spain delivered Louisiana to France, she delivered nothing on the eastern side of the river.

*The history of the title of the United [***299** States to Louisiana will illustrate and confirm the views which have been exhibited in this investigation.

In 1795 the United States made their treaty with France. Difficulties soon after arose on the subject of the navigation of the Mississippi, and the peace of the two countries was in danger from these difficulties. In 1801 or 1802 we heard of the transfer of Louisiana to France, and we were alarmed at the prospect of the armies of a powerful and successful nation landing in our neighborhood.

Before it was known that France had become the owner of Louisiana, we were anxious to obtain Florida; but as soon as this became known every effort was directed to purchase Louisiana from France, or so much of it as would secure to the flourishing and enterprising western population of our country the free use of the magnificent river Mississippi, their right by all the laws of nature. The treaty of April, 1803, gave the whole of Louisiana to the United States; that treaty reciting the treaty of San Lorenzo.

How did we receive the acquired territory? Did we then suppose we had obtained anything east of the Mississippi?

When Claiborne and Wilkinson took possession they received Louisiana, extending only as asserted by the appellants; and they asked for no more.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This suit was brought by the plaintiffs in error in the Court of the United States for the Eastern District of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpents of land, made by the Spanish Governor, on the 2d of January, 1804, to Jayme Joydra, and ratified by the King of Spain on the 29th of May, 1804. The petition and order of survey are dated in September, 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which *they can recover; that the [***300** territory within which the land claimed is sit-

uated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St. Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has with equal perseverance and earnestness maintained, that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi.

Without tracing the title of France to its origin, we may state with confidence that at the commencement of the war of 1756, she was the undisputed possessor of the Province of Louisiana, lying on both sides the Mississippi, and extending eastward beyond the bay of Mobile. Spain was at the same time in possession of Florida; and it is understood that the river Perdido separated the two provinces from each other.

Such was the state of possession and title at the treaty of Paris, concluded between Great Britain, France, and Spain, on the 10th day of February, 1763. By that treaty France ceded to Great Britain the river and port of the Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it is situated; and by the same treaty Spain ceded Florida to Great Britain. The residue of Louisiana was ceded by France to Spain, in a separate and secret treaty between those two powers. The King of Great Britain being thus the acknowledged sovereign of the whole country east of the Mississippi, except the island of New Orleans, divided his late acquisition in the south into two provinces, East and West Florida. The latter comprehended so much of the country ceded by France as lay south of the 31st degree of north latitude, and a part of that ceded by Spain.

By the treaty of peace between Great Britain and Spain, signed at Versailles on the 3d of September, 1783, Great Britain ceded East and West Florida to Spain; and those provinces continued to be known and governed by those names, as long as they remained in the possession and under the dominion of His Catholic Majesty.

On the 1st of October, in the year 1800, a secret treaty was concluded between France and Spain at St. Ildefonso, the third article of which is in these words: "His Catholic Majesty promises and engages on his part to retrocede to the
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French Republic, six months after the full and entire execution of the conditions and stipulations relative to his His Royal Highness the Duke of Parma, the Colony or Province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and the other States."

The treaty of the 30th of April, 1803, by which the United States acquired Louisiana, after reciting this article, proceeds to state, that "the first Consul of the French Republic doth hereby cede to the United States, in the name of the French Republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty concluded with His Catholic Majesty." The 4th article stipulates that "there shall be sent by the government of France a commissary to Louisiana, to the end that he do every act necessary, as well to receive from the officers of His Catholic Majesty the said country, and [*302 its dependencies, in the name of the French Republic—if it has not been already done—as to transmit it in the name of the French Republic to the commissary or agent of the United States."

On the 30th of November, 1803, Peter Clement Laussatt, Colonial Prefect and Commissioner of the French Republic, authorized, by full powers, dated the 6th of June, 1803, to receive the surrender of the Province of Louisiana, presented those powers to Don Manuel Salcedo, Governor of Louisiana and West Florida, and to the Marquis de Casa Calvo, commissioners on the part of Spain, together with full powers to them from His Catholic Majesty to make the surrender. These full powers were dated at Barcelona the 15th of October, 1802. The act of surrender declares that in virtue of these full powers, the Spanish commissioners, Don Manuel Salcedo and the Marquis de Casa Calvo, "put from this moment the said French commissioner, the citizen Laussatt, in possession of the Colony of Louisiana and of its dependencies, as also of the town and island of New Orleans, in the same extent which they now have, and which they had in the hands of France when she ceded them to the royal Crown of Spain, and such as they should be after the treaties subsequently entered into between the States of His Catholic Majesty and those of other powers."

The following is an extract from the order of the King of Spain referred to by the commissioners in the act of delivery. "Don Carlos, by the grace of God, &c." "Deeming it convenient to retrocede to the French Republic the Colony and Province of Louisiana, I order you, as soon as the present order shall be presented to you by General Vietor, or other officer duly authorized by the French Republic, to take charge of said delivery; you will put him in possession of the Colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my Royal Crown, and such as it ought to be after the treaties which have successively taken place between my states and those of other powers."

Previous to the arrival of the French commissioner, the *Governor of the provinces of Louisiana and West Florida, and the Marquis de Casa Calvo, had issued their proclamation, dated the 18th of May, 1803; in which they say: "His Majesty having before his eyes the obligations imposed by the treaties, and desirous of avoiding any disputes that might arise, has deigned to resolve that the delivery of the Colony and island of New Orleans, which is to be made to the General of Division Victor, or such other officer as may be legally authorized by the government of the French Republic, shall be executed on the same terms that France ceded it to His Majesty; in virtue of which, the limits of both shores of the river St. Louis or Mississippi, shall remain as they were irrevocably fixed by the 7th article of the definitive treaty of peace, concluded at Paris the 10th of February, 1763, according to which the settlements from the river Manshac or Iberville, to the line which separates the American territory from the dominions of the King, remain in possession of Spain and annexed to West Florida."

On the 21st of October, 1803, Congress passed an Act to enable the President to take possession of the territory ceded by France to the United States; in pursuance of which commissioners were appointed, to whom Monsieur Laussatt, the commissioner of the French Republic, surrendered New Orleans and the Province of Louisiana on the 20th of December, 1803. The surrender was made in general terms; but no actual possession was taken of the territory lying east of New Orleans. The government of the United States, however, soon manifested the opinion that the whole country originally held by France, and belonging to Spain when the treaty of St. Ildefonso was concluded, was by that treaty retroceded to France.

On the 24th of February, 1804, Congress passed an Act for laying and collecting duties within the ceded territories, which authorized the President, whenever he should deem it expedient, to erect the shores, &c., of the bay and river Mobile, and of the other rivers, creeks, &c., emptying into the Gulf of Mexico east of the said river Mobile, and west thereof to the Pascagoula, inclusive, into a separate district, and to establish a port of entry and delivery **304***] therein. The *port established in pursuance of this Act was at Fort Stoddert, within the acknowledged jurisdiction of the United States; and this circumstance appears to have been offered as a sufficient answer to the subsequent remonstrances of Spain against the measure. It must be considered, not as acting on the territory, but as indicating the American exposition of the treaty, and exhibiting the claim its government intended to assert.

In the same session on the 26th of March, 1804, Congress passed an Act erecting Louisiana into two territories. This Act declares that the country ceded by France to the United States south of the Mississippi Territory, and south of an east and west line, to commence on the Mississippi River at the 33d degree of north latitude and run west to the western boundary of the cession, shall constitute a territory under the name of the Territory of Orleans. Now, the Mississippi territory extended to the 31st

degree of north latitude, and the country south of that territory was necessarily the country which Spain held as West Florida; but still its constituting a part of the territory of Orleans depends on the fact that it was a part of the country ceded by France to the United States. No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power.

The 14th section enacts "that all grants for lands within the territories ceded by the French Republic to the United States by the treaty of the 30th of April, 1803, the title whereof was at the date of the treaty of St. Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto of whatsoever nature towards the obtaining any grant, title or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." A proviso excepts the titles of actual settlers acquired before the 20th of December, 1803, from the operation of this section. It was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and *without deciding [**305** on the extent of that retrocession, to put the titles which might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government.

The President was authorized to appoint registers or recorders of lands acquired under the Spanish and French governments, and boards of commissioners who should receive all claims to lands, and hear and determine in a summary way all matters respecting such claims. Their proceedings were to be reported to the Secretary of the Treasury, to be laid before Congress for the final decision of that body.

Previous to the acquisition of Louisiana, the Ministers of the United States had been instructed to endeavor to obtain the Floridas from Spain. After that acquisition, this object was still pursued, and the friendly aid of the French government towards its attainment was requested. On the suggestion of Mr. Talleyrand that the time was unfavorable, the design was suspended. The government of the United States, however, soon resumed its purpose; and the settlement of the boundaries of Louisiana was bleuded with the purchase of the Floridas, and the adjustment of heavy claims made by the United States for American property, condemned in the ports of Spain during the war which was terminated by the treaty of Amiens.

On his way to Madrid, Mr. Monroe, who was empowered in conjunction with Mr. Pinckney, the American Minister at the court of His Catholic Majesty, to conduct the negotiation, passed through Paris; and addressed a letter to the Minister of Exterior Relations, in which he detailed the objects of his mission, and his views respecting the boundaries of Louisiana. In his answer to this letter, dated the 21st of December, 1804, Mr. Talleyrand declared, in decided terms, that by the treaty of St. Ildefonso, Spain retroceded to France no part of

the territory east of the Iberville which had been held and known as West Florida; and that in all the negotiations between the two governments, Spain had constantly refused to cede any part of the Floridas, even from the Mississippi to the Mobile. He added that he was authorized by His Imperial Majesty to say, **306*** that at the beginning of the year 1802, General Bournonville had been charged to open a new negotiation with Spain for the acquisition of the Floridas; but this project had not been followed by a treaty.

Had France and Spain agreed upon the boundaries of the retroceded territory before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France made after parting with the Province cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations to permit their declarations to decide the course of an independent government in a matter vitally interesting to itself.

Soon after the arrival of Mr. Monroe at his place of destination, the negotiations commenced at Araujuez. Every word in that article of the treaty of St. Ildefonso which ceded Louisiana to France, was scanned by the ministers on both sides with all the critical acumen which talents and zeal could bring into their service. Every argument drawn from collateral circumstances, connected with the subject, which could be supposed to elucidate it, was exhausted. No advance towards an arrangement was made, and the negotiation terminated, leaving each party firm in his original opinion and purpose. Each persevered in maintaining the construction with which he had commenced. The discussion has since been resumed between the two nations with as much ability and with as little success. The question has been again argued at this bar, with the same talent and research which it has uniformly called forth. Every topic which relates to it has been completely exhausted; and the court by reasoning on the subject could only repeat what is familiar to all.

We shall say only, that the language of the article may admit of either construction, and it is scarcely possible to consider the arguments on either side without believing that they proceed from a conviction of their truth. The phrase on which the controversy mainly depends, that Spain retrocedes Louisiana with the same extent that it had when France possessed it, might so readily have been expressed **307*** in plain language, that it is difficult to resist the persuasion that the ambiguity was intentional. Had Louisiana been retroceded with the same extent that it had when France ceded it to Spain, or with the same extent that it had before the cession of any part of it to England, no controversy respecting its limits could have arisen. Had the parties concurred in their intention, a plain mode of expressing that intention would have presented itself to them. But Spain has always manifested infinite repugnance to the surrender of territory, and was probably unwilling to give back more than she had received. The introduction of ambiguous phrases into the treaty, which power might afterwards construe according to circumstan-

ces, was a measure which the strong and the politic might not be disinclined to employ.

However this may be, it is, we think, incontestable, that the American construction of the article, if not entirely free from question, is supported by arguments of great strength which cannot be easily confuted.

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the Legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies; and a degree of disorder prevailed in the **308** Floridas, at which the United States could not look with indifference. In October, 1810, the President issued his proclamation, directing the Governor of the Orleans Territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April, 1812, Congress passed "an Act to enlarge the limits of the State of Louisiana." This Act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the State of Louisiana.

In May of the same year, another Act was passed, annexing the residue of the country west of the Perdido to the Mississippi Territory.

And in February, 1813, the President was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the third of March, 1817, Congress erected that part of Florida which had been annexed to the Mississippi Territory, into a separate territory, called Alabama.

The powers of government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. (U. S. L., c. 4, 409.)

In March, 1819, "Congress passed an Act to enable the people of Alabama to form a constitution and state government." And in December, 1819, she was admitted into the Union,

and declared one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washington on the 22d day of February, 1819, but was not ratified by Spain till the 24th day of October, 1820; nor by the United States until the 22d day of February, 1821. So that Alabama was *admitted into the Union as an independent State, in virtue of the title acquired by the United States to her territory under the treaty of April, 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature. Had this suit been instituted immediately after the passage of the Act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the Acts of Congress on the subject were founded on a misconstruction of the treaty? If it be said that this statement does not present the question fairly, because a plaintiff admits the authority of the court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each. **310*** If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangements made between the two governments.

A "treaty of amity, settlements and limits, between the United States of America and the King of Spain," was signed at Washington on the 22d day of February, 1819. By the 2d article "His Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida."

The 8th article stipulates, that "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful au-

thorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty."

The court will not attempt to conceal the difficulty which is created by these articles.

It is well known that Spain had uniformly maintained her construction of the treaty of St. Ildefonso. His Catholic Majesty had perseveringly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. It is then a fair inference from the language of the treaty, that he did not mean to retrace his steps, and relinquish his pretensions; but to cede on a sufficient consideration all that he had claimed as his; and consequently, by the 8th article, to stipulate for the confirmation of all those grants which he had made while the title remained in him.

But the United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April, 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States therefore cannot be understood to have admitted that this country belonged to His Catholic *Majesty, or that it passed [***311** from him to them by this article. Had His Catholic Majesty ceded to the United States "all the territories situated to the eastward of the Mississippi known by the name of East and West Florida," omitting the words "which belong to him," the United States, in receiving this cession, might have sanctioned the right to make it, and might have been bound to consider the 8th article as co-extensive with the second. The stipulation of the 8th article might have been construed to be an admission that West Florida to its full extent was ceded by this treaty.

But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We cannot say they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.

It is not improbable that terms were selected which might not compromise the dignity of either government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the State of Louisiana as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to His Catholic Majesty.

The 6th article of the treaty may be considered in connection with the second. The 6th stipulates "that the inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty, shall be incorpo-

rated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution."

This article, according to its obvious import, extends to the whole territory which was ceded. The stipulation for the incorporation of the inhabitants of the ceded territory into the Union, is co-extensive with the cession. But the country in which the land in controversy lies, was already incorporated into the Union. It com-
312*] posed a part of the *State of Louisiana, which was already a member of the American confederacy.

A part of West Florida lay east of the Perdido; and to that the right of His Catholic Majesty was acknowledged. There was, then, an ample subject on which the words of the cession might operate, without discarding those which limit its general expressions.

Such is the construction which the court would put on the treaties by which the United States have acquired the country east of New Orleans. But an explanation of the 8th article seems to have been given by the parties which may vary this construction.

It was discovered that three large grants, which had been supposed at the signature of the treaty to have been made subsequent to the 24th of January, 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length His Catholic Majesty yielded, and the following clause was introduced into his ratification: "Desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the 8th article of the treaty, in respect to the date which is pointed out in it as the period for the confirmation of the grants of lands in the Floridas made by me, or by the competent authorities in my royal name, which point of date was fixed in the positive understanding of the three grants of land made in favor of the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas, being annulled by its tenor; I think it proper to declare, that the said three grants have remained and do remain entirely annulled and invalid; and that neither the three individuals mentioned, nor those who may have title or interest through them, can avail themselves of the said grants at any time or in any manner; under which explicit declaration, the said 8th article is to be understood as ratified." One of these grants, that to Vargas, lies west of the Perdido.

It has been argued, and with great force, that this explanation forms a part of the article.
313*] ele. It may be considered *as if introduced into it as a proviso or exception to the stipulation, in favor of grants anterior to the 24th of January, 1818. The article may be understood as if it had been written, that "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty or his lawful authorities in the said territories, ceded by His Majesty to the United States (except those made to the Duke of Alagon, the Count of Punon Rostro and Don Pedro de Vargas), shall be ratified and confirmed, &c."

Had this been the form of the original article,
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it would be difficult to resist the construction that the excepted grants were withdrawn from it by the exception, and would otherwise have been within its provisions. Consequently, that all other fair grants within the time specified, were as obligatory on the United States as on His Catholic Majesty.

One other judge and myself are inclined to adopt this opinion. The majority of the court, however, think differently. They suppose that these three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido, might be objected to on the ground of fraud common to them all; without implying any opinion that one of them, which was for lands lying within the United States, and most probably in part sold by the government, could have been otherwise confirmed. The government might well insist on closing all future controversy relating to these grants, which might so materially interfere with its own rights and policy in its future disposition of the ceded lands; and not allow them to become the subject of judicial investigation, while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law. The form of the ratification ought not, in their opinion, to change the natural construction of the words of the 8th article, or extend them to embrace grants not otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can in their opinion furnish no satisfactory proof that the government meant to recognize *the small grants as valid, [**314** which in every previous act and struggle it had proclaimed to be void, as being for lands within the American territory.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article will not enable this court to apply its provisions to the present case. The words of the article are, that "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, &c., shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass Acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the par-

ties engages to perform a particular act—the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

The article under consideration does not declare that all the grants made by His Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those Acts of Congress which **315*** were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the Act of the Legislature. Until such Act shall be passed, the court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and on their reports titles to lands not exceeding ——— acres have been confirmed, and to a very large amount. On the 23d of May, 1828, an Act was passed supplementary to the several Acts providing for the settlement and confirmation of private land claims in Florida; the 6th section of which enacts, that all claims to land within the Territory of Florida, embraced by the treaty between Spain and the United States of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing provisions of this Act, containing a greater quantity of land than the commissioners were authorized to decide, and which have not been reported as antedated or forged, &c., shall be received and adjudicated by the judge of the Superior Court of the district within which the land lies, upon the petition of the claimant," &c. Provided, that nothing in this section shall be construed to enable the judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners or register and receiver. An appeal is allowed from the decision of the judge of the District to this court. No such Act of confirmation has been extended to grants for lands lying west of the Perdido.

The Act of 1804, erecting Louisiana into two territories, has been already mentioned. It annuls all grants for lands in the ceded territories, the title whereof was at the date of the treaty of St. Ildefonso in the crown of Spain. The grant in controversy is not brought within any of the exceptions from the enacting clause.

316* The Legislature has passed many subsequent Acts previous to the treaty of 1819, the object of which was to adjust the titles to lands in the country acquired by the treaty of 1803.

They cautiously confirm to residents all incomplete titles to lands, for which a warrant or order of survey had been obtained previous to the 1st of October, 1800.

An Act, passed in April, 1814, confirms in-

complete titles to lands in the State of Louisiana, for which a warrant or order of survey had been granted prior to the 20th of December, 1803, where the claimant or the person under whom he claims was a resident of the Province of Louisiana on that day, or at the date of the concession, warrant, or order of survey, and where the tract does not exceed 640 acres. This Act extends to those cases only which had been reported by the board of commissioners; and annexes to the confirmation several conditions, which it is unnecessary to review, because the plaintiff does not claim to come within the provisions of the Act.

On the 3d of March, 1819, Congress passed an Act confirming all complete grants to land from the Spanish government, contained in the reports made by the commissioners appointed by the President for the purpose of adjusting titles which had been deemed valid by the commissioners; and also all the claims reported as aforesaid, founded on any order of survey, request, permission to settle, or any written evidence of claim derived from the Spanish authorities, which ought in the opinion of the commissioners to be confirmed; and which by the said reports appear to be derived from the Spanish government before the 20th day of December, 1803, and the land claimed to have been cultivated or inhabited on or before that day.

Though the order of survey in this case was granted before the 20th of December, 1803, the plaintiff does not bring himself within this Act.

Subsequent Acts have passed in 1820, 1822, and 1826, but they only confirm claims approved by the commissioners, among which the plaintiff does not allege his to have been placed.

Congress has reserved to itself the supervision of the titles *reported by its com- **[317]** missioners, and has confirmed those which the commissioners have approved, but has passed no law withdrawing grants generally for lands west of the Perdido from the operation of the 14th section of the Act of 1804, or repealing that section.

We are of opinion, then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, this court is of opinion that the said District Court committed no error in dismissing the petition of the plaintiffs; therefore it is considered, ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

Criticised—6 Pet., 710, 712; 7 Pet., 51, 86, 89; 14 Pet., 390, 396, 410.

Cited—5 Pet., 46; 6 Pet., 735; 12 Pet., 435, 439, 516, 517, 519, 520, 522, 747; 13 Pet., 420; 14 Pet., 15, 171, 365, 368, 369, 370, 372, 385, 386, 387, 389, 393, 394, 397, 407, 408, 411, 416, 417, 420, 426, 427; 1 How., 103; 2 How., 602, 603; 3 How., 228; 5 How., 374; 7 How., 56; 9 How., 154; 19 How., 372, 630; 2 Black., 320; 11 Wall., 611, 638, 640, 641, 643; 17 Wall., 247; 2 Otto, 132; 3 Otto, 196; 10 Otto, 490; 3 Sumn., 275; 2 McLean, 419; 5 Ill., 409, 424.

318*] *THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, *Plaintiffs in Error,*

v.

JOHN WISTER, JOHN M. PRICE, AND CHARLES J. WISTER, *Defendants.*

Action against Bank of Kentucky—State not a party—act of incorporation—certificate of deposit—bills payable to bearer.

In an action for money had and received for the recovery of the amount of a deposit made in the Bank of the Commonwealth of Kentucky, acting under an Act of incorporation passed by the Legislature of that State, the defendant pleaded to the jurisdiction, on the ground that the State of Kentucky alone was the proprietor of the stock of the bank; for which reason it was insisted that the suit was virtually against a sovereign State.

The court are of opinion that the question is no longer open here. The case of the United States Bank v. The Planters' Bank of Georgia (9 Wheaton, 904) was a much stronger case for the plaintiffs in error than the present; for there the State of Georgia was not only a proprietor, but a corporator. Here the State is not a corporator, since by the terms of the Act incorporating this bank, "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit. Hence, by the law of the State itself, it is excluded from the character of a party in the sense of this law when speaking of a corporation. [323]

It may be added to the reasons which influenced the court in their opinion, in the case of The Bank of the United States v. The Planters' Bank of Georgia, that if a State did exercise the powers in and over a bank or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such a bank from a direct issue of bills of credit; which violation of the Constitution, no doubt the State here intended to avoid. [324]

The Act of incorporating the Bank of the Commonwealth of Kentucky contains a provision by which it is enacted, that the bank shall receive money on deposit without being required to give an obligation under seal to repay it. This enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor by the simple act of depositing, that is, an *assumpsit* in law, implied from an act *in pais*. [324]

Upon the deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave under his hand a certificate that there had been "deposited to the credit of the plaintiffs below, \$7,730.81, which is subject to their order on presentation of this certificate." The deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one-half their nominal value. When the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general not a specific deposit, and the Act of incorporation is express, that the bank shall pay and redeem their bills in gold or silver. The transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it they might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills. [325]

319*] *The bank having offered to pay the amount of the certificate in their bills, they put their own construction on the same, and they cannot afterwards say that the plaintiffs below should have accompanied the certificate with a check. [326]

The bills of the bank were payable to an individ-

ual or bearer, and in the action upon the bills there was no averment of the citizenship of the person to whom the bills are payable, and they might therefore have been payable, in the first instance, to a party not competent to sue in the courts of the United States. This court has uniformly held that a note payable to bearer is payable to anybody, and is not affected by the disabilities of the nominal payee. [326]

ERROR to the Circuit Court of the District of Kentucky.

On the 31st October, 1824, the agent of the defendants in error, John T. Drake, deposited in the Bank of the Commonwealth of Kentucky, in the notes of that bank, the sum of \$7,730.81, and received from the cashier the following memorandum in writing, usually denominated a certificate of deposit:

"Frankfort, 31st October, 1824. John T. Drake this day deposited to the credit of John Wister, John M. Price, and Charles J. Wister, seven thousand seven hundred and thirty dollars and eighty-one cents, which is subject to their order upon presentation of this certificate. Signed, C. G. Waggoner, cashier.—\$7,730.81.

On the 6th of November, 1824, Mr. Drake presented the certificate to the bank and demanded payment of the sum mentioned in it, in gold or silver, which was refused by the cashier, who at the same time offered the amount in notes on the bank, which were rejected by Mr. Drake. At the time the deposit was made, the notes of the bank were of the value of and current in the country at half their nominal amount.

The payment of the amount of the deposit in gold or silver having been thus refused, Wister, Price, and Wister, brought their action in the Circuit Court of the United States for the District of Kentucky. The declaration contained two counts; the first for money had and received, the second a special count upon the certificate of deposit.

At November term, 1826, the defendants appeared by attorney, and afterwards filed a plea to the jurisdiction of the court under the corporate seal of the bank. The plea states "that the court ought not to have or take cognizance of this *action, because the de- [***320** fendant is a body corporate and politic, created and established by an Act of Assembly of the Commonwealth of Kentucky, and constituted by the name and style of 'The President and Directors of the Bank of the Commonwealth of Kentucky,' and that the whole capital stock of the said corporation is exclusively and solely the property of the Commonwealth of Kentucky, and that the State of Kentucky, in her political sovereign capacity as a State, is the sole, exclusive, and only member of the said corporation." To this plea the plaintiffs below demurred, and the Circuit Court having sustained the same, the defendants were ordered to answer over.

Upon the trial of the cause the plaintiffs proved the facts as stated; and the defendants moved the court to instruct the jury that the plaintiffs had not made out a good cause of action, and that the plaintiffs were not entitled to the nominal amount of the deposit, but to the value of the notes at the time of the demand.

The court overruled these motions, and instructed the jury that the plaintiffs were en-

NOTE.—As to jurisdiction of Federal courts, dependent upon the residence of the parties and corporations. see notes to Glass v. Betsey, 3 Dall., 16; Emory v. Greenough, 3 Dall., 369; Strawbridge v. Curtiss, 3 Cranch, 267; Hope Insurance Co. v. Boardman, 5 Cranch, 57.

titled to the full sum as expressed in the certificate, with interest thereon, from the date of the demand, in lawful money of the United States. The defendants excepted to the opinion of the court upon all the matters submitted to them, and the case came before this court upon the bill of exceptions. The facts of the case were not controverted.

For the plaintiffs in error, *Mr. Nicholas* maintained,

1. That the Circuit Court had no jurisdiction over the cause.
2. The declaration was insufficient.
3. The court erred in the instructions given to the jury.

He argued that, upon the decisions of this court, the jurisdiction could not exist in the case. The courts of the United States take jurisdiction; 1st. According to the subject-matter; 2d. The character of the parties; 3d. In cases arising under treaties, &c.

In this case the jurisdiction cannot be assumed, as those principles upon which the 321*] courts of the United States *would have jurisdiction from the character of the parties forbid the same. This court will look behind the Act of incorporation to ascertain who are the corporators; and if they find they are not such parties as can sue or be sued in the Circuit Court, they will refuse to acknowledge that the court could exercise jurisdiction. (Cited, *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheaton, 904.)

In this case the State of Kentucky is the only stockholder of the bank; and this appearing, the State is the party, and cannot be sued. It is a sole corporation, using the money of the State, and by its obligations binding the State. The interests of the State are alone involved in the suit, and the judgment of the court will operate upon the State directly.

2. The declaration is insufficient, because, as the real party defendant is the State of Kentucky, this action should have been so brought, and can only be so sustained.

This court has decided that a corporation can bind itself by a provision without seal. In other States of the Union the same principle has been acknowledged; but it is otherwise in Kentucky. In the Supreme Court of that State it has been adjudged that, unless this obligation or promise of a corporation is under seal, it is not binding. (Marshall's Kentucky Reports, 1.) This has now become a part of the municipal law of the State; and it will be regarded in this court in cases where the decision applies. The certificate of deposit given by the bank was not, therefore, legal evidence of the promise.

3. In this court it has been held that bank notes are not money; and this action, which is for money had and received, cannot be sustained, as the notes of the bank only were received.

It may also be urged that, as the notes are payable to J. T. Pendleton, or bearer, there should have been an averment that he was a citizen of Kentucky. The action cannot be supported unless the citizenship was stated; this court not having jurisdiction, unless J. T. Pendleton was a citizen of Kentucky, and averred so to be in the pleadings.

**Mr. Caswell*, for the defendants in [*322 error.

The plea of the president, directors and company of the Bank of the Commonwealth of Kentucky expressly avers an Act of incorporation, constituting them a corporation by that name. That there are no stockholders but the State, the stock belonging to the State of Kentucky only.

Thus it appears that the real corporators are the president and directors, citizens of Kentucky; and this court has decided that it has jurisdiction in such a case.

That the stock of the bank belongs to the State of Kentucky will not prevent this court from sustaining the suit. The plaintiffs in error are a corporation with all the ordinary powers and incidents of such a body. Among others, to lend money to the Commonwealth of Kentucky. Can it be said that such a body is not suable, and that it is not the corporation, but the State of Kentucky who is the plaintiff in error; and that her rights as a sovereign State were violated by the suit in the Circuit Court?

The plaintiffs in error have a legal entity independent of the State. They exist under the law, and they pay and receive money, and by themselves make contracts which they must perform. Unless subject to suits upon such contracts, there is no remedy for those who have claims, as no suit can be brought against the State.

The amount of the plaintiffs' claim must be that mentioned in the certificate. Had it been the intention of the parties to limit the same to what was the current value of the notes when this deposit was made, this should have been declared. This court can know no other amount but that mentioned in the certificate, or any other money than the lawful money of the United States.

In reference to the claim of the counsel of the plaintiffs in error to apply the decision of the court of Kentucky to the contract of the bank, in opposition to the law of this court holding corporations liable under obligations not under seal, it was argued that this court will not permit the decisions of a State court to contravene the general law, whatever respect it may be disposed to pay to the decisions of such courts upon the statutes or local laws of the place.

**Mr. Justice Johnson* delivered the [*323 opinion of the court:

The defendants here were plaintiffs in the court below, in an action for money had and received, instituted to recover the amount of a deposit made in the Bank of the Commonwealth of Kentucky.

The defendants pleaded to the jurisdiction on the ground that the State of Kentucky was sole proprietor of the stock of the bank, for which reason it was insisted that the suit was virtually against a sovereign State. To this plea the plaintiffs demurred, and the Circuit Court of Kentucky having decided in favor of its jurisdiction, that decision is made the first ground of error in the present suit.

But this court is of opinion that the question is no longer open here. The case of *The United States Bank v. The Planters' Bank of Georgia* (9 Wheaton, 904) was a much stronger

case for the defendants than the present; for there the State of Georgia was not only a proprietor, but a corporator. Here the State is not a corporator, since, by the terms of the Act incorporating this bank, Kentucky Acts of 1820, page 55, sec. 2, "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit. Hence, by the laws of the State itself, it is excluded from the character of a party in the sense of the law when speaking of a body corporate.

On the subject of an interest in the stock of a bank, the language of this court, in the case cited, is this: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of the Union which have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign **324** character so far as respects the transactions of the bank, and waives all privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating Act."

To which it may be added, that if a State did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the Constitution, no doubt the State here intended to avoid.

The next question in the cause is on the sufficiency of the declaration; and on this point it is insisted, that in Kentucky a corporation can only assume under seal, whereas the *assumpsit* here laid, is general and without seal. On this subject the counsel admitted that every other court in the United States had decided otherwise, but that it had been so ruled in the courts of Kentucky, and was there held as an established law.

It cannot be denied that the case of *The Frankfort Bank v. Anderson* (3 Marshall's Rep., 1) fully sustains him in his position; but this court declares it unnecessary at this time to enter into the inquiry how far its decisions and those of other States upon a question of a general, not a local case or character, are to be controlled by those of any particular State, since they are of opinion that the Act by which The Bank of the Commonwealth of Kentucky is incorporated, contains a provision which is conclusive upon this question. We mean the 8th section, by which it is enacted, that the bank shall receive money on deposit without requiring them to give an obligation under seal to repay it. This enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must

create a liability to the depositor by the simple act of depositing; that is an *assumpsit* in law, implied from an act *in pais*.

The two remaining questions arose upon a bill of exceptions, the material facts on which were these:

*The deposit was proved by an instrument of writing, in these words: "J. T. Drake this day deposited to the credit of J. Wister, J. M. Price, and C. J. Wister, the plaintiffs, \$7,730.81, which is subject to their order on presentation of the certificate. Signed, O. G. Waggoner, cashier."

It was admitted that the deposit was made in bills of The Commonwealth Bank, that bills of that bank were then, and at the time of demand, passing current at half their nominal value; and that on presentation of the certificate, the cashier offered bills of the bank to that amount, but the agent of the defendants refused to receive payment in anything but gold or silver.

In behalf of the bank it was moved that the court instruct the jury that the plaintiffs below had not made out a good cause of action, and were not entitled to the nominal amount deposited, but only to the value of the notes. The courts overruled the motion, and instructed the jury that the plaintiffs below were entitled to receive the full sum as expressed in the certificate, with interest from the date of the demand, in lawful money of the United States. In this instruction it is now insisted that the court below erred.

1. Because nothing but a receipt of money can prove the basis of a recovery for money had and received.

2. Because, if entitled to recover at all, the plaintiffs below could recover no more than the value of the thing deposited.

On both these points we are of opinion that the form of the certificate, and the Act of incorporation furnish a conclusive answer.

The language of the certificate is expressive of a general, not a special deposit; and the Act of incorporation, section 17, is express, that the bills of the bank "shall be payable and redeemable in gold or silver."

The transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, nothing would have been easier than to refuse to take the money as a formal deposit; and the holder of their bills would then have been put to his action upon the bills themselves, *in **326** which case he would certainly have received the gold or silver to the amount upon the face of the bill.

There are two other points which the cause has been supposed to present, and which the court notices to avoid the imputation of letting them escape their attention.

The first is that the refusal of the bank to pay on the presentation of the cashier's certificate, may be imputed to the failure to accompany it with a check from the principals. But on this subject the majority of the court are of opinion that the bank put its own construction on the sufficiency of the demand and the meaning of their cashier's certificate, when they tendered, upon its presentation, all that they admitted to be due upon it.

The other point has relation to the form of

the bills, which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable, in the first instance, to parties not competent to sue in the courts of the United States.

But this also is a question which has been considered and disposed of in our previous decisions. This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee.

The judgment is affirmed with costs.

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and is hereby affirmed with costs.

See S. C., 3 Pet., 431.
Cited—11 Pet., 324, 341, 585; 15 Pet., 129; 5 How., 291; 5 Wall., 678; 9 Wall., 391; 2 Otto, 370; 1 Wood. & M., 119, 135; 2 Wood. & M., 82; 1 Biss., 104, 277; 4 Biss., 348; 3 Bin., 506; 2 Brock., 402; 2 McLean, 132, 227; 3 McLean, 107.

327*] *THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, Plaintiffs in Error,

v.

JOHN ASHLEY AND JOHN ELLA, Defendants.

Practice—Amendment.

The declaration purported to count upon sixty-eight bills of the Bank of the Commonwealth of Kentucky, and it appeared that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ claimed or the judgment gave. The defendants in error, plaintiffs below, moved for leave to cure the defect by entering a *remittitur* of the amount of the bill so admitted and damages *pro tanto*.

This court thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remittitur*; but on payment of the costs of the writ, if error is prosecuted no further after such amendment made. [329]

ERROR to the Circuit Court of Kentucky.

This action was in all respects similar to that of the *President, Directors and Company of the Bank of the Commonwealth of Kentucky v. Wister, Prince and Wister* (*ante*, page 318), with the exception only, that it was founded on the notes of the bank payable to bearer, and usually denominated bank notes. The declaration contained counts in debt on simple contract, averring that the plaintiffs in the case were the holders of the notes, and that they became their property by delivery, and that payment had been demanded and had been refused.

The defendants entered the same plea as in the case referred to, which was adjudged against them, and a trial was had and a verdict of judgment rendered for the plaintiffs be-

low for the whole debt, with damages for the detention from the commencement of the suit.

The bill of exceptions presented the same points to the court as in the former case, and the only question which was argued before this court was upon the effect of an omission to describe one of the sixty-eight bank notes in the declaration, the verdict and judgment having been given for a sum including the note, as if the same had been so described.

The counsel for the defendants in error, Mr. Caswell, stated that a *remittitur* would be entered for the amount of *the note which [*328 had not been set out in the declaration, if the court would permit the same. The debt and *detinet* in the declaration, stated correctly the amount of the plaintiffs' claim, and the verdict and judgment were in conformity therewith.

Mr. Nicholas, for the plaintiffs in error, replied that this court cannot amend the declaration, and that the plaintiffs here have a right to avail themselves of the error. Amendments may be made in the courts from which the case is brought, while the record is in the possession of those courts; but this writ of error has brought up the whole record, and the power to amend in the Circuit Court no longer exists.

Mr. Justice JOHNSON delivered the opinion of the court:

This was an action of debt instituted upon the bank notes of the Commonwealth Bank, in which the defendants have recovered judgment for \$6,350 with interest.

The bank filed the same plea to the jurisdiction of the court below as was filed in the case of *Wister, Price and Wister*. The decision, therefore, delivered in that case, renders it unnecessary to remark upon this part of the present cause. No other plea having been filed, judgment went by default for the sum claimed by the writ. But upon examining the declaration, which purports to count severally upon sixty-eight bills, it appears that one of the sixty-eight has been omitted. Of consequence, the declaration makes out a less sum, and one debt less in number than the writ claims or the judgment gives. This is error; but the plaintiffs now move for leave to cure it by entering a *remittitur* of the debt so omitted, and damages *pro tanto*. And this court has taken time to consider the motion.

That the party would have had a right to remit in the court below cannot be questioned. It is every day's practice sustained by the gravest precedents. And the right extends, not only to the amount of damages, but to several causes of action, distinct debts, distinct acres of land, and distinct pleas. (Cro. Jac., 146; Hob., 178; Raym., 395; 3 D. & E., 659.) And the right is recognized as existing after error brought, and *while the cause is depending in the [*329 court above, and the court of error will suspend its judgment to give time for the defendant in error to amend in the court below. (3 D. & E., 349, 659, 749, &c.)

But the difficulty consists in this, that the writ of error here does not bring up the original record, but only a transcript, as in the case of error to the House of Lords. In error to the

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King's Bench, that court will permit a *remittitur*, because it gets possession of the record (3 D. & E., 349), but in error to the House of Lords it is otherwise, and the entry must be made below for the reason assigned. (3 D. & E., 659.)

After such amendment made in our circuit courts, the party would have to avail himself of it by suggesting diminution, and bringing up the amended record by *certiorari*.

This court therefore thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice shall be introduced. And to allow the party to enter his *remittitur* here; but on payment of the costs, if the writ of error is prosecuted no farther after such amendment made.

Such seems to be the rule in the British courts (Barnes, 17), and we think it reasonable.

The defendants here will be permitted to enter the *remittitur*, and upon such entry the judgment will be affirmed, without costs in error.

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it appearing to this court that the judgment of the said Circuit Court is for a larger sum than that claimed and counted upon in the declaration in said cause in said court, the said defendants in error filed here in open court a *remittitur* in the following words, to wit:

"Supreme Court of the United States of January term, in the year of our Lord eighteen hundred and twenty-nine. Be it remembered, that on the trial of this cause before the Supreme Court of the United States on a writ of error to the Circuit Court of the United States for the District of Kentucky, on the fourteenth day of February, in the year aforesaid, it appeared that one of the sixty-eight bills upon which the declaration purported to count severally, to wit, a bill for the amount of fifty dollars, had been omitted in said declaration; the declaration making out a less sum, and one debt less in number, than the writ claimed or the judgment gave. And hereupon the said John Ashley and John Ella, Junior, defendants in error, by Daniel J. Caswell, their attorney and counsel in this court, freely here in court remit to the said president and directors of the Bank of the Commonwealth of Kentucky, plaintiffs in error as aforesaid in this cause, as well the said debt of fifty dollars so omitted as aforesaid, the residue of the debt aforesaid; together with interest on the said fifty dollars at the rate of six per centum per annum from the twenty-second day of September, in the year of our Lord eighteen hundred and twenty-five, as also damages *pro tanto*. As witness our hands this fourteenth day of February, in the year of our Lord eighteen hundred and twenty-nine. John Ashley and John Ella, Junior, by Daniel J. Caswell, their attorney and counsel in this court."

Whereupon it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed without costs, deducting from the said judgment of the said Circuit Court the amount so deducted as aforesaid.

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*THE PRESIDENT, DIRECTORS [*331
AND COMPANY OF THE BANK OF THE
UNITED STATES, *Appellants*.

v.

DANIEL WEISIGER, *Appellee*.

Promissory note—suit against remote indorser—equity—diligence—insolvency—imprisonment for debt—discharge under United States insolvency law.

This court has decided that a suit could be maintained in equity, by the holder of an indorsed note, against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction.

It has been decided in Kentucky, that a suit at law could not be maintained in that State by the indorsee, against a remote indorser. The conclusion, then, results from our own decisions, that he must be let into equity; for an indorsement is certainly no release to the previous indorsers; and the ultimate assignee alone is entitled to the benefit of their liability. And this we understand to be consistent with the received opinions and practice in Kentucky. [348]

The law in Kentucky is settled, as it is in Virginia and in this court, that upon Virginia contracts by indorsement of promissory notes, every reasonable effort must be made to recover of the drawer by suit, before the assignee can have recourse against the assignor or indorser.

It is upon the question, what constitutes such diligence, that all the difficulties arise in suits upon these contracts. And certainly this court cannot be called upon to carry the obligations imposed upon assignees on this point, further than the State courts have already extended them. [348]

What will be considered a sufficient compliance with the requisitions of the laws of Kentucky imposing diligence in the prosecution of a suit against the drawer of a note, by the indorsee, in order to change a prior indorser.

The discharge of an insolvent under the statutes, is the most satisfactory evidence of insolvency. After such discharge, it is not required that process of execution shall be issued against the party, in order to conform to the injunction of diligence. [349]

The 2d, 3d and 4th sections of the Act of January 6, 1800, entitled "An Act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the 5th section extends "the privileges and relief" of that Act to persons in confinement against whom judgment is obtained, but no execution issued. Under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined, and at the end of thirty days, they may be discharged. By the 5th section it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this Act, after the expiration of thirty days from the time such judgment has been or shall be recovered; though the creditor should not within that time sue out his execution, and charge the debtor therewith."

It has been argued that under this section the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement in the cases which come under this section, whereas he remains but thirty days when confined under execution.

There can be no reason for this distinction; and in favor of liberty, and with a view to consistency, the construction should be otherwise. If such were the true construction, the relief would not be the same as is extended to the debtors of the other class. The day of entering judgment under the 5th section, is the day that corresponds to the day of arrest, under the previous provisions of the law; and therefore, in thirty days after the judgment, the defendant may be discharged: complying with the other requisitions of the law. [350]

Where the agent of the plaintiff agreed in writing to dispense with the imprisonment required by

law, to entitle the defendant to be discharged under the insolvent law of the United States; and the defendant who was in confinement was discharged without having been imprisoned thirty days, this was not such a proceeding as would bar the assignee of the note to recover against a subsequent assignor. The object of the imprisonment is to give the plaintiff an opportunity to ascertain the situation of the defendant, and if he does not require this, it may be waived without prejudice to his claims on others. [351]

A discharge under the insolvent laws of the United States, is confined in its effects altogether to the particular cause; and even as to that, does not exempt the debtor's present effects, or future acquisitions from the process of the law. Nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor. [353]

A PPEAL from the Circuit Court of Kentucky.

The complainants' bill, filed in the Circuit Court of Kentucky, on the 22d of November, 1822, stated that, on the 25th of July, 1821, Peter G. Voorhees made his promissory note for \$2,560, payable sixty days after date, to Daniel Weisiger; that Weisiger assigned to John H. Hanna, and Hanna to the complainants, who discounted the note. That they duly instituted a suit against Voorhees, on the common law side of the court, recovered judgment, and prosecuted him to insolvency. It prayed that the defendant may be decreed to pay the amount, with interest and costs.

Annexed to the bill is a copy of the record of the proceedings against Voorhees, from which it appears that the declaration was filed on the 2d of October, 1821; and on the same day a writ of *capias ad respondendum* was issued, with this memorandum: "This is an action of debt; bail required." The marshal made return to the writ as follows: "Executed 6th of October, 1821, and committed defendant to jail at Franklin county; receipt hereon." The jailer's receipt bears date 5th of November, 1821.

At November term, 1821, judgment was entered for the plaintiffs by default for \$2,560, with interest from the 26th of February (September) 1821, and costs. Afterwards, on the 333*] 14th of December, 1821, the jailer of Franklin county surrendered the body of Voorhees into court.

On the 29th of December, 1821, a *fieri facias* issued, which was placed in the hands of the marshal on the 19th of January; and the marshal returned—"No estate found."

On the 11th of April, 1822, a writ of *capias de satisfaciendum* issued, to which the marshal returned—"Not found."

To this bill the defendant Weisiger moved the court for leave to file a demurrer, alleging the cause that the bill did not aver the prosecution of any suit against Hanna, the immediate assignee of the complainant, and that Hanna was not made a party defendant; that the bill contained no case of equitable jurisdiction nor for a decree against Weisiger, and was altogether void of equity.

Afterwards in the same term the defendant Hanna appeared and waived all objection to a decree on account of the want of service of process upon him, and Weisiger waived the demurrer so far as respected the want of proper parties.

And at the following term the court overruled the demurrer.

At May term, 1826, the defendants failing to answer according to rule, the bill was taken for confessed, and the cause came on for hearing on the bill and exhibits; whereupon the court decreed that the complainants should recover from the defendant Weisiger the sum of \$3,278.17, and costs, unless, &c.; which decree was afterwards set aside on Weisiger's motion, and leave given him to file an answer.

The answer of Weisiger, protesting against the jurisdiction of the court, relies and insists by way of plea in bar to the relief claimed, that the matters contained in the bill, if true, do not constitute a case for the interposition of a court of equity, but are cognizable at law, and relies upon the 16th section of the Judiciary Act of 1789. It admits that he may have put his name on the note, but denies that he ever received any consideration for the same, or that it was ever passed or negotiated by him or for his use or benefit. He answers further that he did not of his own knowledge know *of the discount of the note, although [*334 he was informed that such discount had been made, and for a long time believed that it had been fully satisfied by Voorhees; that he is advised that the proper measures were not adopted in due season to enforce the payment; and that the proceedings had were not such as to authorize a recovery against him, inasmuch as the return of the marshal shows that Voorhees was committed to jail, and it does not appear that he had ever been discharged or escaped, and there does not appear to have been any order to charge him in execution; nor is there any return that he had no property or estate on which the *fieri facias* might have been levied. He does not admit that Voorhees was insolvent at the time the judgment was obtained against him, but believes he then had estate within the district sufficient to satisfy the same, in whole or in part.

The complainants' amended bill states that before the rendition of the judgment against Voorhees, he was brought before the district judge, took the oath required by the Act of Congress, and was discharged as an insolvent from the custody of the jailer. Shortly after, and before the return of the *fieri facias*, he left the State, and has ever since remained out of it, leaving no estate upon which the amount could be levied, or any part of it; all of which is averred to be personally known to Weisiger, as is also the fact that he indorsed the note for the accommodation of Voorhees, and to give him credit, and with the view and expectation that it would be discounted by the bank.

The exhibit referred to in the amended bill states the proceedings to discharge Voorhees from imprisonment in three suits of the Bank of the United States, entitled as follows:

The President, Directors and Company of the Bank of the United States, plaintiffs, v. *Peter G. Voorhees*, defendant.

The Same v. the Same.

The Same v. George M. Bibb, Charles S. Todd, and Peter G. Voorhees.

The judge's order to discharge dated 14th December, 1821, states that Voorhees was imprisoned in the jail of Franklin county by process in these suits; that judgment *had [*335 been rendered in the suit, and he had petitioned to have the oath administered to him; that a

citation had been served upon Henry Clay, Esq., agent, &c.; that they appeared, and no good cause being shown, the oath was administered and he was discharged.

The citation bears date the 14th of December, 1821, and requires appearance on the 7th of January following. And then is a paper, of which the following is a copy:

"I agree, on behalf of the Bank of the United States, to waive the previous imprisonment by law to entitle the defendant to take the oath of an insolvent debtor, and that the said oath may be now administered with the same effect as if that imprisonment had taken place 14 December, 1821.

(Signed)

H. CLAY,

Counsel of the B. U. S.

Upon the bills, answer and exhibits above set forth, the court, at May term, 1827, decreed the complainants' bill to be dismissed with costs.

Mr. Sergeant, for the appellants, complainants below, made the following points:

1. The defendant not being the immediate indorser to the complainant, but a remote indorser, the case was cognizable and the complainant relievable only in equity.

2. That having proceeded at law with due diligence against the drawer, and the drawer being insolvent, the complainant was entitled to relief against the indorser.

3. That the discharge by the district judge, or the consent of the counsel of the plaintiff to waive the thirty days' notice or the thirty days' imprisonment, or any part thereof, did not impair or affect the right to recover against the indorser.

4. The fact of Voorhees's insolvency is established by the oath taken by him before the district judge, which is at least *prima facie* evidence, and sufficient until the contrary appear as well by the return to the *feri facias*; and that fact being established is sufficient to entitle the complainant to recover. For,

5. The discharge could not prejudice the indorser. His cause of action against the drawer will accrue by the payment of the money, and be unaffected by the discharge.

6. That the decree below ought to be reversed and a decree rendered for the appellant.

1. As to the objection that the bill contained no case for equitable jurisdiction and was altogether without equity, he said the whole of the questions in the cause, the present included, depended upon a law peculiar (as far as he knew) to Virginia and Kentucky, and derived by the latter from the former. It was not created by statute, but was the common law of the State in the case of indorsers or assignors as expounded by judicial decisions.

The first case in the books was *Mackie's Executors v. Davis and Young*, in Virginia, 1796, (2 Wash. Rep., 219). It makes no distinction between bonds and notes; sealed and unsealed instruments. It established in general, "that the assignor is liable to the assignee, provided due diligence be used by him against the obligor or drawer, and the latter prove insolvent." (Tuck. Bl., 442, in note.) In *Lee v. Love* (1 Call, 497, 1799), it was decided that the assignee of a note must sue the maker before he can resort to the assignor. The liability of the indorser, therefore, is dependent upon a condition which else-

where does not belong to it, of due diligence being first used against the drawer and failing from his established want of ability to pay.

Against the immediate indorser the remedy is at law; against a remote indorser in equity. (*Mandeville v. Riddle*, 1 Cranch, 293; *Riddle v. Mandeville*, 5 Cranch, 322; *Drake v. Johnson*, Hardin, 218; S. C., 3 Marsh., 163.)

This being decided by the Supreme Court of the United States as well as by the tribunals of Kentucky, there can be no doubt that the present is a case for equitable jurisdiction; being the case of a remote, and not of an immediate indorser, there is no jurisdiction at law.

That the bill was without equity is supposed to be made out because Hanna, a subsequent indorser to Weisiger, was not first prosecuted to insolvency, and because (as alleged) there was no consideration from the bank to Weisiger.

*To the first of these suggestions, [*337 after stating that Hanna was a party defendant, he replied that it was no part of the condition of the holder's resort against one indorser, that he should first proceed against another. Their common liability was dependent upon one and the same condition, that is, the failure by due diligence to obtain the money from the drawer; upon which condition they all became liable, and the holder might proceed against either. Such was the law as decided. Independently of this, it must be obvious that no reason can be assigned for requiring the holder first to proceed against a subsequent indorser, inasmuch as a recovery from him would give an immediate action against the prior indorser. This is contrary to the principle of *Riddle v. Mandeville*. There is no ground, however, for the suggestion.

To the other he replied, that if it appeared (which he did not admit) that there was no beneficial consideration from the bank to Weisiger, still there was a consideration sufficient at law and in equity to support the contract—the consideration of injury to the bank. The money was loaned (whoever may have received it) upon the credit of the indorser. His contract was the inducement to lend, without which the loan would not have been made.

2. The complainants, he said, had fully performed the condition to entitle them to recover from the indorser. They had proceeded at law with due diligence against the drawer until he became insolvent, and further pursuit became hopeless. To proceed further could not be required, and would be liable to censure if attempted at the expense of the indorser. He is answerable for costs reasonably incurred, but not for expenses entirely thrown away.

The note fell due the 26th of September, 1821. Suit was brought against the drawer the 2d of October, 1821, to the next term. At the next term judgment was obtained. A *fi. fa.* issued December 29, 1821, and a *ca. sa.* the 11th of April, 1822. In the meantime, to wit, December 14, 1821, Voorhees was discharged under the insolvent law of the United States. So that here there were due diligence, and established legal insolvency. There was even more than *due diligence; for after the insolvency, [*338 the process of execution was unnecessary, and could only have been taken out from abundant caution.

He then examined all the decided cases in

Kentucky, so far as they were accessible,¹ and **339***] proceeded to state that *he perceived in them nothing which appeared to him to interfere with the complainants' right to recover. **340***] *The point to be established by a reasonably diligent pursuit, is the insolvency of the drawer, or the impossibility of getting the money from him. Upon that being established, the right arises against the indorser. It may be established in various ways.

1. By showing that he was out of the State and not within the reach of process, and without property in the State. This he inferred from *Spratt v. M'Kinney* (1 Bibb., 595) *Stapp v. Anderson* (1 Marsh., 535).

2. By the use of due diligence, and inability to recover, or prosecution to insolvency. He **341***] must sue in a reasonable *time. (*M'Kinney v. M'Connell*, 1 Bibb., 239; *M'Ginnis v. Burton*, 3 Bibb., 6.) But there is no fixed time. (*Collyer v. Whitaker*, 2 Marsh., 197.) Perhaps it must generally be the next term. (*Clair v. Barr*, 2 Marsh., 255.) He must use the ordinary remedies. (*Smallwood v. Wood*, 1 Bibb., 542.) But he is not bound to use extraordinary ones. (*Oldham v. Bengan*, 2 Littell, 132.) He must in general issue *fi. fa.* and *ca. sa.* and issue them in succession. He cannot issue them together. No decided case gives any countenance to the suggestion that he can do so. The records in this court show that he cannot. The return to the *fi. fa.* directed to the county where party resides, is conclusive to show that there is no property in the county, and *prima facie* that there is none in the State.

The result is to be insolvency, evidenced by legal pursuit. The end and object is to make this appear.

But there is another case:

3. Insolvency, legally ascertained by other means. When this occurred after the note fell due, he contended that it dispensed with legal pursuit. When it occurred after proceedings begun, he contended it dispensed with further prosecution. The contrary doctrine would be

absurd, the object being to ascertain insolvency. Why proceed after it had been ascertained?

Upon this point, there was a seeming contradiction in the decided cases, but it was not a real one. It was explained by the principle of the decisions, which was this: that parol evidence should not be received to prove insolvency, it must be a legal insolvency, legally or judicially ascertained.

This would appear from a brief attention to the cases. In *Collyer v. Whitaker* (2 Marsh., 197), it is said, "insolvency, in general, only legitimately proved by suit." "The prosecution of suit, however, is essential, barely as the means of ascertaining, &c." In *Young v. Cosby* (3 Bibb., 227), "if the assignee prosecute diligently as far as a prudent man would do in a case where he was solely interested, that is all that is required." In *Stapp v. Anderson* (1 Marsh., 545), insolvency and removal of the drawer from the State were held sufficient, *per se*, to subject assignor, without suit against *drawer. "The law," says the [**342** court, "does not require anyone to do a vain or idle act." If sued to insolvency on one note, therefore, not necessary to sue upon another. These cases are supposed to be contradicted by *Clair v. Barr* (2 Marsh., 255). In that case the drawer was living when the note fell due. He died on the third day of the first term, being about two months after the note fell due. The court decide that proof of insolvency did not absolve the holder from the necessity of suing: "he (the drawer) may have had credit, though he had no property." The decision, therefore, amounts to nothing more than that, at a subsequent time, parol evidence shall not be received to prove that the party was actually insolvent at a prior time. In other words, actual insolvency no excuse. The debtor was going on in business, "had credit," and possibly might have paid. How could this be if he were legally divested of all his property, and stripped of all his credit, by judicial insolvency? It is a reasonable distinction, the same that is made

1.—The following abstract of the cases which have been decided in the courts of Kentucky, for which the reporter is indebted to the counsel of the appellant, will be found highly useful and interesting to the profession:

(*M'Kinney v. M'Connell*, 1 Bibb., 239.)

1808.—Assignor holding up obligation for fourteen months without suit, was guilty of gross negligence. Not accounting for this delay, he was not entitled to recourse against assignor. If the debtor was in doubtful circumstances, the necessity for due diligence was therefore the greater.

(*Smallwood v. Woods*, 1 Bibb., 542.)

1809.—Assignee to use every compulsory process of the law against the debtor; and all the incidental remedies to compel payments; except where obligor is out of the Commonwealth, and such absence was not contemplated by assignor and assignee. To omit to demand bail, where bail was of right demandable, in case the *ca. sa.* should be returned *non est inventus*, would be negligence. Where bail given, the assignee must proceed against bail, upon *n. e. i.* returned against principal.

Refers to *Mackie's Ex. v. Davis* (2 Wash., 219); *Boal's Ex. v. M'Connell* (Pr. Dec., 152).

(*Spratt v. M'Kinney*, 1 Bibb., 595.)

1809.—Assignment on assignment of a covenant.

Absence of debtor from the circuit is not sufficient to entitle the assignee to recourse against the assignor. Diligence by suit cannot be dispensed with by averring that debtor was insolvent.

(*Drake v. Johnson*, Hardin, 218.)

1808.—The assignee of a bond or note cannot sue a remote indorser, for there is no privity between them.

Refers to 1 Cra., 209; *Mandeville v. Riddle* (S. P.) 3 Marsh., 163; 2 Tuck. Bl., 442, a case in District Court, Virginia; and a case in Maryland, see p. 222. (*Hogan v. Vance*, 2 Bibb., 34.)

1810.—The sheriff's return of no property to a *fi. fa.* directed to the county where debtor resides, is conclusive evidence that he had no property in the county, and *prima facie* that he hath none elsewhere. But such return on an execution, directed to a county where he does not reside, is no evidence of insolvency. The assignee must use due diligence to recover the money from the obligor, if he do not, and debtor become insolvent, he makes the debt his own.

(*Thompson v. Caldwell*, 2 Bibb., 290.)

1811.—Suit against two obligors (first one and then the other added), *fi. fa.* against one, and afterwards *ca. sa.* against both. Sheriff returned that he had taken defendant and released by County Court. Held, not sufficient against assignor. Ought to have been a *fi. fa.* Doubt, to which defendant the return applied. Doubt, as to power of court.

(*M'Ginnis v. Burton*, 3 Bibb., 6.)

1813.—Assignee of note (bond), holding up for ten months without bringing suit, and not accounting for delay, guilty of negligence. Staying execution by plaintiff, after property seized by sheriff, discharges assignor. Replevying debt is conclusive evidence of solvency at the time, and if bond afterwards quashed for irregularity, remedy is against officer, and not assignor. (Seems otherwise, 2 Litt., 132, *post*, in this note.)

(*Young v. Cosby*, 3 Bibb., 227.)

1813.—If the assignee prosecute diligently as far Peters 2.

by the priority laws of the United States. They disregard actual insolvency.

This case, therefore, leaves in full force the reasonable doctrine of *Young v. Cosby*, and *Stapp v. Anderson*; otherwise understood, it would be contrary to the very principle of the law, and would go far towards extinguishing all liability of the indorser, already sufficiently reduced.

3. The discharge by the judge, and the waiver of the thirty days' imprisonment, or thirty days' notice, did not take away the right of the complainants. Why keep him in prison?

The insolvency would no more have been ascertained at the end of thirty days than at the beginning. It would have been mere wanton cruelty to keep the debtor in prison. The law does not require it. The decisions in Kentucky, which are in the spirit of humanity to the debtor, do not require it. Else why not require the creditor to pay the prison fees, and thus continue the debtor's imprisonment? It is not necessary to use undue severity or indulge in unproductive cruelty. (*Young v. Cosby*, 3 Bibb., 227.) It has been supposed (and perhaps the belief led to this decision) that *Clair v. Barr* established the doctrine that a creditor was **343*** bound to keep *in prison a destitute and insolvent debtor, in the hope that, though he had nothing himself, something might be extorted by his sufferings from the charity of his friends. This is not a just motive, nor one that a court can countenance. Imprisonment of a debtor is not to be used at this time of day for inflicting a punishment upon him or his friends. Why, then, it is said, is a *ca. sa.* given? The answer is very easy. It is to compel the surrender of property which, from its nature or locality, cannot be made amenable to other process. But *Clair v. Barr* does not proceed upon the principle imputed to it. Rightly understood, it is in harmony with the other cases, and with the obvious dictates of humanity and justice.

As to the supposed neglect to charge Voor-

hecs in execution, he said he doubted whether it was in any case required, or even admissible; for the decisions in Kentucky made it necessary first to issue a *fi. fa.* But, without entering into that question, he said that in this case the discharge under the insolvent law dispensed with that step, and indeed, made it impossible.

He submitted, therefore, that the decree below was not warranted by the principles upon which the liability of indorsers rests, nor by the decisions in Kentucky; which had certainly gone far enough in limiting and crippling the rights of the holder.

Mr. Wickliffe, for the appellee, stated that it was denied that any consideration had been received for his indorsement by Daniel Weisiger; and he also denied that the bank had used due diligence to obtain payment of the note from the drawer. The facts of the case are uncontradicted upon the pleadings and exhibits, as there was no evidence introduced to oppose the statement and allegations in the answer of the appellee in the Circuit Court.

The court should be aware of the nature and legal character of paper of the description of that upon which the appellants claim to receive. Such instruments are not negotiable by the laws of Kentucky; the statute of Anne never having been in force in that State. The party who sues may *do so upon a statute of Ken- [***344** tucky, which authorizes the suit in the name of the assignee, but goes no further.

The true principle upon which the responsibility of the assignor depends, and upon which it can alone be supported, is the general liability to refund that which he may have received, on a consideration which has failed. (1 Bibb., 545.) In 1 Marshall, 544, it was decided that this liability was thus restricted, and did not extend to the amount stated in the note. Under the authority of cases in Kentucky, the assignor is not liable without a consideration received by him; nor unless the consideration be alleged and proved. (1 Bibb, 596; 2 Bibb, 425.)

The only case which impugns the uniform

as a prudent man would do, in a case where he was solely interested, that is all that is required to give him recourse upon the assignor. If he sue a *fi. fa.* which is returned *nulla bona*, and then a *ca. sa.* upon which the debtor is arrested, and discharged for want of security for prison fees, this is not laches, unless the debtor had property not within the reach of a *fi. fa.*, which the assignor must prove.

(Campbell v. Hopson, 1 Marsh., 228.)

1818.—On a transfer of a bond, a covenant to be liable if obligor not solvent, does not vary legal liability of assignor. Must be diligence. "Failing to commence his action for four months, inexcusable delay. Fatal negligence not so to prosecute it as to ascertain insolvency or fix the bail."

(Stapp v. Anderson, 1 Marsh., 535.)

1819.—The insolvency and removal from the State of the drawer, *per se*, subjects the assignor without suit against the drawer. "The law does not require anyone to do a vain or idle act."

A note negotiated in bank is a mercantile paper, &c.

See S. P. Dodge v. Bank (2 Marsh., 610.)

(Collyer v. Whitaker, 2 Marsh., 197.)

1820.—Assignee preferring a petition and summons, and thereby waiving his right to bail, must show payee's insolvency by *ca. sa.* not *aliunde*.

Note, in this case, no neglect imputed for not requiring bail, which is contrary to 1 Bibb., 542. (Perhaps they may be reconciled: the one speaking of a return of *non est*, and the other supposing an arrest.)

As to time of bringing suit, the case says, "short-Peters 2.

ly and within a reasonable time after note became due;" not immediately.

As to *fi. fa.* "which issued in reasonable time;" not immediately.

Supposes that in general "insolvency only legitimately proved by suit," &c. "The prosecution of suit, however, is essential barely as the means of ascertaining," &c.

(*Clair v. Barr*, 2 Marsh., 255.)

1820.—If drawer dead at time note falls due, without heirs or letters testamentary, parol evidence may be received of insolvency. But if he be alive when note falls due, insolvency does not absolve holder from necessity of suing; he may have had credit, though without property.

Note 1. In this case, the drawer died on the third day of the first term after the note fell due, being about two months. The court say that a suit was essential, that proof of insolvency could make no difference, and yet reverse the judgment below, because parol proof of insolvency was not received.

Note 2. "He might not have been without credit," &c., *i. e.*, there was no open, public, or legal insolvency; therefore he might possibly have paid, &c. In this sense (which is the obvious one) it is correct. It cannot be proved that he would not have paid, as he was going on. Many men are insolvent. This reconciles it.

(Smith v. Blunt, 2 Marsh., 522.)

1820.—Omitting to issue a *ca. sa.* for five months after the return of the *fi. fa.* is an unreasonable delay, and discharges assignor. Note. There appears to have been some interval between judgment and *fi. fa.* Certificate of discharge as an

current of decisions in Kentucky upon these principles, is that of *Allen v. Prior* (3 Marshall, 305).

The appellee received nothing for his indorsement of the note; and he is, therefore, protected from all liability upon it, by the decisions of the courts of Kentucky.

There cannot be a liability by the appellee, considering him as having guaranteed the debt. Such a liability should have been in writing; as, unless it is so, the statute of frauds destroys it.

It is not denied that the injury a promisee may receive, as well as a benefit given to the promisor, is a good consideration; but if the principle is otherwise, it can be claimed only in favor of an original indorsee. In this case the bank stands independent of such a principle, for to the bank no promise was ever made by the appellee, his engagement having been made to Hanna, the preceding indorsee. But if a responsibility by the assignor does exist, in a case where he received no benefit, and a chancellor will interpose and enforce the contract, this will only be where the condition imposed by the law governing the contract has been performed.

The next inquiry is, therefore, has the law creating this liability of the assignor been complied with?

The law in Kentucky stands thus:

The assignee ought to take every compulsory process of law against the original debtor, until his insolvency is established, or the suit and **345***]all incidental remedies are found *insufficient to coerce payment. (*Smallwood v. Woods*, 1 Bibb, 546.)

To omit holding to bail, when bail is of right demandable, if on a *ca. sa.* the return is *non est inventus*, is negligence. (2 Marshall, 197.)

The assignee is bound to issue a *fi. fa.* and a *ca. sa.*, and if the debtor is not found, to proceed against the bail. Nothing short of this will do. (1 Bibb, 147.) In *M'Kinney v. M'Connell* (1 Bibb, 239), it was decided that a delay of fourteen months is, *per se*, negligence, no matter what other steps may have been taken.

Averment of insolvency, and consequently proof of that fact, by any other means than a legal proceeding on the note assigned, will not be sufficient to charge the indorser. (3 Bibb, 6.)

Mr. Wickliffe also cited the case of *Hogan v. Vanel* (2 Bibb, 34); *Thompson v. Caldwell* (2 Bibb, 290); also 3 Bibb, 6; and *Young v. Cosby*

(3 Bibb, 227), upon these points. Also 2 Marshall, 524; 2 Littell, 134; and *Parker v. Owingson*, in 3 Marshall.

These authorities, he contended, maintain the absolute obligation of industry and vigilance on the part of the assignee; and they also establish the principle, that the rules in relation to a guaranty are to be construed under the law, with great strictness.

He also argued that the proceedings under which the drawer was discharged from the process against him by the district judge, were irregular, and subjected the appellants to all the consequences of their illegality.

By the pleadings and evidence it appeared that the note fell due on the 23d of September. A writ was issued on the 2d of October, in which bail was required; this was returned "executed" on the 6th of November, the defendant having been committed to prison on the preceding day. On the 20th of November, judgment was entered by default, and afterwards in December, during the same term, the jailer surrendered the body in court. It was the duty of the plaintiff to charge the defendant in execution; and if not so charged within *thirty days, then, and not before, he [**346** might be discharged under the insolvent law.

The discharge by the district judge was before the thirty days, of a prisoner not in execution; and this was done by a waiver of the time required by law. The assignee is not permitted to run ahead of the law, and discharge a debtor before, under its provisions, he is entitled to it. By not proceeding according to law, and failing to pursue the course of the law marks out, he releases the assignor from all responsibility to him.

The district judge had no jurisdiction. His authority was to administer the oath; but the Act of Congress directs him not to do so until after thirty days. The period of thirty days is given for the benefit of the creditor, and of those who are interested that the debt should be paid. All such are, therefore, parties interested in the proceeding; and if the consent of the creditors can give the right to discharge, all should consent. The assignor should have consented, as his responsibility became consummate by the discharge.

The consent of the counsel for the appellants alone gave jurisdiction to the District Court, or was so considered. If it did not, where is the prisoner? The discharge being illegal, he

insolvent debtor in another suit, is not evidence, as he is liable to be imprisoned in other suits.

(*Parker v. Owings*, 3 Marsh., 59.)

1820.—Assignor not liable, though drawer has taken the oath and surrendered a schedule; unless schedule produced and amount of property ascertained, the assignee is bound to pursue the property.

(*Oldham v. Bengan*, 2 Littell, 132.)

1822.—1. Not obliged to sue at first term, if he cannot by so doing get judgment.

2. Not obliged to apply the extraordinary process of the law.

3. Whether in any case, laches of sheriff will relieve assignor? If in any case, it can only be where of such a nature as to subject him to the whole debt.

4. Not obliged to take out execution on affidavit during sitting of court, nor can the assignor avoid responsibility by showing that other plaintiffs did so and got their money.

(*Trimble v. Webb*, 1 Monroe, 100.)

1824.—Judgment obtained 4th of April, 1820 Court adjourned the 14th. Execution issued 26th of July. Court below deemed it sufficient diligence. Court of Appeals: "The only chasm in the diligence exercised by the appellees in prosecuting their suit against the original debtor, appears between the judgment and execution. For this delay no apology was offered, nor excuse proved. This court has never held assignees to more than reasonable diligence in prosecuting the demand against the original debtors, and has never required them to run a race against time; still it has not permitted any unreasonable delay to be passed over. The time here lost is more than any prudent man would have indulged in, when he believed his debt to be in danger, and savors too strongly of indulgence graciously given, by some understanding between the parties. Considering this case, as we have stated it, uncoupled with any other circumstances in the cause, we must, according to previous decisions of the court, hold the delay as conclusive against the appellee's right to recover."

has escaped, and may be pursued and retaken, or the jailer was liable.

It is manifest that the appellants considered that they had not used the diligence required of them. They proceeded afterwards by a *fi. fa.*, which was issued on the 29th of December, but which did not reach the hands of the marshal until the 9th of January following; and which was in March returned "no effects." After the return in March, a *ca. sa.* issued in April, one month having expired.

It has been decided, that it is the duty of the party to place his writ in the hands of the officer in a reasonable time. (*Tremble v. Webb*, 1 Monroe, 100.)

He further argued, that if the discharge of the drawer by the district judge was not in a suit brought upon the note for which the appellee was now claimed to be liable, and this might be inferred from the record, the discharge in another suit was not evidence of insolvency.

347*] *In reference to one of the cases cited by the counsel for the appellants, he argued, that where it had been considered that not holding to bail was not laches, the case was one in which a speedier remedy was obtained by petition and summons, in which no bail was allowed, and good faith was presumed.

Mr. Justice JOHNSON delivered the opinion of the court:

This case turns altogether upon doctrines peculiar to the States of Virginia and Kentucky. It is the case of a suit in equity, instituted by the indorsee, or, in the language of the country, the assignee, of a promissory note, to charge an intermediate indorser. All the doctrine on the subject will be found fully stated in the two cases of *Riddle & Co. v. Manderville & Jameson*, reported among the decisions of this court; and in the cases of *Smallwood v. Woods*, and *Spratt v. M'Kinney*, to be found among the decisions of the Court of Appeals of Kentucky.

The defendant here has demurred to the bill, for want of equity, and this raises the first question in the cause.

In the last case decided in this court, between *Riddle & Co. v. Manderville & Jameson*, which was a case in most respects similar to the present, this court decided, that a suit could be maintained in equity by the holder of an indorsed note against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction. It was a Virginia contract, governed by the same law which is in force in Kentucky. This court had before decided, that by the laws of the country, governing the contract, a suit at law could not be maintained between the holder of the note and a remote indorser. But then a suit at law could have been maintained by him against the immediate indorser, and by him against the preceding indorser, and so on through any number of indorsers. This presented the ordinary case of an assignment of a chose in action, which transfers an interest without the right of action.

To maintain this demurrer, then, it was incumbent on the defendant to have shown that there was some principle in the jurisprudence of Kentucky that could sustain a **348*]** distinction *between his case and that Peters 2.

previously decided here; but everything concurs to repel the idea of such a distinction. In the case of *Drake v. Johnson*, the Court of Appeals of Kentucky also decided, that a suit at law could not be maintained in that State by the indorsee against a remote indorser.

The conclusion, then, results from our own decisions, that he must be let into equity; for an indorsement is certainly no release to the previous indorsers, and the ultimate assignee alone is entitled to the benefit of their liability. And this we understand to be consistent with the received opinions and practice of Kentucky.

The second point made for the defendant is, that as he received no consideration for assigning the note, he is not liable at all.

But on this it is only necessary to observe, that he indorsed it to give credit to Voorhees, the promisor; and the law therefore imputes to him the consideration paid to Voorhees.

The most material point in the cause, and that on which the decision below was rendered in favor of the defendant, was the want of due diligence against the drawer of the note. The law is settled there, as it is in Virginia, and in this court, upon Virginia contracts of this description; that every reasonable effort must be made to recover of the drawer by suit, before the assignee can have recourse against the assignor or indorser. It is on the question what constitutes such diligence, that all the difficulties arise on suits upon these contracts. And certainly this court cannot be called upon to carry the obligations imposed upon assignees on this point, further than the State courts have already extended them.

There are three grounds on which the defendant would impute to the complainant a want of diligence fatal to his right to recover.

The first is, that the *fi. fa.* did not come to the marshal's hands until the expiration of about thirty-six days after the judgment was obtained, and nineteen after it issued.

The second, that the *ca. sa.* did not issue until about three months and a half after the *fi. fa.*

Let it be observed, that the note fell due on the 25th of *September, the writ was [**349** issued on the 2d of October; the judgment was entered the November term following; and the drawer, Voorhees, being held in custody for want of bail, was discharged, as insolvent, on the 14th of December of the same year.

Justice can hardly be charged with a halting gait thus far. As to her subsequent progress, it does not appear on what day the court for November term adjourned; but as the *fi. fa.* bears date on the 29th of December, it is presumable that it sat on that day. The *fi. fa.* did not reach the office of the marshal until three weeks after; and the *ca. sa.* was not sued out at the time when the *fi. fa.* issued. But it was sued out at the term to which the *fi. fa.* was returnable, to wit, on the 11th of April, 1822. So that from the time the note fell due, to the last step in the progress of judicial means for enforcing payment, we count but six months and a half. We do not recognize the supposed obligation or power of the party, in the Circuit Court, to sue out the *ca. sa.* contemporaneously with the *fi. fa.*; and with the exception of that interval, we are rather inclined to attribute

to the complainant extraordinary diligence than culpable delay.

But, why were the executions issued at all in this case, except from abundant caution, and to avoid the imputation of laches? Was it necessary? The courts of Kentucky have certainly decided otherwise. In the case of *Stapp et al. v. Anderson et al.* (1 Marsh., 240), they express themselves thus:

"The discharge of an insolvent under our statute is a judicial act, of a record character, and is in its nature, as it must be in contemplation of law, the most satisfactory evidence of the insolvency of the person discharged."

This, it is true, was declared respecting a discharge in another suit, on a different cause of action, under the insolvent law of the State, and upon a *ca. sa.* But it would be difficult to assign a reason why it should not apply to a discharge in a suit on the same cause of action, under the law of the United States, and where the defendant was in custody under an order for bail. In both instances, a state of insolvency is judicially established; and as the court **350***] expresses itself in "the same case, "it would have been worse than idle," nay, in this case it would have been false imprisonment, to have retaken the debtor; if, as the defendant contends, and no doubt was the fact, he was discharged under the suit upon this note.

The third and last ground of laches, and that which it appears, by a report handed to us, influenced the court below, was the consent of the agent of the complainant to dispense with the imprisonment to which the drawer of the note might have been subjected, before he would have taken the oath, and received a discharge under the Act of Congress.

The correctness of the decision below upon this point must be tested by considerations drawn from the object of the imprisonment; the influence of the discharge upon the loss of the debt, and from adjudged cases. We are inclined to think that it has been rather too hastily conceded that no case similar to the present has been adjudicated. That it adds another to the long list of instances of laches which have been held to be fatal to the recovery of the assignee against his assignor in that country, cannot be doubted.

This case, it must be recollected, comes within the fifth section of the Act of January 6th, 1800, entitled "An Act for the relief of persons imprisoned for debt." The second, third, and fourth sections of that Act make provision for the discharge of persons confined under execution, and the fifth section extends "the privileges and relief" of that Act, to persons in confinement, against whom judgment is obtained but no execution issued. Under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they are confined and at the end of thirty days they may be discharged. By the fifth section it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this Act after the expiration of thirty days from the time such judgment has been or shall be recovered, though

the *creditor should not, within that [***351** time, sue out his execution and charge the debtor therewith."

It has been argued, that under this section the defendant must remain in prison thirty days after judgment before he can sue out his notice to the plaintiff, thus requiring him to remain sixty days in confinement, in the cases which come under this section; whereas he remains but thirty days when confined under execution.

There can be no reason for the distinction, and we think that in favor of liberty, and with a view to consistency, the construction should be otherwise. If such were the true construction, the relief would not be the same as is extended to the debtors of the other class. We think, therefore, that the day of entering judgment under the fifth section, is the day that corresponds to the day of arrest under the previous provisions of the law; and, therefore, that in thirty days after judgment he may be discharged by complying with the other requisitions of the law. The day of entering the judgment appears nowhere in this record, but as the notice was served on the plaintiffs' agent on the 14th of December, we must presume that the judgment had then been entered; and on the same day the agent signed that consent to dispense with "the previous imprisonment by law to entitle the defendant to take the oath of an insolvent debtor," by which, it is now insisted, that the complainants are barred of their right to recover of the assignor.

The error of the court below obviously consists in this, that it considers the imprisonment to which the defendant is subjected, as among the means of coercing payment. The arrest certainly is so; but the thirty days' confinement that ensues is only incidental to the notice required to be given to the plaintiff of the defendant's intention to claim his discharge as an insolvent. Now, he must be insolvent when this notice is given, and what is to be forced from an insolvent man by the thirty days' imprisonment? It is obvious that the confinement is not regarded as the means of coercion, but only as a time necessary to the investigation of the defendant's circumstances, or the collection of evidence *to repel his insolvency. The [***352** coercive means of the law are to be found in the searching oath to be administered, and in the fear of prosecution for perjury, and recommitment in the same actions.

If, then, this imprisonment has no other object than to make the debtor await the investigations of his creditor, it is difficult to assign a reason why the creditor may not dispense with it, when satisfied that the application is an honest one, and that delay would discover nothing that he was not already acquainted with. In the language of the Kentucky court, it would be "worse than idle," to detain him. Nothing but unavailing hardship upon him, and ultimate expense to his indorser, could result from it.

Nor do we think ourselves unsupported by the Kentucky decision in this view of the subject.

In the case of *Young v. Cosby*, the drawer of the note being in custody under a *ca. sa.* issued by the assignee, was discharged for want of security for the payment of prison fees. This

discharge, it was contended, was imputable to the assignee and barred his recovery against the assignor; unless he could prove that the drawer had nothing which might have been wrung from him by a protracted imprisonment. But the Court of Appeals decided otherwise; and established, that if the assignor had sustained any injury in that respect, it was incumbent upon him to prove it. The language of *Chief Justice Boyle*, on that occasion, was this: "It has repeatedly been decided in this court, that to entitle the assignee of a bond or note to recover of the assignor, it was necessary to show that he had used due diligence by suit, to recover the amount from the payer or obligor; but it has never been required of him to prosecute the suit against the payer or obligor, farther than a man of ordinary prudence and diligence would do, in a case where he was solely and exclusively interested. To make it necessary to do so, would be unreasonable and unjust; inasmuch as it would tend to accumulate costs, without the prospect of any probable advantage to either of the parties."

We entirely approve of the opinions here expressed*] pressed; they are conceived in the reason and benignity of the law, and we are unwilling to extend the diligence required of the assignee beyond the limits there laid down.

In the case of *Oldham v. Bengan*, the doctrine laid down in *Young v. Cosby* is considered and affirmed, and *Chief Justice Bibb* observes "that although due diligence has always been required in such cases, yet in no case has all possible diligence been exacted."

And both these cases concur to establish this principle, that it is not on the ground of a mere possible injury that the assignor can claim his discharge; much less where it is improbable, as Judge Rowan remarks in the case of *Stapp v. Anderson*, before cited. The present case presents the drawer in a situation in which it is not only improbable, but scarcely possible, that the assignor could have sustained an injury. For a discharge under the insolvent law of the United States, is confined in its effects altogether to the particular case, and even as to that, does not exempt the debtor's present effects, or future acquisitions from the process of the law; nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor. The bare speculative idea, then, of a possible acquisition of property within the thirty days, during which Voorhees might have been compelled to await the will or inquiries of his creditor, and of property not tangible by the process of the law, is too feeble a consideration to affect the rights of the complainant.

The decree below will be reversed, and a decree entered here that the complainant recover his demand.

Cited—4 Pet., 382, 384, 386, 387; 10 Wall., 528.

354*] *WILLIAM CAMPBELL'S EXECUTORS, Appellants,
v.

PRATT, FRANCIS ET AL., Appellees.

Practice.

The court refused to reverse the decree of the Circuit Court of the county of Washington, at Peters 2. U. S., Book 7.

though an error had been committed in proceeding under the mandate from this court, as no benefit would result to the appellant from a reversal.

APPEAL from the Circuit Court of Washington county.

The matters in controversy in this case arose out of proceedings in the Circuit Court, under the mandate of this court issued at February term, 1815, in the case of *Pratt et al. v. Campbell et al.*, reported 9 Cranch, 456.

In the Circuit Court, the appellants in this case filed their bill alleging that they had been injured by the proceedings under the mandate (9 Cranch, 58), and that the court gave a decree against their claims, as set forth in the bill. From this decree they appealed.

The counsel for the appellants contended, that by the decree passed by the Circuit Court in the original cause, the appellants had sustained injury in the following particulars:

1. Of the thirty-six squares mortgaged to Law, thirty-two were attached and purchased by the appellant; and four squares therefore remained affected only by Law's mortgage.

Campbell was permitted to redeem his thirty-two, by paying their proportion of the whole of Law's debt, thereby making the four remaining squares bear also their proportion of Law's debt.

Admitting this to be right, it should have been decreed, upon the same principle, that if the parties did not redeem, the sale should be made so as to produce the same result; that is, the four squares not purchased by the appellant should have been sold first, and his thirty-two squares should only have been sold to make up the deficiency of Law's debt.

The court below put on these four squares only the sum of \$2,806.29 (much less than their proportion), and decreed them to be [*355 sold last; thereby saving them to Pratt et al., if the other squares produced enough to pay Law, and thus giving them a preference over the appellant, denied by this court in the original cause.

2. Of the eighteen squares mortgaged to Duncanson, thirteen only were attached and purchased by the appellant, consequently five remained; and these five the appellant contends, on the same principle, should have been sold first, and the appellant's thirteen only resorted to, to make good the deficiency under that mortgage.

It was contended that these errors can be corrected, by this court's ordering that such of the said squares as have not been sold, shall be sold for the benefit of the appellant, and that the money received for such as have been sold shall be decreed to him, or the sales rescinded.

3. The court below also erred in requiring the appellant to redeem from both mortgages, and decreeing that in case he did not redeem from both, the squares should be sold to satisfy both.

The case was submitted to the court on the written arguments of counsel. *Mr. Swan* and *Mr. Key* for the appellants; *Mr. Jones* for the appellees.

Mr. Justice JOHNSON delivered the opinion of the court:

This cause has its origin in the great case of

Pratt, Francis et al., which appeared in this court some years ago with the formidable bulk of nine hundred folios! The rights of the parties had become exceedingly perplexed in the progress of large and multifarious transactions, originating in the speculations of Morris, Nicholson & Greenleaf, in the land of this city. Thomas Law held a mortgage of thirty-six squares from Morris, Nicholson & Greenleaf, and fourteen of the same squares were mortgaged by them to one Duncanson. Campbell acquired the equity of redemption of Morris, Nicholson & Greenleaf, in thirty-two of the thirty-six squares, the four others not being included in Duncanson's mortgage. The equity of redemption in these four squares has passed by assignment to present appellees, in right of Morris, Nicholson & Greenleaf. **356***] teen of the *squares included in Duncanson's mortgage were among the thirty-two in which Campbell had possessed himself of Morris, Nicholson & Greenleaf's equity of redemption; and his constant efforts have been to reduce the sum due on Law's mortgage, to put aside that of Duncanson, as a satisfied incumbrance, and to obtain a precedence to Morris, Nicholson & Greenleaf's equity, in the four remaining squares.

This court established the principles on which the sum to be raised to satisfy Law's mortgage should be ascertained; decided against any precedence in Campbell, as a joint holder of the equity of redemption, and sustained Duncanson's mortgage, in favor of a prior equity which Greenleaf held in it. So that in effect, the cause went down to the Circuit Court for the sole purpose of having a sale of the squares effected; the proceeds applied, first to pay off Law's mortgage, then Greenleaf's interest in Duncanson's mortgage, and the balance only, if any, to go to the equity of redemption. Substantially, this has not been done; for we now find the two squares, which form the subject of the present controversy, in the hands of *Pratt et al.*, the appellees, which could only be in the right of Morris, Nicholson & Greenleaf's equity of redemption; whereas Duncanson's mortgage, to a large amount, remains unsatisfied; and Campbell, with eight-ninths of the equity of redemption in him, has received nothing.

If, then, the appellees should be confirmed in the possession of those squares, it is obvious that Campbell would have much to complain of, since his equity of redemption in the other thirty-two squares had been, in effect, applied to the extinction of a common incumbrance. This would serve him at equity in eight-ninths of these two squares.

But this is a mere delusion, since the holders of the equity of redemption could rightfully receive nothing until the mortgages were both paid off. This was certainly the case with Morris, Nicholson & Greenleaf; and this court has been constantly inculcating that Campbell stood precisely in their shoes, and was entitled to no higher equity.

All the obscurity in which the case is involved, and which has seemed so long to keep **357***] both parties from approaching *it, arises from an error committed below, probably by the commissioner, in selling the doubly incumbered squares before those singly incum-

bered were disposed of; the consequence of which is, that these squares, which were not in Duncanson's mortgage, remain unsold, because the sale of the thirty-four satisfied Law's mortgage; whereas, by beginning with the sale of those singly incumbered, two squares (supposing the value to be the same) would have remained, to be applied to the payment of Greenleaf's interest in Duncanson's mortgage.

But there is nothing in this for Campbell to complain of; since, after applying the proceeds of these squares to the payment of the second mortgage, it still remains unsatisfied to a great amount, and leaves Campbell nothing to receive in right of his equity of redemption.

The decree of the court below, as against this appellant, will be affirmed.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is considered, ordered, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

*SUNDRY GOODS, WARES AND [***358**
MERCHANDISES, THE AMERICAN FUR
COMPANY, CLAIMANTS, *Plaintiffs in Error.*

v.

THE UNITED STATES, *Defendants in Error.*

Agency—evidence—construction of an Act of Congress as to Indian territory.

Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal. [364]

Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the other. [365]

The Act of 30th of March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased after March, 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offense within the meaning of the before-mentioned Acts of Congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. [368]

WRIT of error from the District Court of the United States for the District of Ohio.

In the District Court of Ohio, the district attorney filed, on behalf of the United States, a libel or information, stating that on the twenty-third day of September, in the year of our Lord one thousand eight hundred and twenty-four, at and within the district of Indi-

NOTE.—*Agent, what he says or does, while acting as agent, admissible against his principal.*

See notes to *Clark v. Russell*, 3 Dall., 415; *Leeds v. Marine Insurance Co.*, 2 Wheat., 380; *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat., 326.

ana aforesaid, one William H. Wallace, a citizen of the United States, and having a license and legal authority to trade with Indian tribes within the territory of the United States, did take and carry into the Indian country, to wit, the country lying on the north or west side of the river Tippecanoe, for the purpose of trading with the tribes of Indians, sundry goods, wares, and merchandises, enumerating the same; that the said Wallace did, among the goods, wares and merchandises, carry into the said Indian country a large quantity of ardent spirits, to wit, seven kegs of whisky, and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes, contrary to the statute in such cases made and **359*** provided, and against the peace and dignity of the said United States.

The libel further alleged that John Tipton, Indian agent at Fort Wayne, within said district, duly appointed to, and qualified for that office; and being duly authorized and instructed to search the stores and packages of traders among Indian tribes, upon suspicion that ardent spirits had been by the said Wallace carried into the said Indian country for the purpose of being vended or distributed among the Indian tribes therein, caused the said goods, wares and merchandises, to be searched, and upon such search, the seven kegs of whisky and the keg of shrub were found so carried by the said Wallace into the said Indian country, for the purpose of being sold or distributed among the Indian tribes therein, contrary to the statutes aforesaid in such case made and provided, and against the peace and dignity of the said United States; the said goods, wares and merchandises, were, on the day and year aforesaid, seized by the said John Tipton, and now by him held to be disposed of as the court directs.

The libel then proceeds to pray that the goods, &c., so seized may be deemed to be forfeited, and be disposed of according to law.

A claim and answer were filed by William H. Wallace, attorney in fact and agent for the plaintiffs in error, in which the allegations of the libel were denied, and tendered an issue upon which the cause was tried by a jury; who found a verdict for the United States. On the trial three bills of exception were taken by the claimants' counsel to the opinion of the court.

The first exception stated, as ground of error, that on the trial of this cause, the district attorney offered to give in evidence to the jury, the transactions and declarations of one John Davis, with a view to prove the purpose of the defendant, to which the defendant by his counsel objected, and the court permitted the district attorney to give in evidence to the jury the conduct and declarations of Davis, so far as he acted as the agent of the said defendant, **360*** or in conjunction with him, in relation to the charge made against the defendant in the information.

The second exception stated that, on the trial of this cause, the district attorney moved the court to instruct the jury that if they should believe from the evidence that had been adduced that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein

among any part of his goods, that it is *prima facie* evidence of his having violated the Acts of Congress on which this prosecution is founded, so as to throw the burden of proof upon the defendant; which instruction the court did give the jury, also instructing them that an Indian trader might lawfully carry ardent spirits into an Indian country for some purposes, as, for instance, for medical use.

The third exception was, that at the trial of this cause the defendant, by his counsel, prayed the opinion and direction of the court to the jury, that unless they are of opinion from the evidence of the cause that the ardent spirits mentioned in the libel of information were mingled with the bales of merchandise at the time of seizure, and carried into the Indian territory in violation of the Act of 1820, entitled "an Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," and whilst said spirits and goods were remaining in the Indian territory, were seized upon by the officers of government, their verdict must be for the defendant; which opinion and instruction the court refused to give to the jury; but did instruct the jury that if they should be of opinion from the evidence that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst the Indian tribes, that all the goods of said trader designed for sale under his license to trade with Indian tribes and seized in the Indian country, whether all or only a part of them were found with the spirits, are forfeited; and that the seizure thereof in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal; [**361** to which refusal of the court to instruct as requested, and to the instruction given, the defendant, by his counsel, excepted, &c.

The case was argued for the plaintiffs in error by Mr. Ogden, and by Mr. Wirt, Attorney-General, for the United States.

Mr. Ogden, for the plaintiffs, stated, that as to the first exception, no other remark would be made upon it but that if the declarations of Davis were made at the time of the seizure, the evidence was legal; but if at any other time, the testimony was irregular.

On the second exception he argued, that the statute of the United States being highly penal in its provisions, should be construed with great strictness. It was incumbent on the government to show, not only that the spirits were carried into the Indian country, but that the same was done with an intent to sell them. The jury were to judge of the intention; but this was taken from them by the instructions given by the court.

The power to search must only be exercised within the Indian territory. The goods which may be seized must be in the territory; but the instruction given to the jury is in its terms so general as to authorize a seizure of goods belonging to Indian traders in any part of the United States. He argued that this was not the sound interpretation of the law. In support of the third exception, he said that the Act of Congress applied only to those territories in which the Indian title had not been extin-

guished. Those were exclusively the Indian country. "Indian country," *ex vi termini*, means the country belonging to the Indians; and it was not shown that the place of seizure was of this description.

The provisions of the law relative to licenses to trade with the Indians, sustain and illustrate this construction.

Mr. Wirt, Attorney-General, considered the instructions given by the court right in every particular. A reference to the Act of Congress would show that it was the Indian country, and not the Indian territories, from which it was intended to exclude the sale of spirituous liquors. Their sale among the ignorant natives of the forest, led to war and bloodshed, and the evils were the same, on whichever side of the Indian line they were sold.

Such, too, is plainly the purpose, from the language of the Act of 1802. The descriptive words are Indian "country," and not "territory." The Act looks to all places where goods may be carried with the intent to vend them to the Indians, and the penalty is restricted to such offenses. It also takes away the license to the trader.

In reference to the third instruction, he said that the case stated that the ardent spirits were mingled with the merchandise, which is not the language of the law; the residue of the instruction is in accordance with the law. That language is "all the goods designed for sale under his license to trade with the Indians," and "which are seized in the Indian country." It cannot be a question, whether a country, although ceded to the United States, while inhabited by Indians continues an Indian country, within the view of the law. The license granted to trade is, "with the Indians," and not in the Indian country.

Mr. Justice WASHINGTON delivered the opinion of the court:

This was an information filed in the District Court of Indiana, by the United States, against sundry goods and merchandise, seized as forfeited under the provisions of two Acts of Congress, bearing date the 30th of March, 1802, ch. 273, and the 6th of May, 1822, ch. 58, for regulating trade and intercourse with the Indian tribes.

The information sets forth, in substance, that on the 24th of September, 1824, William H. Wallace, a citizen of the United States, and having a license to trade with Indian tribes within the territory of the United States, did take and carry into the Indian country lying on the north or west side of the Tippecanoe River, for the purpose of trading with the tribes of Indians, certain goods, which are particularly described, amongst which were seven kegs of whiskey and one keg of shrub, for the purpose of vending or distributing the same among the Indian tribes; contrary to the **363*** statute, &c. *That upon suspicion that ardent spirits had been carried by the said Wallace into the said Indian country, for the purpose aforesaid, the said goods, &c., were searched by order of an Indian agent, duly appointed to, and qualified for that office; upon which search the said kegs of whiskey and shrub were found so carried, for the purpose aforesaid; and were, together with the said

goods, &c., seized by the said Indian agent. The information concludes with a prayer, that the goods so seized may be declared to be forfeited, and to be disposed of according to law.

To this information, Wallace, as attorney in fact for the American Fur Company, interposed a claim and answer, which, after protesting against the sufficiency of the information, denies, by way of plea, that he did, among the goods, &c., in the information mentioned, carry into the Indian country, lying on the north or west of the Tippecanoe River, seven kegs of whiskey and one of shrub, for the purpose of trading, or distributing the same among the Indian tribes, as in the information mentioned.

The issue was tried by a jury, who found a verdict in favor of the United States.

Upon the trial of the cause, three bills of exceptions, to the following effect, were taken:

The first is to the opinion of the court, which permitted the district attorney to give in evidence the conduct and declarations of John Davis, so far as he acted as the agent of Wallace, or in conjunction with him, in relation to the charge laid in the information, with a view to prove the purpose of the said Wallace.

The second bill states that, upon the motion of the district attorney, the court instructed the jury, that if they should believe, from the evidence, that Wallace, as an Indian trader, did carry ardent spirits into the Indian country, and that the same were found therein, among any part of his goods, it is *prima facie* evidence of his having violated the Acts of Congress, on which this prosecution is founded, so as to throw the burden of proof upon the defendant.

The defendant then moved the court to instruct the jury, that, unless they should be of opinion, upon the evidence, that the **[364]** ardent spirits mentioned in the information were mingled with the bales of merchandise at the time of seizure, and carried into the Indian territory, in violation of the Act of 1802, and, whilst the said spirits and goods were remaining in the Indian territory, were seized by the officers of government, their verdict should be for the defendant. This instruction the court refused to give, and directed the jury that if they should be of opinion, from the evidence, that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst Indian tribes, all the goods of the said trader, designed for sale under his license, and seized in the Indian country, whether all or only a part of them were found with the spirits, are forfeited; and that the seizure thereof in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal. This refusal and instruction form the subjects of the third bill of exceptions.

The objection to the evidence of Davis is so fully answered and repelled by this court in the case of the *United States v. Gooding* (12 Wheat., 468), that it seems necessary only to refer to that decision. That was a criminal prosecution against the owner of a vessel, under the Slave Trade Act of Congress; and an objection was taken by his counsel to evidence of the acts and declarations of the master of the vessel, who was proved to have been appointed to that of

fice by the defendant, with an authority to make the fittings for the vessel.

The principle asserted in the decision of that point, and applied to the case was, that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.

The opinion of the court in the present case is not less correct, whether Davis was considered by the jury as having acted in conjunction with Wallace, or strictly as his agent. **365***] *For we hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury.

The instruction to which the second exception was taken, having been passed over without objection by the counsel for the plaintiff in error, it becomes unnecessary for the court to notice it otherwise than to say that it meets our entire approbation.

In order clearly to comprehend the subjects embraced by the third bill of exceptions, it will be proper to examine with attention a few of the sections of the Acts on which this prosecution is founded.

The first commences in the 1st section, by declaring that a certain boundary line, therein described in general terms, as established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in such places as the President of the United States should deem necessary, and in the manner he should direct; with a proviso, that if the boundary line between the said Indian tribes and the United States should at any time thereafter be varied, by any treaty which should be made between the said Indian tribes and the United States, then all the provisions contained in that Act should be construed to apply to the said line, so to be varied in the same manner as the said provisions apply, by force of that Act, to the boundary line therein before recited.

The Act then proceeds to prohibit citizens of, or residents within the United States, from crossing over the said boundary line to hunt, &c., and inflicts punishments of various degrees upon persons who should be convicted of certain other acts of aggression within the Indian country. By the 16th section, it is made lawful for the military force of the United States to apprehend every person who may be found in the Indian country, over and beyond the said boundary line, between the United States **366***] and the Indian tribes, in violation *of any of the provisions of this Act; and to convey them to the civil authority of the United States, in some one of the three adjoining States or districts, to be proceeded against in due course of law. We then come to the 21st section of this Act, to which the Act of the 6th of May, 1822, is an amendment; which authorizes the President of the United States to take such meas-

ures, from time to time, as to him might appear expedient, to prevent or restrain the vending or distributing of spirituous liquors among all or any of the Indian tribes.

The 2d section of the latter Act, in execution of the power vested in the President of the United States by the preceding 21st section, authorizes him to direct Indian agents, governors of territories, acting as superintendents of Indian affairs, and military officers, to cause the stores and packages of goods of all traders to be searched, upon suspicion or information that ardent spirits are carried into the Indian countries by the said traders, in violation of the aforesaid 21st section; and declares, that if any ardent spirits should be so found, all the goods of the particular trader should be forfeited, one-half to the use of the informer, the other to the use of the government; and that his license should be cancelled, and his bond put in suit.

The difference between the instruction asked for by the defendant's counsel, which the court refused to give, and that which was given in the first part of this exception, consists in this, that the former would seem to insist (for this branch of the exception is very ambiguously expressed, and is on that ground objectionable), that to produce a forfeiture of the trader's goods, the ardent spirits must be found mingled with the bales of goods at the time of seizure in the Indian country; and that no part of the goods but that with which the spirits were found so mingled were liable to seizure. It is very apparent from the manner in which the instruction which was given is expressed, that that asked for by the defendant's counsel was understood by the court below as we have interpreted it.

But the instruction which was given asserts the law to be that if the ardent spirits were found with a part only of the *goods [***367** carried into the Indian country, for the illegal purpose stated in the information, all the goods of such trader designed for sale under his license, and seized in the Indian country, were liable to forfeiture.

This construction of the Acts of Congress which have been referred to, is, in the judgment of this court, well warranted by the words of those Acts, as well as by the obvious policy which dictated them. The expressions "all the goods of the said traders" in the 2d section of the last Act, although general enough if they stood alone, unexplained by the context, to embrace all the goods belonging to the trader wherever they might be found, are clearly restrained by the provision which immediately precedes them, so as to mean those goods only which might be found in company, though not in contact with the interdicted article.

The notion that those goods alone are liable to seizure and forfeiture, amongst which the ardent spirits are found mingled, can receive no countenance from any fair construction of this section. That which is contended for would enable the trader, by the most simple contrivance, to protect the whole of his other goods from forfeiture. To effect this, he would only have to keep the spirits separate from his other goods during their transportation to, and after their arrival in the Indian country, so as not to contaminate those goods

by placing them in immediate contact with the offending article. A construction which would sanction so glaring an evasion of the whole policy of the law, ought in no case to be adopted, unless the natural meaning of the words of the Act require it. Even penal laws, which, it is said, should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the Legislature. This was laid down as a rule by this court, in the case of *The United States v. Wittberger* (5 Wheat., 56).

We are, therefore, of opinion that the instruction asked for by the defendant's counsel was properly refused, and that that which was given, so far as it has been examined, is unexceptionable.

The latter part of this instruction remains now to be considered. After stating to the **368*** jury, that if they should be of opinion that the defendant, as an Indian trader, did carry ardent spirits into the Indian country, which were found with a part of his goods therein, with the purpose of being vended or distributed amongst Indian tribes, all the goods of the said trader designed for sale under his license, and seized in the Indian country, were forfeited; the instruction proceeds as follows: "And that the seizure thereof, in a territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes, is legal."

We have found no little difficulty in understanding the real meaning of the court, from the language in which this latter proposition is expressed; whether it was intended to state that after the goods with the ardent spirits had been carried into the Indian country with the unlawful purpose, they might be seized in a country purchased of the Indians by the United States, under the circumstances referred to; or that being carried into this latter district of country, and there seized, such seizure would be legal.

We rather incline to the opinion that the latter interpretation was the one intended by the court, and that that part of the sentence was merely added as explanatory of the terms *Indian country*, which had previously been used. For if it was merely meant to affirm that, after the forfeiture had attached in the Indian country, the goods might be seized anywhere out of that country; no reason is perceived why the place of seizure should be confined to a territory purchased by the United States of the Indians and inhabited exclusively by them, rather than to a territory not so purchased and inhabited. Besides, the proposition asserted in the preceding part of the instruction being, that ardent spirits carried into the Indian country, with the unlawful purpose, and found with a part of the trader's goods; and seized in the Indian country, subjected all his goods found with spirits to forfeiture; it would seem something like a contradiction to lay it down as a distinct proposition that the seizure spoken of might be made out of the Indian territory. As explanatory of the expressions before noticed, it was entirely appropriate.

369* "If we have rightly interpreted this part of the instruction, we feel no hesitation in saying that we cannot accede to the correctness of the instruction thus qualified, since it would

subject to seizure and forfeiture all the goods of the trader carried into a country, not only belonging to the United States, but lying without the boundaries of the Indian country, as they are described by the 1st section of the Act of 1802; to which all the provisions contained in that Act, and consequently those contained in the amendatory Act of 1822, are by that section expressly confined. If the country referred to in this instruction was purchased of the Indians subsequent to the 30th of March, 1802, so as that the boundary line thereby became varied, then the above section declares that all the provisions of that Act shall be construed to apply to the boundary line so to be varied, in the same manner as they apply by force of that Act to the boundary line therein recited.

If we misunderstand the meaning of this instruction, it is so probable that it might have been misunderstood by the jury, that justice demands a retrial of the cause.

The judgment of the court below is to be reversed, and the cause remanded to that court, with instruction to award a *venire de novo*.

This cause came on to be heard on a transcript of the record from the District Court of the United States for the District of Indiana, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed and annulled, and that the cause be, and the same is hereby remanded to the said District Court, with directions to award a *venire facias de novo*.

Cited—21 How., 165; 22 How., 82; 3 Wall., 140; 13 Wall., 550; 1 Otto, 438; 5 Otto, 208; 3 Wood. & M., 355; 13 Bank. Reg., 290; 5 Ben., 227; 2 Sawy., 151, 316; 3 McAr., 46; 5 McLean, 553.

*JOHN DANDRIDGE, Appellant, [***370**
v.

MARTHA WASHINGTON'S EXECUTORS,
Appellees.

Construction of a will—parties.

The testatrix directed that the interest of certain funds should be applied "to the proper education" of certain persons her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education or reach the age of twenty-one years of age, one hundred pounds to set him up in his trade." She also gave the whole of her estates of every description, to be equally divided among certain persons, who should be living when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given, should be deferred, and no longer.

A bill was filed by the appellant, one of the nephews of the testatrix, charging that the executors had not paid the several sums of money bequeathed to him, and praying that they may be decreed to pay the same. No other persons were made parties to the proceeding but the executors; and after a report of the master, the cause came on to a hearing, and the Circuit Court dismissed the bill for want of proper parties. The defendants at the argument insisted that not only the two nephews, whose education was provided for by the tes-

Peters 2.

tatrix, should have been made parties, but also all the residuary legatees.

So far as the bill sought to obtain such a portion of the fund as was by a fair construction of the will applicable to the education of the nephews of the testatrix, they alone were required to be parties, and the court reversed the decree of the Circuit Court which dismissed the bill, for the purpose of enabling the complainant to make the other two nephews of the testatrix parties.

The court did not consider it necessary to make the residuary legatees parties in a proceeding, the sole object of which was to ascertain and distribute among the nephews of the testatrix, the amount to which they were entitled for the expenses of education. The residuary legatees have undoubtedly an interest in reducing every demand on the estate. Whatever remains, sinks into the residuum; and that residuum is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases, the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits, the residuary legatees are never made parties. To require it, would be an intolerable burden on those who have claims on an estate in the hands of executors. [377]

The court do not think that in ascertaining the amount applicable to the education of the appellant, one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic. The distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other in ordinary language. If the testatrix had contemplated what in the common intercourse of society is denominated a profession, she would scarcely have used a term which is generally received as denoting a mechanical art.

But the bequest is not confined to the expense of [371*] acquiring the trade, so as to *be enabled to exercise it in the common way. The testatrix intended such an education as would fit her relations to hold a distinguished place in that line of life in which she designed them to move. The sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would permit it. [377]

APPEAL from the Circuit Court of the County of Alexandria, in the District of Columbia.

In the Circuit Court, the appellant filed his bill against George W. Curtis and Thomas Peter, as executors of Mrs. Martha Washington, late of Mt. Vernon; claiming the payment of a sum of money due to him, under the bequests in the will of the testatrix, for the expenses of his education; and also for a distributive share of the residuary estate of the deceased, in the hands of the executors, acting as trustees under the will. The facts of the case are stated at large in the opinion of the court.

The Circuit Court dismissed the bill for want of parties, and the case was argued in this court for the appellant by *Mr. Swann* and *Mr. Lear*, and by *Mr. Taylor* for the appellees.

For the appellant, it was contended, that the Circuit Court erred in dismissing the bill, and that this court should correct the decree, and direct the payment of so much of the fund in the hands of the executors and trustees as by the terms of the will was to be appropriated to the education of the appellant.

The counsel for the appellant admitted that the general rule in chancery is, that all who are interested in the decree shall be made parties to the proceedings; but the rule is not without exceptions; and it does not prevail where parties cannot be found, and where great inconvenience would result from its application. (Cited, 2 Mason's Rep., 189.)

Neither creditors or legatees are required to

be parties, unless where one or more residuary legatees sue.

But if all the parties interested under the will should have been absolutely, or constructively before the court, still it was error in the Circuit Court to dismiss the bill. The proper course was for the defendants below to enter a demurrer. (Practical Register, 261; 16 Ves., 321, 325; 4 *Munford, 485.) If the court could [*372] have dismissed the bill, because all the residuary legatees were not parties, yet in this case the complainant below sought to obtain a specific legacy, that sum to which he was entitled for his education; and as to this part of the bill the dismissal was error. (2 Chancery Cases, 124; 3 Johns., Chan. Rep., 555; Finch., 243.)

A sound construction of the will does not confine the education of those who were the objects of the bequest to preparation for a "trade." The appellant had obtained an education for the law, which he afterwards studied, and by no interpretation could it be claimed to restrict the expenses of his instruction to the acquisition of such knowledge as was necessary for a mechanic art. The words of the will are to receive a liberal construction, and to be so applied as will fully execute the generous purposes of the testatrix. "Trade" is "business," and not a "manual," or "mechanic" employment. To the profitable use of every business, knowledge is necessary; and in the United States men are called to the highest stations from every occupation. To limit the education of the appellant only to a preparation for a mechanical employment, was contrary to those principles which should have been applied, taking into consideration the situation and relations of the testatrix, and of the appellant.

Upon general principles, the appellant is entitled to the proportion of the fund claimed by him. Although it was not expended in his education, it is nevertheless his. (Cited, 5 Ves., 461; 1 Swanston, 35.)

This court has all the facts before them, upon which a decree may be made, and it may determine what sum out of the fund appropriated for the education of the nephew of the testatrix. As it would not have been necessary to bring all the parties before the court, if a claim had been preferred while the education of the appellant was going on, it is not essential that this should now be done. What is a reasonable and proper sum to be paid to the appellant, depends on no other circumstances but those with which he is exclusively connected.

**Mr. Taylor*, for the appellees, stated [*373] that the executors of the testatrix had instructed him to offer to restore the bill to the Circuit Court, if the appellant would there make all the legatees, the residuary legatees included, parties. The executors are trustees bound to protect the fund for all who are interested in it. If this court shall decide that they can make a final decree, and shall do so, it will be entirely satisfactory to the appellees. The residuary legatees are interested in the whole of the funds in the hands of the executors. If the expenses of the education of the appellant, and of Bartholomew and Samuel Henley are limited, according to the construction of the will assumed by the executors, that fund, for all, is increased.

The rule is settled, that when an interest can be shown to be in a party not before the court, he must be brought in; unless special circumstances authorize an exception to this rule. (1 Ves., Jun., 311; 8 Wheaton, 451; 2 Atk., 510.)

Were not the Henleys interested in this proceeding? This is not a specific legacy. The fund is to be raised out of the residuary estate, and thus all interested in the residuum ought to be parties. No legacy is specific, unless it is clearly so, and the amount of it not dependent on an account. (4 Ves., 573; 2 Mad., 8, 9.)

By a fair construction of the will, the residuary legatees were interested in the sum to be appropriated to the education of the appellant, and B. and S. Henley; who were to be educated for a *trade*, not a *profession*; as, if those expenses were less than the dividends on the stock, the residuary fund would be increased. It was therefore proper that all those thus interested should be before the Circuit Court.

Want of parties may be objected to at the hearing. This point came before the Court of Appeals of Virginia, and was so decided in the case of *Clark v. Long* (4 Randall's Rep., 451).

The court may dismiss the proceedings for want of parties, or order parties to be made. (1 P. Williams, 428.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

374* This suit was brought by the plaintiff, against the defendants, the acting executors of Mrs. Martha Washington, late of Mount Vernon, to obtain payment of legacies bequeathed to him in her last will.

The testatrix, after several devises and bequests, devised as follows: "Item—It is my will and desire, that all the rest and residue of my estate, of whatever kind and description, not herein specifically devised or bequeathed, shall be sold by the executors of this my last will, for ready money, as soon after my decease as the same can be done, and that the proceeds thereof, together with all the money in the house, and the debts due to me, (the debts due from me and the legacies bequeathed being first satisfied) shall be invested by my executors in eight per cent. stock of the funds of the United States, and shall stand on the books in the name of my executors, in their character of executors of my will: and it is my desire that the interest thereof shall be applied to the proper education of Bartholomew Henley, and Samuel Henley, the two youngest sons of my sister Henley, and also to the education of John Dandridge, son of my deceased nephew John Dandridge, so that they may be severally fitted and accomplished in some useful trade; and to each of them who shall have lived to finish his education, or to reach the age of twenty-one years. I give and bequeath one hundred pounds to set him up in his trade.

"Item—My debts and legacies being paid, and the education of Bartholomew Henley, Samuel Henley, and John Dandridge aforesaid, being completed, or they being all dead before the completion thereof, it is my will and desire, that all my estates and interests, in whatever form existing, whether in money, funded stock, or any other species of property, shall be equally

divided among all the persons hereinafter mentioned, who shall be living at the time that the interest of the funded stock shall cease to be applicable, in pursuance of my will hereinbefore expressed, to the education of my nephews, Bartholomew Henley, Samuel Henley, and John Dandridge; namely, among Anna Maria Washington, daughter of my niece, and John Dandridge, son of my nephew, and all my great grandchildren living at the time that the *interest of the said funded stock shall [*375] cease to be applicable to the education of the said B. Henley, S. Henley, and John Dandridge; and the same shall cease to be so applied when all of them shall die before they arrive to the age of twenty-one years, or those living shall have finished their education, or arrived at the age of twenty-one years; and so long as any one of the three lives, who has not finished his education or arrived to the age of twenty-one years, the division of the said residuum is to be deferred, and no longer."

The bill charges that the executors have not paid the several sums of money bequeathed to him by their testatrix; and prays that they may be decreed to pay the same with interest.

The process was executed on one of the executors only. He failed to answer, and the bill as to him was taken for confessed, and the court ordered the master commissioner to ascertain the period when the complainant attained his age of twenty-one years, and what would have been a competent sum for his education, according to the true intent and meaning of the last will of Martha Washington, and make report to the court. At a subsequent term the defendants were ordered to settle their accounts before the commissioner. The defendant, Thomas Peter, afterwards appeared, and filed his answer, in which he admits the last will of Martha Washington, deceased, and that his co-defendant and himself alone have qualified as executors thereof. He says that they have paid the legacy of one hundred pounds, and advanced a considerable sum of money to the guardian of B. Henly, S. Henly, and the complainant, to fit them for some useful trade. He also alleges that the executors have been prevented from dividing the residuum, by the unreasonableness of the demand made by the complainant.

The master's report shows that the complainant attained his age of twenty-one years on the 21st day of November, 1817; that the defendants were on that day indebted to the estate for principal, the sum of \$7,282.30, and for interest accruing thereon and remaining in their hands, the sum of \$7,345.11. That they had paid the legacy of £100, and *had [*376] advanced to the guardian of the complainant for his education the sum of \$166.67.

The cause came on to be heard in April, 1827, when the bill was dismissed for want of proper parties.

At the argument, the counsel for the defendants have insisted that not only Bartholomew and Samuel Henley, but all the residuary legatees should have been made parties.

This court is clearly of opinion that the two Henleys who participated with the complainant in the fund applicable to their education, ought to have been parties to a suit which asks the distribution of that fund. This would be

admitted if the whole was distributable among them. But the court thinks it also proper, though a different construction should be put on the will. The fund is not so large that the claims of each, while all were under age, might be satisfied without taking into view the claims of the other two. In determining how much ought to have been applied to the education of the complainant, the court would find it necessary to take into consideration the amount of the fund and the relative situation of all the persons entitled to it. They ought to have been parties to a suit in which their interests were involved.

The question whether the whole interest accruing on the residuum ought to be divided among the legatees to whose education it was applicable, or only so much thereof as was necessary for the purpose for which it was given, has been earnestly discussed at the bar. In considering this question, as in all others depending on wills, the intention of the testatrix is to be collected from the will, and from the circumstances under which it was made. In this case the testatrix does not appear to have intended a pecuniary donation to the parties in the particular bequest under consideration. Her intention in that respect was effected by the gifts of £100 to each, to set him up in his trade. This bequest seems to have been made not with a view of adding to their private fortunes, but with a view to their education and preparation for that particular business which they were afterwards to pursue. They **377** are not, therefore, entitled to the *whole fund, whatever may be its amount, but to so much of it as is required for the object it is to accomplish.

In ascertaining the amount which is so applicable, the plaintiffs contend that one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic. The court does not think so. The distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other in ordinary language. If the testatrix had contemplated what in the common intercourse of society is denominated a profession, she would scarcely have used a term which is generally received as denoting one of the mechanical arts.

But we do not think the bequest is confined to the expense of acquiring the trade, so as to be enabled to exercise it in the common way. Such does not appear to have been the intent of the testatrix. Her bounty is extended to the proper education of three relatives, so that they may be severally fitted and accomplished in some useful trade. Their education is a primary object, as well as their acquisition of the trade; and when we consider the situation and character of the parties, and the language of the will, we cannot doubt that the testatrix intended such an education as would fit her relatives to hold a distinguished place in that line of life in which she designed them to move. The sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would admit of it.

In a suit for the distribution of this fund, we do not think the residuary legatees necessary Peters 2.

parties. They have undoubtedly an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees as by this. In all such cases the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. *In such **[*378]** suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors.

We do not think that the bill ought to have been dismissed for want of proper parties, unless the complainant refused to make such as were really necessary; and then it might have been dismissed without prejudice.

The Circuit Court can make no decree for the distribution of the residuum, unless all those entitled to distribution are brought before the court; but it may grant all other relief to which the complainant may be entitled, on making Bartholomew and Samuel Henley parties.

This court is of opinion, that the decree of the Circuit Court, dismissing the complainant's bill, ought to be reversed, and the cause remanded to the said Circuit Court, with leave to the plaintiff to make new parties; after which the cause ought to be referred to the master, with instructions to compute the several sums which ought to be allowed out of the fund applicable to the education of Bartholomew Henley, Samuel Henley, and John Dandridge, in conformity with the will of Mrs. Martha Washington, deceased; on which sums interest ought to be allowed; and also to compute the sum to which the plaintiff may be entitled, as one of the residuary legatees of the said Martha Washington, deceased; provided the other residuary legatees be brought before the court as parties; on failure to do which, the plaintiff's bill is to be dismissed, so far as it claims a part of the residuary estate, without prejudice.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel; on consideration whereof, this court is of opinion, that the Circuit Court erred in dismissing the plaintiff's bill for want of proper parties, and that the said decree ought to be reversed. Whereupon it is ordered and decreed by this court, that the decree of the *said Circuit Court in this **[*379]** cause be, and the same is hereby reversed; and this court doth further order that the said cause be, and the same is hereby remanded to the said Circuit Court, with directions to give leave to the plaintiff to make new parties, that the proper accounts may be taken in order to a final decree; in which decree, the plaintiff ought to be allowed interest on the sum due to him for his education out of the money applicable to that object.

380*] *JOHN F. SATTERLEE, *Plaintiff in Error*,
v.

ELIZABETH MATTHEWSON, *Defendant in Error*.

Ejectment—Connecticut title to land in Pennsylvania—landlord and tenant—constitutionality of Pennsylvania Act of 8th April, 1826—jurisdiction—Constitution of the United States—case of Fletcher v. Peck.

S. and M. held land in Luzerne county, Pennsylvania, in common, under a Connecticut title. A division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease to be terminated on a notice of one year. S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the Court of Common Pleas of Bradford county, Pennsylvania, held that S., having held the land as tenant of M., could not set up a title against his landlord. Upon a writ of error to the Supreme Court of Pennsylvania in 1825, it was held that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The Legislature of Pennsylvania, on the 8th of April, 1826, passed an Act declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the Commonwealth." The case came again before the Supreme Court of Pennsylvania, and the judgment of the Court of Common Pleas of Bradford county, in favor of M., the landlord, was affirmed; that court having decided that the Act of Assembly of the 8th of April, 1826, was a constitutional Act, and did not impair the validity of any contract. S. brought a writ of error to this court, claiming that the Act of the Assembly of Pennsylvania, of the 8th of April, 1826, was unconstitutional. Held, that the Act was constitutional.

Objections to the jurisdiction of this court have been frequently made, on the ground that there was nothing apparent on the record to raise the question whether the court from which the case had been brought had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the Judiciary Act of 1789. This has given occasion for a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is, that if the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause, although the record should not in terms state a misconstruction of the Constitution of the United States; or that the repugnancy of the statute of the State to any part of that Constitution was drawn into question. [409]

There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions. [413]

There is no part of the Constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract. [413]

In the case of *Fletcher v. Peck* (6 Cranch, 87), it was stated by the Chief Justice, that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power, and he asks: "If any be prescribed, where are they to be found, if the property 381*] of an individual, *fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a State statute which divests a vested right is repugnant to the Constitution of the United States. [413]

NOTE.—Appellate jurisdiction of Supreme Court of U. S. to review final judgments of State courts.

See notes to *Matthews v. Zane*, 4 Cranch, 382; *Martin v. Hunter*, 1 Wheat., 304; *Houston v. Moore*, 3 Wheat., 433; *Gibbons v. Ogden*, 6 Wheat., 443; *Cohens v. Virginia*, 6 Wheat., 264.

THIS case came before the court on a writ of error to the Supreme Court of the State of Pennsylvania.

In 1784, or 1785, Elisha Satterlee, the father of the plaintiff in error, and Elisha Matthewson, the husband of the defendant in error—the defendant in error being the sister of Elisha Satterlee—went to a large body of land in Luzerne county, Pennsylvania, part of which was the land in controversy, and both took possession of the same, under, as is believed, a supposed title from the Susquehanna Company. They worked on the lands in partnership—the same lying on both sides of the Susquehanna River—until 1790, when it was agreed that Matthewson, who had a house on the west side of the river, should occupy the land before held in common, on that side, and become the tenant of Satterlee for his portion of the land on the said west side of the river; and Elisha Satterlee moved on the lands on the east side, on precisely the same terms—that is, that he should become the tenant of Matthewson for his portion of the land on the said east side of the river. By this arrangement each became possessed, in severalty, of the particular portion of the lands thus allotted to him, and the tenant to the other of portions of the land before held in common; and it was expressly agreed that either of the parties might put an end to the tenancy at the end of any one year; and in that case, each was to be put into possession of his own lands.

In 1805, Elisha Matthewson died, having bequeathed by his will to his widow during life, and to his children after her death, the interest he had in the said land. Elisha Satterlee repudiated, after Matthewson's death, acknowledged the original bargain, and that he was a tenant of Matthewson's part; but he wished to buy it; he wished to give other lands for it, &c., &c.; but his sister could only sell for life, and her children were minors. In 1810 she built a house on part of the tract, and put a tenant in it; but her brother would not give her possession of the part he had in cultivation. In 1811 she made application to the land-office of *Pennsylvania, and on the 7th of [*382] January, 1812, took out a warrant in her name in trust for her children, and had the land surveyed, and obtained a patent for it from the Commonwealth of Pennsylvania. She stated in her application, an improvement made by her husband in 1785; and paid interest to the State on the purchase moneys from the date of the improvement. After his sister's warrant, survey, and return, Elisha Satterlee purchased a Pennsylvania title, commencing in 1769, and consummated by a patent from the Commonwealth in 1781, which he alleged covered the land in question; but he directed the deed to be made to his son, J. F. Satterlee, the plaintiff in error; and in 1813 an ejectment was instituted in the name of the son against the father, in pursuance of a plan of the father's to release him from the situation of tenant to his sister. By a law of Pennsylvania then in existence, but since repealed, a rule of reference might be entered the same day the writ was taken out, and by diligence a plaintiff might obtain a report of arbitrators, which had the effect of a judgment, before the return day of the writ.

This proceeding was, by means of the father's waiving all objections as to time and notice, so carried on, as that the son not only had judgment, but a writ of possession before the return of the writ.

J. F. Satterlee then gave to his father a lease for life of the land for the consideration of one dollar. Elizabeth Matthewson instituted an ejectment. J. F. Satterlee, in 1817, procured himself to be entered co-defendant in the suit, and, his father being dead, is now sole defendant.

On the trial of the cause, the defendant made title under an application of John Stoner of 3d of April, 1769. Stoner conveyed to Mr. Slough, who in 1780 conveyed to Joseph Wharton. A patent issued to Wharton in 1781, and he, in April, 1812, conveyed to the defendant. The judge of the Court of Common Pleas of Bradford county instructed the jury, that if they found the ejectment brought by the son of J. F. Satterlee, in whose name the conveyance was taken, was actually instituted by the father, though in his son's name, as agent for himself, and that the suit was all a trick, and so concluded **on purpose to prevent his sister from interfering or being heard, that he was still her tenant, as much as if no such proceeding had taken place. But if the son was the real purchaser, and the suit was instituted and conducted bona fide, and the lease to the father during life for a dollar a year was bona fide, that then E. Satterlee, having been evicted by due course of law, might take a lease from him who recovered; and in that case, the relation of landlord and tenant between him and his sister was at an end, and the cause must be decided upon the respective titles of the parties. But if they found him still a tenant, he could not set up against his landlord an adverse title purchased during his life. But he must restore his possession to his landlord, and might then institute a suit on the title he had purchased; and, if it was the best, recover from his former landlord. The verdict and judgment were for Mrs. Matthewson.*

The case was removed by writ of error to the Supreme Court of Pennsylvania. On the argument of this cause before the Supreme Court, it was decided, "That the relation between landlord and tenant could not exist between persons holding under a Connecticut title." And that court in 1825 reversed the judgment of the Common Pleas, and awarded a *venire facias de novo*.

Immediately after this decision, on the 8th of April, 1826, the Legislature of Pennsylvania passed an Act, by which it was enacted, "That the relation of landlord and tenant should exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of the Commonwealth."

The ejectment depending in the Court of Common Pleas of Bradford county, between the plaintiff in error and the defendant, again came on for trial after the law of April 8, 1826, on the 10th of May, 1826; and the judge gave in charge to the jury as follows, after stating the above-recited Act of Assembly, to wit: "It is a general principle of law, founded on wise policy, that the tenant shall not controvert the title of his landlord, and prevent the Peters 2.

recovery of his possession, by showing that the title of the landlord is defective. Among the exceptions to this general rule, the [*384 Supreme Court of Pennsylvania have decided, that when the landlord claimed (as the plaintiff claimed on the former trial of this cause) under a Connecticut title, the case should form one of the excepted cases. The Legislature have thought proper to enact the above-recited law, and by it we are bound. And if the plaintiff in all other respects should be found entitled to a recovery, the mere claiming through a Connecticut title would not now deprive her of her right to a recovery."

A verdict and judgment were obtained in favor of the defendant in error, Elizabeth Matthewson.

To the charge of the judge—which is inserted at large, and sent up with the record—the defendant excepted, and the judge signed and sealed a bill of exceptions.

A writ of error was taken by the defendant to the Supreme Court of Pennsylvania, and the following were among the errors assigned, to wit:

The court erred in charging.

1. That by the laws of Pennsylvania, the plaintiff's testator could lease the land, and that the rights of landlord do extend to him; he having claimed under a Connecticut title.

2. That the Act of the 8th of April, 1826, gives a right of recovery, and does away the force of the law, as declared by the Supreme Court in this case.

On the first of July, 1827, the Supreme Court, after argument, affirmed the judgment of the Court of Common Pleas. And on the 6th of July, 1827, a petition and prayer for reversal was filed by John F. Satterlee, the plaintiff in error, who survived Elisha Satterlee; on the ground that the said court had decided the said Act of Assembly to be constitutional and valid, though he had insisted that he ought not to be affected and barred of recovery by the said Act, for that the said Act was not valid, and was repugnant to the Constitution of the United States.

The cause was argued by Mr. Eli K. Price and Mr. Sergeant for the plaintiff, and by Mr. Sutherland and Mr. Peters for the defendant.

*Mr. Price, for the plaintiff, concluded: [*385

There was enough apparent on the record to sustain the appellate jurisdiction of this court.

If in fact the Act drawn in question is unconstitutional, there is sufficient on the record to give jurisdiction, because it appears that the judge who tried the cause instructed the jury that the Act was binding on them as the law. In accordance with the judge's instruction was the verdict of the jury, on which judgment was rendered, and that judgment was affirmed in the Supreme Court of Pennsylvania, to which this writ of error was taken.

This is therefore a case to which the clause of the Constitution of the United States is applicable, and which was disregarded; which is all that need appear to sustain the appellate jurisdiction of this court. (*Martin v. Hunter*, 1 Wheaton, 304; *Inglee v. Coolidge*, 2 Wheaton, 363; *Lanusse v. Barker*, 3 Wheaton, 147; *Miller v. Nicholls*, 4 Wheaton, 311; *Williams*

v. *Norris*, 12 Wheaton, 124; *Hickie v. Starkie*, 1 Peters, 94.)

Is the Act unconstitutional so far as it affects rights existing at the time of its enactment?

Of the prospective operation of the Act we have nothing to say, our complaint being of the divestiture of vested rights. These were the rights of Satterlee to the possession of his estate, derived from the Commonwealth, and to take the rents and profits, without liability to pay the latter or surrender the former to any landlord who, as such, held a Connecticut title. This was the settled law of the land by the decision in this very case, when first before the Supreme Court of Pennsylvania. (13 Serg. & R., 133.) This decision was evidence of what the law of Pennsylvania had always been. At no time, therefore, did the relation of landlord and tenant exist between these parties. The claimant under the Connecticut title had no rights, and therefore was not entitled to the aid of the liberal principle, that a tenant shall not dispute the possession with his landlord, though he may hold the better title. The decree of Trenton in 1782 had settled the right to the disputed soil in the northern border of Pennsylvania, in favor of that State. **386*** The policy thereafter pursued by that State was utterly to exterminate the Connecticut claims within her borders, at the same time that she made great sacrifices to furnish the Connecticut settlers with Pennsylvania titles, by expending her treasures to purchase releases from the holders of them. Among the penal acts to destroy the Connecticut claims, were the Acts of 1795 and 1802; making it highly penal and criminal to intrude under, or convey a Connecticut title. (3 Smith, 209, 525.) A more extended history of this unhappy and often bloody controversy may be found in 2 Dall., 304; 6 Binn., 467; 6 Binn., 57; 4 Serg. & R., 281, and 1 Binn., 110.

In the last case, it was decided that a vendor of a Connecticut title could not recover from the vendee the purchase money, because, the contract being in violation of the law, the plaintiff had no rights in a court of justice. On the same salutary principle was this case first decided. But with the justice and sound legal principle of this decision, which are most apparent, we have nothing to do. It is enough, that by it the law was settled and a rule of property established. That it did establish a rule of property is most evident; but it has also been expressly decided by the Supreme Court of Pennsylvania. (1 Serg. & R., 521.) Under this rule of property was Satterlee protected in the possession and enjoyment of his estate. By this Act, if this judgment is affirmed, will he be dispossessed of his property, made liable to pay the rents and profits to another, and by the conversion of his possession into the possession of the landlord, forever precluded from regaining his estate.

Does not this Act, then, impair the obligation of a contract? The contract is the grant of a title from the State to Satterlee. Such a grant is a contract within the meaning of the Constitution of the United States. (*Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College case*, 4 Wheaton, 518, 656, 682; *Green v. Biddle*, 8 Wheaton, 1.) The obligation of a contract is "the law which binds the parties to perform

their undertaking." (4 Wheaton, 197.) The undertaking of the State of Pennsylvania by her grant, to which the law bound her, was that Satterlee should have and hold the premises *granted, to take and enjoy the **[*387]** rents and profits thereof, without liability to surrender the possession or pay the profits to any Connecticut claimant, through the relation of landlord and tenant.

By the loss of the possession, Satterlee has been unconstitutionally divested of rights, though the right of possession might remain in him. The possession gives the enjoyment of the rents and profits, which are equivalent to the land itself; and by those terms a title to the land will pass. Possession is itself a title against everybody who does not exhibit a better title. It gives a home, which may be invaluable to the owner from the attachments created by long residence, or from its being the place of nativity, or the patrimony derived from a line of revered ancestors. He who is in possession, may forcibly defend that possession; nay, slay the invader of his habitation, without a breach of the peace or the commission of a crime; while he who is out of possession cannot forcibly take possession, and if he does, though he may have the right, will be dispossessed by the statutes against forcible entry and detainer.

With the title of the Commonwealth in his pocket, Satterlee has "by this Act" been denied the right of defending his possession by it. He has been obliged to confess his possession to be the possession of an alien claimant, whose it never was, and never could have been by any judicial decision that was not suicidal to the State sovereignty. He has been bound in fealty to a landlord to whom, if according to the ancient custom he had taken the oath of homage, it would have been an abjuration of his allegiance to the State; for that landlord claims, in breach of his allegiance, the title of a foreign state. Yet by this Act the strong arm of the State is to be exerted to dispossess her grantee, and to deliver it over to the favored alien claimant who had asserted a title in criminal violation of her laws. And to consummate the injustice as far as the most absolute power could do it, her courts of justice are forever to be closed against a claim on her violated and useless patent. If an individual had thus attempted to re-assume the rights he had granted, he would be met by the doctrine of estoppel. For States who have **[*388]** power to execute their arbitrary will, there is no estoppel but that which is to be found in the paramount law of the Constitution, firmly enforced by an independent judiciary. If this Act had given Satterlee's estate to a claimant on a title perfectly void, it could not have committed a more flagrant violation of justice and of the Constitution; for this title was not only void, but could not have been otherwise than criminally asserted.

It was an attempt by the Legislature to encroach upon the judicial power; was passed at the next session, in terms precisely the reverse of the decision of the court, and applied to pending suits, when probably no suit but this was pending to which it was applicable.

If the Legislature can thus, by a retrospective act, divest a citizen of his estate, there is no

safety for our boasted rights and liberties. It is as impossible to make laws to operate upon the past without the usurpation of despotic power, as it is to recall the past. Law is a rule of action; but a law which did not exist when an action was performed, could not have been a rule for that action. To make a rule for it after the action is performed, is to substitute the will of the Legislature for a rule, which is despotism itself; for what that will may be no man can foresee, and it is the same whether it proceeds from an American legislator or an eastern despot. The court cannot be unmindful that legislative bodies sometimes act under the impulse of strong and sudden excitement; sometimes inadvertently; that sometimes the good intentions of the many may be misled by the management and intriguing talent of the few; and a case has been referred to which shows that they are not always inaccessible to corrupt influences.

This court would not suffer counsel to argue a question so plain as that a Legislature could not declare what a law was. (*Odgen v. Blackledge*, 2 Cranch, 276.) This Act changes the acknowledged law for the past. It has decided that State bankrupt laws are unconstitutional in respect to contracts made previous to their passage (*Sturgess v. Crowninshield*, 4 Wheat., 122); though constitutional in respect to contracts **389***] made after their enactment. (*Odgen v. Saunders*, 12 Wheat., 261.)

Retrospective laws are invalid at common law. (7 Johns., 477; 2 Johns., 263; 13 Serg. & Rawle, 353.) Nor can property be taken away, not even for public use, without compensation. (2 Dall., 304; 2 Johns., 263; 2 Johns. Cha. Rep., 162; 8 Johns., 388.) The principle being the same at common law and under the Constitution, they are applicable to this case.

The recovery in ejectment is conclusive evidence of the plaintiff's right to recover in an action for the mesne profits. (2 Johns. Rep., 371; 2 Dall., 156; 2 Burr., 665.)

If this judgment is affirmed, Satterlee will lose the rents and profits, which he would have held as his own but for the effect of the Act in question.

In *Green v. Biddle*, this court decided laws of Kentucky to be unconstitutional which deprived the owner of a right to recover any part of the profits on a recovery of his land.

The Act having brought Satterlee within the operation of the statute of limitations, if he be dispossessed by the affirmance of this judgment, it has totally deprived him of all remedy. By the loss of all remedy all right is gone. For every right it is a maxim that there is a legal remedy for its violation. The converse of this must therefore be true, and if there be no remedy there is no right.

If this court has not decided that the destruction of all remedy by a State law is an unconstitutional act, the several judges have at least expressed such an opinion. (*Chief Justice Marshall*, 4 Wheaton, 207; *Justice Washington*, 12 Wheaton, 271, 267; *Justice Johnson*, 286; *Justice Thompson*, 295, 301; *Justice Trimble*, 327; *Justice Story*, 8 Wheaton, 12; and State decisions, 5 American Law Journal, 520; 8 Mass., 423, 430; 12 Serg. & Rawle, 358.)

Mr. Sutherland, for the defendant.

The question submitted in the present case was one of great interest; not only to the defendant, but also to the free exercise of the legislative powers of the State of Pennsylvania. The question arose out of the Act of the Assembly of the State, entitled, "An Act [**390** relating to Connecticut settlers," passed the 8th day of April, 1826.

On the case as presented by the plaintiffs, the Act is alleged to have been passed on the 28th, whereas it was in fact enacted into a law on the 8th of April, 1826. It is therefore respectfully submitted to the court as a preliminary point, whether they will not dismiss the writ of error for want of certainty in the date of the Act; as we contend, that under the decisions already made in this court, it should distinctly, and not by reference, appear that a statute of a State was drawn in question, upon the ground of its being repugnant to the Constitution of the United States, and that its decision was in favor of its validity.

But if the court should decide that the record presents a case so as clearly to bring the question before the court, then it is respectfully contended, 1. That the decision of the Supreme Court of Pennsylvania (13 Serg. & Rawle, 133) was contrary to law. 2. That the Act of the Legislature of Pennsylvania, passed March 8th, 1826, was an explanatory Act, and therefore constitutional. 3. That the judgment of the Supreme Court of Pennsylvania, which the plaintiff in error seeks to reverse, did not impair, but affirmed the obligation of a valid contract, and was not against the Constitution of the United States. 4. The judgment of the Supreme Court of Pennsylvania in the case now submitted to this court for revision, was not made upon the authority of the Act of Assembly of the 8th of April, 1826, but upon the known and established law of the State.

It is contended that the first decision of the Supreme Court of Pennsylvania was erroneous. It appears, from looking back into the early history of Pennsylvania, that a number of persons emigrated from the State of Connecticut, and settled in some of the northern counties of Pennsylvania. They alleged that the charter of Connecticut, being of an older date, and covering the soil in question, they were legally entitled to settle on the lands in question. Out of this dispute originated the celebrated Wyoming controversy, which produced the decree of Trenton, which went in favor of the jurisdiction of the State of Pennsylvania. A number of laws were passed by the [**391** Legislature of Pennsylvania relative to the Connecticut settlers. The most important were, what was denominated the "Intrusion Act," and the Act suspending the operations of the statute of limitation in that region of country. The Act to prevent intrusions was highly penal. The first section provided, that if any person shall take possession of, enter, intrude, or settle on any lands within the counties of Northampton, Northumberland or Luzerne, by virtue or under color of any conveyance of half share right, or any other pretended title not derived under Pennsylvania, he shall, on conviction, &c., forfeit and pay two hundred dollars, &c., and be subject to imprisonment not exceeding twelve months.

The 2d section declared, that every person

who shall combine, or conspire, for the purpose of conveying, possessing or settling any lands within the limits aforesaid, under any half share right, or any pretended title as aforesaid, or for the laying out townships by persons not appointed or acknowledged by the laws of Pennsylvania, and accessaries thereto, shall forfeit and pay not less than four hundred dollars, and not more than one thousand dollars, &c., &c., and be subject to imprisonment at hard labor not exceeding eighteen months,

The 8th section enacts, that on trials of indictments for such intrusion, proof that the person indicted entered into, intruded, settled on, or was in possession of the land before the time of finding the indictment, shall be sufficient to convict thereof; unless defendant shall prove that he or she entered upon, took possession of, and settled on such land before the passing of the original Act—11th of April, 1795.

When the case of *Matthewson v. Satterlee* (13 Serg. & Rawle, 133) came up before the Supreme Court of Pennsylvania, the impression, as is evident from the report of the case, upon the minds of the judges of the court, was, that the Intrusion Act was in full operation. For it nowhere appears, either in the argument of counsel or the opinion of the judges, that anything had been said about its repeal. The Act, however, had been repealed. This opinion was no doubt based upon the case of *Mitchel v. Smith* (1 Binn., 110). The plaintiff there sold the defendant a tract of land, lying in the 392*] *county of Luzerne, and held by him under a deed from a committee of the Susquehanna Company, under the Connecticut title, and not derived from the authority of this Commonwealth or the late proprietaries of Pennsylvania; and gave his note for \$483.33, payable in three years. The suit was on the note. The principal question, says the court in that case, is whether this be a legal or illegal consideration for the bill, and whether the contract for the sale and purchase of this land is a violation of the laws of this Commonwealth, so tainting the whole transaction as that this court cannot legally afford their aid to carry the contract into execution. The court say, the mischief intended to be remedied by the Act of the 11th of April, 1795 (the Intrusion Act), was of a grievous nature. A warfare had been carried on between the claimants of land under Connecticut and the claimants under Pennsylvania for many years, and many lives were lost in the contest; the court then go on to state that the decree of Trenton being in favor of Pennsylvania, the Intrusion Act was passed to enforce the rights of that State, and finally decide that the action for the note could not be sustained.

But the Intrusion Act having been repealed, the case of *Mitchel v. Smith* is now no authority; and independent of the repeal of the Intrusion Act, the decision of the court in 13 Serg. & Rawle was erroneous, because the penalties of that law were never extended to apply to a case like *Matthewson's*. The 8th section, by special provision, excludes *Matthewson* from the operation of it. "No person is to be liable to the severities of the law who could prove that he entered upon and took possession of, or settled on such lands before the passing of the

Act of the 11th of April, 1795. *Matthewson* took possession as far back as 1784 or 1785, ten or eleven years before the existence of the Intrusion Act.

In the course of a short time after the repeal of the Intrusion Act, the law suspending the operation of the statute of limitation in this section of the Commonwealth was also repealed. This was the last and only Act remaining upon the statute book, to the prejudice of the Connecticut settlers. So that if *Matthewson* had not ever settled upon these lands, and leased *them to *Satterlee*, long prior to these [*393 enactments, framed for the purpose of preventing any more intrusion from the settlers of New England; yet, their total and unqualified repeal, afterwards, would have been sufficient to entitle him to the benefits of all the laws to which other persons settling in Pennsylvania were entitled. Under this view of the facts connected with this case, we have but one mode left for accounting for the decision of the Supreme Court of Pennsylvania, and that is the one heretofore adverted to; by supposing that the repeal of the Intrusion Act, as well as "the Act suspending the operation of the Limitation Act," had not reached them. Certainly their repeal is not to be collected either from the argument or opinion of the court, in the case of *Satterlee v. Matthewson* (13 Sergeant & Rawle). It being therefore, evidently, an oversight on the part of the court, we contend that the Act of the 8th of April, 1826, became necessary to effectuate justice between the parties, and to declare what was really the law at the time the erroneous decision of the court was pronounced. We therefore maintain the position that the Act of the 8th of April is constitutional.

Indeed, it is nothing more than a declaratory or explanatory Act. It was but a re-enactment of what was understood in that part of the State to have been the law from the year 1785 down to 1813, and certainly ever since the repeal of the acts of restriction. Surely, an undisturbed practice for twenty-eight or thirty years, during which period no tenant in the situation of *Satterlee* had brought a case of the kind into a court of law, ought alone to settle this question in favor of *Matthewson*; and to have satisfied the Supreme Court of Pennsylvania that the title of the landlord, obtained prior to the Intrusion Act, could not be contested by his tenant.

But *Satterlee* became the tenant of *Matthewson* prior to the Act of Intrusion; and when the law was passed, exempting *Matthewson* from the effects of the Intrusion Act, *Satterlee* was his tenant.

By referring to the Act of the 8th of April, it will be found that its provisions are to apply to the "trial of any cause *then pending, or hereafter to be brought;" [*394 and it is alleged that its application to a cause in court proves it to be unconstitutional; and that it wears none of the features of an explanatory act. It is not necessary to call an act in its title an explanatory act, to make it so. If in its design and effects it is explanatory, that is sufficient. If the law of the 8th of April had not applied to the cause in court, it would not have remedied the evil. This was the only cause of the kind that had ever been decided, and the

Legislature being satisfied that the court had misapprehended the meaning of the law, passed this Act by way of explanation.

Again, it has been suggested that this Act violates the obligation of a contract, and affects vested rights; because it "does away the force of the law, as decided by the Supreme Court in this case."

In 15 Sergeant & Rawle, our present case, the court say that the case of *Overton v. Tracy*, reported in 14 Sergeant & Rawle, virtually overrules the decision in 13 Sergeant & Rawle of *Satterlee v. Matthewson*, which decides that a tenant may resist the title of his Connecticut landlord. So far, therefore, as the judgment of the Supreme Court has decided the law, it is in our favor. For it appears, that in the very next volume of reports a case is decided virtually revoking the former decision. They had no vested rights under the first judgment of the court, as it was an erroneous one. This question would have never reached this court, nor would we have heard of the infringement of vested rights, if the Supreme Court had not given an incorrect opinion in the first instance.

But let us look at the law as it stood between Satterlee and Matthewson. Matthewson leased the property in question to Satterlee. It was also agreed that either of the parties might put an end to the tenancy at the end of one year. All this took place when there was no act in existence against Connecticut settlers in Pennsylvania; on the contrary, many of the New England men had gallantly defended the northern borders of the State, where this land is located, from Indian barbarities, and many of them lost their lives there.

395* Under such circumstances, no one could imagine that the men, who thus exposed their all in defense of their settlements, could be driven from them afterwards by honest or upright legislation. Hence we find the Assembly of Pennsylvania, in 1784, passed an Act for restoring possessions from which the Connecticut settlers had been removed. (7 Smith, 531.) And when they enacted the law to prevent intrusion from new emigrants, they cautiously, and with a just regard for good faith, declare that their enactments shall not apply to those who resided there before the passage of the law. Both Matthewson and Satterlee had been there from ten to twelve years before the Act adverted to had been passed. By excluding the prior settlers and defenders of the State from the operation of the Intrusion Act, they virtually passed a law preventing them from disturbance in their possession. And as such they were entitled to all the benefit of the laws of the State. During this time of peace and quiet, the lease was made; and all the inhabitants of Pennsylvania were subject to the same laws. At that time the tenant could not resist the title of his landlord. He was bound to deliver up possession, if he claimed through or by an outstanding title. We hesitate, therefore, not to say that the Act of the Legislature of the 8th of April, 1826, violated no contract, but on the contrary, it prevented injustice by sustaining a contract, made upon the purest principles of good faith.

Mr. Peters, for the defendant, contended, that there is nothing in the record to show upon what principles the Supreme Court of Pennsylvania decided the case, or what in fact Peters 2.

was the decision of the court. The facts of the case may be found on the papers which come up with the record, but there is no certificate by the clerk that the same are part of the proceedings of the cause. The certificate signed by the clerk affirms nothing more than the docket entries; and to all the papers in the case, the clerk's certificate has no application.

If, by the law of Pennsylvania, a judge who tries a cause *is bound to file his opinion, [*396] and the same when filed becomes a part of the record, the law enjoins this duty only when the judge is so required; and there does not appear to have been any request in this case. (5 Smith, 197.) Neither does the record show that the paper, which purports to be the opinion of the court, was filed by the judge. Its language would authorize the assertion that it had been drawn up by another. Nor do the exceptions to the charge of the Court of Common Pleas, which were presented before the Supreme Court, exhibit the particular matters which are presented to this court as ground of error in the court of Pennsylvania; and if this court are to consider these exceptions as bringing up the whole charge of the judge of the Court of Common Pleas, they will have to decide upon the relevancy of all the matter in the charge, and to review the same; some of which this court are not judicially competent to examine.

Thus, therefore, as the charge of the court is not legally upon the record, and there is no exception which is sustained by the actual or certified record, nothing is before the court in the form of assigned errors, upon which they can form an opinion. Again, unless in the form of instructions to the jury, the opinion or charge of the court can in no case constitute a part of the record.

In *Williams v. Norris* (12 Wheaton, 117), this point was explicitly decided as has been stated. The law of Tennessee, like that of Pennsylvania, requires the judges to file their opinions, in writing, among the papers of the cause.

We do not deny the right of this court to decide upon the constitutionality of a law of a State, where the question is fairly and regularly presented for determination, according to the provisions of the Act of Congress, and the settled rules of this court; nor that an Act of a State is unconstitutional if it impairs the obligation of a contract; nor that the grant of titles to lands by a State is a contract within the meaning of the constitutional provision.

All the principles claimed by the counsel for the plaintiff in error upon these points are therefore entirely conceded.

But admitting all these principles, it is submitted that *this is not such a case as [*397] comes within them, or as this court can judicially notice.

To constitute such a case it must appear from the record that the constitutionality of the law of the State has been drawn in question, and that the decision of the court was in favor of its validity. (*Martin v. Hunter's Lessee*, 1 Wheaton, 304, 323, 352.)

The judgment of the State Court, to be reviewed in this court, must not only appear to have been on the validity of the legislative act, but it must also appear that the judgment of this court was upon no other point. If, on the

record, it appears that the court of this State may have decided upon the rights of the parties before them without deciding upon the constitutional question—and it is not expressly shown that the judgment was upon the constitutionality of the law alone—this court will not take jurisdiction.

This is in precise harmony with all the principles which have governed this court, and the course of its proceedings. It always respects the decisions of State courts upon the laws of the State, and reluctantly interferes with them.

This record presents a case in which the judgment of the court may have been upon a question in which the constitutionality of the law of Pennsylvania, of the 8th of April, 1826, was not involved.

Two exceptions were made to the charge of the court of Bradford county, before the Supreme Court.

1. That by the law of Pennsylvania the plaintiff's testator could lease the land, and that the rights of landlord extended to him.

2. That the Act of the 8th of April, 1826, gives a right of recovery, and does away the force of the law, as declared by the Supreme Court.

Under the first proposition the inquiry was, what was the law of Pennsylvania in relation to these parties? They were landlord and tenant; and unless there was a special law exempting them from the obligations of this relation, all the rights of landlord did apply to the defendant in ejectment. The Supreme Court of Pennsylvania had said in 1825 that this law did not apply. This was the question **398*** for the *determination of the Supreme Court in the present case, and they decided that the former decision of the same court was erroneous.

Had they not a right to overrule the former decision of the court? This will not be denied. That this was the fact and that the court so overruled the former decision, is manifest from the opinion of the court.

Thus it is manifest that the opinion of the Supreme Court in the case before this court was, that by the laws of Pennsylvania the plaintiff's testator could lease the land, and that the rights of landlord did extend to him.

Upon this principle the judgment of the court could have been, and was in favor of the defendant in error; without touching the question of the validity of the law of the 8th of April, 1826. And this decision was in conformity with all the principles which had governed the Legislature of Pennsylvania, in relation to the Connecticut claimants.

At no period did the Legislature deny to those claimants the benefits of all the principles of law, except when the preservation of her own rights, and the performance of her own contracts, made it absolutely necessary; and the moment that necessity ceased, she released her restrictions, and at length entirely removed them.

The Connecticut settlers had always been indulgently considered by the Legislature, until after the decision of the case of *Vanhorn's Lessee v. Dorance*, in 1795 (2 Dall., 304).

The decree of Trenton, in 1783, had settled the jurisdiction over the land to be in Pennsyl-

vania; but until 1795, it was not judicially settled that the right of soil was in Pennsylvania, and that the Connecticut grants were void. After the decree of Trenton, violent measures were resorted to by the Pennsylvania claimants to oust the Connecticut settlers.

In 1784 the Legislature of the State passed an Act to stay and prevent these proceedings. It was at this period that Matthewson settled on the land, under a Connecticut title, but never asserting it under a Pennsylvania title. In 1784, an Act offering general amnesty to all those who, as Connecticut claimants, had violated the peace of the State. In 1787 *an **[*399]** Act was passed confirming certain Connecticut claims, which Act was suspended in 1788, and repealed in 1790.

The title of Pennsylvania to the soil being fully established by the decision of the court in 1795 (*Vanhorn v. Dorance*), the State of Pennsylvania then passed the Intrusion Act, referred to by the plaintiff's counsel.

This law was not retrospective. It applied only to settlers after its date. It continued in force until January, 1814, when it was repealed. (6 Smith, 122.)

In 1813 the Legislature repealed the law which had suspended the operation of the Act of Limitations (6 Smith, 61); and thus, those who came in under Connecticut claims were restored to all the rights of citizens of the State, and to the enjoyment of all the laws of the State. Well, therefore, might the court in this case reprobate the decision before given, which was against all the spirit of legislation so emphatically declared by the State, and say that it was not law.

That court in the following term, June, 1826, had, therefore, overruled their former decision. (*Tracy v. Overton*, 14 Serg. & Rawle, 311.) In that case it was held, that an improvement made under a Connecticut title was an object of purchase, and they affirmed the obligation of the mortgageor who had made the purchase.

These views show conclusively that the court thought the Supreme Court in 1825 was mistaken, and that the law was not as they declared it.

Until the decision of the Supreme Court of Pennsylvania is overruled, it will be respected by this court. This is conclusive to the case.

2d point. The counsel for the plaintiff in error say, that the Supreme Court of Pennsylvania have violated the Constitution of the United States, because they have decided that the Act of the 8th of April, 1826, gives a right of recovery, and does away the force of the law as declared by the Supreme Court.

It is nowhere found on the record that the court have said so.

All that the record contains is, that five errors in the charge of the court of Bradford county were assigned, and *that the **[*400]** court gave judgment for the defendant in that court, he being the plaintiff below.

The language of the exception is such as deserves notice. The court are said to have declared that the Act of Assembly does away the force of the law, as declared by the Supreme Court; not that the Act of Assembly does away the law of the land. This is saying that the Act of 1826 was, as in truth it was, a declaratory Act. There can be no doubt of the

right of a Legislature to pass a declaratory Act.

A reference to the opinion of the court will show that this was their decision.

The Act of 1826 is said to be unconstitutional because it impaired a contract; but what is the contract which the counsel assert to be impaired?

The right which settlers had to the possession of the land, under the title obtained in 1812 by purchase from Wharton, it is said to be affected, and the contract under the patent for the State is said to be impaired. Look at the situation of the parties. They both settled in 1784, or 1785, under a Connecticut title. If neither could acquire any legal possession under that title, they stood in the same situation up to the 10th of January, 1812, when Elizabeth Matthewson took out a warrant for the land, and obtained a patent on the 19th of February, 1813.

If the warrant and survey under the State of Pennsylvania carries with it a contract for possession, E. Matthewson was to have the benefit of that contract; and the possession of Satterlee being an illegal one, she must be deemed to be in possession.

After this, or after the warrant to Matthewson, Satterlee bought of Wharton a title derived from the Commonwealth by patent, in 1781, and which had lain dormant from that time thirty-one years.

He now says that the law of Pennsylvania, of the 8th of April, 1826, has divested him of his possession. This possession was not a possession which was lawful.

The possession upon which the Act of Assembly operated, was one which the party could not avail himself of in a court of Pennsylvania. The Act of Assembly, therefore, in giving to **401** *the heirs of Matthewson the rights of landlord, impaired no part of the contract of the State, under Wharton's patent. It only took away a disability, if any existed, as between the two persons who held under the Connecticut possession.

That Act left all the rights derived under Wharton's patent unimpaired.

Ejectment might have been brought, and may now be brought. And unless the Act of 1813 is retrospective, which it cannot be, there is no possession to bar a recovery.

This view puts the case out of all the perils it would stand in, if the law interfered with the rights of Satterlee under the State. It is earnestly presented to the consideration of the court, that the Act of Assembly which is said to be unconstitutional by impairing a contract, has no such operation. It leaves the contract of the State under the patent to Wharton untouched, and the plaintiff in error to the assertion of all his rights derived under it. It does no more than declare that the contract between the plaintiff and defendant, as landlord and tenant, shall operate upon them, and thus it affirms, instead of impairing the obligation of a contract.

From these views it is claimed:

1. That the record does not exhibit a case for the consideration of this court.

2. The decision of the court of Pennsylvania was upon the general law of the land, and not on the Act of Assembly.

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3. The Act of the 8th of April, 1826, was a constitutional law, and did not impair, but affirmed a contract which was lawful; and has been since declared to have been so, by the highest judicial authority of the State.

Mr. Sergeant, in reply.

1. As to the jurisdiction of the court to entertain a writ of error in this case under the 25th section of the Judiciary Act. It appears that, in the Court of Common Pleas, the Act of the 8th of April, 1806, was relied upon by the plaintiff below. The court charged the jury that it was a binding Act. To this charge the defendant excepted, and the judge signed and sealed the bill of exceptions. Was this error? *If it was, the court above, by affirm- **402** ing the judgment, adopted the error, and affirmed the constitutionality of the law. That it was material to the decision, cannot be doubted, but the proof of its materiality does not lie upon the plaintiff. The rule upon this subject is laid down with great precision in *Etting v. Bank of the United States* (11 Wheat., 59). "But if he (the judge) proceed to state the law" (though not bound to do it), "and state it erroneously, his opinion ought to be revised, and if it can have had any influence on the jury, this verdict ought to be set aside." It is necessary, therefore, for those who allege that an erroneous opinion of a judge in his charge to a jury is not examinable in error, to show that it could not have had any influence on the jury.

But it is manifest that the opinion expressed in the Court of Common Pleas, that the Act of Assembly was a binding Act, had a decisive influence on the issue of the cause. It cut off all defense, by making the defendant tenant of the plaintiff. It was so considered by court and counsel; and it was the very ground of reversal of the previous judgment. (13 Serg. & Rawle, 133.)

The exceptionable opinion thus expressed, sufficiently appears. It was filed of record, which in Pennsylvania is sufficient to subject it to revision in the Superior Court. (*Downing v. Baldwin*, 1 Serg. & Rawle, 298.) It is set out, too, in a bill of exceptions signed and sealed by the judge. The Supreme Court, therefore, could not avoid passing upon it. They did pass upon it; and thus it became a final decision of the "highest court" in the State, to which a writ of error lies from this court.

Does it sufficiently appear that the Constitution of the United States came in question? This is the only remaining inquiry under this head, and it is settled by decisions heretofore made. It is not necessary, to found the jurisdiction, that it should appear that the Constitution, or an Act of Congress, or a treaty, was insisted upon. It is sufficient if it be seen that either of them was applicable to the case. (*Müller v. Nicholls*, 4 Wheat., 311; *Williams v. Norris*, 12 Wheat., 124; *Hickey v. Starkie*, 1 Peters, 98.) But it is *very apparent that the **403** unconstitutionality of the Act was insisted upon in both courts. The charge was excepted to in the common pleas, on the ground that it stated the Act to be binding. In the Supreme Court, it was evidently presented in the first and second errors assigned. It appears, also, that the suit was brought in 1817, so that the Act passed after the commencement of the action; and it further appears from the charge, what the

former decision had been upon the same alleged lease, before the Act was passed. The judge decided (and the Supreme Court of Pennsylvania affirmed the decision) that the court and jury were bound by the Act. If it was unconstitutional, it was no law, and they were not bound by it. He therefore decided that it was not unconstitutional. The question is thus directly brought before this court, and it is the only question in the record which is examinable here.

2. Is this Act, then, a constitutional Act, consistent with the Constitution of the United States? Before the Act passed, there was no subsisting lease between the parties. The Act created one. (*Satterlee v. Matthews*, 13 Serg. & Rawle, 133.) It was impossible that any valid lease could be derived from, or founded upon a Connecticut title. That title was from the beginning adverse to the sovereignty of Pennsylvania, was maintained by force, was treated by the laws of Pennsylvania as hostile, and its assertion as criminal. For proof of this position, he referred to the history of the controversy, the decree of Trenton which settled the right, and the various laws of Pennsylvania which prohibited, under severe penalties, every form of Connecticut title, of derivation from it, or possession under it. He referred also to judicial decisions, to show that every contract growing out of it was void, and especially to *Mitchell v. Smith* (1 Binn., 110), and the preamble of the Act of 1802 (3 Smith, 525). The period of settlement or claim under that title made no difference. The Act of 1795, it was true, gave peculiar powers, in certain cases, to punish and remove certain intruders. But all were intruders, not upon private right merely, but upon the State sovereignty, who came in or **404*** continued, under pretense of Connecticut right; and as such they were public disturbers, obnoxious to public chastisement. So, they were always considered, both in the legislation and in the judicial decisions of Pennsylvania. *Overton v. Tracy* (14 Serg. & Rawle, 311) was not to the contrary. It only decided that it was not unlawful and criminal for the owner of a Pennsylvania title voluntarily to pay a Connecticut settler for his improvements. That case admits that it would be unlawful to buy the title.

Independently, then, of the Act in question, there could be no relation of landlord and tenant, because there could be no valid lease. The Act creates the relation in a pending suit. It was a law to alter the rights of property between individuals without their consent, so as to give to one a right to recover from the other which he had not before. It works this result, by making a new rule to govern between the parties, so that A shall be enabled by means of it to recover the property of B. In other words, it enables A to turn B out of the possession of his freehold. This is precisely equivalent to a law declaring that A shall have B's property without his consent. Such a law, penned in plain terms, would excite universal abhorrence in every one who has the least feeling of respect for individual rights. It is not the less dangerous and objectionable for being more indirectly accomplished.

This Act does not profess to be declaratory. If it did, it would still be objectionable. To ex-

pound laws is a judicial, and not a legislative function. (*Ogden v. Blackledge*, 2 Cranch, 277.) But, admitting the law to be as it had been laid down by the Supreme Court, it changes the law, as to existing cases, so as to divest vested rights. To do this, it makes that rightful and valid which before was wrongful and void. It creates a lease where none before existed. It makes one a landlord and the other a tenant, creating for each the capacities and disabilities belonging to that character. It carries this back for thirty-five years. It thus makes A's possession the possession of B, and introduces the statute of limitations as a bar. Thus, it creates lease, tenancy, possession, bar, and ***405** completely changes the whole case. The effect is precisely this, that Satterlee shall have no defense in the pending suit.

This cannot be called judicial legislation. It is neither judgment nor legislation, but more. Neither does it merely exercise appellate power. It makes a case for a party to insure a recovery in an existing case. It is an exercise of power, neither legislative, executive, or judicial, but arbitrary. The intention of the Legislature is not material. The time when this Act was passed, a few days before the end of the session, warrants a belief that it was not much considered. But, though the Legislature did not so intend, it was clearly devised for this very case. The haste with which it was carried to the common pleas of Bradford county, immediately after it was passed, and before the laws of the session could have been published, is proof of its design. It was meant for this case.

Is such an Act constitutional?

1. It is a violation of contract. In 1781, the State sold the land to Mr. Wharton, who paid for it; and granted him by patent an estate in fee-simple. In 1812 he sold to John F. Satterlee, who succeeded to all his rights. Thus, Satterlee held by contract of the State who sold the land. Could the State resume the grant? No. (*Fletcher v. Peck*, 6 Cranch, 87, 131.) If the State could not resume the grant, could she grant it to another? That would, in fact, be a resumption; for she could not grant without assuming the dominion over the land. Such a proceeding is entirely indefensible, and is used as the strongest illustration of what rightful legislation cannot accomplish, by Justice Patterson in *Vanhorn v. Dorrance* (2 Dall., 304), and Justice Chase in *Calder v. Bull* (3 Dall., 386).

Can the State, then, rightfully resume any part of the dominion over the land? The answer is implied in the universality of the former proposition. She has parted with the whole. To resume a part violates the contract of sale as much as to resume the whole. Can the State grant any part of it? Certainly not. Can she, by her mere authority, impose upon it any incumbrance, subject it to mortgage, judgment ***406** or lease? Can the State alter the relation of the owner to his property, or make him less than an owner, or less than a tenant in fee-simple? Can she, directly or indirectly, deprive him of his title, his possession, or right of possession? Either is inconsistent with the grant, and a violation of the contract. These deductions are all legitimately and unavoidably made from the first principle. Now, this Act of Assembly does take from the owner his pos-

session and his right of possession, and transfers them to another. It therefore violates the contract and transcends the just powers of legislation. If this can be done, what limit shall be assigned to the power? The truth is, that the Act gives Matthewson a title. That is its effect. It takes away the right of Satterlee. It is the same exercise of power, as to declare that a valid lease should be void, or a younger grant better than an older one.

2. It is retrospective and *ex post facto*. There are three provisions in the Constitution which, in defining the limits of legislative power, ought to be taken together: The guaranty of a Republican government, in the 4th section of the 4th article, which secures the distribution of legislative, executive, and judicial authority; the prohibition to the States of the power to pass bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, in the 10th section of the 5th article; and the fifth amendment, restricting the exercise of the power of the eminent domain. They were intended, together, effectually to secure the political and civil rights of the citizen, and to protect from legislative encroachment. They ought always to be liberally construed in favor of the rights of the citizen. (Opinion of Judge Johnson, 12 Wheaton, 286.) These provisions were intended to be equal and invariable in their operation, and to embrace all cases of unjust legislation affecting the property or liberty of individuals. Retrospective laws are always unjust, and are contrary to the fundamental principles of our social compact. In these clauses of the Constitution, regard must be had to the spirit. Suppose a law were to declare a valid lease void. This would impair the obligation of the contract between the parties. Sup-⁴⁰⁷ pose a law to declare a void lease valid. Precisely the same injustice is done. Will the Constitution be satisfied with a distinction between them, when there is no difference? The spirit of the Constitution abhors it. Private property cannot be taken, even for public use, without full compensation and process of law. To affect the rights of property in any other way, was deemed to be beyond the power of legislation, and therefore the guard is applied to the taking for public use. The other parts of the Constitution had done the rest.

Retrospective laws, violating the rights of property, are contrary to the contract of any society established upon a Republican basis. They not only impair, they break it. The great object of our Constitution is to preserve individual rights, not to destroy them. There is no power in the government but what is given for this end. The freedom of the citizen, the enjoyment of his own without disturbance or interference, are what constitute his happiness; and in a government where that is consulted, constitute his rights. They are sacred, and ought not to be interfered with.

Mr. Justice WASHINGTON delivered the opinion of the court:

This is a writ of error to the Supreme Court of Pennsylvania. An ejectment was commenced by the defendant in error in the Court of Common Pleas against Elisha Satterlee, to recover the land in controversy, and upon the motion of the plaintiff in error, he was admitted

as her landlord, a defendant to the suit. The plaintiff, at the trial, set up a title under a warrant dated the 10th of January, 1812, founded upon an improvement in the year 1785, which it was admitted was under a Connecticut title, and a patent bearing date the 19th of February, 1813.

The defendant claimed title under a patent issued to Wharton in the year 1781, and a conveyance by him to John F. Satterlee in April, 1812. It was contended on the part of the plaintiff, that admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff some time in the year *1790. The Court of Common Pleas [*408] decided in favor of the plaintiff upon the ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the Supreme Court of that State, that court decided, in June, 1825 (13 Serg. & Rawle, 133), that by the settled law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title; upon which ground the judgment was reversed and a *venire facias de novo* was awarded.

On the 8th of April, 1826, and before the second trial of this cause took place, the Legislature of that State passed a law in substance as follows, viz.: "That the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any cause now pending, or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding."

Upon the retrial of this cause in the inferior court in May, 1826, evidence was given conducing to prove that the land in dispute was purchased of Wharton by Elisha Satterlee, the father of John F. Satterlee, and that by his direction, the conveyance was made to the son. It further appeared in evidence, that the son brought an ejectment against his father in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father for two lives, at a rent of one dollar per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the plaintiff that, notwithstanding the eviction of Elisha Satterlee under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the Supreme Court in 1825, and the Act of Assembly before recited, stated to the jury the general principle of law, which prevents a tenant from controverting the title of his *landlord by showing it to be defect. [*409] The exception to that principle where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the Act of Assembly upon that decision, which Act he pronounced to be binding on the court. He therefore concluded, and so charged the jury, that if they should be satisfied from

the evidence that the transactions between the two Satterlees before mentioned were *bona fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that if the jury should be satisfied that those transactions were collusive, and that Elisha Satterlee was in fact the real purchaser, and the name of his son inserted in the deed for the fraudulent purpose of destroying the right of the plaintiff as landlord, then the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit.

To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is spread upon the record. The jury found a verdict for the plaintiff; and judgment being rendered for her, the cause was again taken to the Supreme Court by a writ of error.

The only question which occurs in this cause which it is competent to this court to decide is, whether the statute of Pennsylvania, which has been mentioned, of the 8th of April, 1826, is or is not objectionable, on the ground of its repugnancy to the Constitution of the United States? But before this inquiry is gone into, it will be proper to dispose of a preliminary objection made to the jurisdiction of this court, upon the ground that there is nothing apparent on this record to raise that question, or otherwise to bring this case within any of the provisions of the 25th section of the Judiciary Act of 1789.

Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. (2 Wheat. 410*) ton, 363; 4 Wheaton, 311; 12 *Wheaton, 117.) One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the Act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the State to any part of that Constitution was drawn into question.

Now, it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law, as the Supreme Court had decided it to be in this very case in the year 1825. (13 S. & R., 133.)

That the charge of the judge forms a part of this record is unquestionable. It was made so by the bill of exceptions, and would have been so without it, under the statute of the 24th of

February, 1806, of that State; which directs, that in all cases in which the opinion of the court shall be delivered, if either party require it, it is made the duty of the judges to reduce the opinion, with their reasons therefor, to writing, and to file the same of record in the cause. In the case of *Downing v. Baldwin* (1 Serg. & Rawle, 298), it was decided by the Supreme Court of Pennsylvania, that the opinion so filed becomes part of the record, and that any error in it may be taken advantage of on a writ of error without a bill of exceptions.

It will be sufficient to add that this opinion of the Court of Common Pleas was, upon a writ of error, adopted and affirmed by the Supreme Court; and it is the judgment of that court upon the point so decided by the inferior court, and not the reasoning of the judges upon it, which this court is now called upon to revise.

We come now to the main question in this cause. Is the *Act which is objected [*411 to repugnant to any provision of the Constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error, for a variety of reasons; and particularly, because it impairs the obligation of the contract between the State of Pennsylvania and the plaintiff, who claims title under her grant to Wharton, as well as of the contract between Satterlee and Matthewson; because it creates a contract between parties where none previously existed, by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that in passing the Act in question, the Legislature exercised those functions which belong exclusively to the judicial branch of the government.

Let these objections be considered. The grant to Wharton bestowed upon him a fee-simple estate in the land granted, together with all the rights, privileges and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed, or impaired by the Act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Matthewson, by which he became his tenant, under a stipulation that either of the parties might put an end to the tenancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord, by setting up a better title to the land in himself, or one outstanding in some third person.

It is true that the Supreme Court of the State decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that *the [*412 principle of law which has been mentioned did not apply to it. But the Legislature afterwards

declared by the Act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist, and be held effectual, as well in contracts of that description as in those between other citizens of the State.

Now, this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise, by the Legislature, of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted; but the question which we are now considering is, does it impair the obligation of the contract between the State and Wharton, or his alienee? Both the decision of the Supreme Court in 1825, and this Act, operate, not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose, or was decided, to disparage the title of Wharton, or of Satterlee as his vendee. So far from it, that the judge stated in his charge to the jury, that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict.

We are then to inquire, whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute? The objections urged at the bar, and the arguments in support of them, apply to that contract, if to either. It is that contract which the Act declared to be valid, in opposition to the decision of the Supreme Court; and admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create **413*** a contract between parties *where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing.

If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument.

All the other objections which have been made to this statute, admit of the same answer. There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions. The case of *Ogden v. Blackledge* came into this court from the Circuit Court of the United States, and not from the Supreme Court of North Carolina; and the question, whether the Act of 1799, which partook of a judicial character, was repugnant to the Constitution of the United States, was decided by the Supreme Court of the United States. *Peters 2.*

United States, did not arise, and consequently was not decided. It may safely be affirmed, that no case has ever been decided in this court, upon a writ of error to a State courts which affords the slightest countenance to this objection.

The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this Act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract; and it has been shown that the Act in question has no such effect upon either of the contracts which have been before mentioned.

In the case of *Fletcher v. Peck*, it was stated by the Chief Justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, *where are they to be found, if [**414** the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a State statute which divests a vested right is repugnant to the Constitution of the United States; and the case in which that opinion was pronounced was removed into this court by writ of error, not from the supreme court of a State, but from a circuit court.

The strong expressions of the court upon this point in the cases of *Vanhorne's Lessee v. Dorrance* and *The Society for the Propagation of the Gospel v. Wheeler*, were founded expressly on the Constitution of the respective States in which those cases were tried.

We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a Circuit Court, sitting to administer the laws of a State, in giving to the Constitution of that State a paramount authority over a legislative Act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that unless it be so, this court has no authority, under the 25th section of the Judiciary Act, to re-examine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case.

That judgment, therefore, must be affirmed with costs.

Mr. Justice JOHNSON. I assent to the decision entered in this cause, but feel it my duty to record my disapprobation of the ground on which it is placed. Could I have brought myself to entertain the same view of the decision of the Supreme Court of Pennsylvania, with that which my brethren have expressed, I should have felt it a solemn duty to reverse the decision of that court, as violating the Constitution of the United States in a most vital part.

What boots it that I am protected by that Constitution from having the obligation of my contracts violated, if the legislative power can

create a contract for me, or render binding upon me a contract which was null and void in its creation? To give efficacy to a void contract, is not, it is true, violating a contract, but it is doing infinitely worse; it is advancing to the very extreme of that class of arbitrary and despotic acts which bear upon individual rights and liabilities, and against the whole of which the Constitution most clearly intended to interpose a protection commensurate with the evil.

And it is very clear to my mind, that the cause here did not call for the decision now rendered. There is another, and a safe and obvious ground upon which the decision of the Pennsylvania court may be sustained.

The fallacy of the argument of the plaintiff in error consists in this, that he would give to the decision of a court, on a point arising in the progress of his cause, the binding effect of a statute or a judgment; that he would in fact restrict the same court from revising and overruling a decision which it has once rendered, and from entering a different judgment from that which would have been rendered in the same court, had the first decision been adhered to. It is impossible, in examining the cause, not to perceive that the statute complained of was no more than declarative of the law on a point on which the decisions of the State courts had fluctuated, and which never was finally settled until the decision took place on which this writ of error is sued out.

The decision on which he relies to maintain the invalidity of the Connecticut lease was rendered on a motion for a new trial; all the right it conferred was to have that new trial; and it even appears that before that new trial took place, the same court had decided a cause which, in effect, overruled the decision on which he now rests: so that when this Act was passed, he could not even lay claim to that imperfect state of right which uniform decisions are supposed to confer. The latest decision in fact, which ought to be the precedent, if any, was against his right.

It is perfectly clear, when we examine the reasoning of the judges on rendering the judgment now under review, that they consider the law as unsettled, or rather, as settled against the plaintiff here at the time the Act was passed; and if so, what right of his has been violated? The Act does no more than what the courts of justice had done, and would **416*** do without the aid of the law—pronounced the decision on which he relies as erroneous in principle, and not binding in precedent.

The decision of the State Court is supported under this view of the subject, without resorting to the portentous doctrine (for I must call it portentous) that a State may declare a void deed to be a valid deed, as affecting individual litigants on a point of right, without violating the Constitution of the United States. If so, why not create a deed, or destroy the operation of a Limitation Act after it has vested a title?

The whole of this difficulty arises out of that unhappy idea that the phrase "*ex post facto*," in the Constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative Acts without the prohibitions of the

Constitution. It was in anticipation of the consequences, that I took occasion, in the investigations on the bankrupt question, to make a remark on the meaning of that phrase in the Constitution. My subsequent investigations have confirmed me in the opinion then delivered, and the present case illustrates its correctness. I will subjoin a note¹ to this opinion, devoted to the examination of that question.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Pennsylvania for the Middle District of Pennsylvania, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said Supreme Court for the State of Pennsylvania in this cause be, and the same is hereby affirmed with costs.

Aff'g, 16 Serg. & R., 191; 13 Serg. & R., 133.
Cited—3 Pet., 302; 8 Pet., 110, 111; 10 Pet., 396; 11 Pet., 539, 550; 1 How., 330; 7 How., 784; 10 How., 402, 539; 18 How., 379; 1 Wall., 204; 4 Wall., 390; 7 Wall., 424; 8 Wall., 603; 6 Otto, 436; 1 Wood, & M., 374; Bald., 77, 220, 285, 302, 547; 1 McLean, 532; 3 McLean, 217; 5 McLean, 165; 6 McLean, 441; 7 Bank. Reg., 262; 8 Bank. Reg., 407; 2 Paine, 80; 1 Dill., 254; 2 Dill., 448.

*JOHN REYNOLDS, TENANT THE [417
UNITED STATES, Plaintiff,

v.

DUNCAN M'ARTHUR, Defendant.

Lands reserved by Virginia in her deed of cession—military land warrants.

The lands north-west of the river Ohio, between the rivers Scioto and Little Miami, lying west of Ludlow's line, east of Roberts' line and south of the Indian boundary, reserved by Virginia, in her deed of cession to the United States of March, 1784, for the satisfaction of the military bounties Virginia had promised, were not, prior to 1810, by any legislative Acts of the government of the United States, withdrawn from appropriation under and by virtue of Virginia military land warrants. A patent issued on the 12th of October, 1812, founded upon a military land warrant, for land within the reserved lands, is valid against a claimant of the same land, holding under a sale made by the United States.

ERROR to the Supreme Court of Ohio. This was an action of ejectment, brought originally in the Court of Common Pleas for Champaign county, in the State of Ohio, by M'Arthur, the defendant in error, against Reynolds, the tenant in possession. In that court a verdict and judgment were rendered in favor of the plaintiff below. The plaintiff in error appealed to the Supreme Court of Ohio for that county.

On the trial in the latter court (being by the laws of Ohio, a trial *de novo*), M'Arthur again obtained a verdict and judgment in his favor. M'Arthur claimed the land in controversy under a patent from the United States, bearing date October the 12th, 1812, founded on entry and survey made in the year 1810, on a warrant granted for services in the Virginia line on continental establishment during the war of the Revolution. Reynolds, the defendant below, claimed as the assignee of one

1.—For this note, see the end of the volume.

Henry Van Meter, who in the year 1805 entered the land in controversy at the Cincinnati land-office. It reverted to the United States in the year 1813, for non-payment of the purchase money, and during the same year it was entered again by Van Meter, and the certificate of entry assigned by him to Reynolds.

The deed of cession of the country north-west of the Ohio River from Virginia to the United States, dated in March, 1784, reserved the country between the rivers Scioto and **418*** Little Miami for the satisfaction of the military bounties Virginia had promised to her officers and soldiers on continental establishment. The sources of the two rivers are between fifty and sixty miles apart, and the country between them makes a part of the western boundary of the reservation. In 1802 Israel Ludlow was directed by the then Surveyor-General of the United States, to run the boundary line between these rivers, who in that year accordingly ran a direct line from the source of the Little Miami towards what he supposed to be the source of the Scioto; to which river he did not extend his line, in consequence of being arrested in his survey by the Indians at the Greenville treaty line, that line being then the Indian boundary. The line run by Ludlow is called Ludlow's line.

In the year 1812, Congress passed an Act authorizing the appointment of three commissioners, who, in conjunction with commissioners to be appointed by Virginia, were directed to run the boundary line between the sources of these rivers, with authority to agree upon and establish the same. They proceeded to ascertain the sources of these rivers and employed a surveyor of the name of Roberts to run a direct line between them. While he was running the line, a misunderstanding arose among the commissioners as to the principle on which the boundary should be settled. The Virginia commissioners contended for a line from the source of the Scioto to the mouth of the Little Miami as the boundary. The United States commissioners claimed the line then running between the sources of the two rivers as the boundary.

The commissioners separated without agreeing upon a boundary. This line is called Roberts's line. It runs from nearly the same point on the Little Miami, at which Ludlow's line commences, to a point on the Scioto several miles west of the termination of Ludlow's line when extended to the latter river. The two lines include a triangular gore of country extending from one river to the other. Shortly after Ludlow's line was run, the surveyors in the employment of the United States proceeded to survey the country west of and bounding upon that line as far as the Indian boundary, **419*** and the officers at the Cincinnati land-office sold the whole or part of the country lying between Ludlow's and Roberts's lines as the land of the United States; among which was the land in controversy. The Act of 1812 declared that Ludlow's line should be the boundary until otherwise established by the consent of Virginia and the United States. By another Act of Congress, passed in 1818, Ludlow's line to the Greenville treaty line was made the boundary until otherwise directed by law. And above the Greenville treaty line to

the Scioto, Roberts's line was made by that Act the boundary.

The land in controversy was admitted by the parties to lie on Buck Creek, a water of the Great Miami River, adjoining Ludlow's line, and south of the Indian boundary line. The plaintiff below, M'Arthur, further agreed that if the land in controversy did not lie between the rivers Scioto and Little Miami, a verdict and judgment should be rendered against him.

On the trial in the Supreme Court of Ohio the counsel for the plaintiff in error prayed the court to give the jury eight several instructions; all of which that court refused to give.

To this refusal a bill of exception was tendered, upon which the writ of error is founded.

The instructions prayed for by the counsel for the plaintiff in the court below were as follows:

1. That the lands west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, had been withdrawn from appropriation under and by virtue of said military land warrants prior to the year 1810; and that as the same had, pursuant to the Acts of Congress in such case made and provided, been directed to be surveyed and sold; and that as the same had accordingly been surveyed and sold to the defendant prior to the year 1810; consequently that the plaintiff's patent is void, and their verdict ought to be for the defendant.

2. That as the third section of the Act of Congress of the United States of the 11th April, 1818, declares, "that from the source of the Little Miami River to the Indian boundary line established by the treaty of Greenville in 1795, the line designated as the westerly boundary line of the Virginia tract, *by an Act of [**420** Congress passed on the 23d day of March, 1804, entitled 'An Act to ascertain the boundary of the lands reserved by the State of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands,' shall be considered and held as such until otherwise directed by law;," and as said boundary line was run by Ludlow, under the directions of the Surveyor-General, pursuant to an Act of Congress, entitled, "An Act to extend and continue in force the provisions of an act entitled 'An Act giving a right of pre-emption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers in the territory north-west of the Ohio, and for other purposes,'" approved May 1st, 1802, and offered for sale at public auction at the Cincinnati land-office pursuant to the Act entitled "An Act making provision for the disposal of public lands in the Indian territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the time the above-recited Act, entitled "An Act to ascertain the boundary of the lands reserved by the State of Virginia, north-west of the river Ohio, for the satisfaction of the officers and soldiers on continental establishment, and to limit the period for locating said lands," approved 23d of March, 1804, was passed and took effect; and as the plaintiff's patent covers lands west of that line, and

south of the Greenville treaty line, and is based on an entry made in 1810, on a Virginia continental land warrant, which land had been surveyed and sold to the defendant pursuant to the Acts of Congress prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant.

3. That according to the true intent and meaning of the Act and deed of cession from Virginia to the United States, and the several Acts of Congress relative to the sale of the public lands to the United States, the lands lying between the rivers Scioto and Little Miami are bounded by a line extending from the source or point of land farthest removed from the mouths of these respective rivers from which the rain descending on the earth runs down in-**421** *] to their respective channels, along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami, which empty into the Ohio below the mouth of the Little Miami, as delineated on the diagram returned by the county surveyor for the defendant in this cause; and as the plaintiff's patent covers land west or without the boundary of the district so bounded as aforesaid, and is based on an entry on a Virginia continental land warrant, which entry was made in the year 1810, and which said entry and patent cover lands which had, pursuant to the Act of Congress, been surveyed and sold to the defendant prior to the date of the plaintiff's said entry, the plaintiff's patent is void, and their verdict ought to be for the defendant.

4. That if the line connecting the rivers Scioto and Little Miami cannot, according to the true intent and meaning of the said Act and deed of cession, and the several Acts of Congress for the sale of their public lands, be extended as stated in instructions last above asked, then that the line connecting the rivers Scioto and Little Miami, so as to include all the lands between the said two rivers must be extended from the sources of the Little Miami, parallel to the general course of the Ohio River until it intersect the river Scioto; and as the plaintiff's patent is based on a Virginia continental land warrant, which warrant had been located in 1810 on lands which had prior to the year 1810 been surveyed and sold to the defendant pursuant to the Act of Congress the patent of the plaintiff is void, and their verdict ought to be for the defendant.

5. That if the line connecting the rivers Scioto and Little Miami cannot, according to the true intent and meaning of the said Act and deed of cession, be extended as stated in either of the instructions asked for above, then that the sources of the said two rivers must be at that point in their respective channels, at which, from the union of several rivulets, brooks or creeks, sufficient water flows at an ordinary stage, on which to navigate small vessels laden; and that the line connecting said rivers must be a direct line from said sources so ascertained as aforesaid; and if, from the evidence, the jury shall find that the lands covered by **422** *] the plaintiff's patent are based on an entry covering lands without the limits of said Virginia military district so called, which had prior to the year 1810, pursuant to the Acts of Congress in such case made and provided, been surveyed and sold to the defendant, the plaintiff's

patent is void, and their verdict ought to be for the defendant.

6. That if the line connecting the rivers Scioto and Little Miami, according to the true intent and meaning of the said Act and deed of cession, cannot be extended, as stated in either of the instructions asked for as above, then that the sources of the said two rivers must be considered as commencing at that point in their respective channels, from which the water flows at all seasons of the year; and that said rivers must be connected by a direct line, run from said sources; and if, from the evidence, the jury shall find that the plaintiff's patent is based on an entry, covering lands without the limits of said Virginia military district, so called, which had prior to the year 1810, pursuant to the Acts of Congress in such case made and provided, been surveyed and sold to the defendant, the plaintiff's patent is void, and their verdict ought to be for the defendant.

7. That if the line connecting the rivers Scioto and Little Miami, according to the true intent and meaning of the said Act and deed of cession, cannot be extended, as stated in either of the instructions asked for above, then that the sources of the said two rivers must be fixed at that point in their respective channels, farthest removed from their respective mouths, at which water is found at all seasons of the year, and that a direct line, connecting said rivers, must be extended from said point; and if, from the evidence, the jury shall be of opinion that the plaintiff's patent covers land without said boundary, so fixed as aforesaid, and which is based on an entry covering said land, made in the year 1810, which had pursuant to the Acts of Congress of the United States been surveyed and sold to the defendant by the United States prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant.

8. That if the line connecting the said rivers Scioto and Little Miami, according to the true intent and meaning of the said Act and **[423** deed of cession, and the several Acts of Congress relative to the sale of the public lands of the United States, cannot be extended, as stated in either of the instructions asked for above, then that the sources of these streams are at that point, farthest removed from their respective mouths, from which the rain descending on the earth, runs down into their respective channels; and that the lands lying between these rivers are limited by a direct line run from those points; and if, from the evidence, the jury shall be of opinion that the plaintiff's patent covers land without the limits of said boundary, so stated as aforesaid, and which is based on an entry made in the year 1810, which had, pursuant to the Acts of Congress of the United States, prior to the said year 1810, been surveyed and sold to the defendant by the United States pursuant to the Acts of Congress, the plaintiff's patent is void, and their verdict ought to be for the defendant.

But the court declined giving the instructions asked for, to which refusal of the court the defendant, by his counsel, excepted, and prays the court here to sign and seal this bill of exceptions, which is done accordingly, July 19th, 1827.

This case was argued by *Mr. Scott* for the
Peters 2.

plaintiff in error, and by *Mr. Mason* and *Mr. Vinton* for the defendant. *Mr. Wirt*, Attorney-General, appeared for the plaintiff by order of the government of the United States, but was prevented taking part in the argument by indisposition.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered by the Supreme Court of Ohio for the county of Champaign, in an ejectment in which the lessee of Duncan M'Arthur was plaintiff, and John Reynolds was defendant. The plaintiff claimed the land in controversy, under a patent issued on the 12th day of October, 1812, founded on an entry made in the year 1810, on a military land warrant granted by the State of Virginia for services during the war or the revolution in the Virginia line, on continental establishment.

424*] *The title of the defendant is thus stated: The land was sold by the United States at their land-office in Cincinnati, in the year 1805, to Henry Van Meter. It reverted to the United States in the year 1813 on account of the non-payment of the purchase money; and was again sold, during the same year, at the same office, to Henry Van Meter, to whom a certificate of sale was issued, which he afterwards transferred to the defendant, John Reynolds.

The verdict and judgment were in favor of the plaintiff in the State Court. At the trial, the counsel for the defendant moved the court to instruct the jury on several points made in the cause; and excepted to the refusal of the court to give these instructions. The judgment of the State Court, having been against a title set up under several Acts of Congress, is brought before this court by writ of error, that the construction put on those Acts by that court may be re-examined. The inquiry will be, whether the court ought to have given any one of the instructions which were required. The several prayers for this purpose will be considered in the order in which they were made.

1. The first instruction asked is, that the lands west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line, had been withdrawn from appropriation under and by virtue of military land warrants prior to the year 1810; and that as the same had, pursuant to the Acts of Congress in such case made and provided, been directed to be surveyed and sold, and had accordingly been surveyed and sold to the defendant, prior to the year 1810, the plaintiff's patent is void, and their verdict ought to be for the defendant.

This motion does not question the bounds of the lands reserved by Virginia for military bounties, but supposing the tract of country west of Ludlow's line, east of Roberts's line, and south of the Indian boundary line to be within that reserve, asks the court to say, that Congress had, prior to the year 1810, when M'Arthur's entry was made, withdrawn it from appropriation under and by virtue of military land warrants.

425*] *Before deciding on the propriety of refusing or granting this prayer, it will be necessary to review the legislation of Congress on this subject.

Peters 2.

The Act of the 9th of June, 1794 (2 United States Laws, 440), taken in connection with the reservation in favor of their officers and soldiers contained in the deed of cession made by Virginia, unquestionably subjected the whole of the military reserve to the satisfaction of those warrants, for which the reserve was made. Had Congress, previous to the year 1810, withdrawn that portion of this reserve which lies between the line run by Ludlow, and that run by Roberts, from its liability to be so appropriated?

So early as the year 1785, Congress passed "an ordinance" (1 United States Laws, 563, 569) "for ascertaining the mode of disposing of lands in the western territory," in which, for the purpose of securing to the officers and soldiers of the Virginia line on continental establishment the bounties granted them by that State, it is ordained "that no part of the land between the rivers called Little Miami and Scioto, on the north-west side of the River Ohio, be sold or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers and persons claiming under them, the lands they are entitled, to agreeably to the said deed of cession and Act of Congress accepting the same.

The scrupulous regard which this clause in the ordinance of May, 1785, manifests to this condition made by Virginia in her deed of cession, is the more worthy of remark, because at that time no suspicion was entertained that the military warrants of Virginia would cover the whole territory; and it was even doubted, as the legislation of Congress shows, whether any part of that territory would be required for them. Even under these circumstances, Congress declared the determination not to sell or alienate any land between the Scioto and the Little Miami.

In May, 1796, Congress passed "an Act providing for the sale of the lands of the United States in the territory north-west *of [**426** the river Ohio, and above the mouth of Kentucky River." (2 United States Laws, 533.)

The second section enacts that, "the part of the said land which has not been already conveyed," &c., "or which has not been heretofore, and during the present session of Congress may not be appropriated for satisfying military land bounties, and for other purposes, shall be divided," &c.

This law, then, from which the whole power of the Surveyor-General is derived, excludes from his general authority all lands previously appropriated for military land bounties and for other purposes; and consequently excludes from it the lands between the Scioto and the Little Miami.

In May, 1800 (3 United States Laws, 385), Congress passed an Act to amend the Act of 1796, which enacts "that for the disposal of the lands of the United States directed to be sold by the original Act, there shall be four land-offices established in the said territory." The places at which these land-offices shall be fixed are designated in the Act, and the district of country attached to each is described. One of these is Cincinnati, the place at which the lands in controversy were sold, and the district attached to it is that below the Little Miami.

It is perfectly clear from the language of this Act, that it extends to those lands only which

were comprehended in the Act of May, 1796, and that no one of the districts established by it, comprehends the land in controversy. Any general phrases which may be found in the law must, according to every rule of construction, be limited in their application to those lands which the original Act authorized the Surveyor-General to lay off for the purpose of being sold. If he surveyed any lands to which that Act does not extend, he exceeded his authority, and the survey is not sanctioned by the law. If land thus surveyed by mistake has been sold, the sale was not authorized by the law under color of which it was made.

The counsel for the plaintiff in error has pressed earnestly on the court the grants made **427*** to John Cleves Symmes, and *to the purchasers under him. We are not sure that the argument on this point has been clearly understood, and have therefore examined that transaction, in order to discover its influence, if it can have any, on the question now under consideration.

In 1787 John Cleves Symmes applied to Congress for a grant to himself and his associates of the lands lying within the following limits, viz.: "Beginning at the mouth of the Great Miami River, thence running up the Ohio to the mouth of the Little Miami River; up the main stream of the Little Miami River to the place where a due west line; to be continued from the western termination of the northern boundary line of the grant to Messrs. Sargent, Cutler & Co. shall intersect the said Little Miami River; thence due west, continuing the said western line to the place where the said line shall intersect the main branch or stream of the Great Miami; thence down the Great Miami to the place of beginning."

In consequence of this petition, a contract was entered into for the sale of one million of acres of land, to begin on the bank of the Ohio, twenty miles along its meanders above the mouth of the Great Miami; thence to the mouth of the Great Miami; thence up that river to a place whence a line drawn due east will intersect a line drawn from the place of beginning, parallel with the general course of the Great Miami, so as to include one million of acres within these lines and the said rivers, and from that place upon the said Great Miami River, extending along such lines to the place of beginning, containing, as aforesaid, one million of acres.

The language of this contract does not indicate any intention on the part of Congress to encroach on the military reserve, which the ordinance of May, 1785, then in full force, had excepted from sale or alienation.

In 1792 (2 United States Laws, 270) Congress, at the request of John C. Symmes, passed an Act to alter this contract in such manner that the land sold should extend from the mouth of the Great Miami to the mouth of the Little Miami, and be bounded by the river **428*** *Ohio on the south, by the Great Miami on the west, by the Little Miami on the east, and by a parallel of latitude on the north, extending from the Great Miami to the Little Miami, so as to comprehend the proposed quantity of one million of acres."

The lands, then, which might be granted to John C. Symmes, in pursuance of this Act of

Congress, lay between the Great and Little Miami, and were to lie below the Little Miami. The Scioto is above that river; so that Congress could not have intended that this grant to Symmes should interfere with the military reserve.

On the 36th of September, in the year 1794, a deed was executed in pursuance of the Act of 1792, conveying to John C. Symmes that tract of land beginning at the mouth of the Great Miami River, and extending from thence along the river Ohio to the mouth of the Little Miami River, bounded on the south by the river Ohio, on the west by the Great Miami, on the east by the Little Miami, and on the north by a parallel of latitude to be run from the Great Miami to the Little Miami, so as to comprehend the quantity of 311,682 acres of land.

It is obvious that this patent does not interfere with the military reserve. But John C. Symmes had sold to several persons who purchased in the confidence that he would comply with his contract for one million of acres, and be enabled to convey the lands sold to them.

In March, 1799, Congress passed an Act declaring that any person or persons, who, before the first day of April, in the year 1797, had made any contract in writing with John C. Symmes for the purchase of lands between the Great and Little Miami rivers, which are not comprehended in his patent dated the 30th of September, 1794, shall be entitled to a preference in purchasing of the United States all the lands so contracted for at the price of two dollars per acre.

In March, 1801, Congress passed an Act extending this right of pre-emption to all persons who had, previous to the first day of January, 1800, made any contract in writing with the said John C. Symmes, or with any of his associates, for the purchase of lands between the Miami rivers within the *limits of a [**429** survey made by Israel Ludlow, in conformity to an Act of Congress of the 12th of April, 1792.

The provisions of this Act are supposed to contemplate the survey and sale of the lands which had been sold to John C. Symmes between the Miami rivers; in like manner as had been prescribed for other lands lying above the mouth of Kentucky by the Acts of 1796 and 1800. The right of pre-emption was limited to lands within Israel Ludlow's survey; but that survey contained less than 600,000 acres, and the contract of Symmes was for one million of acres; Congress therefore resumed the consideration of this subject, and in May, 1802, extended this right of pre-emption to all those who had purchased from John C. Symmes lands lying between the Miami rivers, and without the limits of Ludlow's survey. It cannot be doubted that this right of pre-emption, allowed to the purchasers under John C. Symmes, was limited to lands lying between the Miami rivers, and lying within his contract. Congress could never have intended that this contract should interfere with the military reserve. That reserve was of lands lying above the Little Miami. The sale to Symmes was of lands lying below that river. It was made while an ordinance was in full force, declaring the resolution of Congress not to alienate any part of that reserve. Their contract was made

in subordination to that ordinance, and cannot have intended to violate it. The terms of the contract do not purport to violate it. The land sold to Symmes, and the pre-emption rights allowed to the purchasers under him, are so described as to furnish no ground for the opinion that Congress could have suspected them to interfere with the military reserve. If the Scioto and the Great Miami, contrary to all probability, should take such a direction as to produce a possible interference between the lands sold to Symmes and the reserve which Congress had declared its resolution not to alienate, some difficulty might possibly arise in a case where one of the parties claimed under a military warrant, and the other under a pre-emption certificate. But that is not this case. The title of the plaintiff in error is under a purchase made at a sale of the lands of the United States at Cincinnati, by Henry Van Meter, who is not **430*** stated to have held a pre-emption certificate, or to have been a purchaser under Symmes.

The instruction which the court was asked to give is, that the land between the lines of Ludlow and Roberts had been withdrawn from appropriation, under and by virtue of military land warrants, previous to the year 1810. This withdrawal is not in express terms, but is supposed to be implied from a direction to survey the lands between the Great and Little Miami which had been exempted from the operation of the Acts of 1796 and 1800, under the idea that they were comprehended in the contract with Symmes. Congress could not suspect that the lands to be surveyed under this law could interfere with the lands lying between the Little Miami and the Scioto; and consequently cannot have intended by this Act to vary the boundary of the military reserve.

It has been very truly observed, that all the laws on this subject should be taken together. The condition inserted in the deed of cession of Virginia, which reserves the land lying between the Little Miami and the Scioto for the purpose of satisfying the warrants granted to the officers and soldiers of that State; the ordinance of May, 1785, declaring that no part of that reserve should be alienated; the contract with Symmes for the sale of lands lying between the two Miamis; the Acts relative to pre-emptions, and which direct the survey and sale of the lands lying between the Miamis, without any allusion to the military district, must be taken into view at the same time.

It is, we think, impossible to believe that Congress supposed itself, when directing the survey and sale of lands between the Great and Little Miami, to be abridging or altering the bounds of a district which Virginia had reserved in the deed of cession by which the country north-west of the Ohio had been conveyed to the United States.

When Congress designed to act on this subject the purpose was expressed, and overtures were made to the other party to the compact to obtain her co-operation.

In executing the Act of May, 1800, the Surveyor-General had caused a line to be run, from **431*** what he supposed to be the source of the Little Miami, towards what he supposed to be the source of the Scioto, which is the line denominated Ludlow's, and surveyed the lands

west of that line in the manner prescribed by the Act of Congress.

In March, 1804 (3 United States Laws, 592), Congress passed an Act establishing that line as the western boundary of the reserve, provided the State of Virginia should, within two years after the passage of the Act, accede to it. Virginia did not accede to it.

In 1812 (4 United States Laws, 455) Congress made another effort to establish this line. The President was authorized to appoint commissioners to meet others which should be appointed by Virginia, who were to agree on the western line of the military reserve, and cause the same to be surveyed and marked out. These commissioners met, and after ascertaining the sources of the two rivers, employed Mr. Charles Roberts to survey and mark a line from the source of the one to the source of the other. This line is called Roberts's line. The Virginia commissioners, however, refused to accede to this line.

This Act provided that, until an agreement should take place between the commissioners, the line designated in the Act of 1804, which is Ludlow's, should be considered and held as the proper boundary line. This enactment is provisional and prospective.

In 1816 (6 United States Laws, 282) Congress passed an Act declaring that from the source of the Little Miami to the Indian boundary line established by the treaty of Greenville, Ludlow's line should be considered as the western boundary of the military reserve, until otherwise directed by law; and that from the said Indian boundary line to the source of the Scioto River, the line run by Charles Roberts shall be so considered.

When we review the whole legislation of Congress on this subject, we think the conclusion inevitable, that in the Acts of 1801 and 1802, which have been cited, the Legislature did not consider itself as altering the bounds of the military district, or as withdrawing before the year 1820 any part of the territory lying between the Little Miami and the Scioto from being appropriated by the mili- **432** tary land-warrants granted by the State of Virginia. If those Acts have this effect, it is one which was not intended.

Before a court can be required to declare the law which would arise between conflicting statutes of this character, the fact that they do conflict ought to be clearly established. The counsel for the plaintiff in error has argued this part of the case as if the fact was established; as if a line drawn from the source of the Little Miami to the source of the Great Miami would include the land between Ludlow's line and that of Roberts, and this court has thus far treated the question as it has been argued. But this fact is not established in this case. It is not among the facts agreed by the parties, nor was the State Court required to instruct the jury, that if they should find the land west of Ludlow's and east of Roberts's line to lie between the Little and Great Miami, or within Symmes' purchase, "that it had been withdrawn from appropriation, under and by virtue of said military land-warrants, prior to the year 1810," and that M'Arthur's patent was consequently void. The court was not required to state the law hypothetically, as being depend-

ent on the fact; but to assume the fact, and to state the law positively upon that assumption. The record, we think, did not authorize the court to consider this fact as established, and to withdraw it from the jury.

There is no error in refusing this instruction.

2. The counsel for the defendant then asked the court to instruct the jury that, as the third section of the Act of the Congress of the United States, of the 11th of April, 1818, declares: "That from the source of the Little Miami River to the Indian boundary line established by the treaty of Greenville in 1795, the line designated as the westerly boundary line of the Virginia tract by an Act of Congress passed on the 23d day of March, 1804, entitled 'An Act to ascertain the boundary of the lands reserved by the State of Virginia north-west of the river Ohio for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands,' shall be considered and held as such until otherwise directed by law;" **433*** and as said "boundary line was run by Ludlow, under the directions of the Surveyor-General, pursuant to an Act of Congress, entitled 'An Act to extend and continue in force the provisions of an Act entitled 'An Act giving a right of pre-emption to certain persons who have contracted with John Cleves Symmes, or his associates, for lands lying between the Miami rivers, in the territory north-west of the Ohio, and for other purposes,'" approved May 1st, 1802, and offered for sale at public auction at the Cincinnati land-office, pursuant to the Act entitled "An Act making provision for the disposal of public lands in the Indiana territory, and for other purposes," approved March 26th, 1804, must be construed as having relation back to the time the above-recited Act, entitled "An Act to ascertain the boundary of the lands reserved by the State of Virginia north-west of the river Ohio for the satisfaction of the officers and soldiers on continental establishment, and to limit the period for locating said lands," approved 23d of March, 1804, was passed and took effect; and as the plaintiff's patent covers lands west of that line and south of the Greenville treaty line, and is based on an entry made in 1810 on a Virginia continental land-warrant, which land had been surveyed and sold to the defendant pursuant to the Acts of Congress prior to the year 1810, the plaintiff's patent is void and their verdict ought to be for the defendant.

The prayer for this instruction is founded on the assertion that Ludlow's line was run under the direction of the Surveyor-General, pursuant to the Act of Congress of the 1st of May, 1802, granting pre-emption rights to purchasers from John Cleves Symmes; and that the land in controversy was sold pursuant to the Act of the 26th of March, 1804, making provision for the disposal of public lands in the Indian territory, and for other purposes.

If by the words "pursuant to an Act of Congress," as used in this prayer, it is intended to say that the boundary line run by Ludlow was correctly run as required by the Act of May 1st, 1802, and that the sale of the land in controversy was authorized by the Act of the 26th of March, 1804, then the court is required to decide facts not admitted by the parties,

*which are proper for the consideration [**434** of the jury, and then to declare the law arising upon those facts. If those words mean no more than that the line was actually run under the authority of the Surveyor-General, and that the land in controversy was actually sold at the land-office in Cincinnati by the officers of government, the question fairly arises, what influence have these facts on the rights of the parties? Do they, taken in connection with the Acts of the 23d of March, 1804, and of the 11th of April, 1818, justify the inference which the court is asked to draw, that the Act of 1818 relates back to the Act of 1804, and takes effect from its date, so as to avoid a patent issued in October, 1812, on an entry and survey made in 1810?

It has already been stated that the Act of the 23d of March, 1804, establishes Ludlow's line, not absolutely, but on condition that Virginia should assent to it; and that Virginia never did assent to it.

It has also been stated that in 1812 Congress authorized the President to appoint commissioners who should proceed in concert with such as might be appointed by Virginia, to run a line which should constitute the western boundary of the Virginia military reserve. These commissioners did meet, and did cause a line to run from the source of the Little Miami to the source of the Scioto. This is called Roberts's line. The commissioners of Virginia did not assent to this line. Consequently it is of no operation.

The Act of April the 11th, 1818, declares that Ludlow's line shall be considered and held as the true western boundary of the Virginia military reserve until otherwise directed by law. But from what time shall it be so considered and held? The language of the law is entirely prospective. It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forward, not backward; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable. No words are found in the Act of 1818 which render this odious construction indispensable. The language is, that Ludlow's line shall be considered and held; that is, shall in future be considered and held as the "true west- [**435** ern boundary of that reserve. That this was the understanding of the Legislature, is rendered the more probable from the clause which relates to patents. It does not annul patents already issued, but declares that no patent shall be granted on any location and survey that has been or may be made west of this line. Patents which have been granted are not affected directly by the words of this law, and must depend on the pre-existing Act of Congress.

The argument is, that this Act declaring that Ludlow's line shall be considered and held as the westerly boundary line of the reserve until otherwise directed by law, proves that, according to the true construction of the deed of cession, this line is in reality the true boundary, and therefore that all titles previously acquired to lands lying west of this line are invalid.

We cannot admit the correctness of this argument.

That in the state of things which existed in 1812 and 1818, Congress might establish the western boundary of the military reserve, so as to affect titles thereafter to be acquired, is not questioned. Congress might fix a reasonable time within which titles should be asserted, and might annex conditions to the extension of this time. But to look back to titles already acquired, to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact and to adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative power. This construction can never be admitted by the court unless it be rendered indispensable by the language of the Act. We do not think that the language of this Act does require it.

If the language of the statute does not require this construction, neither do the facts that Ludlow's line was run by order of the Surveyor-General, and that the land in controversy was sold by the regular agents of government. These facts cannot, we think, carry back the Act of 1818 to 1804, and give it a retrospective operation.

We do not inquire into the power of Congress to pass such an Act. There is undoubtedly much force in the argument suggested at the bar, that the general power of legislation, **436*** *which Congress could exercise over the territory north-west of the Ohio, passed to the new government when the territory was erected into a State; and that Congress retained only the power of a proprietor with a capacity "to dispose of and make all needful rules and regulations respecting the property." But it is unnecessary to pursue this inquiry, because we are of opinion that this construction is inadmissible.

The court therefore did right in rejecting this prayer.

The third instruction asked by the defendant is in these words: that, according to the true intent and meaning of the Act and deed of cession from Virginia to the United States, the land lying between the rivers Scioto and Little Miami is bounded by a line extending from the source or point of land farthest removed from the mouths of these rivers, from which the rain descending on the earth runs down into their respective channels, along the tops of the ridges, dividing the waters of the Scioto from the waters of the Great Miami, which empties into the Ohio below the mouth of the Little Miami, as delineated on the diagram returned by the county surveyor for the defendant in this case; and as the plaintiff's patent covers land west or without the boundary of the district so bounded as aforesaid, and is based on an entry on a Virginia continental land warrant, which entry was made in the year 1810, and which said entry and patent cover land which had, pursuant to the Acts of Congress, been surveyed and sold to the defendant prior to the date of the plaintiff's said entry, the plaintiff's patent is void; and their verdict ought to be for the defendant.

In the case of *Doddridge v. Thompson* (9 Wheaton, 469), this court said that the territory lying between two rivers is the whole country from their sources to their mouths; and a straight line drawn from the source of one riv-

er to the source of the other was considered, in that case, as furnishing the western boundary of the lands lying between them. One or both of the rivers may pursue such a course that a straight line from the source of one to the source of the other may cross one or both of them. Such a case may form an exception to the universal application of the straight line, *and may go far in showing that no **[*437]** general rule can be laid down which will fit every possible case. But this obvious and reasonable rule has been adopted by Congress as well as by this court. The Act of 1804 adopts the straight line. The Act of 1812 obviously contemplates a straight line, and the Act of 1818 adopts Ludlow's line, from the source of the Little Miami to the Indian boundary line established at the treaty of Greenville, and the line run by Roberts from the Indian boundary to the source of the Scioto.

The counsel for the defendant in the State Court abandoned the rule adopted by Congress and by this court, by taking for his commencement "that point of land which is farthest removed from the mouths of the respective rivers, and from which the rain descending on the earth runs down into their respective channels;" and to draw a line from that point along the top of the ridges dividing the waters of the Scioto from the waters of the Great Miami.

We feel some difficulty in comprehending the principle which has suggested and can sustain this rule. Why should a line drawn along the top of the ridges which divide the waters of the Scioto from those of the Great Miami, constitute the true boundary of the country lying between the Great and Little Miami? Would such a line certainly lead to the source of the Scioto or to that of the Little Miami? We can give no satisfactory answer to these inquiries. It is some objection, too, to this instruction, that the jury would be much and unnecessarily perplexed in finding the point of land farthest removed from the mouth of each river, and from which the rain descending on the earth runs down into their respective channels. If any point exists which would fit all parts of the description, and could be found by the jury, it is by no means certain that such point would be in a line which would mark the boundary of the country between the two rivers.

The rule which the court was asked to lay down appears to us to be entirely arbitrary; and this prayer was properly rejected.

4. The fourth instruction has been abandoned by the plaintiff in error.

*5. The proposition on which the **[*438]** fifth prayer depends, is that the sources of the two rivers must be at that point in their respective channels at which, from the union of several streams, sufficient water flows at an ordinary stage on which to navigate small vessels laden.

This rule for ascertaining the source of a river is entirely new in this country. A stream may acquire the name of a river which is not navigable in any part. A river which is navigable may retain that name above the highest navigable point. The meaning of words as commonly used must be changed before the source of a river can be confounded with its highest navigable point

The court did not err in rejecting this prayer.

6. The proposition on which the sixth prayer depends is, "that the sources of the two rivers must be considered as commencing at that point in their respective channels from which the water flows at all seasons of the year."

Is this proposition so invariably true as to become a principle of law? We think it is not. A stream may acquire the name of a river, in the channel of which, at some seasons of extreme drought, no water flows. For a great portion of the year parts of a stream may flow in great abundance, in which, during a very dry season, we may find only standing pools. It would be against all usage to say that the general source of the river was at that point in its channel from which the water always flows.

This prayer, we think, ought not to have been granted.

7. The seventh prayer depends on the proposition, that the sources of the two rivers must be fixed at that point in their respective channels, farthest removed from their respective mouths, at which water is found at all seasons of the year.

If the terms of this proposition be taken according to their most obvious import, it would seem to vary from the sixth only in this: that the sixth fixes the source of a river at the point in the channel from which water flows at all seasons in the year; while the seventh fixes it at that point which is farthest removed from its mouth, at which water is found at all seasons. Understanding it in this sense, the proposition **439*** would not raise the question, which of several was the main branch; but at what point the source of that main branch was to be found. The remarks made on the sixth prayer would apply with equal propriety to this; and the court would come to the same conclusion on both. But we understand from the argument, that the counsel for the plaintiff in error, intended, by this prayer, to furnish a rule by which the main branch might be designated. That rule is, that the branch in whose channel water might be found furthest removed from the mouth of the river, is its main branch.

Is this proposition universally true? That branch of a river, which is entitled to the appellation given to the main river, is a conclusion of fact to be drawn from the evidence in the cause. Consequently no general rule can be laid down, which will, in all cases, guide us to a correct conclusion. One of the forks may have retained the name of the main river, in exclusion of the others. The Scioto and Miami are both Indian names, and if any one branch of either had received from the natives, and retained exclusively, the name given to the main river, that would have been the stream referred to in the reserve, contained in the deed of cession; although water might have been found in a dry season of the year, in the channel of some other, at a greater distance from the mouth of the river; or the white men, who explored the country before the deed of cession was executed, may have fixed the name on some one of the branches of the respective rivers.

When France ceded to Great Britain all her pretensions to the country lying east of the Mississippi, "from its source to the river Iberville," no man could have been so extravagant as to assert that the source of the Missis-

siippi was to be looked for through all its branches, and fixed at that point in the channel of either in which water might be found farthest removed from the mouth of the river.

The size of the rivers, and the notoriety of the names by which they were designated, place the unreasonableness of such a pretension in so strong a point of view, that we can scarcely bring ourselves to suppose that there is any resemblance *between the case put by [***440**] way of illustration, and that under consideration. And yet, what is the real difference in principle? If one branch of a small river has by consent retained the name of the main river, in exclusion of the others, that branch must be considered, in the absence of other circumstances, as the true boundary intended by the parties, in a deed which calls for the stream by its name. The fact may be less certain and less notorious; but, if it exists, it must be followed by the same consequences.

If neither branch had notoriously retained the name of the river, the main branch is entitled to it. But the main branch is not necessarily that in whose channel water might be found at all seasons of the year, at the point farthest removed from its mouth. The largest volume of water is certainly one indication of the main stream, which does not necessarily accompany that which the counsel for the plaintiff in error has selected as the sole criterion by which it is to be determined. The length of the stream is another. It is obvious, that two branches may pursue such a course that the source of the longest may be nearer the mouth of the river than that of the shortest.

We think the rule proposed in this prayer does not furnish a certain guide to conduct us to the source of the river; and therefore the instruction ought not to have been given.

8. The eighth prayer requires the court to instruct the jury that the source of each river is at that point farthest removed from its mouth, from which the rain runs down into its channel.

We cannot perceive in the rule which this instruction proposes, any principle which will conduct us to the source of the main stream. Every objection to granting the seventh prayer, applies with equal force to this. They need not be repeated.

The court did not err in rejecting it.

The instructions to the jury, for which the plaintiff applied to the State Court, are some of them mixed questions, involving fact with law, and requiring the court to decide the fact, and then to declare the law upon that fact. Others propose a rule, as of universal application, to ascertain the main *branch of [***441**] a river, and the source of that main branch, which would unquestionably, in many cases, mislead us. They propose one single circumstance, in exclusion of all others, as being the infallible evidence of a complex fact depending on a number of varying circumstances.

The court very properly refused to give any of these instructions.

This court is of opinion that there is no error in the judgment of the State Court, and that it ought to be affirmed with costs.

442*] *SOLOMON SOUTHWICK, SPENCER STAFFORD, AND JOHN VAN NESS GATES, *Plaintiffs in Error*,

v.

THE POSTMASTER-GENERAL OF THE UNITED STATES.

District Court of United States.

A District Court of the United States, performing the appropriate duty of a District Court, is not sitting as a Circuit Court, because it possesses the powers of a Circuit Court also.

WRIT of error to the Circuit Court of the Southern District of New York.

This suit was commenced, originally, by the Postmaster-General, in the District Court of the Northern District of New York, in May, 1822, against Solomon Southwick and his co-defendants, who were his sureties, to recover six thousand dollars, the penalty of a bond given by them for the faithful discharge of his duties as postmaster of the city of Albany. In 1824, judgment was rendered in favor of the Postmaster-General, and a writ of error was thereupon brought, and the record certified to the Circuit Court of the Southern District of New York. The judges of the Circuit Court divided in opinion upon several points which arose in the case, and the same were certified to this court; where they were considered and decided at January term, 1827. The decision of this court having been certified to the Circuit Court, the judgment of the District Court was affirmed by the circuit, in May term, 1828.

Upon this judgment this writ of error was prosecuted, and now *Mr. Wirt*, the Attorney-General of the United States, moved to dismiss the same.

He contended that the phrase in the Act of Congress, passed April 29, 1812 (1 Sess., 12 Congress, ch. 71), "sitting as a circuit court," is confined to such causes as are exclusively of circuit court jurisdiction; and does not embrace causes of which district courts as such, and circuit courts as such, have a concurrent jurisdiction.

He argued, that this is the correct construction of the Act of Congress, and is consistent **443*]** with the judicial system; because, *in no case has a writ of error been given to reverse the judgment of a circuit court, in a cause brought up from a district court; provided such cause was within the ordinary jurisdiction of a district court. In such cases, the judgment of the circuit court has been uniformly final and conclusive. If the Act in question has introduced a different rule, in reference to causes decided in the Northern district court of New York, it is an anomaly in our judicial legislation.

The district courts have jurisdiction of post-office bonds. (12 Wheaton, 136; *Dox et al. v. The Postmaster-General*, 1 Peters, 318.)

He submitted that the Act of 1826 does not reach cases within the ordinary jurisdiction of the district courts. If it be otherwise, it must be shown that, in fact, the District Court sat as a circuit court; and this cannot be established in the case before the court.

He inquired if the judgment of the District Court, in this cause, could have been removed

directly to the Supreme Court under the Act of 1826. Certainly not.

The Act creating the Northern District Court, was designed to extend to that district the benefit of a circuit court jurisdiction; not to confer circuit court powers, concurrent with those which it possessed in its appropriate character. It would have been idle and useless to have intended otherwise, and therefore cannot be presumed.

Mr. Taylor, for the plaintiffs in error, in opposition to the motion, urged that the appropriate original jurisdiction of the District Court, in its general features, relates to admiralty and maritime causes, to seizures under the revenue laws, to petty offenses, and to civil suits when the United States is plaintiff, and the sum in controversy does not exceed five hundred dollars. It is the inferior court of the United States.

The appropriate original civil jurisdiction of the Circuit Court extends to all civil suits where the United States is plaintiff, and the matter in controversy exceeds five hundred dollars; or when an alien is a party; or the suit is between a *citizen of the State where [*444 the action is brought, and a citizen of another State.

The District Court may, indeed, exercise jurisdiction of civil causes in behalf of the United States, where the matter in controversy exceeds five hundred dollars, but in all such cases the jurisdiction of the district and circuit courts is concurrent. It is to be presumed that the court sits in its superior character, whenever the matter in controversy will authorize this to be done.

This presumption is strengthened by the consideration that the parties have a right in the one case to have the proceedings reversed, and the errors which may happen corrected by this court, which is of common right; and which is denied to them upon the principles claimed for the Postmaster-General.

The propriety of a liberal construction of the Act of Congress, for the purposes of allowing a review of the District Court for the Northern district, will be apparent, when the history of that court for several years subsequent to 1811, shall be considered.

In 1812 the judge of the New York District Court became incapable of discharging the duties of his office. Hence the Act of April, 29, 1812, which authorized the appointment of an additional judge of the District Court, for the District of New York. The Act of April 9, 1814 (2d Session of the 13th Congress, ch. 108), divided the original New York district into two districts, and assigned a district judge to each.

It provides "that the District Court in the said Northern District of New York, shall, besides the ordinary jurisdiction of a district court, have jurisdiction of all causes except of appeals and writs of error, cognizable by law in a circuit court;" and writs of error shall lie from decisions thereon, to the Circuit Court of the Southern District of New York, in the same manner as from other district courts, to their respective circuit courts.

Writs of error would lie equally in all cases, whether the court was exercising its ordinary or extraordinary jurisdiction.

In the northern district, until the Act of the **445***] 3d of March, *1815, there was but one Attorney-General, and the marshal was appointed and commissioned for both courts, until the Act of March 3d, 1825.

Mr. Taylor considered that the Act of the 3d of March, 1817, revived and continued the suits and proceedings which had been discontinued in the Northern District of New York, and that it authorized the judges of the southern district to hold the courts therein, either singly or jointly, with the judge of the northern district.

Under this Act the same difficulties arose in conducting the business of the northern district, which had been formerly experienced in the southern district. To remedy these evils, at the first session of the 15th Congress, the Act of April 3d, 1818, was passed. That Act required the judge of the northern district to hold his courts, unless he gave timely notice of his inability to the judge of the southern district; in which case the latter was required to act as his substitute. Suits and proceedings were again revived; actions commenced in the former district of New York were transferred, and actions thereafter to be commenced were limited to the district where they might or did arise; and the original jurisdiction of the Circuit Court of the southern district was confined to actions arising there.

No further legislation took place relative to these courts until the 22d of May, 1826, when the Act was passed allowing appeals and writs of error to this court, from decisions of the northern District Court, "when exercising the power of a circuit court;" and from decisions thereafter to be made by the Circuit Court for the southern district, in causes removed to the Circuit Court from the District Court of the northern district, "sitting as a circuit court."

At the time the former writ of error was brought to remove this cause from the northern District Court to the Circuit Court of the southern district, it was not legal to prosecute it to this court. Similar causes may now be removed, and here reviewed. This, he argued, furnished a reason for the second clause of the Act of 1826.

These Acts afford an answer to the inquiry, whether the northern District Court, in deciding this cause, "was sitting *as a circuit court." The expression in the Act of 1814 is, "causes cognizable by law in a circuit court," and in that of May, 1826, it is, "when exercising the powers of a circuit court."

Was not this cause cognizable by law in a circuit court? Would not such a court, in entertaining jurisdiction over it, be in the exercise of its appropriate powers? If so, the District Court was "sitting as a circuit court."

The parties were proper for the Circuit Court; the nature of the action was one involving a large sum, and questions were presented of deep interest, both as to their responsibility as sureties, and the character of the principal in the bond. The allegations made by the defendants were supported by the finding of the jury, and they went to show that the sureties were exonerated, and in judgment of law were discharged from the bond. The doubts and difficulties of the case were manifested by the division of opinion of the judges of the south-

ern Circuit Court. These matters are sufficient to give the District Court of the northern district, jurisdiction as a circuit court. The Act of 1826 allows writs of error from the District Court only "when exercising the powers of a circuit court," and this is done on the presumption that these powers were exercised on subjects proper for them.

He further contended that the Act of 1826 was a remedial statute, and was entitled to be viewed most favorably to parties to whom it was intended to give relief. If its provisions do not embrace this case, it will stand almost wholly inoperative on the statute book.

Had the Circuit Court, when the case was first before it, decided that the facts found by the jury discharged the parties to the bond, the United States would, by their law officer, have considered it altogether reasonable that the opinion should have been reviewed by this court. The plaintiffs in error claim no more than the application of the same just principle to their case.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

*This is a motion to dismiss a writ of **[*447]** error to a judgment rendered in the Court of the United States for the Seventh Circuit and Southern District of New York, in favor of the Postmaster-General. The foundation of the motion is, that this court has no jurisdiction of the cause.

The original judgment was rendered in the court for the Northern District of New York, on which Congress had conferred jurisdiction as a circuit court also. That judgment was removed into the Circuit Court sitting in the southern district by writ of error, and was affirmed in that court.

In May, 1826, Congress enacted "that appeals and writs of error shall lie from decisions in the District Court for the Northern District of New York, when exercising the powers of a circuit court; and which may be made by the Circuit Court for the Southern District of said State, in causes heretofore removed to said Circuit Court from the said District Court, sitting as a circuit court, to the Supreme Court of the United States, in the same manner as from circuit courts."

The doubt respecting the jurisdiction of the court is produced by this Act.

By the Judicial Act the district courts have cognizance concurrent with the Circuit Court of all cases where the United States sue. By the Act of the 3d of March, 1815, Vol. IV., p. 855, it is enacted that the district courts of the United States shall have cognizance, concurrent, &c., of all suits at common law where the United States or any officer thereof, under the authority of any Act of Congress, shall sue, &c. This Act gave the District Court jurisdiction of all suits brought by the Postmaster-General. It has been construed by this court to give the circuit courts cognizance of the same causes.

The district courts which exercise circuit court jurisdiction, do not distinguish in their proceedings whether they sit as a circuit or a district court. That is determined by the subject-matter of their judgments. Their records are all kept as the records of a district court. If the court for the Northern District of New

York sat as a circuit court when the original judgment was rendered against the plaintiff 448*] *in error, this court can take jurisdiction of the judgment affirming it, which was rendered in the Circuit Court; if the original judgment was rendered by a district court, no writ of error lies to the judgment of affirmance pronounced in the Circuit Court.

Had the Court for the Northern District of New York possessed no circuit court powers, it could still have taken cognizance of this cause. By conferring on it the powers of a circuit court, Congress has added nothing to its jurisdiction in this case. In taking cognizance of it, a district court has exercised the ordinary jurisdiction assigned to that class of courts. No extraordinary powers were brought into operation. We cannot say that a district court, performing the appropriate duty of a district court, is sitting as a circuit court, because it possesses the powers of a circuit court also.

The writ of error must be dismissed, this court having no jurisdiction in the case.

This cause came on to be heard on a transcript of the record from the Circuit Court of the United States for the Southern District of New York, and on the motion of the Attorney-General made in this cause at a prior day of this term, to wit, February 7th, 1829, to dismiss this cause for want of jurisdiction, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the writ of error in this cause be, and the same is hereby dismissed for want of jurisdiction.

Cited—1 Wood. & M., 448.

449*]*PLOWDEN WESTON ET AL., *Plaintiffs in Error*,

v.

THE CITY COUNCIL OF CHARLESTON,
Defendants.

State tax of federal securities—jurisdiction—writ of error—"suit"—"final judgment"—Constitution of the United States.

A tax imposed by a law of any State of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional.

The power of this court to revise the judgments of State tribunals, depends on the 25th section of the Judiciary Act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined, and reversed or affirmed in the Supreme Court of the United States." [463]

The city council of Charleston, exercising an authority under the State of South Carolina, enacted an ordinance, by which a tax was imposed on the

six and seven per cent. stock of the United States; and in the Court of Common Pleas of the Charleston District, an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance violated the Constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the Constitutional Court, the highest court of law of the State; and in that court it was held that the ordinance did not violate the Constitution of the United States, and a writ of error was prosecuted on this decision to this court. Held, that the question decided by the Constitutional Court was the very question on which the revising power of this court is to be exercised. [464]

A writ of error to this court may be prosecuted, where by the judgment of the highest court of the State of South Carolina a prohibition, issued in a State court, to prevent the levying of a tax which was imposed by a law repugnant to the Constitution of the United States, was refused on the ground that the law was not so repugnant to the Constitution. [464]

The term "suit" is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice in which an individual pursues that remedy in a court of justice which the law affords him. [464]

The words "final judgment," in the 25th section of the Judiciary Act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause; and it is not required that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section. [464]

It is not the want of original power in an independent sovereign State to prohibit loans to a foreign government, which restrains the State Legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments. The grant of the power, and the declaration of supremacy, is a declaration that no such restraining or controlling power shall be exercised. [468]

THIS was a writ of error to the Constitutional Court of South Carolina. [*450]

On the 20th of February, 1823, the city council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provides "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted), twenty-five cents upon every hundred dollars."

In the Court of Common Pleas for the Charleston District, the plaintiffs in error, in May, 1823, filed a suggestion for a prohibition, as owners of United States stock, against the city council of Charleston, to restrain them from levying under the ordinances, on six and seven per cent. stock of the United States and the tax imposed under the ordinance: on the ground that the ordinance, so far as it imposes a tax on the stock of the United States is contrary to the Constitution of the United States.

The prohibition having been granted, the city council applied to the Constitutional Court, the highest court of law in the State, to reverse the order, on the ground that the ordinance was

NOTE.—Appellate jurisdiction of Supreme Court of U. S. to review final judgments of State courts.

See notes to Matthews v. Zane, 4 Cranch, 382; Martin v. Hunter, 1 Wheat., 304; Houston v. Moore, 3 Wheat., 433; Gibbons v. Ogden, 6 Wheat., 438; Cohens v. Virginia, 6 Wheat., 264.

not repugnant to the Constitution of the United States; and the proceedings in the case having been removed to the said court, the said court in May term, 1823, by a majority of their judges the ordinance, and three against it), decided that (for being in favor of the constitutionality of the said ordinance did not violate the Constitution of the United States, in imposing a tax upon the holders of United States stock. From this decision the relators appealed by writ of error to the Supreme Court of the United States.

The error assigned in this court was, that **451***] the judgment *of the Constitutional Court was erroneous, in that it decided the ordinance of the city council of Charleston not to be repugnant to the Constitution of the United States.

The case was argued by *Mr. Hayne* for the plaintiffs in error, and by *Mr. Cruiger* and *Mr. Legare* for the defendants.

The counsel for the plaintiffs in error submitted, that if the course of proceeding adopted by the plaintiffs in error was not approved of, by requiring a prohibition in the Court of Common Pleas, and on the decision of the Constitutional Court being against them by taking the writ of error, some other mode would be employed. It was the wish of all the parties to have the decision of this court on the question involved in the case; and a ready and entire acquiescence would be yielded to the judgment of the court by all who were interested. It was submitted to the court, that for the purposes of justice, the court would give an opinion upon the matter assigned for error; and if the form in which the case had been brought up was not proper, the judgment of the court would be equally operative, and would be yielded to by the parties, plaintiffs and defendants in error.

The subject in controversy is one of proper cognizance for this court. It involves a most important constitutional question; the right of the States, or of State authorities, to tax the funded debt of the United States.

The subject-matter of the case belongs to this court. The soundest rule that can be adopted is, that when the matter in question belongs to the jurisdiction of the federal courts, a liberal construction in favor of the powers of the court over it should be given.

The question in this case concerns the vital means of the nation; and the power claimed to be exercised under the ordinance, would interfere with those means on emergencies of the deepest interest. It is a constitutional question, and as such is peculiarly under the guardianship of this court.

The writ of error is to the highest tribunal of the State of South Carolina; and the decision of that court has been in favor of the constitutionality of the ordinance; thus bringing **452***] ing *the case fully within the 25th section of the Judiciary Act. Let this court certify its opinion, and the controversy will be at an end.

1.—*HUGER, J., dissentiente.* This was an application for a prohibition to restrain the treasurer of the city of Charleston from levying a tax, imposed by a city ordinance, on six and seven per cent. stock of the United States. The words of the ordinance are: All personal estate, consisting of bonds, notes, &c., six and seven per cent. stock of the United States, or other obligations, upon which

On more occasions than one, when the court has felt some embarrassment as to its jurisdiction, it has expressed an opinion upon important questions; and when the general good required a decision. (*United States v. Kirkpatrick*, 9 Wheaton, 720.)

2. The Act of Congress organizing the courts of the United States, authorizes this court to form and mould its process, so as to enforce and carry into effect the objects and purposes for which the federal courts were established. It is conceived that the writ of prohibition is a mode of exercising jurisdiction which is essential to those purposes. There is a strong analogy between the prohibition asked in this case, and those issued to district courts under the law. But if the writ of prohibition may not be adopted, and the court should decide this case in favor of the plaintiffs in error, the case may be remanded to the Court of Common Pleas for the Charleston District; and should that court refuse to proceed as required, the Supreme Court may itself enforce its judgment.

Upon the general question, the counsel for the plaintiffs in error argued, that the ordinance does not impose a tax on all public funds, but specifically on the six and seven per cent. stock of the United States. Thus there are selected, as the particular object of taxation, those debts of the government of the United States; and the sum the government has stipulated to pay for the loan is diminished to the extent of the tax. The contract of the general government is invaded, and its credit impaired. Its competency to negotiate loans may be destroyed by the admission of this power of taxation. There are two sources of revenue which are essentially the right of the general government—that of imposing duties, and that of borrowing money on the credit of the nation. The safety of the whole depends upon the free and undisturbed exercise of these powers. In peace, the first is necessary to revenue; in war, the second *is vital to de- [***453** fense and success. If these powers and rights are not guarded and preserved, the functions and purposes of the Union will be suspended and destroyed.

There is no warrant for this tax, to be derived from the opinion of this court in the case of *M'Culloch v. The State of Maryland* (4 Wheaton, 316). The court, at the close of the opinion delivered in that case, sanction a tax on property held by citizens of Maryland in the Bank of the United States, in common with other property throughout the State; but they say expressly, that “a particular tax upon the operation of an instrument employed by the government to carry its powers into execution, is void.”

Mr. Hayne presented, as a part of his argument, the opinion of *Mr. Justice Huger* in the Constitutional Court; who, with *Nott* and *Bay*, *Justices*, dissented from the opinion of the majority of the court.¹

interest has been or will be received during the year, over and above the interest which has been paid (except, &c., &c.), twenty-five cents on every \$100. The prohibition was ordered. A motion is now submitted for the reversal of that order. I am unwilling, on so important a question, merely to express my dissent from the judgment of the court. It is now for the first time agitated, and

454*] *Mr. Cruger and Mr. Legare*, for the defendants in error, contended that a writ of error could not be sustained on proceedings in prohibition.

455*] *Should the Supreme Court reverse the judgment below in this case, a mandate will*
 456*] *be directed to the inferior State court.* (3 Dall., 342.) In the event of the State court declining or refusing to carry that mandate
 457*] into effect, a question will then arise as to the mode of proceeding to be adopted as a remedy. That a futile exercise of jurisdiction may not on this occasion take place, the difficulty ought to be anticipated; for if it be insurmountable, this tribunal will not, from self-respect, hold cognizance of the principal inquiry involved in the present suit.

Unless the Supreme Court acts in this matter through the intervention of the State tribunal, it must issue a prohibition of itself, ad-

ought to be fully discussed that it might be better understood. It affects the use of a power, as essential to the general government in periods of difficulty and danger, as any other which the people have delegated to it. If the city council of Charleston can tax the stock of the United States, *ex nomine*, the States can; and if the States can, it is impossible not to perceive that the fiscal operations of the general government may be completely frustrated by the States. It will be in vain for Congress to pass acts authorizing the Secretary of the Treasury to borrow money; if the holders of their stock can be taxed for having done so by the States. Congress may offer ten per cent. for loans, but who will lend, if the States can appropriate the whole to their own use? Whether the States will do so or not may be problematical, but if they can do so, the risk of their doing so must be covered by the terms on which the loans will be made. There is but one substantial security for the proper administration of our governments—the immediate responsibility of the administrators thereof to the people. If, however, the people have or feel no interest in the measures of a government, its administrators are only nominally responsible; they will only be checked where they act in derogation of what is understood or felt to be the interest of their constituents. Remote interests are not seen by the better informed, and they always must present grounds for much difference of opinion, even among the best informed. It is not a sufficient guard to the powers of the general government, that the constituents of the administrators of the State governments have a remote interest in the preservation of those powers, or in an unembarrassed exercise of them by the general government. They must not be seen, or may not be understood, and the very case before us presents a full illustration of the truth. No government, not revolutionary, has ever attempted to tax its own stock, and among others, for two very satisfactory reasons. 1. Because such a tax must necessarily operate injuriously upon all future loans; and 2. Because there is in fact a violation of contract in so doing, and therefore immoral and impolitic. Under the influence of these reasons, the Legislature of this State has refused to tax the stock of the United States; but it appears that the city council of Charleston have thought differently, and have taxed it. There are, however, some very obvious reasons why the council of Charleston should be less disposed to impose such a tax than the Legislature. In the first place, the city of Charleston being commercial, is more within the influence of the policy of the general government than the Legislature; if, therefore, the council of the city can believe it politic and just to tax the stock of the United States, can it be thought improbable that the Legislature may do so? If they can do so at all, they may do so to any extent; it is equally within their power to tax twenty per cent. or one hundred per cent. as one-half per cent. What shall govern their discretion, it is impossible to foresee. A State or a few States may concur in a policy at variance with that of the government, nay, in hostility to it. This, unfortunately, has been already witnessed. They may, indeed, be indisposed to dissolve the Union, and declare war;

addressed to the tax collector individually. Should he disobey, it will then have to proceed against him for a contempt, and inflict a fine; and thus be thrown into a course of practice unprecedented and extremely inconvenient. That it will not award compulsory process directed to a recusant State court may safely be assumed upon the strength of the reasoning in *Martin v. Hunter's Lessee* (1 Wheaton, 362). If not from a regard to the sovereignty of a State in its last refuge of the judiciary, this resort will not be had at least because it seems to be negatively precluded by the 25th section of the Act of the 24th of September, 1789. That section provides for the Supreme Court's "proceeding to a final decision of the cause, and awarding execution therein if it has been once remanded before." Whether under these words on the refusal of a State court to fulfil its mandate this court has jurisdiction in prohibition so

when they might have no objection to counteract Congress, and control its measures by the exercise of a power strictly constitutional. Seven-tenths of the stock of the United States are owned in the cities of Boston, New York, Philadelphia, Baltimore, and Charleston.

The same causes which have concentrated the stock in these cities, will, in all probability, continue to operate, and the greater part of future loans will be effected there. Should, therefore, even so small a portion of the United States as these cities, unite in taxing stock to any considerable amount, the government may be defeated, and will certainly be impeded in its fiscal operations, to the extent of any tax imposed. It may be supposed, that these cities would be checked in such proceedings by their State Legislatures. Whether this could be done, must depend upon the constitutions of the States, and the charters of the cities. It may not suit the prevailing policy of a State to interfere in such a case, even if it possess the power. We know, from the charter of the city of Charleston, that the Legislature of this State can interfere and repeal the ordinance in question; this, however, has not been done, although they have refused to impose such a tax themselves; and South Carolina is, has always been, and I hope will ever continue to be, as national as any other State in the Union. It may be said, that admit all this to be true, it cannot affect the question before the court; who are called upon to decide what the constitution is, and not what it ought to be. The judicial branch of the government most certainly does not possess the power of legislating; much less, then, can they claim the power of making a constitution. But, in construing the constitution, they must look to the objects it professes to attain, and they cannot so as to defeat the very end and aim of its creation, nor can they make it inconsistent with itself, if it be possible to avoid it. The general powers of Congress may be sufficiently designated in the Constitution, but the extent and ramifications of each power, it was not in the wisdom of man to foresee and precisely describe. How they are to operate and exhibit themselves, must depend upon the future contingent circumstances of the nation; and, as these must be forever varying, constitutional questions or doubts must arise, as long as the Constitution shall exist. These are the certain and legitimate consequences of a written constitution. The numerous questions which the statute of frauds has given rise to, simple as was its object, may afford some intimation of the number, which an instrument so complicated and general in its objects as the Constitution may be expected to produce. The great difficulty is, not only in ascertaining and defining the powers which result from those which are expressly given to the government, but (as in this case, and in that of the Bank of the United States) in determining the influence of these on the powers of the different States. In the decision of such cases, there must, at least, be the semblance of legislation. I am not conscious of even a desire to extend unnecessarily the powers of the judiciary; the pursuits and habits of near twenty years, by far the better part of my life, have given at least to my feelings a direction decidedly favorable to the leg-

as to enable it to execute its own judgment, by inhibiting the officers personally from collecting the tax under consideration, if adjudged unconstitutional, must first be decided. If the power be wanting, nothing but an Act of Congress can supply the deficiency. The mode and forms of proceeding under the appellate authority of 458*] this court are dependent upon the *Acts of Congress for their regulation. (6 Cr., 307.) Although the 14th section of the Judiciary Act gives to the courts of the United States "power to issue all writs necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," this general grant is limited by the 25th section in the particular instance of writs of error from final judgments of State courts to "awarding executions." No construction of these words consistent with technical accuracy will bring a prohibition within their meaning; and original

jurisdiction will scarcely be assumed to admit the proceeding.

The power of Congress to incorporate a bank, or even to invade the territory of a State to establish its branches, cannot be controverted after the decisions in *M'Culloch v. Maryland* (4 Wheat., 316), and *Osborne v. United States Bank* (9 Wheat., 738); much less could their right to raise loans for carrying on the operations of government be drawn into question. On the other hand, it would be taken as conceded that the right of the States to impose taxes is sovereign and concurrent; and that there are no express limitations upon this attribute, except those contained in the 18th section, article 1st, of the Federal Constitution, as to duties or imposts on imports, exports and tonnage.

Through these mutual admissions, the question now to be disposed of is simply, can a

islative branch of the government; when attached in fact, as I was in feeling, to that branch, I could not but discern the importance of the judicial branch of the government, and the necessity of leaving to its decisions all questions like the one before the court, though they savored of legislation. I shall certainly not omit to do now what I formerly regarded as incumbent upon the judiciary to perform. I shall now proceed to inquire—1st. Whether the tax in question be an income tax? That it is not, appears very clearly from the facts of the case, as well as from the terms of the ordinance. The stock of the State; the stock of the city; bank stock universally, as well as the profits of agriculture, enjoyed by those who reside in the city, are not taxed; nor does the ordinance affect to regard it as an income tax. It is a tax upon the United States stock, *eo nomine*. As this is not a tax upon income, it is unnecessary to inquire if the city council, or a State, have the power to tax income, and include therein the interest received on United States stock. I shall, therefore, proceed to inquire if the city council, or a State, have the power to tax the United States stock, *eo nomine*. The first question presented by the inquiry is, the meaning of the term United States stock. It is, I apprehend, a credit on the government for so much money, on which they have agreed to pay a certain interest. He who has the credit is the holder, and the certificate is the evidence of the credit, and the terms on which the credit has been given. The power to create this credit is expressly given by the 8th section, 1st article, of the Constitution of the United States: "Congress shall have power to borrow money on the credit of the United States." The credit of the United States is the essence of the stock; without it the stock is of no value. The credit of the United States is a creation of the general government, which did not exist until they brought it into being; and, in the production of which, the State governments did not participate. The State could not tax it before the Constitution was formed, for it did not exist; if, therefore, they can tax it now, it must be by some new power vested in them by that instrument; but there is no such power given; the credit of the United States cannot be taxed by the States. It is contended that to deny the States a power to tax money loaned to the general government, is to deprive them of a great resource without any adequate object. In the first place, I must observe that if the States cannot tax the stock of the United States, the general government will be able to borrow on better terms, and in this way the people of the United States will be compensated for any inconvenience that might result from the exemption of the stock from the taxation of the State governments. In the second place, I must repeat, they have no cause to complain, because it is a creation of the general government which the States did not possess before its establishment. But on this subject I cannot but think that a very erroneous opinion prevails. It appears to be thought that for every thousand dollars loaned to the general government, so much taxable property has been withdrawn from the States. But this is certainly not so. Of the one hundred millions of dollars loaned to the general government,

during the late war, how much of it remains with the government? Not one cent. Where, then, is it? Certainly in the States. If a certain number of individuals paid it into the Treasury of the United States, the government has returned it to individuals living in the different States; and if liable to taxation at all, can now be taxed by the States. If the general government had been foreign to the State governments, or had they hoarded it up, this objection might have had some force; but as fast as they got it, they returned it, and no means of the State governments were affected, but an increased difficulty in borrowing money, owing to the competition of the general government. One of the great objects of the Constitution was to render the general government independent of the State governments for those pecuniary means which are necessary to effect the great purpose for which it was established, viz., to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, &c., &c. If, however, means so essential in periods of distress and danger, as loans, can be controlled by the States, Congress is yet essentially dependent upon the States. There is another objection to this tax. I regard it as a violation of the contract made with the holders of the United States stock. The people of the United States, of whom the citizens of Charleston are a part, have contracted to pay so much per centum on the stock by their agents, the general government. To authorize the citizens of Charleston to deduct a part from the interest agreed upon, they must possess the power of altering the contract, without the consent of the holders of the stock, which would be a violation of the obligation of the contract. But the Constitution expressly declares that they shall not violate the obligation of contract.

To recapitulate my objections to the tax, they are:

1. Because a tax upon stock of the United States, *eo nomine*, is a tax upon the credit of the United States.

2. Because the credit of the United States was not a subject for taxation by the States, anterior to the adoption of the Constitution; the credit of the United States being a result of the establishment of the government of the United States; and the Constitution has given no new powers to the State governments.

3. Because the objects of taxation by the State governments are not diminished by withholding from them the power of taxing stock of the United States; as the money borrowed by the United States is immediately, by disbursements, returned to the people of the different States.

4. Because it renders the general government dependent upon the discretion of the State governments, for one of its essential means in accomplishing the purposes for which it was established, a result at variance with one of the principal objects of the Constitution, which was to render the general government independent of the pecuniary aid of the State governments.

And lastly, because it is a violation of the obligation of contract.

State constitutionally tax the income accruing to its citizens from six and seven per cent. stock of the United States owned by them individually?

The purpose of plaintiffs in error is to make out by implication a restriction upon a sovereign and vital, though a concurrent State right. This is attempted upon substantially three grounds: 1st. That the tax in dispute is a violation of the faith and obligation of a contract. 2d. That the credit of the United States upon which it bears did not exist until after the Constitution was framed. And 3d, because it interferes with the means of the federal government necessary to carry their powers into effect.

As to the first objection, certainly if the United States were to impose a tax going to diminish the interest it had stipulated to pay the purchasers of this stock, such a measure **459*** would be a violation of faith. But the reason does not hold as to a third person, not a party to the contract; and in this light the State of South Carolina stands; for her faith is pledged as an integral part of the Union in this respect only, *quod* federal taxation. She has come under no obligation individually, not to draw her resources from these funds, though emanating from the common authority whenever they pass into the hands of her peculiar citizens; and it may be presumed that the liability of this stock so situated to State taxation, was perfectly understood by those who became holders and entered into their contract with the general government. As well might a tax imposed by a State on the public lands within its limits when sold out to private persons be treated as a departure from good faith and a violation of the contract of sale, for here, as much as where public stock is created and sold, a State is a party to the engagement that no more than a certain price is to be paid for the property, and that its profits are not to be diminished. It is said, however, that where lands are sold, the United States parts with the freehold with no prospect of resumption, and that it is otherwise with stock. Yet in point of fact the only difference is between the real and personal property of the government, for in the case of a sale of the former on credit, liable to a foreclosure of mortgage, there will be a chance of its reverting to the public domain; and surely it will not be exempted from State taxation until the last cent of the price is paid off.

It is next said that this stock constitutes the credit of the Union which, not having existed anterior to the adoption of the Constitution, cannot be subjected to State taxes unless by virtue of some provision in that instrument. This reason, if of any avail, will go to exonerate all the territories and other property of the United States acquired subsequently to that epoch; and failing of that result, must be discarded altogether.

The objection most strongly urged, however, against this ordinance, is that it interferes with a law of the general government, which, being supreme, must predominate, and it is roundly laid down that "should any State **460*** directly or indirectly *modify, alter or abridge any of the acts of sovereignty of the United States, or render any of its measures

nugatory or inoperative, or in any manner impeach the credit or impair the resources of the Union by taxation or otherwise, the act would be an interference repugnant to the Constitution," and that "a State cannot tax any of the constitutional means employed by the government of the United States to execute its constitutional powers;" "nor can it, by taxation or otherwise, retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government."

Throughout this discussion the State has been treated of as in an antagonist position towards the federal government, and as seeking purposely to incommode and destroy its fiscal operations; while the direct effect of these upon the resources of the State has been allowed no consideration. The ordinance in question is assumed to be a measure passed expressly to countervail and defeat a law of Congress. But it is nowhere demonstrated that a tax on this stock owned by individuals will be attended by any such consequence. The utmost that may ensue will be a prejudice to the preference of this stock in market, and perhaps the citizens of the State imposing the tax may find it more profitable to invest their capital otherwise. This creates a question of policy, at the discretion of the State alone, whether it will drive abroad a particular means of speculation; but the reflection is beside the constitutional inquiry now agitated.

The position broadly taken here is that if the exercise of a concurrent power by a State interferes with a power of the general government, the former must give way. What is the extent of interference which is to be thus resisted? and how is this interference to be graduated? Here it is always put as mounting to the point of destruction, and as brought into action *ipso intuitu*. To presuppose hostility on the part of the State is wholly gratuitous, and greatly to be deprecated. As much may be trusted to the liberality and forbearance of a State, as of the federal government; and *comity and cordial confidence should [**461** characterize all their relations. All the reasoning in this case is against the abuse of a conceded State right, and it is founded upon a *quia timet*, and its materials are extremes. Not even a surmise is thrown out that this tax has, in point of fact, impeded, much less frustrated a fiscal operation of government; but it is said that if the power it involves were pushed further it might have that effect; and that as it is without any limit or control save the discretion of a State, no guarantee against its abuse short of abolition should be accepted. This is in a strain of hostility that well warrants the interrogatory, why should an unprescriptible sovereign and indispensable right of a State be postponed and put in derogation in favor of an implied, auxiliary and optional means of the general government? Is not the power to use this means also a power to destroy, and alike unlimited?

The general government, by carrying their power to extremes in the creation of extensive loans, might furnish facilities of exempt investment, that would entirely absorb from the reach of State taxation all the funds of its citizens, and thus destroy one of its highest pre-

rogatives and very existence. If the possible abuse of the power to tax by a State, is to infringe upon the right, the like objection will assuredly attach to the power of borrowing on the part of the United States. In answer to this a suggestion has been made, that the general government does not hoard up its revenue, but immediately re-instates by expenditure, all that has been subtracted from the resources of a State. This is only partially true, and yields but indifferent consolation, and affords occasion for another most forcible impeachment of the prevailing system of internal improvements, and other government expenditure of the public money. By the supposed operation the Southern States not only have their capital drawn off from local taxation, but in the existing state of things supply another means of conferring benefits, or rather gratuities, in which they have no participation.

The doctrine that interference with federal power will suffice, by implication, to neutralize, or even annihilate State rights, is startling in **462** itself, and most pernicious when *carried out to its legitimate results. The degree of interference being entirely unsettled, and incapable of adjustment, however slight *or shadowy it may be, the objection can never be started but to a fatal issue. Indeed, it will go to abolish all power in the States, under some circumstances, to levy and collect taxes. In the event of a resort to direct taxation, on the part of Congress, whatever is subjected to federal assessment, must, *ipso facto*, be discharged from all other imposition; inasmuch as a tax by a State, on any given article, must necessarily diminish its capacity of bearing other exactions, and, if carried to excess, must frustrate any attempt on the part of the general government to raise a revenue from the same sources. In fact, there are but few powers reserved to the States that, upon the possibility of abuse, may not be brought under the ban of interference with federal measures.

In the case of *Bulow et al. v. The City Council of Charleston* (1 Nott & M'Cord, 527), it has been decided that United States bank stock, in the hands of individuals, may constitutionally be taxed by a State. And in *M'Cullough v. Maryland*, it is admitted, that the principle there ascertained "does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State, nor to a tax imposed upon the proprietary interest which the citizens of that State may hold in this institution, in common with other property of the same description throughout the State," and that, "as to the bank stock belonging to its own citizens, it still continues liable to State taxation, as a portion of their individual property in common with all other private property in the State." The stock brought under contribution by the city ordinance now attacked, comes within this exception. When taxed it had been sold out by government, and was in the hands of individuals, whose proprietary interest in the fund was subjected in common with property of a similar description. The tax here assessed was not in the nature of a penalty on lending to the United States, being neither excessive nor discriminating. If charged on the stock, *eo no-*

mine, the name was inserted in *the [**463** ordinance merely as a description of one among several sources, from whence the income of the citizens might arise on which it was to bear. The words of the ordinance evince clearly that this species of property was not singled out for prescription, or a sinister purpose, as various others are enumerated; and if an exception is made in favor of stock of the United States Bank, and of local institutions, motives of expediency, or the fact that a bonus had been paid in commutation of taxes, probably influenced the departure from, while they recognized the existence of the general rule.

This tax, then, is not obnoxious to the objections urged against it, and being upon the interest held by individuals in the funded debt of the United States, in common with other property of the same description in South Carolina, it comes within the exception made in the leading case decided by this court upon the subject, and the ordinance imposing it is constitutional and valid.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This case was argued on its merits at a preceding term; but a doubt having arisen with the court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a re-argument was requested. It has been re-argued at this term.

The power of this court to revise the judgments of a State tribunal, depends on the 25th section of the Judicial Act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had," "where is drawn in question the validity of a statute or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity," may be re-examined and reversed or affirmed in the Supreme Court of the United States."

In this case the city ordinance of Charleston is the exercise of an "authority under the State of South Carolina," *"**464** the validity of [**464** which has been drawn in question on the ground of its being repugnant to the Constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the Constitutional Court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordi-

nance is contested; the party aggrieved by it applies to a court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also that it was a final judgment in the sense in which that term is used in the 25th section of the Judicial Act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word "final" must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause.

We think, then, that the writ of error has brought the cause properly before this court.

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our Republic. In war, when the honor, the safety, the independence of the nation are to be defended; when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a

principle which authorizes every State and every corporation in the Union which [*466 possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous State governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

This subject was brought before the court in the case of *M'Culloch v. The State of Maryland* (4 Wheaton, 316), when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in [*467 this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that "all subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

The court said in that case, that "the States have no power by taxation, or otherwise, to re-

tard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch v. The State of Maryland*, to be exempt from State taxation, and consequently from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it: that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the **468** intimate *connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the Legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the

lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. *But a tax upon **469** debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

"The Federalist" has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch v. The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Cullough v. The State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.

We are therefore of opinion that the judgment of the Constitutional Court of the State of South Carolina, reversing the order made by the Court of Common Pleas, awarding a prohibition to the city council of Charleston, to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies for the use of the city of Charleston for the year 1823, is erroneous in this, that the said Constitutional Court adjudged that the said ordinance was not repugnant to the Constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are therefore of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that farther proceedings may be had therein according to law.

Mr. Justice JOHNSON, dissentiente.* [470** Entertaining different views on the questions in this cause from the majority of the court, and wishing generally that my reasons for my opinions on constitutional questions should appear, where they cannot be misunderstood or misrepresented, I will briefly state the ground upon which I dissent from the decision now rendered.

On the first point I am of opinion that the cause is not one within either the letter or the policy of the 25th section of the Judiciary Act.

That the suggestion and motion to obtain a prohibition is a suit in its general sense, cannot be questioned; but that is not enough to give this court jurisdiction; it must be a suit within the meaning and policy of the law which gives this writ of error. The words of the 25th sec-

tion are, "a final judgment or decree on any suit;" from which I think it unquestionable that it must be a suit capable of terminating in a final judgment or decree. Now, a prohibition, especially where it is refused, as in this case, is not final, and concludes nobody. If the party against which it was prayed goes on to carry into effect an unconstitutional law, he to whom it was refused is at liberty to bring his action of trespass, and the refusal of the prohibition would be no bar to his recovery.

Indeed, in cases of prohibition, there is no *consideratum est*, no judgment entered, except, as well as I can recollect, in two cases: in that where it is first granted and then dissolved, and a writ of consultation awarded authorizing the defendant to proceed; and in the case where the promovent is ruled to declare, and the cause goes on to judgment in the usual form. When it is refused there is never a judgment entered, nor where it is granted in ordinary cases; and hence it is laid down generally that no writ of error lies in prohibition. There is no ground that I can perceive, to suppose that Congress intended any innovation in the ordinary rules of law as to suing out writs of error. On the contrary, in authorizing a writ of error to a final judgment in so many words, the legal conclusion is that they need not to adhere to the rule that a writ of error can only issue to recover a judgment as technically understood.

471 *Again, the suit to which this section has relation must be a suit in which this court possesses or can exercise the power to enter judgment and award execution; because the latter part of the 25th section enacts, "that the Supreme Court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. Now, if the term "execution" here be taken in its ordinary technical meaning, this is not a case in which it can issue; the sole object of this prohibition being to stay the proceedings of the city council and city sheriff under the law complained of; and if the issuing of a prohibition be considered as coming within the meaning of execution as here used, then this court has no power to issue a prohibition to a State, court, or State officer. Congress has not pretended to vest in it such authority. And I am well satisfied that this power has been withheld from the courts of the United States *ex industria*. For every provision in the Constitution and the uniform policy of the government, have been to prevent the immediate action of the one government upon the constituted authorities of the other, a collision which it was a leading object in the Constitution to avoid, because its effects were unavoidably and fully anticipated.

If it be asked, or has been argued, why may not this court proceed as far as it can proceed, and reverse the judgment of the State court, or enter a judgment for a prohibition, though it cannot issue it? I answer, simply because the case wants those distinctive features which are necessary to make out a case for the interference of this court under the 25th section. And I cannot imagine that the Legislature would place this court in the unenviable dilemma of thus assuming ungranted powers, or of exercising jurisdiction in a case over which it could assume no coercive power.

Peters 2.

Hence I conclude, that neither the letter nor the policy of the law sanctions us in exercising this jurisdiction. Nor is there the least necessity for it, since every beneficial end may be answered, when individuals are brought into controversy, by the ordinary proceedings under an unconstitutional law; and until **[*472]** this conflict of interest arise from the actual execution of process, the law remains a mere "*brutum fulmen*."

My views of the question of jurisdiction would exempt me from the necessity of giving an opinion on the constitutionality of the case under consideration. But I have no objection to expressing my opinion upon this question.

If I could bring myself to consider this question in the form in which it is considered by the majority of the court, I should certainly concur in the opinion that the tax was unconstitutional. For, the exercise of a power which, under the mask of imposing a tax, may defeat or impede the operation of the government of the United States in borrowing money, could not be tolerated. But I am strongly impressed with the opinion that the record does not authorize this state of the question. It is true the act of the city council of Charleston, which imposes this tax, is most clumsily worded. But I think it clear that, taken together, the object is to impose an income tax. This, I think, is necessarily inferred from the fact that the tax is not imposed upon money at interest generally, but only on so much as the individual has at interest above what he owes or pays an interest upon. The operation of this is to charge no more than his clear income from money at interest. It is objected that they make discriminations, and exempt from taxation State stock, city stock, and stock of their own chartered banks. But then they exempt, also, stock of the United States Bank; and there can be no better proof demanded to show that the law is conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government. Had they, in fact, taxed any one of these excepted objects, we should have had the law brought up here as a violation of the obligation of contracts; since the statute books of the State will show that all their banks, with the exception of the State bank, have paid a bonus to the State. And it would have been impossible to tax the State bank, because the stock is altogether owned by the State, and the laws of the council are subject to be repealed by the State.

*As to the specification of six and **[*473]** seven per cent. stock of the United States as objects of taxation, this also admits of an explanation, showing that the council acted in the spirit of fairness and candor, although certainly not happy in expressing the legislative mind. This specification became necessary from their imposing the tax by means of a percentage of twenty-five cents upon the capital at interest instead of a percentage on the interest received. Hence, to have brought the four and three per cent. stock of the United States under the tax, would have been unequal and unjust; and there can be little doubt that to avoid this inequality was their object.

I consider the case, therefore, as one of a tax upon income arising from the interest of mon-

ey, a very unwise and suicidal tax unquestionably, and not very judiciously arranged and expressed; but still characterized by no unfairness, and no masked attack upon the powers of the general government. And if so, with what correctness can it be characterized as unconstitutional?

Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation?

No one imagines that it is to be singled out and marked as an object of persecution, and that a law professing to tax, will be permitted to destroy; this subject was sufficiently explained in *M'Culloch's* case. But why should the States be held to confer a bonus or bounty on the loans made by the general government? The question is not whether their stock is to be exposed to peculiar burdens; but whether it shall enjoy privileges and exemptions, directly interfering with the power of the States to tax or to borrow.

I can see no reason for the exemption, and certainly cannot acquiesce in it.

Mr. Justice THOMPSON, dissentiente. This case comes before us under the 25th section of 474*] the Judiciary Act of 1789, *on a writ of error to the Constitutional Court of the State of South Carolina, the highest Court of Appeals in that State. The question in the State court arose upon proceedings commenced in an inferior court, and the issuing of a prohibition to restrain the city council of Charleston, and all other persons acting under their authority, from levying and collecting a tax on stock of the United States, held by the appellants; on the ground that such tax was a violation of the Constitution of the United States. The prohibition having been granted by the inferior court, the order and judgment of that court were reversed in the Constitutional Court, thereby upholding the constitutionality of the tax.

A preliminary question has been raised, whether this court has jurisdiction of the case, under the 25th section of the Judiciary Act. I think we have not. It is not a suit within the meaning of that section; and if it was, the writ of error is brought to reverse a judgment, refusing to grant the prohibition. And if that judgment or order should be reversed here, this court has no power to enforce its judgment, or give the party any relief or protection against the imposition of the tax. But I shall not enter into an examination of this question; it is one of minor importance; as I understand this court does not claim the power of enforcing its judgment in any manner whatever, and the ordinance will remain in full force, and the payment of the tax be enforced unless the city council shall voluntarily repeal it, and revoke the order to collect the tax. The judgment of this court is, therefore, no more than an opinion expressed upon an abstract question, and in its nature and effect only monitory.

In considering this case on the merits, it is to be borne in mind that this ordinance of the city

council is subject to be repealed by the Legislature of South Carolina, and not having been done, we must consider it as having tacitly received the sanction of the Legislature, and comes before us, therefore, with all the force and authority of a State law, and involves one of those delicate and difficult inquiries of conflicting powers between the general and State governments.

It is necessary, in the first place, that we should understand the true character of this tax. Much importance seemed to *be [*475 attached to this, both in the court below and on the argument here. In the opinion of the minority of the State Court, which has been submitted to us by the appellants' counsel as a part of his argument, it is said, "this ordinance does not affect to regard the tax as an income tax. It is a tax upon the United States stock *eo nomine*. As it is not a tax on income, it is unnecessary to inquire if the city council or a State have the power to tax income, and include therein the interest received on United States stock. The inquiry is, whether there is any such power to tax United States stock *eo nomine*." This distinction being so emphatically relied upon by the minority of the court, it is a fair inference, that if it had been considered a tax on income, it would not be objectionable on constitutional grounds.

What are we to understand by its being a tax on United States stock *eo nomine*? Certainly, nothing more than that it is enumerated as one description, in a long list of specified property subject to taxation.

We have not the ordinance at large before us, but the clause upon which the question arises, is stated as follows: All personal estate, consisting of bonds, notes, insurance stock, &c., &c., six and seven per cent. stock of the United States, or other obligations, upon which interest has been, or will be received during the year, over and above the interest which has been paid, twenty-five cents on every hundred dollars. There is excepted out of this enumeration, stock of the State, stock of the city, and bank stock. But this exception cannot certainly affect the present question. No part of the Constitution of the United States prohibits the States from exempting from taxation certain species of property, according to their own views of policy or expediency.

What, then, is the ordinance in substance? It is a tax upon the net income of interest, upon money secured by bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations, upon which interest has been received, &c. It is the net interest received upon which the tax is laid. For the ordinance declares the tax shall be on the interest received over and above that *which [*476 has been paid. For example: he who receives \$1,000 interest, and pays out \$500 interest, is taxed only upon the balance. It is therefore a general tax upon an income from money at interest, and this, too, only included as one item in the enumeration of taxable property. It is not an objection that can be made here, if anywhere, that the tax is not upon the whole income. It is a tax, general in its application to income, from interest derived from investments of every description (with the exception mentioned) and money on loan. It cannot be con-

sidered as an exorbitant tax, or in any manner partaking of the character of a penalty. It being only a tax of a quarter of one per cent.

If the objection to this tax is to be sustained, it must be on the broad ground that stock of the United States is not taxable in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation; and that I understand is the extent to which a majority of this court mean to carry the exemption. As I am unable to come to this conclusion, and it being a constitutional question of vital importance; I am constrained to dissent from the opinion of the court, and, contrary to my usual practice in ordinary cases, briefly to assign my reasons.

I shall, for the reason already mentioned, consider this ordinance as standing upon the same grounds precisely as if it had been a law of the State of South Carolina.

It is not pretended that there is any express prohibition in the Constitution of the United States, which has been violated by this law.

The only express limitation to the power of the individual States, to lay and collect taxes, is to be found in the 10th section of the first article of the Constitution. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, &c. No State shall, without the consent of Congress, lay any duty of tonnage." The tax in question can certainly not fall within either of these prohibitions.

The objection to the tax is rested chiefly, if not entirely, upon that part of the 8th section **477*** of the first article which *gives to Congress the power "to borrow money on the credit of the United States." And it is said that to permit the States to tax the stock, might, by possibility, sometimes embarrass the United States in procuring loans. In the examination of the powers of the general government under the Constitution, "The Federalist" is often referred to as a work of high authority on questions of this kind; and the author has seldom been charged with surrendering any powers that can be brought fairly within the letter or spirit of the Constitution. In No. 32 of that work, the writer, in discussing the subject of taxation, and the conflicts that might arise between the general and State governments, says: "Although I am of opinion that there would be no real danger of the consequences to the State governments, which seem to be apprehended from a power in the Union to control them in the levies of money, yet I am willing to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority, in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution. That a negation of the authority of the States to impose taxes on imports and exports, is an affirmance of their authority

to impose them on all other articles. That it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty."

The power of the general government to borrow money on the credit of the United States, is not only an express power granted to Congress, but one that it must have been foreseen would be brought into practical operation, and that stock would of course be created; and yet it never entered into the discriminating mind of the writer referred to to ***478** that merely investing property, subject to taxation, in stock of the United States, would withdraw the property from taxation. It is said, the credit of the United States is a creation of the general government, which did not exist until they brought it into being, and in the production of which the State governments did not participate; that the States could not tax it before the Constitution was formed, for it did not exist. This view of the subject is calculated to make an erroneous impression. It is true it did not exist in the shape of stock, but the property existed in some other form. No one procures stock without exchanging for it an equivalent in money or some other property; all which was, doubtless, subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might, possibly, enable the government to procure loans with more facility, and perhaps on better terms. But this possible, or even certain benefit to the United States, cannot extinguish pre-existing State rights. To consider this a tax upon the means employed by the general government for carrying on its operations, is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burdens. A construction of the Constitution, drawing after it such consequences, ought to be very palpable before it is adopted.

But it seems to me, that the right of the States to tax property *of this description ***479** is admitted by the court, in the case of *McCullough v. The State of Maryland* (4 Wheat., 436.) The court there considered the tax imposed directly upon the operations of the bank, which was employed by the government as one of the means of carrying into execution its constitutional powers; and in summing up the result, it is said, the States have

no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws of Congress to carry into execution the powers vested in the general government; and yet the court say this opinion does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the bank, in common with other property of the same description throughout the State.

In the case now before us, the tax is not direct upon any means used by the government to carry on its operation. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, viz., the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired.

The broad proposition (laid down in the case of *McCulloch v. The State of Maryland*) that the States cannot tax any instrument or means used by the general government in the execution of its powers, must be understood as referring to a direct tax upon such means or instrument; and that such was the understanding of the court, is to be inferred from the exemption of bank stock from the operation of the rule; and the parallel cases put to illustrate the application of the doctrine lead to the same conclusion. Thus it is said the States cannot tax the mint; but this does not imply that they may not tax the money coined at the mint, when held and owned by individuals. Again, **480***] it is said the States cannot *tax a patent-right; but if the patentee, from the sale or use of his patent has acquired property, or is receiving an income, it could not be intended to say that such property or income cannot be taken into the estimate of his taxable property.

The unqualified proposition that a State cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its powers, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such cannot be taxed, yet it will not be claimed, that all such officers and soldiers are exempt from State taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the Constitution of the United States to include therein interest accruing from stock of the United States.

I am accordingly of opinion that there is no error in the opinion of the State court.

This cause came on to be heard on the transcript of the record from the Constitutional Court of the State of South Carolina, and was

argued by counsel; on consideration whereof, this court is of opinion that there is error in the judgment of the said court in this, that the said court decided that an ordinance passed by the city council of Charleston for the year 1823, entitled, an ordinance to raise supplies for the use of the city of Charleston for the year 1823, is, so far as the same imposes a tax on the six and seven per cent. stock of the United States, consistent with the Constitution of the United States. Whereas, it is the opinion of this court, that so much of the said ordinance as imposes the said tax, is repugnant to the Constitution of the United States, and void. Whereupon it is considered, ordered and adjudged by this court, that the said judgment be, and the same is hereby reversed and annulled, and that the said cause be, and the same is hereby remanded to the said Constitutional Court for the State of South Carolina, that such further proceedings may be had therein as may consist with law and justice.

Criticised—14 Pet., 599, 611.

Cited—12 Pet., 645; 14 Pet., 563, 566, 611, 612, 624; 16 Pet., 449; 6 How., 548; 7 How., 534, 538; 16 How., 409; 1 Black, 273; 2 Black, 629, 633; 3 Wall., 591, 596; 4 Wall., 112; 6 Wall., 47, 605; 7 Wall., 24; 9 Wall., 589; 11 Wall., 123; 12 Wall., 224; 18 Wall., 34, 38, 585; 1 Otto, 34, 375; 3 Otto, 121; 6 Otto, 436, 437; 9 Otto, 279; 10 Otto, 543; 12 Otto, 144, 418; 1 Wood. & M., 372; 5 Bank. Reg., 248; 2 Wall. Jr., 74; 3 Cliff., 352, 378, 384, 388.

*THE PRESIDENT, DIRECTORS [***481**
AND COMPANY OF THE BANK OF
THE UNITED STATES, *Appellants*,

v.

DAVID WEISIGER, *Appellee*.

Decease of appellee during a term.

Where the appellee had died after the commencement of the term, and the court not knowing his decease had decided upon the case, after argument, the court ordered the decree to be entered as of the first day of the term.

IN this case which had been argued on a previous day of the term, and the opinion of the court delivered in favor of the appellants, (See *ante*, page 331) Mr. Bibb having informed the court that the defendant, Weisiger, had died since the commencement of the term; stated that he had been of counsel with the respondent, but he considered that his authority had expired by his death. He objected to the entry of a decree.

Mr. Sergeant, for the complainants, moved the court to cause the decree to be entered of a day in the term before the respondent's death; and he cited *Davis v. Davis* (9 Ves. 461), *Campbell v. Mesier* (4 Johns. Ch. R. 342), *Asburnham v. Thompson*, and 2 Mad. C. P. 529, as fully establishing the practice according to his motion.

Mr. Bibb, *contra*.

The court ordered the decree to be entered as of the first day of the term.

Peters 2.

482*] *JOSEPH MANDEVILLE ET AL.,
Appellants,
v.

ROMULUS RIGGS, Appellee.

Service upon stockholders of a voluntary association—death of a party—equity—joint liability—service on non-resident stockholders—practice on appeal.

Where a bill was filed against the stockholders of a voluntary association for the purposes of banking, and the process was returned "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found;" the court stated, that it was not meant to say, that in cases of this nature it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known that there are cases in which a court of equity dispenses with such a proceeding, when the parties are very numerous and unknown; and the adoption of the rule would evidently impede, if not defeat the purposes of justice. [487]

Upon the death of some of the parties to the bill who had been served with process, the bill ought to have been revived against their personal representatives, if they could be brought before the court; unless some good reason, such as absolute insolvency, could be assigned to justify the decision. [487]

One of the great principles upon which courts of equity generally require all parties who are known and within the reach of its jurisdiction to be made parties, is to prevent future litigation, and to take away multiplicity of suits. There are exceptions, it is true, to the rule, but they are founded upon special considerations. [487]

We know of no instances where a joint liability has been asserted before a court of chancery, on which the decree has not been made against all the parties before it who did not establish some personal discharge. [488]

In a bill filed in the Circuit Court of Alexandria county, in the District of Columbia, against the stockholders of an association for banking purposes, the bill was dismissed as to those stockholders who were named in the bill, but were not served with process; and it was held to be error. As non-residents, the Act of Congress of the 3d of May, 1803, allows proceedings to be had against them by publication in the newspapers in the district. [489]

Where an appeal from the Circuit Court to this court was prayed by a number of the defendants, and one only executed the proper appeal bond, the objection to the proceeding ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond. [490]

THIS was an appeal from the decree of the Circuit Court of the United States for the county of Alexandria, in the District of Columbia.

In that court in July, 1818, a bill was filed by the appellee against certain individuals named in the subpoena, charging them with having entered into a certain association or copartnership, called "the Merchants' Bank of Alexandria." That the partnership, for a considerable **483*]** time, issued notes and bills, and in other respects prosecuted their trading or business as a bank, until about the month of May, 1816, at which time they became so embarrassed as entirely to put a stop to their proceedings. The bill then alleges, that sundry notes or bills of various denominations and amounts, issued and sent into circulation by the bank during its operations, amounting in the whole to \$20,000, regularly came into the possession of the complainant, and that no part of them has been paid. The bill proceeds to present other facts and proceedings upon which the complainant claimed relief, and concludes with a demand for general relief.

Peters 2.

The process was served on twenty-two of the stockholders and defendants; the whole number being sixty-one. An alias subpoena having issued, the marshal returned, as to the others, "not found; non-residents in the county of Alexandria." On the 13th of August, 1818, a pluries subpoena was issued, on which the marshal returned, "executed on John McPherson; the other defendants not found."

In November, 1818, the bill was taken for confessed, as to those defendants on whom process had been served, and who had not answered; and continued as to the others.

At May rules, 1820, and at November term, 1820, the suit was abated as to such of the deceased defendants upon whom the process was executed; and no proceedings were instituted to bring in their legal representatives. The answers of some of the defendants who were served with process having been filed, depositions taken, reports of the auditor made, and the arguments of counsel heard, the court went on to decree the payment of certain sums to the complainant by the parties thus before the court; apportioning the same according to the time they became stockholders in the bank, and the periods of issuing the notes held by the complainant. The bill was dismissed as to the other defendants who did not answer; and also as to all those who were either not served with process to appear in the cause, or who were served with process, and not charged by any evidence on the part of the complainant.

The defendants against whom the decree was rendered, prayed an appeal to this court, which was allowed on their giving bond and [***484** security, &c. Joseph Mandeville alone, of all the defendants, gave bond to prosecute the appeal.

It is not considered necessary to state in this report any of the points presented by counsel, upon which no opinion was expressed by the court; and therefore those proceedings in the case, and matters set forth in the bill, answers, and evidence, which are not connected with, or required to exhibit the only question decided by the court, and the arguments of the counsel upon them are omitted.

The case was argued upon all the questions presented by the record, by *Mr. Jones* and *Mr. E. J. Lee* for the appellant, and by *Mr. Wirt* and *Mr. Cox* for the appellee. The only points upon which the court gave an opinion were, 1. The dismissal of the bill as to the absent defendants who were not served with process. 2. The omission to make the legal representatives of those defendants who had died after they were served with process, parties to the proceedings. And 3. The regularity of the appeal to this court, Mandeville only having given bond.

Mr. Justice Story delivered the opinion of the court:

This is an appeal from a decree rendered in the Circuit Court of the District of Columbia, sitting in Alexandria, in a suit in chancery, in which the appellants were original defendants. The appellants are stockholders in an unincorporated association, which was formed in 1815, for the purpose of carrying on the business of banking, under the name of the Merchants' Bank of Alexandria; the nature and extent of

which association is evidenced by certain articles of agreement; which were at the time published in the newspapers in the district, and are set forth in the case. The first article provides, that the capital stock may consist of one million of dollars, divided into shares of one hundred dollars each, which were to be payable by calls, provided for therein. In the other articles provision is made for the management of the business of the bank by directors, and for the issuing of bank notes, &c., to be signed by the president, and countersigned by the cashier of **485***] the bank. The 15th *article declares the object of the stockholders to be, that the joint stock of the company "shall alone be responsible for the debts and engagements of this company; and that no person who may deal with the company, &c., shall, on any pretense whatsoever, have recourse against the separate property of any present or future member of this company, or against their persons, further than may be necessary to secure the faithful application of the funds thereof to the purposes to which, by these presents, they are liable. But all persons accepting any bond, bill or note, &c., of the company, &c., thereby give credit to the said joint stock or property of said company, and thereby respectively disavow having recourse, on any pretence whatever, to the persons, or separate property of any present or future member of this company, except as above mentioned."

The whole stock of one million of dollars was subscribed, and calls to an amount of about one hundred and eighty three thousand dollars were paid in, with money or by stock notes discounted for that purpose. The bank went into operation, and circulated its notes to a large amount; and finally, after about a year, the bank failed, leaving its notes to an amount, as it is said, of about ninety thousand dollars in circulation and unpaid; and having assigned all its property to certain assignees (who were not parties to the bill), for the payment of certain preferred debts, and then for the benefit of the creditors generally. These assignees have now no property in their hands for distribution. The original plaintiff is the holder of the bank notes of the bank to the amount of \$20,000 and upwards, which remain unpaid. The form of the notes issued by the bank was as follows: "Capital, one million of dollars. The Merchants' Bank of Alexandria promises to pay to C. M'Knight or order, on demand, — dollars." These notes were signed by the president and countersigned by James S. Scott, who was cashier, and indorsed by C. M'Knight, in blank, without consideration; and solely to enable the notes to circulate as currency, as notes payable to the bearer.

The bill seeks payment out of the separate property of the stockholders, to the amount of **486***] \$20,000, the notes so held *by the plaintiff. It states the articles of copartnership, and charges that the notes were issued by the bank, and that it prosecuted business until May, 1816, at which time its affairs, either by mismanagement or by a fraudulent issue of paper beyond its known means, became embarrassed and stopped payment. But it contains no direct charge of fraud or fraudulent misapplication of the funds, by the directors or stockholders in distinct terms. It states the assignment of the

property of the bank after the failure; and charges the preferences therein provided for to be fraudulent; but if not fraudulent, then that the trust fund is insufficient to pay the creditors of the bank, without resort to the separate property of the stockholders. It further charges that the plaintiff does not know whether there are other stockholders or not, than those sued, and that he has no means of ascertaining them, and calls upon the defendants for a discovery. And the prayer of the bill is, that the assignment may be decreed null and void, that the plaintiff's demand may be paid out of the joint funds as far as they will go, and then, out of the separate funds of the stockholders; and also for general relief.

In the progress of the cause some of the original defendants died, and the bill was not revived against their representatives. Some of the defendants put in their several answers, to which the general replication was filed, and against others the bill was taken *pro confesso*; and after several intermediate proceedings, references to, and reports by a master in order to ascertain certain facts, &c., &c., the cause was finally set down for a hearing against the defendants who had answered, and those against whom it was taken *pro confesso*, and a decree rendered for the plaintiff; from which the parties against whom it was made have appealed to this court. The decree, in substance, declares that there are no funds in the hands of the assignee to pay the debt; that certain defendants (naming them) who had answered, do pay the debt to the plaintiff with interest from the first of January, 1818, with costs; that this decree be discharged as to two of the persons so charged, by their paying a less sum, equal to the amount of the notes issued *by the bank, while they [**487** were stockholders; and as to the other defendants, the decree is that the bill be dismissed, "it appearing to the court that they are either not served with process to appear in the said cause, or were served with process, not charged by any evidence on the part of the plaintiff."

Such is a very summary statement of the case. Several questions have been elaborately argued at the bar, respecting the form and sufficiency of the bill, as well as the merits of the case. Upon some of these questions much diversity of opinion at present exists among the judges. But as we are all of opinion that there must be a reversal upon two points, we deem it unnecessary to examine any others. Those points are the defect of parties, and the erroneous dismissal of the bill as to any of the defendants properly before the court, against whom a decree might have been made.

In the first place, as to the defect of parties, we do not mean to say that in cases of this nature it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known that there are cases in which a court of equity dispenses with such a proceeding when the parties are very numerous, or unknown, and the adoption of the rule would essentially impede, if not defeat the purposes of justice. But in the present case we are of opinion that upon the death of the parties who were before the court, the bill ought to have been revived against their personal representatives, if they could be brought before

the court, unless some good reason, such as absolute insolvency, could be assigned to justify the omission. The reason is obvious. Supposing the decree against the parties jointly to be good, those who shall pay, are entitled to contribution from the other stockholders and their personal representatives. If they are not before the court they are not bound by the decree; and consequently in a subsequent suit for contribution, they may controvert every material fact upon which the decree was founded, and put the party seeking contribution to the full proofs of them, as well as of the responsibility over, of the party sued. One of the great principles upon which courts of equity generally require all *persons who are known, and within the reach of its jurisdiction, to be made parties, is to prevent future litigation, and to take away multiplicity of suits. It is a matter of justice, as well as of convenience, that all the parties who are ultimately liable to contribution, should, when practicable, be brought before the court, so that the equities between them may be adjusted as well as the right of the plaintiff. There are exceptions, it is true, to the rule, but they are founded upon special considerations; such, as where a decree of contribution would be useless, or where the proceeding would defeat the jurisdiction of the court, and the parties are not indispensable to a decree, or where the convenient administration of justice forbids it in the particular case.

This reasoning applies with far more force to the dismissal of the bill as to the defendants, who were before the court, and who were liable to a decree as stockholders. It is a positive injury to the defendants; who are charged by the decree, not only as to their immediate responsibility, but as to the means and proofs of contribution. The decree of dismissal, so far from aiding the other defendants, puts them to the absolute necessity of instituting a new suit for contribution, and to establish every step in its progress by plenary evidence. We know of no instance, where a joint liability has been asserted before a court of chancery, in which the decree has not been made against all the parties before it who did not establish some personal discharge.

If the bill had been dismissed against those persons only who appeared and answered, and whose liability was not proved by the evidence there would have been no difficulty. But it is dismissed as to all the defendants who did not answer the bill, and against whom the bill was taken as confessed, and set for a decree. Now, if these persons were duly brought before the court, and if due proceedings were afterwards had against them they certainly were jointly chargeable with the other defendants, upon their own default as in cases of confession.

It is no answer to this objection, that no exception was taken at the hearing for the want of proper parties. The objection we are now **489***] considering is not merely, that the *proper parties were not before the court, but that the bill, being set down for a hearing, as to those who had answered, and also as to those against whom it had been taken as confessed, the court has decreed against a part only; when it ought to have decreed against the whole, who were chargeable as stockholders.

Peters 2.

The proper parties for such a decree were before the court, and the error was in dismissing the bill as to any of them. It has been also said that the decree of dismissal, if an error, is only to the prejudice of the plaintiff. But this is not admitted. It was prejudicial to the rights of all the defendants, who were charged by the decree.

We are also of opinion, that assuming that the cause might be properly brought to a hearing as to the parties before the court, the decree was erroneous in dismissing the bill as to any of the defendants named in the bill as stockholders, upon whom process was not served; if by any proceedings they could have been brought before the court before a final decree. They were known to the plaintiff when he brought his bill, and were named therein; and the other defendants, in proceeding to a hearing, cannot be understood to waive any further proceedings against them. If they were non-residents, still the Act of Congress of the 3d of May, 1802, allows proceedings to be had against non-residents by publication in the newspapers in the district; and no reason is assigned why such a proceeding might not have been effectual to bring them before the court in the present case. We give no opinion what would have been the case, if they had not been named in the bill, or had not appeared by the bill to have been known to the plaintiff at the time of filing it. But as they were known and named, the same reasons apply to them as to the other defendants before the court and their personal representatives.

It was asserted at the argument that the bill had also been dismissed as to some of the defendants, who had answered and admitted themselves liable as stockholders. Upon examining their answers, it is manifest that they were nominal stockholders only, their names having been used without their consent, or under circumstances which demonstrate that they *never meant to become stockholders. [***490** And no attempt was made at the hearing to charge them with any other proofs. As to them, therefore, the dismissal was properly decreed.

An objection was taken at the argument, as to the regularity of the appeal, it having been claimed by all the defendants against whom the decree was made, and the appeal bond having been given by Mandeville only. The objection, if it had been material in this case, ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond. But it is not material in this case, since if Mandeville be considered the only appellant, the error of the decree is equally fatal, and consequently re-instates the cause, discharged of that decree, as to all his co-defendants.

Upon the whole, we are of opinion that the decree must be reversed, and the cause remanded to the Circuit Court with directions to have the cause re-instated, as to all the defendants as to whom the bill was taken as confessed, and dismissed at the hearing; and with directions also that the personal representatives of the parties to the bill, who died during the pendency of the suit, if they are known, can be brought before the court to be also made parties; and also with directions, that all the

other defendants named in the bill, who were not served with process, but against whom farther proceedings may be had to bring them before the court (as to whom the bill was dismissed at the hearing), be brought before the court, if practicable, as parties; and that thereupon such farther proceedings be had as to justice and equity may appertain.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel; on consideration whereof, it is the opinion of this court, that there is error in the decree of the said Circuit Court in dismissing the bill against the defendants upon whom process was not served, **491*** and also *against the defendants against whom the bill was taken *pro confesso*, and set down for a hearing; and also error in the said court in not requiring the said suit to have been revived before said decree against the personal representatives of the parties thereto, who were served with process, and died during the pendency of the said suit, who were known, and might have been brought before the court. It is therefore ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed and annulled, and that the cause be, and the same is hereby remanded to the said Circuit Court, with directions to cause the same to be re-instated as to the defendants aforesaid against whom the bill was taken *pro confesso* and set down for a hearing, and by the decree dismissed. And also with directions that the personal representatives of the defendants, who died pending the suit, who are known and may be brought before the said Circuit Court, be made parties thereto, and the bill be revived as to them.

Rev'g, 3 Cranch, C. C., 183.

Cited—8 Pet., 258; 24 How., 206; 6 McLean, 463.

492*] *THE BANK OF HAMILTON,
Plaintiff in Error,

v.

THE LESSEE OF AMBROSE DUDLEY,
JUN., Defendant.

Repeal of Ohio Act regarding sale of real estate of intestate—acts of a court of record nunc pro tunc—administrators—judiciary—right to jury trial—practice.

Proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced before the repeal of the Act of the Legislature of Ohio, entitled "A law for the settlement of intestates' estates." The administrators, notwithstanding the repeal, went on to sell the land, and appropriate the proceeds to the discharge of the debts of the intestate. Held, that the sale was void.

The power of the inferior court of a State to make an order at one term as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal, that the judgment of the same is considered authority, and this court is disposed to conform to it. [522]

That a court of record, whose proceedings are to be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that, too, after the repeal of the

law which gave authority to make such an order, is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of the court question the existence of the power. [522]

Where administrators, acting under the provisions of an Act of Assembly of the State of Ohio, were ordered by the court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made the law was repealed, the powers of the administrators to sell terminated with the repeal of the law. [523]

The lands of an intestate descend not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts. The administrator has no estate in the land, but a power to sell under the authority of the Court of Common Pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but it is conferred by the court, in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order, be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every Legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the Legislature. [523]

The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. If in a case depending before any court a legislative Act shall conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the Act. The court must determine whether a repugnancy does, or does not exist, and in making this determination must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason. [524]

*This court can perceive no sufficient **493** grounds for declaring that the Legislature of Ohio might not repeal the law of that State by which the Court of Common Pleas was authorized to direct, in a summary way, the sale of the lands of an intestate. "Jurisdiction of all probate and testamentary matters" may be completely exercised without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to be identical with that power, or to comprehend it. [524]

The occupant claimant law of Ohio, which declares that an occupying claimant shall not be turned out of possession until he shall be paid for lasting and valuable improvements made by him, and directs the court in a suit at law, to appoint commissioners to value the same, is repugnant to the seventh amendment of the Constitution of the United States, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The compensation for improvements is a suit at common law, and must be submitted to a jury. [525]

Admitting that the Legislature of Ohio can give an occupant claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the Legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. [526]

The inability of the courts of the United States to proceed in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him. The modes of proceeding which belong to courts of chancery, are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the Act be unconstitutional, the provisions of that part may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the State, or the ordinance of 1787. The question whether any of its

provisions be of this description, will properly arise in the suit brought to carry them into effect. [526]

THIS is a writ of error to a judgment rendered in the Court of the United States for the Seventh Circuit and District of Ohio, in an ejectment brought in that court by the defendants in error, against the present plaintiffs for part of lot No. 103, in the city of Cincinnati.

The plaintiff is heir-at-law of Israel Ludlow, who died seized of the premises in the declaration mentioned. The defendant claimed under a sale and deed made by the administrator of the said Israel Ludlow, in pursuance of certain orders of the Court of Common Pleas for the county of Hamilton.

494* *The case depends on the validity of this deed.

In August, 1788, the territorial government of Ohio enacted "a law establishing a court of probate." The first section enacts that "there shall be appointed one judge of probate in each county, whose duty it shall be to take the probate of last wills and testaments, and to grant letters testamentary and letter of administration, and to do and perform every matter and thing that doth or by law may appertain to the probate office, excepting the rendering definitive sentence and final decrees.

In 1795, an Orphans' Court was established, and it was enacted that where persons die intestate and leave lawful issue, "but not a sufficient personal estate to pay their just debts and maintain their children, it shall be lawful for the administrator or administrators of such deceased person to sell and convey such part or parts of the said lands or tenements for defraying their just debts, maintenance of their children, &c., as the Orphans' Court of the county where such estate lies, shall think fit to allow, order and direct, from time to time."

In the year 1802, Ohio became an independent State. The Constitution, in the article which respects the judicial department, declares that "the Court of Common Pleas in each county shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law." In April, 1803, the judicial courts were organized; and the Court of Common Pleas, after a general grant of original jurisdiction, was empowered to examine and take the proof of wills, to grant administration on intestate estates, and to hear and determine all causes, suits and controversies, of a probate and testamentary nature.

In June, 1805, the territorial ordinance of 1795 was repealed.

At the trial of the ejectment in the Circuit Court, after the plaintiff had closed his evidence, the defendants offered in evidence a deed from the administrators of Israel Ludlow, deceased, to Andrew Dunsen, for the premises in the declaration mentioned. "They also offered in evidence duly *certified entries and copies of orders from the records of the Court of Common Pleas within and for the county of Hamilton, State of Ohio, of which the following are true copies, viz., '2d of February, 1804: Letters of administration granted unto Charlotte C. Ludlow, John Ludlow, James Findlay, and James Pierson, on the Peters 2. U. S., Book 7.

estate of Israel Ludlow, deceased; and their bond with William Ludlow and James Smith as securities for their faithful administration.'" At May term, in the year 1804, date 8th of May, 1804, the following order was made, viz.: "The administrators of the estate of Israel Ludlow, deceased, exhibit an account current and pray the court to issue an order for the sale of real property to defray the debts due from the estate, &c. John Ludlow and James Findlay sworn in court. The court order so much of the real property to be sold as will meet the said demand, except the farm and improved land near Cincinnati, together with the house and lots in Cincinnati." At the August term of the said court in the year 1805, a supplemental order was made, of which the following was a copy, viz.: "The administrators of I. Ludlow, deceased, on application to the court to extend the order for the sale of property to discharge the debts arising from the estate; whereupon the court allow the administrators to sell the house and lots in the town of Cincinnati and any other property, except the mansion house and farm in the country, so that the sale do not amount to more than ten thousand dollars. This entry considered as of May term, 1805."

It was in evidence that the sale was made agreeably to the provisions of the law adopted from the Pennsylvania code by the Governor and judges of the north-western territory on the 16th of June, 1795, entitled, "a law for the settlement of intestate estates;" that the deed was duly executed, acknowledged and proved.

The plaintiff, by his counsel, moved to overrule the testimony offered by the defendants' counsel, because the law aforesaid, entitled, "a law for the settlement of intestate estates," was repealed before the order was made authorizing said sale, and that at the time of making of the said order there was no law of the State of Ohio authorizing the Court of Common Pleas to *order the sale of real estate for the [*496 payment of debts, &c., of intestates. The court sustained the motion and overruled the defendants' evidence. The defendants excepted to this opinion.

The jury found a verdict for the plaintiff; after which the counsel for the defendants moved the court for the appointment of commissioners, under the occupying claimant law of Ohio, to value improvements. This motion was overruled, and judgment was rendered for the plaintiffs.

The case was argued for the plaintiff in error by *Mr. Benham* and *Mr. Baldwin*, and by *Mr. Garrard* for the defendant.

For the plaintiff it was said, that the defendant in error claims by descent, as heir-at-law of Israel Ludlow, deceased, who died seized of the premises in question; and the plaintiff claims by purchase from his administrator.

The case is one of deep interest to the present litigants, as well as to all those who hold real estate in Ohio under deeds from administrators; and this class is numerous. Its decision depends upon old statutes which it is proposed to collate, in such a manner as to aid the judgment of the court in expounding them in reference to this case.

These statutes will be found between the periods of 1788 and 1805, and to relate, 1. To

the establishment of probate and testamentary courts under the territorial government. 2. Their powers and jurisdiction. 3. The abolition of these courts upon passing from a territorial into a State government. And 4. The organization of new courts of similar jurisdiction, and the modification and repeal of laws relating to testamentary matters.

The facts of the case in reference to which the court must expound these laws are as follows: Ludlow died the 21st of January, 1804. On the 2d of February of that year, administration was granted upon his estate to John Ludlow and others, who gave bond with sureties, as the law required, for the faithful execution of their trust. On the 10th of May, 1804, the following proceedings were had in the Court of Common Pleas of Hamilton county, viz.: "The administrators of J. Ludlow, deceased, exhibit an account current, and pray **497*** the court to issue an order for the sale of real property to defray the debts due from the estate, &c. John Ludlow and James Findlay, sworn in court. The court order so much of the real property sold as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." On the 15th of August, 1805, the court made another order as follows: "The administrators of J. Ludlow, deceased, on application to the court to extend the order for sale of property to discharge the debts owing from the estate; whereupon the court allow the administrators to sell the house and lots in the town of Cincinnati and any other property except the mansion house and farm in the country, so that the sales do not amount to more than ten thousand dollars—this entry considered as of May term, 1805." The administrators, under the above orders or decrees, sold the lot in dispute and made a deed therefor to Andrew Dunseth, under whom the plaintiff in error claims, which orders and deeds were offered in evidence in the Circuit Court and overruled.

Whether this evidence were admissible or not, will depend upon the solution of the following propositions:

1. Had the Court of Common Pleas jurisdiction of the subject-matter? 2. Was it competent for that court, upon the application of administrators, to condemn the real estate of intestates to be sold for the payment of their debts, &c.? 3. Did the sale and deed of the administrators of the lot in question, pass the legal title to their vendee?

By the law of the territory, adopted by the Governor and judges in 1788, and confirmed in 1799 (Ohio Laws, 378-9), a qualified jurisdiction over probate and testamentary matters was confided to a judge of probate in each county. This judge had power to grant letters testamentary and of administration, receive guardians chosen by, and appoint guardians for minors, idiots, and insane persons; but he had no power to compel executors, administrators, or guardians to execute faithfully their duties. And for this purpose, in 1795, an Orphans' Court was instituted, with supervisory jurisdiction, to call trustees to account, and to review the judicial proceedings of the judges of **498*** probate. (Maxwell's Code, 81.) *At the time the Orphans' Court was established,

in June, 1795, a law was adopted from the Pennsylvania code "for the settlement of intestates' estates" (Maxwell's Code, 90). This statute prescribes the form of administrators' bonds, directs the distribution of the personal estate under the superintendence of the Orphans' Court; and provides (section 7), upon a deficit of personalty, to pay the debts of intestates and maintain and educate the children, &c., for the sale of the lands and tenements for these purposes by the administrator, in such manner as the Orphan's Court "shall allow, order and direct, from time to time."

In May, 1798, another Act was adopted, which contained a general provision for the sale and distribution of insolvents' estates, which was repealed by an Act passed January, 1802, on the same subject. (Ohio Land Laws, 383.) Coeval with the last-mentioned Act, a law was passed for the appointment of guardians to lunatics, &c., which provides for the sale of their real estates, in the same manner that administrators are authorized to sell the real estates of their intestates. (Terr. Law, 120.) Thus stood the laws relative to courts probate and testamentary, and the apportionment of jurisdiction among them, and relative to the sale and distribution of the estates of intestates, minors, idiots, &c., up to the adoption of the State constitution in 1802. In this political transit from a territorial to a State government, the courts above mentioned were abolished, and new courts instituted with plenary probate and testamentary jurisdiction.

But the abolition of the testamentary courts of the territory did not abrogate the laws above cited; relative to the sale of intestates' estates for the payment of debts, &c.; the Act adopted from the Pennsylvania code in 1795 remained in full force. What court under the State government was charged with its execution, will now be considered.

By the constitution of Ohio, the judicial power of the State is vested in a supreme court, courts of common pleas, and justices of the peace. The Common Pleas is invested with jurisdiction of all probate and testamentary matters, granting of administration, &c. (art. 3, sec. 2), and such other cases as shall be prescribed by law. It also provides that all actions, *suits, prosecutions, rights, [***499** claims and contracts, shall continue as though no change had been made in the organic law. (Sched., section 1st.)

It is maintained to be clear, that by the words "all probate and testamentary matters," was meant all the duties of executors and administrators, and all matters arising out of the settlement of the estates of decedents. The Common Pleas was the only court, under the new form of government, that possessed original jurisdiction over the estates of intestates; and it could not have been the intention to leave the law of 1795 in force without a court to execute it. Again, it will be seen that the constitution provides (art. 3, sec. 5) that the Common Pleas shall have jurisdiction "in such other cases as shall be prescribed by law." Now, by the statute of April 15, 1803, unlimited jurisdiction is given to the Common Pleas in all civil cases in law and equity, and all causes, suits and controversies of a probate or testamentary nature. (Ohio Laws, 40.) And the 26th section of this

Act requires the Supreme Court and Common Pleas to take cognizance of all judgments, matters and causes whatsoever, pending in the territorial courts. For the sense in which the words "courts of probate" were used, see the law abolishing territorial courts. (3 Ohio Laws, 188). The Legislature has throughout used the words "probate and testamentary" in a popular, and not in a restrained and technical sense.

2. If the Common Pleas had jurisdiction of the subject, either as a court of general chancery powers or a court of probate, did the orders granted confer the right upon the administrators to sell this lot? The order of May term, 1804, extends to all the real estate "except the farm and improved lands and house and lots in Cincinnati." It is asked if this exception includes the unimproved lots; the lot in dispute was unimproved and unproductive. But if this order did not extend to the lots, the order of 1805 did; whether it be considered as the order of May or August term. If it be a valid order of May term, it ends the controversy; and whether it can be so regarded or not, must depend upon the power of the court to grant it. We affirm the order was **500*** made at *May term, and, by the mere misprision of the clerk, not recorded; to correct which, it was entered, *nunc pro tunc*, at August term. The exercise of this power rests in the sound discretion of the court, and is indispensable to prevent a failure of justice. Amendments are always allowed where the omission happens by the oversight or neglect of any of the ministers of justice, as an attorney or clerk. (3 Johns. Rep., 443, 144, 519; 1 Bin., 368, 486.)

The power to correct clerical misprisions is incidental to every court of record. (1 Tidd's Prac., 438; 1 Durnf. & East, 638; 2 Tidd, 846.)

Judgments are entered under powers after the death of the donor (1 Salk., 87; 3 Salk., 116; 3 P. Williams, 399; 6 Durnf. & E., 368; 2 Strange, 882, 1081), and also on verdicts of a prior term. (Salk., 401.) The same rule obtains in chancery. (4 Johns. Ch. Rep., 342; 9 Ves., 461, 92.) If an execution be lost or destroyed, a second will be ordered, *nunc pro tunc*. (3 Johns. Rep., 443). In the case of *Lawrence v. Richards* (1 Jac. & Walker, 241), the chancellor, after the lapse of more than twenty years, ordered a decree filed *nunc pro tunc*. It may be said that this is a delicate power, and should be exercised with great circumspection. This is true; but when a court of competent jurisdiction has exercised it, and the validity of the act is drawn collaterally in question in some other court, that court will presume favorably — *omnia esse rite acta*. (2 Bin. Rep., 255.)

Now, if this order can be considered as of May term, could the administrators sell under it, after the law of 1795 was repealed? For the argument, the law may be considered repealed before the sale. The order was granted upon the application of the administrators, *ex parte*, it is true, the law not requiring the heir to be notified; for the administrator is often the heir himself, or next of kin, or the particular friend of the heir, who is presumed to be careful of his rights. The order is a proceeding *in rem*; it condemned the real estate to be

sold, and a sale made under it directs the title of the heir, and judgment liens.

This order confers more power upon the administrators than a judgment or decree can give to the sheriff; and in *devesting [***501** lieus, it is more efficacious than either. Why, then, shall it be regarded as less sacred? Acts done under an existing law are not impugned by its repeal. (6 Bac. Ab., 392; 12 Co., 7; 3 Dall., 379.)

It is not in the power of either the judiciary or Legislature to render nugatory an existing judgment. (7 Johns. Rep., 485.)

If this order can be regarded in the light of a mere power, it would not affect the conclusion to be drawn. A power in a will to executors to sell real estate, to pay debts, is a power coupled with an interest, and survives. (2 Johns. Ch. Rep., 1, 19; 12 Johns. Rep., 537; 14 Johns. Rep., 527.)

This court, in 7 Wheat, 114, recognizes as a lien the power of the administrator to sell real estate of intestates to pay debts, and limits its exercise within a reasonable time, which is to be fixed by analogy to the statute of limitations.

Again, if this order cannot be regarded upon either legal or equitable principles as of May term, it is urged, that as a decree of August term it authorized the sale, whether it did or not depend upon the power of the court to grant it at that time; and this proposition involves several nice and difficult considerations, upon which the counsel for the defendant in error will place much emphasis. He will contend that the court had no power to make the order, independent of the Act of 1795, and that this Act was repealed before it was made. He will rely, to maintain this postulate, upon the following statutes, viz., an Act passed the 18th of February, 1804, "defining the duties of executors and administrators on wills and intestates' estates," which took effect in May, 1804 (2 Ohio Laws, 279); an "Act directing the manner of executing, proving, and recording wills and codicils;" an "Act directing the distribution of insolvents' estates," and an "Act defining the duties of executors and administrators, on wills and intestates' estates, and providing for the appointment of guardians." (3 Ohio Laws, 173, 182, 188.)

These several Acts, did they all conflict with the provisions of the Act of 1795, are in terms prospective; they refer to future administrations, and define the duties of executors and administrators, in relation to the personal estate of those who may die after they take effect. Neither of them contains *any [***502** provision incompatible with the Act of 1795, but they stand in perfect harmony with it, at least so much of it as provides for the disposition of the lands and tenements of intestates.

The Act of the 18th of February, 1804, repeals "all laws contrary to its provisions," but contains no provision relative to lands. So far from being repugnant, it rather contemplates the life of the Act of 1795, as necessary to give complete effect to its 6th section, which requires the administrator to account to the heir, after paying the debts. The Act "directing the manner of executing, &c., wills and codicils," repeals "all laws on that subject." (Sec. 6.) The Act "defining the duties of ex-

ceutors, &c., on wills and intestates' estates," repeals the law establishing the courts of probate, of June, 1795; the Act "empowering the judges of probate to appoint guardians to minors," and "all other laws on the subject of this law." Here the laws intended to be repealed are expressly designated, and the general clause was added, *ex abundante cautela*, to guard against collusion. A subsequent act must be expressly repugnant to a former, or it does not operate as a repeal. (11 Co., 64.) Again, the learned counsel will strenuously insist that the Act of 1795, authorizing administrators to sell the lands, &c., of decedents, was expressly repealed on the 1st of June, 1805, by an Act repealing certain laws, passed the 22d of February, 1805.

This law purports to repeal all the laws adopted or passed by the Governor and judges, prior to the first of September, 1779, then in force. (3 Ohio L., 294.) At the session this law was enacted, the Legislature undertook a revision of the old statutes; not with a view of forming a new code of laws out of new materials, for the course of legislation shows no intention to change the general principles of the laws; but rather to preserve, arrange and classify them, with a view to perspicuity and certainty. It was believed, no doubt, that the committee of revision had fully and faithfully performed this onerous and responsible duty; and that all the elementary principles of the laws repealed, had been incorporated into the new code. Under these circumstances, on the last day of the session, to prevent confusion and repugnancy, *the general repealing law was enacted. This is a question of legislative intention. In exploring this intention, in all cases of ambiguity, the judgment is submitted to the guidance of certain familiar rules of construction. We look back upon the old law, and trace its effects upon community, with an eye to its mischievous influence; and we consider well the remedy or policy of the law given in the enactment of the new law. Now, the liability of real estate in the hands of an administrator for the just debts of his intestate, is a sacred elementary principle to be found in all the codes of the different States of this Union, introduced originally by an Act of Parliament. At an early period of their colonial history, it was a relaxation, in favor of the colonies, of that feudal sternness which characterizes the common law in relation to landed property; and which, for reasons of State policy, has been scrupulously maintained in England; indeed, upon this principle and that of primogeniture, depends the stability of the peerage. In the United States, land has a less sacred character than in less free governments, and has ever been considered an article of trade; and it is the policy of our laws to discourage everything calculated to fetter or embarrass titles, or to lock up estates in families; such as entailments, &c.

Upon the hypothesis that this law was repealed, what remedy was left for creditors against deceased debtors? They were remediless; chancery could afford none, and they had none at common law. (2 Saund. Rep., 7, note 4; Cruise Dig. title 1, sec. 63., title 32, sec. 12-16.)

Now, suppose the partial remedies of the common law existed after the organization of

the State government; which is denied, because they are incompatible with the judgment and execution laws then in force, and in express violation of the Act of February 11, 1805, for the distribution of insolvents' estates; still the simple contract creditors have no remedy, and the specialty creditors are left to scramble for priority; some one creditor, and often the least worthy—for such are apt to be most vigilant—monopolizes the whole.

Again, whether the Legislature did intend to repeal the Act of 1795 must be determined by considering as unique, *all the laws *in* [*504 *pari materia*, whether repealed or not. (3 Mass. Rep., 21; 1 Kent's Com., 443; 6 Bac., 380, 383.)

Applying these rules of exposition, it is submitted that not only *ab inconvenienti*, but from necessity, in order to give effect to the Act of the 11th of February, 1805, which provides for an equal distribution among all the creditors, the court will be constrained to say the Act of 1795 was not intended to be repealed. This idea is also fortified by the Act of the 15th of January, 1805 (3 Ohio Laws, 163), for the "appointment of guardians to lunatics" and others. It provides for the sale of their real estate "in such manner as executors or administrators are by law enabled to discharge the debts of deceased persons."

The plaintiff also relies upon the general understanding of the profession, that this law was not repealed. (5 Cranch, 32; 1 Dall., 131, 11, 13.)

What was the effect of the saving clause in the repealing law; and whether the repeal of the law could operate on an administration pending.

1. Upon general principles, if the law were repealed, it was prospectively, and could not affect the duties of these administrators, nor their rights, nor the rights of creditors. The maxim is, *nova constitutio futuris formam debet imponere, non præteritis*. Ludlow died on the 21st of June, 1804, and administration was granted on his estate on the 2d of February following. The administrators had disbursed all the personal effects in their hands, and had filed a petition to sell the real estate, upon which a limited order had been granted; which proceedings were pending *in fieri* before and at the time all the repealing statutes before named took effect.

By the laws in force when this administration was commenced, the real estate of intestates were assets, *sub modo*, in the hands of the administrators; and by the Act directing the distribution of insolvents' estates the creditors were prohibited from prosecuting their claims to judgment; by these laws, the rights of the administrators, creditors, distributors, and heirs in said estate were to be ascertained and finally settled; and by these laws the administrators had *made a partial settlement. The [*505 rights of the creditors to look to the real estate (rights paramount to the heirs), as assets, had attached; had been recognized by the court; and the administrators had instituted the only suit known to the law to enforce them; the suit was *ex-parte*, it is true; so are admiralty, bankrupt and insolvent proceedings, from necessity; they all act under the supervision and direction of the court, at all times liable to be called to account, or subject to be removed for

omission or neglect of duty. The administrator brings no adversary into court, but must meet all who choose to come; his proceedings are *in rem*, and must be considered as entire and pending, until finished upon the basis they were begun. He had undertaken a trust and had entered into a contract, and had given security for its faithful execution. By this contract, in reference to the laws in force at the time of its date, the duties of the administrator were fixed, and the rights of the creditors and heirs were to be ascertained. (2 Serg. & Rawle, 8; 2 Binn., 299.)

If this be not true, it would be easy to point out the confusion and injustice of a contrary doctrine. Some creditors have been paid, others have received part, and others nothing. And the administrator may have paid debts out of his own pocket, as he had a right to do, looking to the real estate to be re-imbursed, &c.

To show that the repeal of the law, even without a saving clause, could not affect an administration commenced and pending, the following authorities were cited: *Dash v. Van Kleeck*, 7 Johns. R., 485; 3 Dall., 397; 20 Johns. R., 212; 17 Johns. R., 203; 3 Johns. Ca., 75; 16 Johns. R., 252; 7 Johns. R., 309; 1 Kent's Com., 419. *Vide* also ordinances of Congress of 1787, article 2, made perpetual by the Act of 1802, section 5.

2. The repealing law, however, contains this saving clause: "This Act shall not be construed to affect in any manner any suit or prosecution pending and undetermined; but the same shall be carried on to final judgment, and execution, agreeably to the provisions of any of said laws under which they are commenced, and the practice of the courts."

It is asked, what was the object of this saving clause, or rather what rights and interests was it intended to protect from the operation of repealing power? The rights and interests which the saving clause were to protect were all those various rights and interests upon which the laws repealed had acted or begun to act in a course of judicial proceeding; it is to affect not in any manner any suit or prosecution pending and undetermined, commenced under existing laws, or sanctioned by the practice of the courts.

Prosecution is a word still more comprehensive than suit, and which cannot be subjected to technical restraints. It is not a technical term, though sometimes vulgarly used to signify criminal proceedings. (3 Thomas's Coke, 348.)

In addition, to show the sense in which the words *suits*, *actions* and *prosecutions* have been used by the Legislature of Ohio, the court will look at Land Laws, 323. (1 Ohio Laws, 8, 11; 2 Ohio Laws, 67; 3 Ohio Laws, 257, 284, 285, 294.) From these it appears, that these words have been used to embrace all manner of judicial proceeding when transferring jurisdiction, upon passing from a territory to a State; in the organization of new counties and new courts.

It has been said that this petition of the administrators for the sale of the land, &c., was pending, and that a qualified order had been granted in 1804, and that the order of 1805 was supplementary. Now, it is asked whether this proceeding did not involve rights and interests as sacred, falling as completely within the mis-

chiefs intended to be guarded against by the saving clause as any adversary proceeding which can be imagined. In 2 Serg. & Rawle, 8, the court decides, that all the orders of sale are parts of the same proceeding, they rest upon the same foundation, and refer themselves back to the filing of the petition. It is, therefore, considered that if the Act of 1795 were repealed, it did not affect the administration.

It has been shown that the Common Pleas was a court of original and almost unlimited jurisdiction, and that the principle that lands should be assets in the hands of administrators for the payment of debts, a principle unknown to the common law, had been early introduced into the colonies, and perpetuated after the revolution by nearly all the States, *and [*507 particularly by Pennsylvania, the powerful neighbor of Ohio; from whom were borrowed not only most of the principles of her organic law, but nearly all her first statutes. Now, if the point of jurisdiction is established, it is claimed that the order of 1805, which authorized the sale of the lot in question, is valid until reversed; it is *res judicata*, and cannot be impeached collaterally. It is not like the order of a judge of probate or any other judicial, whose powers are specified and limited. The principle which this argument maintains pervades all the cases. "What judges of the matter have adjudged, is not traversable." (1 Salk., 396.) A contrary principle applies only to courts of special limited jurisdiction.

It was hoped that as the defendant in error had elected the federal judiciary to decide upon his rights, he would have been content to abide by its unbiassed decision; and that if those whom he has driven to battle were to fall, they would, at least, have the consolation which in legal warfare always arises from an unshaken confidence in the learning and integrity of the arbiter. It is known that it is the law of this forum, that in cases depending upon the laws of a State, this court will adhere to the construction given by the Superior Court of the State, upon the universally recognized principle, that the judicial department of every government is not only competent to, but is the fit organ to expound its laws. But this rule, from the peculiar form of our governments, is subject to these limitations, namely, that if the exposition of the local laws by the local judiciary conflict with the Constitution, the laws, or treaties of the United States, it is not binding upon this court. To this rule, which is certainly correct, we yield unqualified approbation; but deny its application. What is the reason upon which it is founded? Why does this court, possessing so many superior advantages, yield an entire submission to State adjudication? It is not from courtesy; but because natural justice requires it, since the local adjudication has become a rule of property which regulates and settles the rights of *meum* and *tuum*, a permanent landmark which it would be mischievous to remove. (*Vide* 5 Cranch, 184; 10 Wheaton, *199; 7 Wheaton, 114; 5 Johns. Rep., [*508 290; 9 Johns. Rep., 424; 6 Johns. Rep., 387.)

Even if the statute of 1795 were repealed, and had no saving clause, while the act requiring an equal distribution of insolvents' estates continued in force, the court had jurisdiction of the

subject-matter and could grant the order. And the order once granted could not be invalidated by showing, some twenty years afterwards, that the court erred in point of fact, that the estate was solvent; for whether Ludlow's estate was solvent or insolvent does not appear.

This case having been continued under advisement since the last term, we are now met with a decision of the Supreme Court of Ohio, which, it is said, decides the merits of this controversy and concludes this court. What influence this ought to have upon the judgment of this court as to the law of the case, will now be considered.

The decision in Ohio acts retrospectively and annuls past transactions, and not prospectively to regulate the future acquisition of property. It is the decision of the Common Pleas which settled the law, if competent to decide upon the subject-matter, which is binding upon this court until it is reversed. The questions involved in this case, can only be decided by the principles of the common law; even the question whether a statute is repealed or not, can only be determined by the rules of construction which it prescribes. If the Supreme Court had decided against the jurisdiction of the Common Pleas to grant the orders, perhaps it would have been conclusive upon this court; but it sustains the jurisdiction. The order of 1805 is claimed to be an order of May term before the law was repealed, entered, *nunc pro tunc*, at August term; and if not valid as an order of May, it is good as a supplemental order of August, and relates back to the petition; but the Supreme Court has decided, collaterally, that it was an act *coram non judice*. All these are questions which depend upon general principles, and not upon the exposition of local laws, and we think we have a right to ask the unbiased decision of this court upon them.

This court will never follow the law as decided by the local tribunals, unless it be settled 509*] by a series of decisions, *and is acquiesced in by the profession. But it is in this case asked to yield implicit obedience to an isolated case, in the decision of which the court was divided; a decision, too, as it is solemnly believed, fraught with the most pernicious and ruinous consequences; and which, unless the learning and justice of the profession are greatly mistaken, will never meet its approbation.

The counsel for the plaintiff then proceeded to discuss the question of the constitutionality of the occupying claimant law. The arguments upon this point for the plaintiff and the defendant, are stated in the opinion of the court.

Mr. Garrard, for the defendants, after stating the case, the laws of the territory of Ohio, and the Acts of the Legislature of that State, which had been referred to by the counsel for the plaintiff in error, proceeded to say:

In construing the Act of 1803, it should be borne in mind that the Court of Common Pleas, created by it, is a limited and circumscribed tribunal in its jurisdiction; and that upon the law of 1803 it depends entirely for its existence. If it is a court of limited and not general jurisdiction, the distinction between them is at once destroyed, if the exercise of general

powers shall be deemed consistent with its limited character.

The distinction between courts of limited and general jurisdiction should not be abolished. Obligatory effect should not alike be given to acts of a court of limited jurisdiction, when they are done within their real, or by assumed powers. If a court of limited and circumscribed jurisdiction can legitimately exercise general powers, no good reason can be given why the Court of Common Pleas should not be sustained in assuming the peculiar powers and jurisdiction of this court. If an assumed power is valid for one purpose and for one occasion, it is valid for all and every purpose. There is no rule of construction by which the limited and circumscribed jurisdiction of the Court of Common Pleas can be made so broad and reaching in its character as to embrace the orders of 1804 and 1805. The rule of construction applicable *to this case is well set- [*510 tled, and has never been deviated from; it is, that the organic law of the court is the charter of its powers, and that it has no powers beyond that charter, except such as are necessarily incident to it, to carry into effect its orders, judgments, and decrees. Such was the rule of construction under which the Court of Probate and Orphans' Court acted, who possessed the same power with the Court of Common Pleas, under their respective organic laws. The power to order the sale of an intestate's real estate, by his administrators, was exercised by the Orphans' Court only in virtue of the Act of 1795. That Act does not extend to the Court of Common Pleas, but is confined in its terms. The law of 1803 does not extend that power to them by any express grant; nor can it be implied by any reasonable interpretation of that Act. The power therefore did not exist, and the orders are consequently "*coram non judice*."

Should the jurisdiction of the Court of Common Pleas be sustained, it will then be contended that the Act of 1795 was repealed prior to the granting of either of the orders in evidence.

1. The Act of 1795 was repealed by the Act of the 18th of February, 1804, which took effect the 1st day of May, 1804, entitled, "an Act defining the duties of executors and administrators on wills and intestates' estates." This Act strictly confines the duties and powers of executors and administrators to the personal estate of the deceased; it directs how letters of administration shall be granted; what powers they shall confer; how administrators shall proceed; how they shall be called to account; and it repeals "all laws and parts of laws contrary to the provisions of this Act." The intention of this law was to point out and define the whole duties and power to be exercised by executors and administrators in future, and it restricts them to the personalities of the deceased; a power to sell the real estate does not seem to be contemplated by this statute in any of its provisions, either by a direct grant or by reference to former and existing laws, giving such power; but it repeals all laws *and [*511 parts of laws contrary to the provisions of this law. A power in the administrator to sell the land and pass the title of an intestate's real estate is certainly inconsistent with, and

contrary to, the provisions of a law, that undertakes to prescribe the whole duties and powers of executors and administrators, and limits their management to the personal estate. And whilst this spirit continued to direct the minds of the first legislatures of the State, it is a reasonable and legitimate presumption to say that whenever they undertook to legislate upon any particular subject, they made all regulations and provisions required by the exigences of the country. That they intended by this Act to define the whole duties and powers of executors and administrators, and limit them to those prescribed by this statute itself, which repeals all laws and parts of laws contrary to its provisions.

2. It was repealed by the Act of 1805, entitled "An Act defining the duties of executors and administrators on wills and intestates' estates, and providing for the appointment of guardians." This Act was passed in connection with two other laws relative to the same matter—one directing the manner of executing, proving and recording wills and codicils; and the other directing the distribution of insolvents' estates. All of these laws restricts the duties of executors and administrators, and the powers of the courts to the personalities of the deceased; and each of them contains a repealing clause, and the first all laws upon the same subject. If the law of 1795 was then in force, it was certainly repealed; as it was upon the same subject with this Act. By a reference to the statute book of this year it will be seen that the Legislature of 1804-5 took upon themselves, in an especial manner, the character and duties of revisors of the laws then in force; and they adopted a system which underwent little or no change till 1808. They passed a general repealing law, which will be noticed hereafter. They passed a general law regulating judgments and executions, incorporating in it provisions entirely new, and repealed all other laws upon that subject. That the three laws above mentioned were treated and considered as the only laws in force from their passage till 1808, is evidenced **512*** by the fact that the law of *the 18th of February, 1808, which incorporates the provisions of these three laws into one, repeals these laws by a special reference to them as the only laws then in force upon the subject. (Land Laws, 459.)

3. The Act of 1795 was repealed by the Act of the 22d of February, 1805, entitled, "An Act repealing certain laws." (Land Laws, 473.) The first section repeals all the laws adopted by the Governor and judges prior to the 1st of September, 1799. The Act for the settlement of intestates' estates, having been adopted prior to that period, was certainly repealed by this Act; and all proceedings by administrators subsequent to the 1st of June, 1805, which assumed the Act of 1795 as their basis, were null and void, unless they were such as came within the meaning of the saving clause of the second section.

The second section provides, "that nothing in this act contained, shall be so construed as to affect in any manner, any suit or prosecution now depending and undetermined, but the same shall be carried on to final judgment and execution, agreeably to the provisions of any of said laws under which the suit or prosecution

may have been commenced, and the practice of the courts." It was contended by the defendant's counsel, that the clause not only saved the unexecuted power derived under the order of 1804, but that it saved a power in the Court of Common Pleas to go on and make additional and supplemental orders *ad infinitum*, by relation to the first. To support these propositions, it was maintained that such was the intention of the statute by a fair construction of the terms used; and, secondly, that the Legislature had not the constitutional power, under the circumstances of the case, either to annul the order of May, 1804, although no rights had been acquired by a sale under it, or to repeal the Act of 1795 so as to prevent the court from making new and additional orders.

In determining the correctness of the first position, as to the meaning of the saving clause, we must look to the language of the statute. The repeal is not to affect in any manner any "suit or prosecution." The definition is thus given of the term suit, "the lawful demand of one's right," *or in the words of Justinian, "*jus prosequendi in judicio quo alteri debetur.*" (3 Blackstone's Commentaries, 116.) If a "suit" means the lawful demand of one's right, there necessarily must be some one to make the demand, and some one of whom the demand is made, through the medium of a court, and these parties receive the names of plaintiff and defendant. The one complains of the violation of his rights, either growing out of contract or torts committed; the other, defending himself against the injury complained of, either denies the contract or tort, or shows that the one has been satisfied, or the other justified. (See, also, 6 Wheat., 407, 406.)

The term *prosecution*, both technically and in common parlance, when applied to the proceedings of a court, relates exclusively to criminals, or to suits upon penal statutes. If a murder is committed, the perpetrator is prosecuted by the State. So with perjury, rape, arson, and the various degrees of felony—the State is plaintiff, complaining of wrongs and violations of her statutes. There are also various statutes attaching penalties in money for the performance or non-performance of certain acts—when the one is done or the other neglected, prosecutions are commenced in the name of the State for the amount of the penalty.

But the terms "suit and prosecution" are fully explained (if they needed any explanation) by the subsequent part of the saving clause. It provides that the "suit or prosecution" depending and undetermined, shall be carried on to final "judgment and execution." It is wholly immaterial whether the term "suit or prosecution" is attempted to be applied to the order of 1804, or the subsequent petition and order of August term, 1805. If it is said that the unexecuted order of 1804 is saved by the term "suit or prosecution," it may be asked, who is the plaintiff in the order? To what tribunal was the appeal made? And against whom was the complaint made? What judgment was the order to be "carried on to?" Against whom and for whose benefit was the judgment to be entered? These queries unquestionably show that the terms "suit or prosecution" cannot be applied to the order of 1804, or to the subsequent petition and order of 1805. But the

“suit or prosecution” is to be carried on, not **514***] only to “final judgment,” but also to “execution.” The term “execution” is certainly used here in the technical sense of the word, as applied to the final process of the court, in the hands of its executive officer, to carry into effect its orders, judgment, and decrees. An execution is defined to be the “putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.” (3 Blackstone, 412, title Execution, chap. 26.)

Neither the order of 1804, nor the subsequent petition and order of August, 1805, can, by any reasonable interpretation of language, be construed into a “suit or prosecution;” neither was “pending and undetermined” at the time the repealing law took effect; neither of them was a proceeding of a character upon which a judgment could be entered or an execution issued; they are, therefore, clearly without the saving clause of the general repealing law of 1805.

But to this it is replied, that the Legislature had not the constitutional power to repeal the law of 1795, so as to affect either the order of 1804, or the subsequent order of 1805. It is said that by the laws in force at the “death of Ludlow, and when administration was granted, the real estate of an intestate was assets in the hands of his administrators; and that by these laws the rights of the administrators, creditors, distributees and heirs in the estate should be ascertained and settled. That the rights of the creditors to look to the real estate in the hands of the administrators as assets, had attached; that their rights had been recognized by the court, and the administrators had instituted the only suit known to the law to enforce them.”

If these orders and proceedings were withdrawn from the scope of constitutional legislation, and the law of 1795 rendered perpetual, it was in virtue of the Constitution and the ordinance of Congress.

What are the facts relative to the order of 1804, and what rights had been acquired under it at the date of the repeal of the Act of 1795, that were shielded by the Constitution and ordinance? It is in evidence, that at the May **515***] term, 1804, of the Court of Common Pleas, the administrators of Ludlow applied for and obtained an order to sell a portion of the estate of said Ludlow. No sale, however, was made of any portion of his real estate till August and September, 1805, in the county of Hamilton. None had ever been offered under that order at public sale; no purchase had been made, no contract had been entered into, that was within the power conferred by the order. The order remained a naked authority or power to sell; it was unexecuted either in whole or in part; it was dependent upon the statute for its validity, and when that was repealed, the order fell with it. The rights of the creditors were in no better or worse condition by the repeal of the law; they remained as they did at the death of Ludlow, susceptible of having the lands charged with them in case of a deficiency of the personal estate. If in fact the Court of Common Pleas had jurisdiction under the Act of 1795, and it was in force at the date of the

order of 1804, and in virtue of that order the administrators had proceeded to sell at public sale the real estate of Ludlow, prior to the repeal, but had not finally executed the title papers, it would be a fair and legitimate construction of the repealing law, to say that the rights of the purchasers thus acquired would be saved by the reservation of the repealing law, and the administrators would, under those circumstances, have been authorized to proceed and complete the title to the purchasers.

The order of 1804, and the rights of the creditors under it, were, at the time of the repeal, as legitimate subjects of legislation, as the execution laws of the State are, which have undergone various changes and modifications without reference to the contracts of individuals. (Cited *M'Cormac v. Alexander*, 2 Ohio Rep., 76.)

What were, in fact, the rights of the creditors of Ludlow at his death? They consisted of debts due from him as evidenced by open account, or by bonds or notes of hand. Now, these are the rights which, it is said, were so incorporated with, and mixed up with the laws existing at his death, that the repeal of those laws impaired the obligation of his contracts.

*These rights, in their amount and [**516** their character, were ascertained and fixed by the contracts of the parties. The right to demand, and the obligation to pay, are the consequences of contract. The repeal of the Act of 1795 neither takes away the right to demand, nor diminishes, nor discharges the obligation to pay. The amount and quality of the rights of his creditors were left by the repealing law exactly as they were fixed by the parties; and the obligation to pay, and the liability of his estate to answer the demand of his creditors, are as valid and perfect as they were prior to the repeal. The law does not assume that the debts due shall, from its passage, be considered paid, and the estate discharged; it does not purport to absolve the estate from the contracts of Ludlow, in any other manner than by the payment of the uttermost farthing. If it lessened the rights of the creditor, and impaired the obligation of the debtor, it would not only fill the spirit, but the letter of the inhibiting clause.

Whatever power the order may have conferred on the administrators, or whatever rights the creditors may have had, to have their debts collected through that particular mode of enforcing their collection, they were all alike derived through, and dependent upon, the legislation of the country; and it is held to be consistent with sound principles, and the decisions of this court, to say, that so long as the order remained unexecuted, neither purchaser nor creditor had such vested rights under it as were drawn out of the scope of legitimate legislation. If the order itself, or the supposed vested rights of the creditors to have that order executed, were the result of the contracts of the parties, and not the effect of the operations of a law, which in no manner entered into or became a part of their contracts, they might with some propriety be said to be embraced within the Constitution.

All the arguments of the defendant's counsel, whatever form they may have assumed, have been refuted by the very learned and unanswerable opinion of the Chief Justice of the

United States in the case of *Ogden v. Saunders*. (12 Wheaton's Reports, 332 to 357). He seems **517***] to have established, *incontrovertibly, the converse of the proposition contended for by the defendants in this case. He has shown that the right to contract is not conferred by society, but is a natural original right, brought by each individual into society; and that the obligation of contracts is not the result of positive law, but is intrinsic, and is conferred by the act of the parties. The right to coerce the performance of a contract, although as much a natural right as the right to contract, yet it is surrendered by every individual when he comes into a government of laws, and this surrender imposes the duty on the government to furnish adequate remedies. The defendant's counsel assume that the right to regulate the remedy, and to modify the obligation of a contract, are the same; that the obligation and the remedy are identical; that they are synonymous—two words conveying the same meaning. The answer to this shape of the argument, is plain and simple. The obligation of a contract is coeval with the contract itself—it originates with the contract, and exists with it anterior to the time of performance. The remedy operates upon a broken contract, and its office is to enforce a pre-existing obligation. Obligation and remedy, or right and remedy, are therefore not identical; they originate at different times, and are derived from different sources; the one flows from the act of the parties—the other is furnished by the government.

The counsel themselves shrink from the conclusions to which their doctrines must inevitably lead, and attempt to show that such would not be their consequences; but they cannot be disguised. If the rights of the creditors of Ludlow to have their debts collected under the remedial laws in force at the date of their contracts or at his death, were such as were withdrawn from subsequent legislation, by that clause of the Constitution inhibiting "the passage of any law impairing the obligation of contracts," and a sale could legally be made one day after the repealing law took effect, the same principle can be extended to all cases without regard to time or circumstances. The Act of 1795 would be made perpetual in the settlement of an estate. The order of 1804 would be a springing use, or power in the ad- **518***] ministrators, *which they could go on to execute at their pleasure, regardless of the subsequent alterations and modifications of the laws regulating the passage of lands from one to another. The power to modify the remedial law, necessarily includes the power to repeal it; and this doctrine equally excludes both.

Upon the subject of this repealing law of February 22d, 1805, another argument has been pressed into the service, of a very singular character. However out of place it is considered, still it has been urged so often, so seriously, and by so many different gentlemen, that it ought not to be passed in silence.

In the session of 1804 and 1805 (Vol. III., 164), the same Legislature that enacted the repealing law, also enacted a statute providing for the appointment of guardians to lunatics and others. This latter statute passed January 15, 1805, and the 2d section contains a provision similar to that of the law, on the same sub- Peters 2.

ject, of 1792, with a variation of phraseology, using the word "are," instead of "may or shall." "Out of the real estate, in such manner as executors and administrators are by law enabled to discharge the debts of deceased persons," &c. It is urged that all the acts of the same session should be taken and considered together as one statute. And that, upon this construction, the clause here quoted is to be considered as a declaration that no repeal of the law of 1795 was intended.

The answer already given to the attempt to create or set up a law, by indirect legislation of this nature, applies with equal force here. But in this place the argument is destroyed by other considerations. The last enactment of the same session controls the first, if they are in terms contradictory or inconsistent. If, in January, the law of 1795 was supposed to be in force, and if the reference to it may be regarded as a legislative declaration of an intention to continue it, the subsequent enactment of February expressly repealing it, must nevertheless have operative effect. And, adopting the principle of construction insisted upon by the other side, this consequence follows: the reference in the Act of January to the existing law, adopts or revives it for *the spe- **519** cial purpose declared; but cannot, contrary to the Repealing Act, continue it in force for any other purpose.

There remains one point more to be disposed of, in relation to the order of 1805. It is not denied that the order of May, 1804, excludes from its operations the lot now in dispute, and that the defendants are thrown entirely upon the order of August term, 1805, to make out their defense. As an order of August term, 1805, it is liable to all the objections made to the order of 1804, with this additional and unanswerable one, that it was applied for and obtained after the Repealing Act took effect. It is attempted, however, to obviate this objection by showing that the order was really applied for and granted at May term, 1805, prior to the taking effect of the repealing law; but that it was, through the negligence of the clerk, not entered till the subsequent term, "*nunc pro tunc*."

If this order can be sustained for any beneficial purpose, in this controversy, as an order of May term, 1805, it must be upon the principle that a court of record is not bound to keep a record, but that its proceedings are matters which can be sustained and preserved in the minds of its officers. In this instance, it is an order of May term, only by the testimony of one of the judges, who then composed the court.

Admit, for the sake of argument, that the Court of Common Pleas had the power to make the order at the May term, yet that power had ceased before the August term, by force of the repealing law, and it was as competent for them to grant a new order upon an original application as it was to enter this one "*nunc pro tunc*."

But suppose the law of 1795 had not been repealed, and the jurisdiction of the court should be admitted, still it is contended that upon well-settled principles, heretofore recognized by this court, the order could only be regarded as the judicial act of the court, from

the time it actually became a matter of record; and the fact that the court attempted to give it an operative character, prior to its having been entered of record, by ordering it to be entered "*nunc pro tunc*," gives it no additional validity. If, indeed, the order had been regularly applied for, and the records of the 520*] court *furnished evidence of that fact, and the order had been granted, but neglected to be entered by the clerk, and previous to the next term the administrators had gone on to sell, under the belief that the officers of the court had done their duty, and purchasers had paid their money upon the faith of the validity of the proceeding, it is not doubted, that at a subsequent term, it could be entered and held valid.

The records themselves would furnish evidence of the proceedings in part, and the remainder might be substituted; but its validity, as the order of a previous term, could only be supported upon the principle, that rights had been acquired in good faith, under a due execution of the power intended to be conferred by the order. It would be to protect and make good that which had already been done in good faith, and under the supposition that the proceedings of the court were spread upon its records; but it cannot be made the order of May term, merely to give color to the power of the court, and to support proceedings which took place subsequent to August, 1805.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This cause was fully argued at the last term on the validity of the deed made by the administrators; and several acts, which were supposed to illustrate that question, to which it is unnecessary now to refer, were cited and relied on. As it was a question of great interest, on which many titles depended, which was to be decided entirely by the statutes of Ohio; and as the court was informed that the very case was depending before the highest tribunal of the State, the case was held under advisement. The cause depending before the State Court, which was an ejectment for other land sold by the same administrators under the same orders of the Court of Common Pleas, has been since decided, and the Supreme Court of the State has determined:

1. That there was no law in the territory prior to the Act of 1795, authorizing administrators to sell the lands and tenements of an intestate.

521*] *2. That this law was repealed, and ceased to have effect from and after the 1st day of June, 1805.

3. That the order of the Court of Common Pleas of May term, 1804, directing the administrators of Israel Ludlow to sell a part of the real estate of said Ludlow for the payment of his debts, did not embrace the premises in question.

4. That the parol testimony offered in evidence to prove an order of sale at the May term, 1805, was incompetent.

5. That the order of the said court at the August term, 1805, was *coram non judice* and void; and that the lessors of the plaintiffs could not be divested of their title, in consequence of any act done in pursuance of that order.

At this term the cause has been again argued, and the counsel for the plaintiffs in error have made several points which they suppose to be still open.

They contend that the repeated declaration of this court, that it will conform to the construction of the statutes of a State made by its own tribunals, does not apply to the decision respecting the order made in August, 1805. They insist that the power of the court to make this entry as of the May term preceeding, depends upon the common law, not on the statutes of Ohio, and that the question is still open for discussion.

Supposing it to be open, they maintain that the omission to enter the order in May, when it was made, was a clerical misprision, which the court might correct in August, and enter the order as of May term. It has, they contend, the same effect as if it had been actually entered in May; and allowing this, the subsequent repeal of the law before the sale was made, could not affect the power to sell which was given by the order, and therefore the sale is valid.

To sustain this argument, all the propositions on which it rests must be true. The decision of the State tribunal must be of a character which this court will consider, undoubtedly, with great respect, but not as conclusive authority. The Court of Common Pleas must have had the power in August, after the repeal of the law under which the order was made, to enter it as of May, and the administrators must have had the power to sell in virtue of the order, after the law, by authority of which it was made, had been repealed. If the plaintiffs in *error have failed in sustaining any one [*522 of these propositions, the conclusion which has been drawn from them is not supported.

The judges are not united in opinion on these several propositions, but concur in thinking that the conclusion drawn from the whole of them is not sustained. The power of the inferior courts of a State, to make an order at one term, as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal of the State, that a majority considers that judgment as authority, and we are all disposed to conform to it.

But were this question entirely open, the considerations which appear to have influenced the judgment of the Supreme Court of Ohio are certainly entitled to great weight. That a court of record, whose proceedings can be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that, too, after the repeal of the law which gave authority to make such an order, is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of us question the existence of the power.

In the case, as depending before this court, there is still a stronger objection to the validity of the order of August, 1805. Its language does not import that the administrators had applied to the court at the preceeding May term, for an extension of the order of May, 1804, and that the court had granted their application, and made the order, which the clerk had

omitted to enter, and that therefore the order is now made, with a direction that it should be entered as of May. This is not its language. It makes no allusion to any proceeding in May. It purports to have been made on an original application by the administrators, in August, for an extension of the order of May, 1804. On this original application, the court allows the administrators to sell the house and lots in Cincinnati, and adds, "this entry to be considered as of May term, 1805." The entry, on its face, does not import to be the correction of the record, by placing on it an order which had in fact been made in the preceding May, **523***] and which the clerk had omitted to enter; but to be an original proceeding in August, to which the court by its own authority gives a retrospective operation. If any explanatory testimony could have been received in the Circuit Court, none was offered. That court was required to infer from the words, "this entry to be considered as of May term, 1805," that it was in fact made at that term, and that the clerk had totally omitted it. The certainty which is necessary in judicial records, and the principle that they prove themselves, forbade the court to draw this inference. The law being then repealed, the order was certainly *coram non judice*.

It is also the opinion of one of the judges, that had the order even been made in May term, the repeal of the law before the sale, terminated the power to sell.

The counsel for the plaintiffs in error have also contended, that the interest of the administrators in the real estate, as trustees for the creditors, was a vested interest, which the repeal of the law could not divest; and that they might proceed to sell under the sanction of an order made even after the law was repealed.

This is a point on which we cannot doubt. The lands of an intestate descend not to the administrators, but to the heir. They vest in him, liable, it is true, to the debts of his ancestor, and subject to be sold for those debts. The administrator has no estate in the land, but a power to sell under the authority of the Court of Common Pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but is conferred by the court in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorized the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every Legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the Legislature.

It is also contended that the jurisdiction of **524***] the Court of *Common Pleas, in testamentary matters, is established by the Constitution, and that the exclusive power of the State courts to construe legislative acts does not extend to the paramount law, so as to enable them to give efficacy to an act which is contrary to the Constitution.

We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws; and emphatically

of its supreme law. If in a case depending before any court, a legislative act shall not conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the Act. The court must determine whether a repugnancy does or does not exist; and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason.

But, had the question never been decided in Ohio, this court can perceive no sufficient ground for declaring that the Legislature of the State might not repeal the law by which the Court of Common Pleas was authorized to direct, in a summary way, the sale of the lands of an intestate. "Jurisdiction of all probate and testamentary matters," may be completely exercised, without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to us to be identical with that power, or to comprehend it. The Constitution did not mean, and could not mean, to deprive the Legislature of the power of exercising its wisdom on the subject so vitally interesting to the people; nor do its words convey such an intent. Were it even true, which we cannot admit, that the Constitution established the jurisdiction of the Court of Common Pleas in the case, still the Legislature might prescribe the rule by which that jurisdiction should be exercised.

We are satisfied that there was no error in the instruction given by the Circuit Court to the jury.

The plaintiffs in error contend that the court erred in overruling the motion to appoint commissioners to value the improvements in pursuance of the occupant law of Ohio; *and [**525** in rendering judgment without conforming to that law. The first section of the Act provides that "an occupying claimant," circumstanced as was the plaintiff in error, "shall not be evicted or turned out of possession, until he or she shall be fully paid the value of all lasting and valuable improvements made by such occupying claimant," "previous to receiving actual notice by the commencement of suit," &c., "unless such occupying claimant shall refuse to pay the person so setting up and proving an adverse and better title, the value of the land without the improvements made thereon," &c.

The 2d section proceeds to direct the court to appoint commissioners to make the valuation, which had been prescribed by the preceding section.

The counsel for the defendant in error insists that this law is repugnant to the 10th section of the first article of the Constitution of the United States; and to the ordinance of 1787 for the government of the north-western territory.

This court does not think that these questions properly arise in the present actual state of this controversy. The 7th amendment to the Constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title.

The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury.

It has been said that the occupant law of Ohio must, in conformity with the 34th section of the Judicial Act, be regarded as a rule of decision in the courts of the United States.

The laws of the States, and the occupant law, like others, would be so regarded independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the Constitution of the United States and of the State of Ohio, is a rule of property, and of 526*] course a rule of decision in the *courts of the United States; but that rule must be applied consistently with their constitution.

Admitting that the Legislature of Ohio can give an occupant claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still that Legislature cannot change radically the mode of proceeding prescribed for the courts of the United States; or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury.

But this inability of the courts of the United States to proceed in the mode prescribed by the statute, does not deprive the occupant of the benefit it intended him. The modes of proceeding which belong to courts of chancery are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery, it can appoint commissioners to estimate improvements as well as rents and profits, and can enjoin the execution of the judgment at law until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the Constitution of the United States or of the State or to the ordinance of 1787. The question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect.

We think there is no error in the judgment, and it is affirmed with costs.

Cited—2 How., 17; 8 How., 562; 9 How., 31; 1 Wall., 210; 6 Wall., 630, 641; Bald., 222, 227, 275, 284, 405; 3 Wood. & M., 483; 8 Ben., 480.

527*] *THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES,

v.

WILLIAM OWENS, HERBERT G. WAGONER, GEORGE WAGLEY, AND ALEXANDER MILLER.

Usury—fraud upon a statute—charter of Bank of United States.

The branch Bank of the United States, at Lexington, Kentucky, discounted a promissory note,

reserving interest thereon, at the rate of six per centum per annum; it being agreed that the owner of the note should receive the proceeds of the discount in notes of the Bank of Kentucky, at their nominal value, although the same were at the time of no greater current value than fifty-four per cent. of the said nominal value. Held, that the contract was usurious, and void; and that the bank could not recover of any of the parties to the discounted note.

A fraud upon a statute is a violation of the statute. [536]

A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest. According to this principle, the lender in this case has taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. This is contrary to the provisions of the charter of the Bank of the United States, and against law. [537]

Reserving interest as discount, is the same as taking the same; since it cannot be permitted by law to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for there the actual receipt is generally necessary to consummate the offense. But where the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do. [538]

The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. [538]

THIS case came up on a certificate of the judges of the Circuit Court for the District of Kentucky, they being opposed in opinion.

The action was upon a promissory note signed by the defendants, bearing date the 7th of February, 1822, by which they promised to pay to the president, directors and company *of the Bank of the United States or or [528] der, on the 7th of February, 1825, five thousand dollars, with interest at the rate of six per centum per annum from the date.

The following indorsement is on the note:

“Mem. Interest is to be charged on this note from the 21st day of May, 1822, only, and not from the 7th of February, 1822, within mentioned, the former being the day on which the amount was actually received by the makers of this note. (Signed) H. CLAY.

The declaration being in the usual form, the defendants, Waggoner, Wagley, and Miller, pleaded as follows:

“That they ought not be charged with the said debt by virtue of the said supposed note or writing, because they say that they executed the said note at the instance and for the accommodation of the said Owens, and with the view of making him to obtain a loan of the money from the Bank of the United States, upon the discounting of said note; and defendants alleged that afterwards, to wit, at, &c., the said Owens

NOTE.—Usury—receiving interest as discount.

See notes to Levy v. Gadsby, 3 Cranch, 180; Sluemi v. Pomeroy, 6 Cranch, 221; Fleckner v. Bank of U. S., 8 Wheat., 338; Gaither v. Farm. & Mchs. Bank, 1 Pet., 37.

presented the said note for discount to the president and directors of the office of discount and deposit of the Bank of the United States at Lexington, Kentucky, and that the president and directors of the said office, then and there failed to discount the said note or make any loan thereon; and that after the rejection of the said note as aforesaid at Lexington in Kentucky, to wit, on the 31st day of May, 1822, it was unlawfully, usuriously, and corruptly agreed by and between the said plaintiffs, by their agents, managers and servants employed in the management and business of said office, and the said Owens, that they, the said plaintiffs, would receive and discount said note, and that the said Owens should receive from them therefor notes of the Bank of Kentucky or its branches at the nominal value of said notes; and for the forbearance and loan aforesaid, that said Owens would pay said note in current money of the United States when it fell due, with interest at the rate of six per cent. per annum from the 7th day of February, 1822, and they aver, that in pursuance of said corrupt and unlawful agreement, the said note was delivered to the said plaintiffs at their said Lexington office upon the **529** terms aforesaid, they advancing *and loaning therefor, as the whole and sole consideration of said note (after deducting a large sum from the amount of said note for discount) to wit, the sum of \$——— in notes of said Bank of Kentucky, counted and rated at their nominal value. And said defendants aver, that at the time said note was discounted as aforesaid, the notes of said Bank of Kentucky and its branches were generally depreciated, so much so that one hundred dollars thereof nominally were of the value of fifty-four dollars only, or less, and current only at that depreciation for greater or smaller sums, to wit, at, &c. And the said defendants aver that said transaction and dealing was contrary to law and the fundamental articles of said corporation, and the said note founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater interest than at the rate of six per cent. per annum upon the value of the notes loaned by them as aforesaid, and this they are ready to verify. Wherefore, &c.”

To this plea, the plaintiffs by their attorney demurred.¹

1.—The demurrer entered in this case, prevented that investigation of the facts attending the transaction which was the subject of the suit, and by which the plaintiffs would have been enabled to present the circumstances under which the loan was made to the drawer of the note, so as to fully vindicate the institution from any charge of intentional violation of the provisions of the charter of the Bank of the United States, or the general rules of law. The following authentic and explanatory statement has been furnished to the reporter:

The note in this case is joint and several, and was not offered, as the plea suggests, for a loan in the ordinary course of discount, in United States bank notes, or specie (it being generally known that the Lexington office was at that time restrained from making such loans), but specially for notes of the Bank of Kentucky. These notes had been received by the Bank of the United States, at their office at Lexington, at their nominal specie value, a part of them being for government deposits; they had always preserved that value to the bank, by the balance being liquidated, and interest being paid by the Bank of Kentucky, periodically, and by the actual payment in specie, within a few (six) months after the loan to Owens, of the balance due. The bank therefore would have received in specie from Peters 2.

*Upon the argument of the demurrer, [***530** the following questions arose, namely:

1. Whether the facts set forth, and the averments in said plea, make out a case in which the corporation has taken more than at the rate of six per cent. per annum, upon a loan or discount, contrary to, and in violation of the 9th rule of the fundamental articles of the constitution of the corporation.

2. If the plea does make out such a case, whether the notes sued on, or the contract therein expressed to pay to the plaintiffs five thousand dollars, is void in law, so that no recovery can be had thereon in this suit.

3. If not wholly void, whether the plea is sufficient to bar the plaintiffs' recovery of any, and if of any, of what part of the said sum of five thousand dollars.

The judges being opposed in opinion upon the questions, they were, upon the request of the plaintiffs by their counsel, certified to the Supreme Court of the United States.

Mr. Sergeant, for the plaintiffs.

1. Upon the first question, after referring to the 9th rule,² he proceeded to say, that the case presented by the plea was not within the words of the rule. The prohibition is against taking more than six per cent. The utmost that can be made out of the allegations of the plea, supposing the construction attempted to be put upon the transaction to be correct, is that there was an agreement to take more than at the rate prescribed. Nothing was taken but the note. There is no prohibition against an agreement to take more than six per cent. The offense is in taking more and nothing else. Penal provisions in a statute are to be construed strictly. This is highly penal, for it is made a *violation of the charter, and exposes to the danger of forfeiture.

Where a penalty is given for taking usurious interest it is well settled that the penalty cannot be recovered without proving an actual taking of the usurious interest. (*Fisher v. Beasley*, Doug., 236; *Maddock v. Hammett*, 7 T. R., 180.) Here no discount was deducted, as is most usual in banking operations. The interest was not payable till the maturity of the note. It is clear, therefore, that there has not been a taking of more than six per cent. in violation of the 9th rule.

the Bank of Kentucky the amount loaned to Owens with its interest, in addition to the sum actually paid, had the loan not been made to him. The public exhibits of the Bank of Kentucky, at the time of the loan, and before and since, have shown its entire ultimate ability to pay its notes and deposits in specie; and individuals have, in a great number of instances, received from that bank by compromise on time, or by assignments of its discounted notes, or by recovery on suit, the nominal amount of their notes and deposits in specie. The great issue of Commonwealth Bank notes at the period referred to, and their free reception by the Bank of Kentucky in payment of its debts had, however, the effect of giving to the notes of the Bank of Kentucky nearly the same nominal depreciated character as those of the Bank of the Commonwealth.

2.—“The said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or upon its loans or discounts.”

2. This question does not arise unless the first be made out affirmatively. If there has been no taking of more than six per cent. in violation of the 9th rule (as there clearly has not) this question being by its statement made dependent upon the first is also decided in the negative.

There is nothing in the Act to make the contract void. The penalty is specified, and is of a different nature. An additional penalty cannot be imposed.

A mere prohibition to take more than six per cent does not of itself avoid a contract agreeing to take more. When the agreement is avoided, it is always in consequence of an express provision by law to that effect. Such is the law in England against usurious contracts, and in many of the States. Such is the law of Kentucky, and this question could only have arisen from the application of that law to the present case.

Nor do courts incline to destroy the contract. Even under those laws which avoid the contract for usurious agreement, if chancery get possession of the matter by the application of the debtor, it will compel him to pay the debt and legal interest as a condition of relief.

But State legislation has no power over the Bank of the United States or its contracts. This has been decided, and is obvious from the nature of the case. The Bank of the United States is governed by the law of Congress, and is subject to no other jurisdiction. (*M'Culloch v. The State of Maryland*, 4 Wheat., 316; *Osborne v. The Bank of the United States*, 9 Wheat., 859; *Wayman v. Southard*, 10 Wheat., 1; *Bank of the United States v. Halstead*, 10 Wheat., 51.)

The rule in the charter, therefore, is the governing rule. That even the taking of more than the legal interest does not under the charter avoid the contract has been already decided by this court. (*Fleckner v. Bank of the United States*, 8 Wheat., 355.) "The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of the charter for which a remedy might be applied by the government; but as the Act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery."

Still less can the agreement to take.

3. Admitting for the argument's sake that if the bank had agreed to take more than by law it was authorized to take, the court would not lend its aid to recover the excess, the question arises whether this was an agreement to take more than six per cent. on a loan or discount.

It was not so in terms, for the interest payable was precisely six per cent., neither more nor less. It was not so in extent. The object of the transaction was not to cover illegal interest. The real design was to dispose of the notes of the Bank of Kentucky. It was in substance a sale upon a credit of three years, and not a loan.

If the transaction be unimpeachable on this ground can it be questioned on any other? The plea seems to aim to extricate the defendants from knowledge of the negotiation. But there are two particulars to be observed in it. 1. It does not aver that the bank knew

that the note was given to enable Owens to get a discount in the ordinary way. 2. It does not aver that the defendants were ignorant of the negotiation for the Kentucky bank notes. What is not denied in pleading must be considered as admitted. There is an admission, therefore, that the bank did not know that the note was given for any particular purpose (if such were the fact) and that the defendants did know of the negotiation for the bank notes. Upon this basis of knowledge and assent the case is to be considered.

*Was there not, then, an adequate [*533 consideration given? It was so agreed voluntarily, without coercion, compulsion or duress; the parties being able and willing to contract, and understanding the subject-matter of the contract. The bank had a perfect right to fix the terms upon which it would part with the notes, and the defendants an equal right to decide whether they would accede to them. Both were the exclusive masters of their own judgment in making the contract; but that once made, and not in itself unlawful, becomes the law between them. No one has a right to alter it. The consideration has passed; the contract is executed; and the parties cannot now be restored to the condition they were in at the time of contracting. Sales are made according to the views of the parties, understood by themselves and influenced by many circumstances. Here the sale was upon a long credit enhancing the risk to the seller and increasing the chances of the buyer. The notes might, and did appreciate during the interval.

It is impossible now to adjust the terms differently. There is no evidence to furnish a rule. What were these notes worth to the Bank of the United States? They were notes for the payment of money, which the Bank of Kentucky was bound to pay, and the payment of which to the full amount was compellable by process of law. Who can say that the full amount might not have been recovered? Again, what was the value to the buyer? He, too, could enforce the payment and use the notes for some purposes, as equivalent to money. It does not appear that he did not so use them. He may have recovered the full amount or passed them off in advantageous negotiation.

The case is not new. Bank paper being a kind of currency, has been variously depreciated at different periods and in different parts of the United States; in some to the extent of more than twenty per cent. Contracts made when specie was the basis of circulation were satisfied with depreciated bank paper. Was it ever heard that he who chose to take them in payment (and none could be compelled to do so) could afterwards recover the difference? Contracts were made in the time of a [*534 depreciated currency, and executed since by payment with specie. Was it ever understood that the payee could claim a deduction or recover back any part of what he had paid?

Bank paper, too, which, besides being a currency, was a commodity, was the subject of purchase and sale for cash and on credit under all the modifications that effect the dealings in any other article. Those who dealt in it were the judges, as they are with respect to other commodities. It was never thought that courts of justice could be required to revise and reform

their bargains. This would be an exercise of equity power that would end in anything but equity. It would be wholly without limit or guide.

The pleadings, however, do not admit of such a defense in part. The plea is entire, and goes to the whole. If bad for a part, it is bad for the whole. They should have taken defense only for as much as they controverted. (1 Chitty, 523; 6 Cranch, 136.)

That such a transaction could not be considered a cover for usury was quite evident. An increased rate of interest or profit for the use of the money was no part of the object. There is no pretense of any such thing. If not, it is unobjectionable even under the usury laws. A bond or note or other security may be purchased at any discount without incurring the charge of usury. (*Musgrave v. Gibbs*, 1 Dall., 217; *Wycoff v. Loughed*, 2 Dall., 92.) Cases more analogous to the present, and involving the very same sort of negotiation, had been judicially decided upon principles decisive of this. (*Northampton Bank v. Allen*, 10 Mass. Rep., 254; *Stuart v. Farmers & Mechanics' Bank*, 19 Johns. Rep., 496.)

The question whether the bank had a right to make a sale of notes, was not presented here. If it had been, he would have cited as deciding it, *Fleckner v. The Bank of the United States* (8 Wheat., 349, 351.) The same point, he would remark, has been fully discussed and decided in the Court of Appeals in Kentucky in the case of *The Bank of the United States v. Norton*. 535*] The opinion would be found *at length in the record of the case of *The Bank of the United States v. Venable*, decided at the present term of this court.

No counsel appeared for the appellees.

Mr. Justice JOHNSON delivered the opinion of the court:

This suit is instituted for the recovery of a promissory note.

The plea is filed by the three last-named defendants, who represent themselves as securities to Owens, and sets out in substance that the note was created for the purpose of enabling Owens to obtain a loan of money from the plaintiff in the ordinary course of discount; that it was offered for discount and rejected, and after such rejection it goes on to aver that "it was unlawfully, usuriously, and corruptly agreed by and between the said plaintiffs, by their agents employed in the management and business of the said office, and the said Owens, that they, the said plaintiffs, would receive and discount the said note, and that the said Owens should receive from them therefor, notes of the Bank of Kentucky, or its branches, at the nominal value of said notes, and for the forbearance and loan aforesaid, that Owens should pay said note in correct money of the United States, when it fell due, with interest at the rate of six per centum per annum from, &c.; the plea then avers "that in pursuance of said corrupt and unlawful agreement," this note was passed to the plaintiffs, and Kentucky notes received in loan "as the sole consideration thereof" at their nominal value; and farther, "that at the time the said note was discounted, as aforesaid, the notes of the said Bank of Kentucky and its branches were generally depre-

ciated, so much so, that one hundred dollars thereof, nominally, were of the value of fifty-four dollars only or less, and current only at that depreciation for greater or smaller sums," &c.; and the defendants further aver "that the said transaction and dealing was contrary to law and the fundamental articles of the said corporation; and the said note founded upon a corrupt and usurious consideration, the said plaintiffs reserving a greater *interest than [*536 at the rate of six per centum per annum upon the value of the notes loaned by them, as aforesaid."

To this plea the plaintiffs demurred, and three points are made on which the court below certify a difference of opinion to this court.

The first is, Whether the facts set forth and the averments in said plea make out a case on which the corporation has taken more than at the rate of six per centum per annum upon a loan or discount, contrary to, and in violation of the ninth rule of the fundamental articles of the constitution of the corporation.

The proposition here presented to the court has relation altogether to the violation of the ninth fundamental rule of the Act of Incorporation, and it brings under consideration the sufficiency both of the facts and averment contained in the plea to make out a violation of that article.

I have myself entertained very serious doubts of the sufficiency of the averment in the plea, for it is not a case of a direct reservation of a higher interest than the law allows, since on the face of the note only six per cent. is reserved; but the facts are calculated to present one of those cases in which a device is resorted to by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction, to wit, by taking a note payable in gold or silver for a loan of depreciated paper—a return, in fact, in specie, for an article of scarcely half the value of specie—a loan of adulterated dollars, for which a note is taken, payable dollar for dollar, in coin of the United States.

That the law will not tolerate such transactions has long been settled, for a fraud upon a statute is a violation of the statute.

But the difficulty with me was this, that the plea neither avers an intention to evade the statute, nor a knowledge in the plaintiffs of the actual depreciation of Kentucky money. I am content, however, to unite with the three of my brethren who make up the majority on this point in holding the averments to be sufficient; because, in a considerable dearth of authorities on this subject, I find it decided in the case of *Bolton v. Durham*, in Croke's Reports (Cro. Eliz., 642), that *the confession of [*537 the *quo animo* implied in a demurrer will affect a case with usury, when a very similar case; in the same book in which the plaintiff had traversed the plea, was left to the jury with a favorable charge. (*Benningfield v. Ashley*, Cro. Eliz., 741.)

In the present instance, the loan, the unconditional return of the sum lent, the illegality, and even corruption of the bargain, are all distinctly averred, and more than once reiterated. If the transaction was corrupt and in violation of the fundamental laws of the charter, as averred in the plea and admitted by the demur-

rer, it could only have been upon the ground of an intention to evade the statute, and with a knowledge of the reduced value of the Kentucky bills.

And it is not unnatural here to remark that the plea sets out a refusal to make a loan in the ordinary course, to wit, in gold or silver, or the plaintiffs' own notes; and a subsequent agreement to make the loan, provided payment would be received in this depreciated paper. This state of facts presents an obvious analogy to the leading case of *Lowe v. Waller* (Douglas, 736), in which the negotiation commenced for a loan of money, but terminated in a sale of goods, on the resale of which the borrower (as he was held to be) sustained a great loss.

The court charged the lender with that loss, as so much exacted from the necessities of the borrower.

That part of the 9th section of the fundamental rules of the bank charter, which is here drawn in question, is expressed in these words: "The bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts."

A profit made or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest.

According to this principle the lender has **538**] here taken *forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. So that in this point the certificate of this court must be in the affirmative.

Some doubts have been thrown out whether, as the charter speaks only of taking, it can apply to a case in which the interest has been only reserved, not received. But on that point the majority are clearly of opinion that reserving must be implied in the word taking; since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. (1 Hawk. P. C., 620.) In those instances in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense. But when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do.

The second question propounded to this court is, "Whether, if the plea does make out a case of violation of a provision of the charter, the notes sued on, or the contract therein expressed, is void in law, so that no recovery can be had therein in this suit.

The question here propounded has relation exclusively to the legal effect of a violation of the provision in the charter on the subject of interest; and does not bring in question the operation of the statute of usury of Kentucky upon the validity of this contract. To understand the gist of the question, it is necessary to observe that, although the Act of Incorporation forbids the taking of a greater interest

than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all the Acts passed in England and in the States on the same subject, declare such contracts usurious and void.

The question then is, whether such contracts are void in law, upon general principles.

The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a *country; how can they then become [**539**] auxiliary to the consummation of violations of law?

To enumerate here all the instances and cases in which this reasoning has been practically applied, would be to incur the imputation of vain parade.

There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

That this is true of contracts violating the laws of morality is recognized in the familiar maxim, "*ex turpi causa non oritur actio*;" as has been exemplified in some modern cases of a house let for immoral purposes. (Cited and admitted in 1 B. & P., 340, and Esp. N. P., 13.)

In the case of *Aubert v. Maze* (2 B. & P., 374) it is expressly affirmed that there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*. And that case is a strong one to this point, since the contract there arose collaterally out of transactions prohibited by statute.

So the same doctrine was maintained in equity upon a similar contract in the case of *Watts v. Brooks* (3 Ves., Jun., 612), in which the court observes: "There is nothing immoral in this transaction, but it is against a prohibitory statute. I doubt a little the policy of the act, but I cannot allow it to be argued that you can break a law covertly. The court will not execute these contracts."

So in the case of *Webb v. Pritchett* (1 B. & P., 264), where the action was by a tavern-keeper against a candidate for provisions furnished to the voters at an election, contrary to the statute of William. Although the statute does not declare the contract void, the court declared it void, and in this explicit language: "This action is apparently founded on a contract to disobey the law." "The defense set up proves the principle of the contract." "Then how shall an action be maintained in that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the Legislature; how, then, can we enforce a contract to do that very thing which is so much reprobated by the act?" "This *court [**540**] cannot give any assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law, &c."

So in the case of assurance in illegal voyages, even where the underwriters have contracted with their eyes open, they are, notwithstanding, permitted to avail themselves of the plea of illegality *ad libitum*; as in the case of *Camden v. Anderson* (6 T. R., 723), adjudged in the King's Bench and affirmed in the Ex-

chequer, where it is declared that "the defense is founded upon a principle of law which is permanent to all obligation by which the parties to a contract can bind themselves." (1 B. & P., 272.)

And so in another case of great hardship (*Morek v. Abel*, 3 B. & P., 35), where the insurance was upon a trading in the East Indies prohibited by an obsolete statute, the plaintiff could not even recover back his premium, although admitted that the risk never commenced because the policy was void in its inception on the ground of illegality.

Nor is it to voyages illegal by statute alone that this principle applies. A respectable writer on insurance makes these remarks: "Whenever an insurance is made on a voyage expressly prohibited by the common, statute or maritime law of the country, the policy is of no effect. The principle on which such a regulation is founded is not peculiar to this kind of contracts, for it is nothing more than that which destroys all contracts whatsoever (Park, 232), that men can never be presumed to make an agreement forbidden by the laws; and if they should attempt it, it is invalid, and will not receive the assistance of a court of justice to carry it into execution.

Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to affect the general interest and policy of the country.

Thus, a note given by a bankrupt upon a secret compromise with a creditor is declared void, as it produces inequality in the distribution of the bankrupt's effects and evades the provisions and policy of the law, which pro-^{541*} poses *to put all the creditors upon an equal footing. (*Wells v. Girling*, 1 Brod. & Bing., 447.)

And on the same principle a note given for a wager on the future amount of a branch of the public revenue is declared void, because it interests an individual in diminishing the production of the revenue. (2 T. R., 610; 2 B. & P., 130.)

After citing these more modern decisions upon this subject, it may not be amiss to refer to some reporters whose authority has been consecrated by the respect of ages. They will serve to show the antiquity and universality of this doctrine.

Thus, in 1 Bulls., 38, it is laid down "that wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration be unlawful, the whole contract is void.

So in Hobart, 72, and Dyer, 356, "if one promises to do a thing that is unlawful, such promise is void."

And innumerable ancient cases might be cited from the best reporters of the application of the rule to maintenance, to simony, and to promises made to public officers, engaging them to act contrary to the duties of their offices, or to individuals imposing upon them restraint inconsistent with the public interest.

For these reasons, and upon these decisions, the majority of the court are of opinion that an affirmative answer must also be certified upon the second question in the cause.

And this renders it unnecessary to consider the third question.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel; on consideration whereof, it is the opinion of this court, (1) that the facts set forth, and the averments in said plea, make out a case in which the corporation *has taken more [*542 than at the rate of six per centum per annum upon a loan or discount, contrary to and in violation of the ninth rule of the fundamental articles of the constitution of the corporation. (2) That the plea does make out such a case where the notes sued on, or the contract therein, expressed to pay the plaintiffs five thousand dollars, is void in law, so that no recovery can be had thereon in this suit. And (3) this court being of opinion in the affirmative on the first and second points, renders it unnecessary to consider the third question; all of which is ordered and adjudged to be certified to the said Circuit Court.

Cited—9 Pet., 399, 400, 403; 18 Wall., 384; 6 Otto, 302; 7 Otto, 23; 1 Bank. Reg., 477; 4 Bank. Reg., 609; 7 Bank. Reg., 260; 8 Bank. Reg., 82; 9 Bank. Reg., 248; 11 Bank. Reg., 175; 3 McLean, 614; 4 McLean, 248; Taney, 236, 237; 1 Dill., 149, 253; 5 Dill., 339; 1 Biss., 443; 2 Abb. U. S., 431, 432; 2 Bond, 177; 3 Wood. & M., 492; 2 Sawy., 421; 5 Sawy., 500.

*THE PRESIDENT, DIRECTORS [*543
AND COMPANY OF THE BANK OF THE
UNITED STATES, *Plaintiffs in Error*,
v.

THOMAS D. CARNEAL, *Defendant in Error*.

*Promissory note—demand of payment—notice of
non-payment—diligence.*

The evidence in the case was, that the day when the note became due, the bank being the holder thereof, and it being payable there, after the usual banking hours were over it was delivered to a notary by the officers of the bank, they informing him at the time that there were no funds there for the payment of the note. This was a sufficient proof of due demand of payment. [549]

When a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same, and if he omits so to do, and a demand is there made of payment by the holder within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor. [549]

It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. [551]

When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post town; if it is not, then to the post-office or post town nearest to his residence, if known. But the rule as to the nearest post-office is not of uni-

NOTE.—*Bills and notes—steps to charge indorsers.*
See notes to Brown v. Barry, 3 Dall., 365; Wilson v. Lenox, 1 Cranch, 194; Fenwick v. Sears, 1 Cranch, 259; Coolidge v. Payson, 2 Wheat., 66; Bussard v. Lovering, 6 Wheat., 102; Young v. Bryan, 6 Wheat., 146; Bank of U. S. v. Smith, 11 Wheat., 171; Thornton v. Wynn, 12 Wheat., 183; Brent v. Bank of Metropolis, 1 Pet., 89; Schimmelpennick v. Bryant, 1 Pet., 264.

versal application; for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and the fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices to suit his own convenience or business, it may be sufficient to send it to either. [551]

A suggestion was made at the bar that the letter to the indorser, stating the demand and dishonor of the note, is not sufficient unless the party sending it also informs the indorser that he is looked to for payment. But where such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. [552]

ERROR to the Circuit Court of Ohio.

This suit was originally brought against William Steele, William Lytle, and Thomas D. Carneal. The plaintiffs counted in *assumpsit* for money lent and advanced, under a provision of the statute of the State of Ohio authorizing a joint suit against all the parties to a promissory note.

The original process was served upon William Steele and William Lytle. As to Thomas D. 544*] Carneal, the marshal of *the District of Ohio returned "not found;" and this return being suggested of record, the plaintiffs, at the September term of the Circuit Court for the year 1823, proceeded to judgment against Steele and Lytle.

In May, 1824, the plaintiffs, in pursuance of another statute of the State of Ohio, sued out of the clerk's office of the Circuit Court a writ of *scire facias* against Thomas D. Carneal (as to whom the marshal of the district had previously returned "not found"), the object of which writ was to call upon him to show cause why he should not be made a party to the judgment against Steele and Lytle, and why execution should not issue against him agreeably to the provisions of the statute.

This writ having been served upon the defendant, a rule was taken against him for a plea. At the September rules, 1824, the defendant's default was entered, and judgment *nisi*. At the January term, 1825, this default was set aside, and the defendant filed the plea of *non assumpsit*; upon which issue was joined.

The cause was regularly continued upon the docket until the July term, 1827; at which term the defendant's attorney filed a further plea.

"And the said Thomas D. Carneal, by the leave of the court, first had and obtained for further plea in this behalf, defends the wrong and injury, when, &c., and says that the said promise in the said declaration, in the original cause supposed, was made by the said Carneal as co-indorser with William Lytle upon a promissory note made and executed by the said William Steele, the said Carneal and Lytle being indorsers, as securities for the said William Steele; and, after the making of the said promise, and after the commencement of this suit, to wit, on the 17th day of December, 1824, in consideration that the said Lytle had transferred to the plaintiffs a large amount of real estate, in payment and satisfaction of the debts of the said William Lytle to the said plaintiffs, including the debt due the plaintiffs upon the indorsement aforesaid, and had given his notes for the payment of a large sum of money, to wit, the sum of forty thousand dollars, upon

account of and in satisfaction of his said liabilities *to the plaintiffs, including the [*545 indorsement aforesaid, the said plaintiffs agreed with the said William Lytle that they would accept and receive the real estate so conveyed and the notes so made and delivered in satisfaction of the said debt due from the said William Steele, upon which the said Carneal, with the said William Lytle, were indorsers and securities as aforesaid; and did then and there accept and receive the same in satisfaction of said debt; and this the said Carneal is ready to verify; wherefore he prays judgment, if the said plaintiffs their action ought further to have or maintain against him."

At the December term, 1827, the plaintiffs filed their replication to the above plea in the following words: "And the said plaintiffs, by Daniel J. Caswell, their attorney, as to the plea of the defendant, by him last pleaded, to the further maintenance of the said action, say, that for anything in the said plea set forth they ought not to be barred from further having and maintaining their said action, because protesting that the said William Lytle did not transfer to the said plaintiffs the real estate in the said plea set forth, nor give his notes for the sum of money in the said plea set forth; for replication to the said plea they say that the said plaintiffs did not accept the same in satisfaction of the sum of money due the said plaintiffs, as set forth in their said declaration; and this they pray may be inquired of by the country, and the defendant doth the like," &c.

The cause was tried at the July term, 1828, and a verdict and judgment rendered for the defendant.

The counsel for the plaintiffs tendered their bill of exceptions and prosecuted this writ of error.

The bill of exceptions sent up with the record contains the whole of the testimony given on the trial. The facts of the case, as they were understood and considered by the court, are stated in the opinion of the court delivered by *Mr. Justice Story*.

On the trial in the Circuit Court of Ohio, after the evidence was closed, the defendant's counsel moved the court to instruct the jury as in case of a nonsuit, "upon the ground that the evidence adduced by the plaintiffs was not sufficient in *law to charge the defend- [*546 ant as indorser of the note aforesaid; and the court, upon the motion aforesaid, decided that the evidence in writing adduced by the plaintiffs was insufficient in law to charge the defendant and render him liable as indorser of the note aforesaid, and so charged the jury; to which opinion of the court and charge to the jury the plaintiffs, by their counsel, except, and pray the court that this, their bill of exceptions, may be signed, sealed, and made a part of the record; which is hereby ordered."

The plaintiffs, by their counsel, moved the court to charge the jury that, under the present state of the pleadings in the cause, it was not necessary for the plaintiffs to prove that they gave notice to the defendant of the non-payment of the said note at the time the same became due and payable, in order to charge the said defendant; which instruction the court refused to give the said jury; and, on the contrary, charged the said jury that it was incum-

bent upon the plaintiffs to prove such notice. To which opinion and charge of the court the plaintiffs, by their counsel, excepted, and prayed that this, their bill of exceptions, may also be signed, sealed, and made a part of the record. All which was ordered by the court.

The case was argued by *Mr. Caswell* and *Mr. Sergeant* for the plaintiffs in error, and by *Mr. Benham* for the defendant.

The counsel for the plaintiffs contended:

1. That the court erred in deciding that it was incumbent upon the plaintiffs to prove that due and legal notice was given to the defendant of the non-payment of the note set forth in the record. In order to sustain this position they relied upon the fact that, after the issue of *non assumpsit* was joined by the parties, the defendant, by leave of the court, filed a plea of accord and satisfaction pending the writ, upon which issue was joined. This plea, it is contended, was a waiver of the former issue.

2. That the proof of notice was sufficient to charge the defendant with the payment of the note, and, consequently, that the court erred in charging the jury as in case of nonsuit.

547*] *For the defendant in error it was argued that there was no error in the decision of the Circuit Court of Ohio.

1. Because the evidence adduced on the trial by the plaintiffs to prove a presentment of said note and demand of payment, was not sufficient to charge the defendant as indorser.

2. That the evidence of notice to charge defendant as indorser was insufficient.

3. That the special plea filed by the defendant at the term of July, 1827, in bar of the further maintenance of said writ, did not waive the issue previously joined.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Ohio. The Bank of the United States brought a joint action against William Steele, William Lytle, and Thomas D. Carneal (the defendant in error), upon a promissory note dated at Cincinnati on the 22d of August 1820, whereby Steele promised to pay Carneal or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, the sum of \$11,563 in sixty days after date; which note was afterwards successively indorsed by Carneal and Lytle, and was discounted by the bank and dishonored at its maturity.

The declaration is for money lent and advanced, and the suit is authorized to be brought in this form jointly against all the parties to the note, by a statute of Ohio. The process was served upon Steele and Lytle, but returned "not served" upon Carneal. Judgment was afterwards duly obtained against Steele and Lytle, and a *scire facias* issued according to another statute of Ohio against Carneal, to which he appeared and pleaded the general issue of *non assumpsit* at the January term of the court in 1825. The cause was then regularly continued until July term, 1827, when by leave of the court he pleaded, as a further plea, the receipt of certain real estate of Lytle by the bank, after the commencement of the suit, in satisfaction of the debt due upon the note, and prayed judgment if the plaintiffs

their action ought further to have or maintain against him. To this plea there was a replication and issue to the *country; and at [*548 June term, 1828, the cause was tried and a verdict was found, and judgment thereupon entered for the defendant. A bill of exceptions was taken at the trial, upon which the questions arose which have been discussed at the bar, and upon which the opinion of the court is now to be delivered.

The first question is, whether the plea of satisfaction, so as above pleaded, is a substitution for the former plea of *non assumpsit*, so as to displace it entirely, or whether it is an auxiliary plea, so that both issues were properly before the jury at the trial upon which they might pronounce their verdict. The latter is contended for by the defendant in error, and was supported by the judgment of the Circuit Court.

It is admitted that a plea *puis darrien continuance* is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. (Stephens on Pleading, 81, 83; Comyn's Dig. Abatement, I. 24.) The present plea was in fact pleaded after the last continuance, although it is not so stated in the plea. It differs from a technical plea of *puis darrien continuance* only in this circumstance, that the satisfaction is alleged to have been after the commencement of the suit, instead of after the last continuance of the suit. In principle, however, they do not differ, since each of them requires the same commencement and conclusion; that is, instead of *actio non*, generally, each must be pleaded with the prayer of *actio non ulterius habere*, &c., and the judgment must follow the prayer, and is repugnant to and incompatible with that of a general judgment upon matters before the suit brought. As, therefore, the same judgment cannot be rendered upon the general issue, and upon such a plea of matters arising after the suit brought, it is difficult to perceive how they can be united. But it is the less necessary to rest any absolute decision upon this point, because we are all of opinion that the judgment below ought to be reversed upon the exceptions taken to the merits.

The court below ruled that the evidence adduced at the *trial was not sufficient in [*549 law to charge the defendant as indorser. That evidence was supposed to be deficient in two respects: 1st, that there was not a proper demand of payment of the note of the maker at the time when it became due; and, 2d, that due notice was not given of the non-payment to the defendant as indorser.

Upon the first point the evidence is, that on the day when the note became due, the note was in the bank at Cincinnati, the bank being the holder thereof, and it being payable there, and that after the usual banking hours were over, it was delivered to a notary by the officers of the bank for protest, they informing him at the time that there were no funds there for the payment of the note. We are all of opinion that this was a sufficient proof of a due demand of payment. Where a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same,

and if he omits so to do, and a demand is there made of payment by the holder within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor. But where the bank is itself the holder of the note so payable, no formal demand is necessary to be made of payment. The maker has the whole period of the usual banking hours to pay it, and if he does not pay it within those hours, it is equivalent to a demand and refusal of payment on his part, and the note ought not to be delivered out for protest until after those hours are passed. If the bank has funds of the maker in its hands, that might furnish a defense to a suit brought for non-payment. But this is properly matter of defense to be shown by the party sued, like any other payment, and not matter to be disproved by the bank by negative evidence. This doctrine was recognized by this court in *Fullerton v. The Bank of the United States*, at the last term. (1 Peters' Rep., 604, 617.)

Then, as to the other point of notice, the facts are that the defendant, Carneal, resides in Campbell county, in the State of Kentucky. The note became due on the 24th of October, 1820, and on the next day the notary put a **550*** sealed *notice of the protest and non-payment into the post-office in Cincinnati, directed "To Thomas D. Carneal, Campbell county, Kentucky," the postage on which was not paid. At that time Carneal's residence in Campbell county was without the limits of any post town, and about two miles from Cincinnati, across the river Ohio; and his residence was well known to the officers of the bank as well as the postmaster at Cincinnati. The county seat of Campbell County is Newport, where there is a post-office, about three miles distance from Carneal's residence, the river Licking being between them; and there is also another post-office at Covington, below the river Licking, about two miles distance from his residence. In October, 1820, the mails from Cincinnati passed once a week only through Covington, and three times a week through Newport. Carneal was in the habit of receiving letters at the Newport office, as well as at the offices in Covington and Cincinnati. He was in the habit of receiving all the letters directed to him at Cincinnati at the office in that place, and had given orders to the postmasters to detain all such letters there until he called for them. He visited Cincinnati very frequently, and almost daily, having business, and being a director of a bank located at that place. The postmaster was in the habit of sending letters directed to him, in Campbell county, by the Covington mail, whenever he observed the address, unless, as was sometimes the case, he called for letters at the office before the Covington mail was sent. But other letters, directed generally to Campbell county, when the place of residence of the party was unknown, were sent by the postmaster to Newport. The notary himself, when he put the present notice into the post-office at Cincinnati, supposed that Carneal received all his letters at that office. The first mail which left Cincinnati for Newport after the deposit of this notice, was on the 26th of October; and the first which left for Covington was on the 28th

of the same month. There is no evidence in the case that the letter in question went either by the mail of the 26th to Newport, or by that of the 28th to Covington. The defendant, Carneal, has not produced the letter, if it was ever *received by him; and the cir- **[*551]** cumstances afford a strong presumption that it might have been received at Cincinnati.

Such is a summary of the material facts upon which this court is called to pronounce, whether there was due diligence in the transmission of the notice to the defendant. The latter having asked the court below to instruct the jury as in case of a nonsuit, and the court having acceded to his request, that instruction can be maintained only upon the supposition that there was no contrariety of evidence as to the facts which ought to have been left to the jury; and, consequently, every inference fairly deducible from the facts which afforded a presumption of due notice ought to be made in favor of the plaintiffs.

It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post town. If it is not, then to the postoffice or post town nearest to his residence, if known. But the rule as to the nearest post-office is not of universal application; for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and that fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices to suit his own convenience or business, it may be sufficient to send it to either. The object of the law in all these cases is to enforce the transmission of the notice by such a route as that it may reach the party in a reasonable time. This doctrine is fully recognized by this court in the case of *The Bank of Columbia v. Lawrence*, decided at the last term. (1 Peters' Rep., 578.)

It has been objected that the direction of this letter to Campbell county generally was not sufficient, but that it ought to have been directed to the nearest office, for otherwise it might happen that it would be sent to a post-office which, though the county seat, might be very distant from *the residence of the **[*552]** party. Whether a mere direction to the county without farther specification, where the party does not reside in any town therein, would be sufficient in all cases and under all circumstances, we do not think it necessary to decide. That question may well be left until it is necessary in judgment. But where the description is general, if it is in fact sent to the proper post-office, or, if after due inquiry it is the only description within the reach of the person sending the notice, we think it may be safely declared to be sufficiently certain, and that a different doctrine would materially clog the circulation of negotiable paper. We think the description in the present case was in every view sufficient. There was no misdirection; for Carneal did live in Campbell county.

Peters 2.

His actual residence was well known to the postmaster at Cincinnati, and the description did not and could not mislead him. If the direction was observed it would be sent to Covington, or would be delivered at Cincinnati. If not, it would be sent, at farthest, to Newport.

Then, was the notice in fact only given, or only sent through the proper post-office? We are all of opinion that it was. The post-office at Cincinnati was almost as near to the party's residence as that at Covington. The difference is too trifling to afford any just ground of preference; and Cincinnati was the place where he was most likely to receive the letter promptly, since it was the place of his business and of his habitual and almost daily resort. If it had never been transmitted from that office at all, we are not prepared to say that, under such circumstances, the notice left there was not of itself sufficient, since the party was known there and his description unequivocal. It does not appear in point of fact that it ever left that place for any other postoffice. If it did not, the strong presumption is that it was there delivered to the party. But if it was sent to Newport, how can the court say that it was mis-sent? The party was in the habit of receiving letters there; it was the county seat; and the mail by that route was three times a week, and that by Covington only once a week. The probabilities, therefore, in favor of an early receipt **553*** of the letter *from this circumstance might fairly balance any in the opposing scale, from the increase of distance and the intervention of the river Licking. And, in fact, the letter would at that time have reached Newport two days earlier than it would have reached Covington. We think it would be inconvenient and dangerous to lay down any rule that the person sending a notice ought under such circumstances to direct the letter to the nearest post-office. We think that the notice would have been good by either route; indeed, good if left at the post-office at Cincinnati.

A suggestion has been made at the bar that a letter to the indorser stating the demand and dishonor of the note is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice.

For these reasons we are all of opinion that the judgment of the Circuit Court ought to be reversed and the cause remanded, with directions to award a *venire facias de novo*.

Cited—10 Pet., 582; 4 How., 348; 8 Wall., 649; Hemp., 460.

554*] *DAVID CANTER, *Appellant*,
v.

THE AMERICAN AND OCEAN INSURANCE COMPANY OF NEW YORK,
Appellee.

Jurisdiction.

A motion to dismiss a suit for want of jurisdiction applies solely to cases where this court has not Peters 2.

jurisdiction of the cause, and not where the Circuit Court has exceeded its proper jurisdiction in the particular case.

THIS case was heard and decided upon the preliminary question which it involved in January term, 1828. (See 1 Peters, 511.) On the hearing, the Supreme Court decided in favor of the claimant, and decreed restitution of the cotton which was the subject of controversy. By the mandate directed to the Circuit Court, it was ordered "that such execution and proceedings be had as, according to right and justice, and according to the laws of the United States, ought to be had." The mandate being filed in the Circuit Court, it was ordered that the same be recorded, "that the case be put on the docket, and it be referred to the officer of this court to examine into the damages sustained by the claimant, David Canter, in consequence of the proceedings of the libelants, and report thereon at as early a day as possible to the court."

Upon this order of court being made, Mr. Canter filed a statement of his claim, and the case went before the register.

The counsel for the defendants filed with the register the following protest:

And now, on this sixteenth day of July, one thousand eight hundred and twenty-eight, the said libelants, by Petegru and Cruger, their proctors, object to the order of reference made by the honorable the Circuit Court of the United States for the Sixth Circuit, to ascertain the damages alleged to have been sustained by the respondent in this case, and they article and protest against all acts and proceedings under the same for these reasons, to wit: 1st. That the mandate of the Supreme Court of the United States gives no authority or instructions to the Circuit Court to inquire into damages. 2d. That the decrees of the District, *Circuit and Supreme courts do ***555** not award damages to the respondent. 3d. That the libelants are not in any manner liable for damages. 4th. That, at all events, the inquiry as to damages cannot extend beyond the amount of libelants' stipulations, by which alone they are before the court.

PETEGRU & CRUGER,

Proctors for Libellant.

These objections were disallowed, and the register proceeded to take evidence subject to the protest, and to examine into the claim of damages; and afterwards made a report upon the claim to the Circuit Court.

The Circuit Court having by their decree disallowed the claims of the appellant to damages, with the exception of a small amount, an appeal was entered to this court.

Mr. Cruger, for the appellees, moved to dismiss the appeal on the ground that the mandate of this court did not authorize any proceedings in the Circuit Court for the assessment of damages.

The motion was supported by Mr. Cruger for the appellees, and opposed by Mr. Core and Mr. Webster for the appellant.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The motion made is to dismiss this case for want of jurisdiction. But a motion to dismiss a suit for want of jurisdiction applies solely to

cases where this court has not jurisdiction of the cause, and not to cases where the Circuit Court has exceeded its proper powers in the particular case. In the present case this court has certainly jurisdiction to revise the decree complained of in the Circuit Court. Whether that decree was proper or not, after the mandate of this court, is matter for discussion upon an argument upon the merits of that decree, but not on a motion like the present.

The motion is therefore overruled.

S. C., 3 Pet., 307.

556* *JAMES CONOLLY ET AL., Appellants,*

v.

RICHARD TAYLOR ET AL., Appellees.

Jurisdiction—parties.

When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties is governed by that condition as it was at the commencement of the suit. [565]

If an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise jurisdiction while the defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause. [565]

The suit was originally instituted by aliens and a citizen of the United States as complainants, against the defendants, citizens of the United States. In the progress of the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was struck out, and he was made a defendant by the court. It was held: The substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction: strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties and all the citizen defendants. There is no objection, founded on convenience or law, to this course. [565]

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, in which court the appellants were complainants and the appellees were defendants.

In the Circuit Court of Kentucky, on the 20th of February, 1818, Thomas Conolly, James Conolly, Margaret Conolly, David David, and Francis Badley, aliens and subjects of the King of the United Kingdoms of Great Britain and Ireland, and Samuel Mifflin, a citizen of the State of Pennsylvania, filed their bill against certain defendants, claiming to have an equitable title to a large tract of lands in right of Colonel John Conolly, deceased, situated at the Falls of Ohio, in the State of Kentucky. The defendants in the bill were Richard Taylor, Fortunatus Cosby, and Henry Clay, citizens of Kentucky, and William Lytle, **557*** described in the subpoena as a "citizen of Kentucky, but who was in fact a citizen of the State of Ohio. The subpoena was served on all the defendants, Mr. Lytle having been found by the process in Kentucky.

The answer of Mr. Lytle protests against the

jurisdiction of the Circuit Court, he being a citizen of the State of Ohio.

In the further progress of the suit before the Circuit Court at May term, 1823, on motion on the part of the complainants the name of Samuel Mifflin was struck out of the bill as a plaintiff, and he was made a defendant, after which he answered an amended bill filed against him.

When, therefore, the case came on to a hearing in the Circuit Court at May term, 1826, the parties complainants were all aliens and subjects of the King of Great Britain and Ireland; two of the defendants were citizens of the State of Kentucky, one of them was a citizen of the State of Ohio, and Samuel Mifflin was a citizen of the State of Pennsylvania.

The cause was argued upon an objection to the jurisdiction of the case in the Circuit Court of Kentucky, and upon its merits. This court being divided upon the merits, and no opinion having been expressed upon any other question in the cause but that of jurisdiction, the reporter does not consider himself permitted to state any of the facts of the case or the arguments of counsel, other than those connected with that point.

The counsel for the plaintiffs in error were *Mr. Wirt*, Attorney-General, *Mr. Wickliffe*, and *Mr. Peters*. For the defendants, *Mr. Sergeant* and *Mr. Nicholas*.

In support of the jurisdiction of the court, it was argued that it was a subject of frequent regret that the whole jurisdiction proposed by the Constitution for the courts of the United States has not been conferred by Congress on these courts. The wise policy of the Constitution has failed to take effect, and justice has often fallen short and been defeated by the mere defect of the judiciary system.

The court will not be disposed, therefore, to narrow the *defective legislation which [**558** has taken place, by putting on it a too rigorous construction.

In the present instance it requires only a fair construction of the Act of Congress to sustain the jurisdiction. All the cases cited on the other side are admitted, but it is conceived that they do not touch the question of jurisdiction in this case.

The 11th section of the Judiciary Act of 1789 gives jurisdiction to the circuit courts "of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between the citizen of a State where the suit is brought and a citizen of another State." Thus the Act presents three distinct classes of cases where the court takes jurisdiction from the character of the parties: 1st, where the United States are plaintiffs or petitioners; 2d, where an alien is a party; and, 3d, where the action is between a citizen of the State where the suit is brought and a citizen of another State.

The counsel for the appellees suppose that this case falls within the third class, and they have cited several cases decided in the circuit courts to show that where the case does fall under the third class, one of the parties must be a citizen of the State in which the suit is brought.

If it were conceived that the case did belong to the third class, it might well be contended that the objection came too late from Mr. Lytle; because it is a privilege on which the party may insist, or may waive at pleasure; and that after appearing and answering to the merits, it is too late to make it. (*Gracie v. Palmer*, 8 Wheaton, 699; the case of *The Abbey*, 1 Mason, 360; 3 Mason, 158.)

Lytle appeared and answered to the merits; and although in his answer he suggests an objection to the jurisdiction of the court, he does not state the specific ground of his objection.

Besides, according to the chancery practice, a plea in abatement to the jurisdiction and an answer to the merits cannot stand together, but the answer overrules the plea.

559*] *But the conclusive answer to the objection of the want of jurisdiction is, that this case does not belong to the third class of cases put by the Judiciary Act, but belongs to the second.

The third class, being of suits between citizen and citizen, has been judicially settled to relate to cases not where citizens were the nominal parties only, but where the interests also are citizen interests.

In *Brown et al. v. Strode* (5 Cranch, 303), this court decided that the courts of the United States have jurisdiction of a case between citizens of the same State where the plaintiffs are only nominal parties for the use of an alien. The plaintiffs in that were the justices of the peace for the county of Stafford in Virginia, and were all citizens of that State. The defendant Strode was also a citizen of that State. The action was on an executor's bond; no one could have sued on that bond but the plaintiffs, to whom the bond had been given. They were, therefore, necessary and indispensable parties.

But the interests involved in the suit being the interest of an alien; the suit being for the use of the alien; the nominal plaintiffs being, *quoad hoc*, merely trustees for the alien, suing solely for his benefit without any interest in the subject themselves, the jurisdiction was maintained on this ground, and on this alone.

So here, Mifflin, one of the nominal plaintiffs, had and still has no manner of interest in the case. He is a mere trustee under the will of John Conolly for the alien complainants, and the suit is brought solely for the use of aliens.

In principle the case is identical with that of *Brown et al. v. Strode*. Like that it is purely a suit for the recovery of alien interests, and like that this suit is well founded, as being in substance a suit by aliens.

Again, Mifflin was a party solely for conformity; that is, a merely formal party. The test of a defendant being merely a formal party is that no decree can be rendered against him; that is, against his interests or affecting his interest. *E converso*, the test of a complainant being merely a formal party is that no decree **560*]** can be rendered *for him; that is, no decree in favor of his interests, and the joinder or non-joinder of such a party cannot affect his interests.

In support of which were cited the following authorities: *Russell v. Clark* (7 Cranch, 69); *Peters 2*.

Wormley v. Wormley (8 Wheaton, 421); *West v. Randall* (2 Mason, 181).

The suit, then, being substantially and according to *Brown et al. v. Strode*, a suit by aliens, is it any objection to the jurisdiction of the court that some of the defendants are citizens of Kentucky, where the suit is brought, and one of them is a citizen of Ohio? Is it necessary, when the plaintiffs are aliens, that the defendants should be citizens of the particular State where the suit is brought?

The Judiciary Act does not make this necessary. The 11th section gives the jurisdiction where an alien is a party without a word more; there is no qualification of this jurisdiction from the residence of the opposite parties; it is enough if they be citizens of the United States.

Will this court create a limitation on their jurisdiction when the law has created none?

Is it not the object of the law and of the Constitution in all cases to give the alien, where he is a party to the suit, an impartial tribunal in the courts of the nation? And is not this object as strongly demanded where his antagonists are citizens of different States as where they are citizens of the same State?

The manifest object of the Constitution and law is to prevent the alien from being driven into the State courts, and there encountering the prejudices which were to be apprehended in the local courts; but this salutary purpose will be totally defeated if, by the residence of his adversaries in different States, you compel him to go into the courts of the State where some of them reside. Hence the law founds the jurisdiction in any case where an alien is a party.

If you limit his right to a case in which all his adversaries reside in the same State, you defeat, so far, the salutary purpose of the Constitution and the law.

Reverse the case: suppose that citizens of different States have a joint claim against an alien, can they not bring a suit *against **561** him in the federal court? The single criterion of jurisdiction put by the law has occurred. "An alien is a party, and it is nowhere said that the opposite parties must all belong to the same State."

Will you not apply the same rule, where the alien is the plaintiff, the case being the same?

So far as the court appear to have touched this question in former cases, it may be inferred that their construction is that which has been indicated.

When the case is one between citizens, it is necessary to show the jurisdiction in the bill or declaration by averring that the plaintiff is a citizen of one State and the defendant of another. But when an alien is a party, the jurisdiction has been held to be sufficiently shown by stating that fact, without averring that the defendant is a citizen of the State in which the suit is brought. (*Gracie et al. v. Palmer et al.*, 8 Wheaton, 699.)

The 11th section contains this further provision, "that no civil suits shall be brought before either of the said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of suing the writ."

Does this apply to suits brought by aliens,

or is it confined to suits brought by citizens? Considered as applying to suits brought by citizens, it has been judicially pronounced to be a very inconvenient restriction on the constitutional grant of jurisdiction. (*White v. Fenner*, 1 Mason, 521.) That it should apply to suits by aliens may be well questioned.

The only substantial and real parties in interest to this suit were the aliens. Mr. Mifflin was made a party complainant at the commencement of the proceedings, but it was afterwards found that in order to carry into effect the object of the bill, and to obtain from him what the real parties had a right to demand, it was necessary to make him a defendant. Thus, therefore, in the Circuit Court, when the case was heard, all the parties plaintiffs, even nominally, were aliens; and the defendants were all citizens of the United States, and alleged to be so on the record.

562* For the defendants in error it was contended that the Circuit Court of the Kentucky District had no jurisdiction. The bill of complaint, which is the foundation and commencement of the suit in equity, states Samuel F. Mifflin, one of the complainants, to be a citizen of Pennsylvania, and William Lytle, one of the defendants, to be a citizen of Ohio. William Lytle pleaded to the jurisdiction and thus saved his right to object, even if he had had power to waive it, which he had not. Consent cannot give jurisdiction. The objection is not founded upon the provision that a citizen shall not be sued in the courts of the United States, except in the State where he resides or is found at the time of serving the process. That is a privilege which he may waive by appearance. It rests upon that part of the Act of Congress (Act of 1789, sec. 11) which expressly limits the jurisdiction (and so far as it rests upon the character of the parties) to suits between citizens of different States, one of them being "a citizen of the State where the suit is brought." There is no doubt that the jurisdiction, under the Constitution, might have been more extensive. The terms of the Constitution only require that the parties should be citizens of different States. But the uniform construction of this grant of power has been that it is to be exercised by the judiciary only to the extent which Congress may authorize.

It is perfectly clear, upon this statement, that the Circuit Court had no jurisdiction between Mifflin and Lytle. (Section 11 of the Act of the 24th of September, 1789.) The court is bound to notice the question of jurisdiction whenever it may occur and however proposed. (2 Dall., 368.) The plaintiff may assign as error the want of jurisdiction, though the tribunal of the United States were resorted to by himself. The court must see that it has jurisdiction.

The jurisdiction must appear on the record affirmatively. Everything must be alleged that is necessary to give jurisdiction. (3 Dall., 382; 4 Dall., 8; 1 Cranch, 343; 2 Cranch, 186; 5 Cranch, 185; 6 Wheat., 450.)

This would be clear if Mifflin and Lytle were the sole parties. Does their joinder with others make any difference? The answer has long **563*** since been given. The plaintiffs and defendants must all be competent to sue and be sued. (*Strawbridge v. Curtis*, 3 Cranch, 267; *Hope Insurance Company v. Boardman*, 5

Cranch, 57; *Bank of the United States v. Deveraux*, 5 Cranch, 61.)

If the plaintiffs be not all competent, it is immaterial whether the joinder is from necessity or voluntary. (*Corporation of New Orleans v. Winter*, 1 Wheat., 91, 94; *Ward v. Arredondo*, 1 Paine, 410.) The rule is the same as to defendants.

Some exceptions have been made out of the generality of the proposition, but none that in its terms or spirit can comprehend the present case. In *Cameron v. M^rRoberts* (3 Wheat., 591), it was decided that if a distinct interest vested in one of the parties defendant, he being the one within the jurisdiction, so that substantial justice could be done so far as he was concerned without effecting the other defendants, the jurisdiction of the court might be exercised as to him alone. That is, to apply it to the present case; if Lytle were within the jurisdiction, the case might proceed against him alone; for here Lytle was the sole party in interest. It so appears by the bill of complaint, the title having come to be entirely vested in him. But he who was thus the only material party, was the very party who was out of the jurisdiction, and not amenable to the court.

So it is very true that the joinder of a mere formal party defendant does not take away the jurisdiction. (*Wormley v. Wormley*, 8 Wheat., 421, 451.) The criterion in such cases is whether a decree is sought against him. (*Ward v. Arredondo*, 1 Paine, 410.) If he be a material party, he must be brought in, even though the jurisdiction would thereby be ousted. (*Harrison v. Rowan*, Circuit Court New Jersey District.) But Lytle was not a mere formal party, he was an indispensable party, without whom no decree could be made.

So if improper persons be made parties by mistake who are not subject to the jurisdiction. (*Carneal v. Banks*, 10 Wheat., 187, 188.) But here there was no such mistake in joining improper persons.

There is no case, therefore, where the decision has been contrary to what is now contended for. The opinion that *in a suit at common [**564** law in Pennsylvania, where *non est inventus* is returned as to one who is not subject to the jurisdiction (2 Wash. C. C. Rep., 505; 1 Peters' Rep., 431, note), the proceedings may go on against the others, has no application.

It is true that in this case the court, in 1821 (three years after suit brought), permitted the complainants to amend their bill by striking out Mr. Mifflin as complainant and making him a defendant. But this was itself an exercise of judicial authority which could not rightfully take place, but in a case over which the court had previously a power. The court could not make the amendment, unless it first had jurisdiction. The time of suit brought is the period to which the question of jurisdiction applies. (*Mollan v. Torrance*, 9 Wheat., 537.) It cannot afterward be either vested or divested.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

As an objection was made to the jurisdiction of the court in this case it may be proper, in order to prevent a possible misunderstanding of the principle on which jurisdiction is sustained, briefly to state it.

The bill is filed in the court of the United States sitting in Kentucky by aliens, and by a citizen of Pennsylvania. The defendants are citizens of Kentucky except one, who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned so far as respects the alien plaintiffs. As between the citizen of Pennsylvania and of Ohio, neither of them being a citizen of the State in which the suit was brought, the court could exercise no jurisdiction. Had the cause come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill before the cause was brought before the court, and the question is whether the original defect was cured by this circumstance—whether the court, having jurisdiction over all the parties then in the cause, could make a decree.

The counsel for the defendants maintain the **565*** negative of *this question. They contend that jurisdiction depends on the state of the parties at the commencement of the suit, and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same State, he cannot give jurisdiction by removing himself and becoming a citizen of a different State.

This is true, but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court in the first case had complete original jurisdiction; in the last it had no jurisdiction either in form or substance. But if an alien should sue a citizen and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.

So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course.

Upon examining the record, the judges are divided in opinion on the question whether the defendants, who are purchasers, have taken the lands charged with the equity which was attached to it while in possession of Campbell and his heirs, or are to be considered as purchasers without notice. It would be useless to state the arguments and facts in support of each opinion. The decree is affirmed by a divided court.

Peters 2.

Cited—7 Pet., 261; 18 Wall., 574; Bald., 193, 284; Hemp., 712; 2 Brock., 522; 12 Blatchf., 290; 1 Sumn., 584; 12 Bank. Reg., 102.

*CHARLES A. BEATTY AND JOHN T. RITCHIE, *Appellants*,

v.

DANIEL KURTZ ET AL., Trustees of the German Lutheran Church of Georgetown, *Appellees*.

Dedication of land to public use—Maryland bill of rights—members of voluntary society as parties.

A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran Church," and by the German Lutherans of the place had been used as a place of burial from the dedication, and who had erected a school-house on it, but no church; exercising acts of protection and ownership over it at some periods by committees appointed by the German Lutherans; the original owner acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses; and, although the German Lutherans were not incorporated, nor were there any persons who as trustees could hold the property, the appropriation was also valid under the bill of rights of Maryland. The bill of rights, to this extent at least, recognizes the doctrines of the statute of Elizabeth for charitable uses; under which it is well known that such uses would be upheld, although there was no specific grantee or trustee. This might at all times have been enforced as a charitable and pious use through the intervention of the government as *parens patrie*, by its Attorney-General or other law officer. It was originally consecrated for a religious purpose. It has become a depository of the dead, and it cannot now be resumed by the heirs of the donor. [584]

If the complainants in the Circuit Court were proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession; under the circumstances of this case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession. [584]

The only difficulty which presents itself upon the question whether the complainants in the Circuit Court have shown in themselves sufficient authority to maintain their suit, is, that it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, under all the circumstances, it might be fairly presumed. But this is not necessary; because this is one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interests, as part of the same society, for purposes common to all and beneficial to all. [585]

APPEAL from the Circuit Court of the county of Washington.

The appellees filed their bill in the Circuit Court against Charles A. Beatty and John T. Ritchie, which states, in substance, that the late Colonel Charles Beatty and George Frazier Hawkins, in the year 1769, laid out on lands belonging *to them and adjoining the [*567 town of Georgetown, a certain town known by the name of "Beatty and Hawkins's addition to Georgetown;" the lots whereof were laid down and distinguished on a plot and disposed of by lottery. That Beatty, in laying out the said addition, distinguished and set apart a certain lot or portion of ground in the said addition for the sole use and benefit of the German Lutheran Church, declaring the same to

be their absolute right and property, to be held by them for religious purposes and the use of said congregation, and caused the same to be so entered and designated in the plot of said addition, as now appears by the plot and papers on record in the clerk's office for Washington, to which they beg leave to refer; which plot and papers were recorded under authority of the Act of Maryland, 1796, ch. 54; which lot is described in the said plot of said addition as the German Lutheran Church lot, and also in the general plot of the town of Georgetown and its additions, deposited in the office of the clerk of the corporation of Georgetown. That soon after the lots in the said addition were laid off and disposed of as aforesaid, the said lot was taken possession of by the said German Lutherans, and was inclosed, and a church erected thereon; and hath been kept and held by them ever since, during a period, as they believe, of upwards of fifty years, and hath been used by them as a burying-ground for the members of the said church, with the avowed intention of building thereon another church or place of worship, the building first erected being decayed, whenever their funds would enable them to do so. That during all this period, neither their possession nor title hath ever been questioned, and the lot has been exempted from taxation at their request by the corporation of Georgetown as being church property. That Charles Beatty died about sixteen years ago, and without having made any conveyance of the said lot, and that Charles A. Beatty is his heir-at-law. They therefore pray that he may be made defendant, and be compelled to convey the title to the complainants, in trust for the German Lutheran Church.

They further state that the defendant, John T. Ritchie, without any pretense of title, dis-**568***] puts the title of complainants *and their right of possession, and has undertaken to enter on part of the lot, and to remove tombstones, &c., and they fear that he means to dispossess them; wherefore they pray subpoena, &c., and that they may be quieted in their possession of said lot, and that the defendant, Ritchie, may be enjoined from disturbing their possession, and for general relief.

The answer of the defendants in the court below admits that Charles Beatty, deceased, did designate a lot in his addition to Georgetown by inscribing on the plot thereof these words, "for the Lutheran Church;" that they always understood and believed that he meant by that inscription to manifest an intention to appropriate that lot to the use of the Lutherans, provided they would build on it within a reasonable time a house of public worship, which would conduce to diffuse piety, to enhance the value of his property, and to adorn his addition to Georgetown. But they deny that this inscription was ever meant, or could be interpreted to be, a contract with the Lutheran Church to convey to that body the property in question. That the writing itself could not operate as a conveyance, and there was no consideration to sustain it as a contract. They deny that Charles Beatty ever declared the lot in question to be the absolute right and property of the Lutherans, or did in any manner by means thereof hold out inducements to them or the public to purchase tickets in the pre-

tended lottery mentioned in the bill, or to purchase and improve lots in that part of the town. They aver that no church had ever been built on it, and that its occupation by graves and a school-house was a use of it by no means beneficial to defendants, or him under whom they claimed.

The answer denies the possession averred in the bill, and also that there ever was an organized congregation of German Lutherans in Georgetown.

It avers, also, that the lot in question has remained uninclosed for at least three-fourths of the time since it became a part of Georgetown, and that the inclosures which occasionally surrounded it were not erected by the complainants, nor those whom they pretend to represent. The respondents *admit that [***569** the lot was used as a burying-ground; but aver that it was thus used by Beatty's permission, and not exclusively by the Lutherans, but the public generally. But they further say that if the Lutherans had enjoyed the possession alleged in the complainants' bill, they might and should have enforced the rights thereby acquired at law, and ought not to have come into equity for a remedy. Finally, confessing that they had resumed possession of the property, they deny the authority of the complainants to act in behalf of the pretended German Lutheran Church, and pray the same benefit of these defenses as if they had been urged by plea to the bill.

The plaintiffs amended their bill by stating the German Lutheran Church, mentioned in their bill, was composed of the members of the German Lutheran Church in Georgetown, duly organized as such; "that the lot was set apart by C. Beatty," from and out of that "part of the said land composing said addition," of which he, the said Beatty, was seized. "The said Beatty, by the said designation, declaration, and setting apart, holding out to the public, and to the German Lutherans particularly, inducements as well to purchase tickets in a lottery by which the said lots were disposed of, as to purchase and improve that part of the town in other ways. And thereby meaning to transfer to the said German Lutherans, as soon as they should organize themselves into a congregation or church, all his right to said lot in fee, to be used for the religious purpose of such congregation or church, and thereby declaring that intention. That they organized themselves into a congregation or church, and erected a church, or house of worship, on the said lot." That the complainants, and the congregation for whom they act, have called upon C. A. Beatty, and required a conveyance according to the promise and declared intent of the said Charles Beatty, deceased; that upon organizing the church or congregation aforesaid, certain officers, called a committee, were appointed to take charge of the concerns of the church; which appointments were, from time to time, made and renewed, and that complainants were appointed in 1824, and have continued to hold such appointment ever since.

*To those amendments the defend- [***570** ants answered, and denied all the allegations in the amended bill.

It was in evidence that soon after this lot

was thus set apart for the Lutherans, it was, with Colonel Beatty's permission, taken possession of by certain persons of that sect in Georgetown, who had a log house erected on it, which was called a church, and used as such frequently, and also as a school-house, by the German Lutherans. That in the year 1796 a German minister came from Philadelphia and was employed by them, and preached in this house for three months, being employed and paid by the German Lutherans of Georgetown; and about the year 1799 the congregation of German Lutherans, of which Travers, the witness in this cause, was one, employed a German minister, who officiated in said house for about nine months. Though divine service was frequently administered in that building, there was, at no other periods than those just mentioned, a stationed preacher who ministered to a congregation in regular attendance there, except a Mr. Brooke, who was an Episcopal clergyman, and who, Dr. Balch testifies, had possession of that building as a church in 1779. In the same or the following year a steeple was erected on the said house, in which a bell was hung, at the expense and by the direction of the German Lutherans of Georgetown. This building some years afterwards went to decay, and no church has been since rebuilt on the lot, though efforts have been since made for that purpose; and as late as 1823 a considerable subscription was raised, but not sufficient for the object.

During the whole period from 1769 to the bringing of this suit, the lot in question was generally under inclosures put up at the expense of the Lutherans of Georgetown, and under the care and custody of a committee appointed by them. It has been continually so inclosed for more than twenty years before the entry and claim set up by the defendants in this suit. The said lot has been also used by the Germans as a burying-ground from the year 1769 till a short time before the bringing this suit, and has been called and known as the Dutch burying-ground, and one of the witnesses, Styles, acted as sexton, under the orders of **571***) the committee of the *congregation. It does not appear that the German Lutherans in Georgetown ever were incorporated by law as a religious society.

It also appeared from the evidence that from the year 1769 till within a month or two before the bringing this suit, no claim to the possession or property in the lot now in dispute was ever set up by Col. Charles Beatty or by either of the defendants; but, on the contrary, Col. Charles Beatty, up to the time of his death, always declared it to be the property of the German Lutherans of Georgetown; his administrator, Abner Ritchie, who, it is stated, sold all his lots in said addition left by him at his death, never claimed or offered to sell the lot in question as part of his property: that his son and heir, the defendant, Charles A. Beatty, has repeated the same declarations to a witness (Mountz) a few years before this suit—he expressed “his surprise, that the Germans had been so indifferent about getting their title to this property, as he was always ready and willing to give them a deed for it.”

A witness, Mr. Rhæffer, testified that in 1823 **Peters 2.**

the defendant Beatty, in his presence, declared “that the lot aforesaid was the property of the Lutherans, and that he was very anxious to make them a deed. He also confirmed the evidence of the other witnesses.

It also appeared from the evidence that since the year 1769 the said lot has never been assessed for taxes to Col. Beatty or his heirs, nor have any taxes ever been paid by them. That it has always been recognized by the corporation of Georgetown, since their charter in 1789, as the church property of the Lutherans; and as such has been exempted from taxation with other church property in the town.

It was in evidence that the Lutherans of Georgetown always had a church committee to act for them, and to take charge and custody of the lot in question; and the appellees constituted that committee from 1816 till the bringing this suit, and to the present time. In virtue of that appointment, when Ritchie entered on the premises and threw down the fence and tombstones, they filed this bill for a conveyance *in fee of the lot to complainants [***572** as trustees for said church; to be quieted in the possession thereof, and for an injunction to restrain the appellants from disturbing their possession or trespassing on said lot.

The Circuit Court decreed a perpetual injunction against the defendants, the appellants; who, by their appeal, brought the case before this court.

The cause was argued for the appellants by *Mr. C. C. Lee*, and for the appellees by *Messrs. Key and Dunlop*.

For the appellants it was claimed that the decree of the court below should be reversed and the bill dismissed.

1. Because neither C. Beatty nor his son ever did any act which divested either of them of the right of property and possession in the lot in question.

2. Because neither of them ever entered into any contract (and least of all such an one as a court of equity will enforce) with the appellees, or those whom they pretend to represent, to convey to them or their pretended *cestuis que trust* the lot in question.

3. Because the appellees, or those whom they pretend to represent, have never had such an adverse possession of the lot as gave them a title to it.

4. Because if they had, it was such a title as they might and should have enforced at law and not in equity.

5. Because the appellees have failed to show any authority in themselves to prosecute this suit.

Mr. Lee contended that the only act done by C. Beatty or his heirs which can be pretended to have divested them of the title to the lot in question, is the inscription by C. Beatty on the plot of the lot of the words “for the Lutheran Church.” No possible interpretation of these can make them act as a conveyance; and the bill itself, which attempts to interpret them into a contract, and which seeks to have that contract specifically performed, necessarily admits the title of the lot to be still remaining in the appellants.

Dismissing, then, this point, as scarcely made in the case, it will be most perspicuously treated

by considering the bill in reference to its different prayers, which are for specific performance, and to be quieted in possession. This leads directly to the point that the bill shows no contract of which equity will decree performance. The words relied on as creating a contract are the aforesaid inscription, "for the Lutheran Church." But of the three requisites of a contract two are wanting here, viz., parties and a price; and interpret them as you will, no mutuality can be pretended. This of itself is sufficient to prevent the assistance of a court of equity. (*Hovel v. George*, 1 Mad., 12.) Moreover, the contract alleged concerns lands, and must, therefore, by the statute of frauds, be in writing. But there is no consideration mentioned in the contract as set out, and this has been too often decided to be an essential part of a contract, and therefore to be embraced in the written instrument to need illustration from cited authorities. True, the plot of Beatty & Hawkins' addition to Georgetown, with the said inscription thereon, was recorded, as alleged in the bill, by the Act of 1796, ch. 54; but the court will perceive, by inspecting that Act, that it does not affect this discussion.

The appellees will doubtless insist on a part performance of the pretended contract to relieve themselves from operation of the statute of frauds. This is a matter of fact which the court must decide on from the evidence. They will at least remember that if the appellees rely on their pretended erection of a pretended church as an execution on their part of the pretended contract, they admit that they were bound by that contract to erect a church; while it will be impossible to regard a log school-house, afterwards converted into a dwelling-house, and now destroyed, whoever may have called it a church and have preached in it, as such a building to be applied to such a purpose as is called for by a contract to build a church. And it may also be observed upon this part of the case, that this prayer of the bill was refused by the court below, and no appeal was taken from that decision.

As to the second prayer of the bill, he argued that it might be viewed under two aspects. 1. As regarding the complainants below, dispossessed by the defendants and seeking to be repossessed and quieted; and, 2. As regarding the complainants in possession and seeking protection against the defendants as intruders or trespassers. Either view of the case is equally fatal to the bill; and for the same reason, because the proper remedy is at law. For, regarded under the first aspect, the bill is what is reproachfully termed an ejectment bill, and clearly condemned. (*Cooper's Plead.*, 125; *Locker v. Rolle*, 3 Ves., Jun., 4, and *Ryves v. Ryves*, 3 Ves., Jun., 343.) And regarded under the second aspect, no precedent can be found to authorize it. The only species of bills which can be mistaken as affording such a precedent, are bills of peace and bills founded on the *solet*. But the least reflection will show that this is not a case for a bill of peace, which is "made use of where a person has a right which may be controverted by various persons at different times and by different actions," and "where there have been repeated attempts to litigate the same question by ejectment and repeated and satisfactory trials." (1 Mad. Ch., 166.)

In short, bills of peace lie to prevent multiplicity of actions, and this is not pretended to be brought for that purpose.

Bills founded on the *solet* are used "where a man is entitled to a rent out of lands, as chief rents or quit-rents, and from length of time the remedy at law is lost or become very difficult;" relief has, in such case, been given in equity, on the sole ground of long and undisputed payment of the rent. (1 Mad. Ch., 29.) But the appellees in this case, or those whom they pretend to represent, never had such an adverse possession of the lot in question as gave them a title to it; and if they had, the argument supposes them in possession, and they can maintain all their rights at law without the aid of the Court of Equity.

He also contended that whatever rights any society of German Lutherans might have to the lot, the appellees had shown no authority in them to prosecute their claim to those rights; and that the bill they had filed, regarded in its true light, is a bill to establish a legal title and to obtain a perpetual injunction. That such a bill is inadmissible is clearly established by *Wilby v. The Duke of Rutland* (2 Brown's P. C., 41).

Mr. Lee, in reply to the argument of the counsel for the appellees, said the true sources of the success of the appellees in the court below were in the clamor about the pollution of the remains of the dead—in the declamation about violating the sanctuary of the tomb, which triumphed before the inferior tribunal, and which now places the appellants literally in the situation which was but figuratively ascribed to Sextius—

Jam te premet nox, fabulæque manes,
Et domus exilis Plutonia.—*Hor.*

And, after all, the only thing done was by one of the appellants, who threw down a part of the inclosure of the lot in dispute; but it was that part which separated it from his own garden. Yet that is complained of as such a nuisance as that the chancellor will prevent it by injunction. But while this is complained of as a nuisance, why is not that considered to which the appellants are subjected? It may well be that one will consent to have a graveyard in his vicinity if it be hallowed by a church. The spire which points us to the skies may reconcile us to the mound which tells of what is mouldering in the earth. But we object to the bane without the antidote—the objects which awaken the mortal shudders without that which inspires the immortal hopes.

He contended that the old Acts of Maryland referred to were entirely inapplicable to this cause. That the case cited from 7 John. Ch. Rep. does not refer to perpetual injunctions, and that in the one cited from the 4th vol. of the same book there was a dispute about boundaries, to ascertain and establish which has long formed a head of chancery jurisdiction; and that the extraordinary powers of one of the parties entitled the other to the extraordinary aid of the chancellor.

As to the possession contended for, *Mr. Lee* insisted that no persons were pointed out who held that possession; that the temporary committees were never incorporated, and there could have been no holding by succession; and that the appellees, so far from showing any au-

thority vested in them to institute these proceedings, had even failed to show any congregation or religious society which could confer such an authority.

For the appellees it was contended:

The decree below for a perpetual injunction was right, if the appellees had title, either under the grant or by possession, and we contend that they had title under both.

1. Under the grant, three objections are made to it: that it is without consideration; that there is no certain grantee; that it is within the statute of frauds.

As to consideration, we admit the general rule to be that equity will not lend its aid to enforce a mere voluntary agreement. But here there is a consideration. The diffusion of piety and promotion of religion are sufficient to support it. Besides there was a money consideration. The designation of this lot as a church lot caused the tickets to sell, and enabled the grantor to dispose of his property. It is in proof that the Germans were by this means induced to buy.

"That there is no certain grantee." It is agreed that upon general principles this grant could not be executed in favor of a voluntary, unincorporated society, and that the statute of 43 Eliz., ch. 4, having been decided not to be in force in Maryland, no aid can be derived from that statute.

But this grant has had a legislative recognition. (Act of Assembly of Maryland, 1796, ch. 54, sections 3 and 4.) That Act is as strong a recognition of the grant by the Maryland Legislature as if they had passed a special law with the assent of Beatty, declaring the lot in question to be the property of "the German Lutherans of Georgetown."

If such a special law had passed, would not the courts be bound to give effect to the intent of the Legislature and donor? Would they not apply to it the principles of construction adopted by England in relation to the 43 Eliz., and the charities provided for by that statute? (See 4 Wheaton, appendix, p. 11.)

It is also contended that this grant is protected and made valid by the 34th article of the bill of rights of Maryland. The grant is within the exception contained in the 34th article, and that exception ought to have a liberal construction.

577* Within the narrow limits prescribed by the exception, the principles of construction adopted in England as to the 43 Eliz. ought to be applied. Within these limits it was and had been the policy of the people and Legislature of Maryland to favor the Church. (Acts of Assembly of Maryland, 1704, ch. 38; 1722, ch. 4.)

The last objection urged against the grant is that it concerns lands, is not in writing, and is avoided by the statute of frauds. We answer that the contract is in writing. The inscription on the plot is by Beatty himself, and describes the lot with certainty. But if it was not in writing, the contract has been performed, the gift executed, and possession delivered and retained for more than fifty years.

If the grant was void for uncertainty of the donee, then it is contended that the appellees and those under whom they claim have a good title by possession. The lot has been in their adversary possession by actual inclosures for more than twenty years.

Peters 2.

Having title either under the grant or by possession, the only remaining question is, is there a right to the interference of a court of equity to restrain Ritchie, the trespasser, by injunction?

It is said the only remedy is at law, for damages: that a court of equity has no jurisdiction to enjoin trespass. It is known that in ordinary cases of private trespass the proper remedy is at law, for damages; and this has been found sufficient for the protection of property. But in cases of trespass of a peculiar nature, where the mischief is irremediable, which damages could not compensate; where the injury reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed, the English Court of Chancery and the courts of chancery of this country are in the habit of granting injunctions.

To this point, and in support of the distinction here taken, cited the case of *Jerome v. Ross* (7 Johns. Ch. Rep., 332). Also 6 Vesey, 147; 7 Vesey, 307; 1 Brown, 588; 10 Vesey, 290; 17 Vesey, 128; 18 Vesey, 184.

If any case could justify the strong and menacing hand of an injunction, this is **[*578]** it. What damages can redress the feelings of the injured, or punish, as they ought, the aggressor? What trespass could more effectually destroy the property in the character in which it is enjoyed?

If the appellees had no other title but possession, the case of *Varick v. The Mayor, &c., of New York* (4 Johnson's Ch. Rep., 53) fully sustains the decree of the court below. In that case, Varick, who applied for and got the injunction, set up no other title but possession for twenty-five years.

Chancellor Kent says: "After such a length of time, it is right and just that the plaintiff should be protected in his property, &c. The defendant must first acquire possession of the ground in dispute, not by forcible entry, but by regular process of law. The principle upon which the injunction is to be upheld is, that after a claim of right, accompanied with actual and constant possession for twenty-five years and upwards, the corporation of New York cannot be permitted, without due process of law, to enter upon possession, pull down buildings," &c.

In the case at bar, our adversary possession is long enough to take away the appellants' right of entry.

Mr. Justice STORY delivered the opinion of the court:

This is an appeal in a suit in equity from a decree of the Circuit Court of the District of Columbia, sitting for the county of Washington.

Georgetown was erected into a town by an Act of the Legislature of Maryland, passed in 1751, ch. 25. By subsequent acts additions were made to the territorial limits of the town; and the town was created a corporation with the usual municipal officers by an Act of the Maryland Legislature passed in 1789, ch. 23. The charter of incorporation has been subsequently amended by Congress by various acts passed upon the subject since the cession.

In the year 1769, Charles Beatty and George

F. Hawkins laid out a town known by the name of Beatty and Hawkins' addition to Georgetown, and which is now included within its corporate limits. The lots of this addition were disposed of by way of lottery, under the direction of commissioners appointed to lay out the same and conduct the drawing of the lottery. The books of the lottery and the plan of the lots, and a connected survey thereof, were afterwards, by Act passed in 1796, ch. 54, ordered to be recorded in the clerk's office for the Territory of Columbia, and copies thereof to be good evidence in all courts of law and equity in the State. Upon the original plan so recorded, one lot was marked out and inscribed with these words: "for the Lutheran Church;" and this lot was in fact part of the land of which Charles Beatty was seized.

The bill was brought up by the original plaintiffs, alleging themselves to be trustees and agents for the German Lutheran Church composed of the members of the German Lutheran Church of Georgetown, duly organized as such, in behalf of themselves and the members of the said church. It charges the laying out of the lot in question for the sole use and benefit of the Lutheran Church, to be held by them for religious purposes and the use of the congregation, as above mentioned. That soon afterwards the lot was taken possession of by the said German Lutherans in Georgetown, who organized themselves into a church or congregation and erected a church or house of worship thereon; and the lot was inclosed by them and a church erected thereon, and hath been kept and held by them during a period of fifty years, and hath been used as a burying-ground for the members of the church, with the avowed intention of building thereon another church or place of worship, the first building erected thereon being decayed, whenever their funds would enable them so to do. That during all this period their possession has never been questioned, and the lot has been exempted from taxation as property set apart for a religious purpose. It further charges that upon the organization of the church or congregation, certain officers, called a committee and trustees, were appointed to take care of the said church, which appointments have been from time to time renewed; that in 1824 the plaintiffs were re-appointed as such, having been so appointed at former times. It further charges that Charles Beatty died about sixteen years ago *without having made any conveyance of the said lot, and that Charles A. Beatty, the defendant, is his heir, and has the title by descent; and prays that he may be compelled to convey it to them. It further charges that Ritchie, the other defendant, has unwarrantably disputed their title; and has entered upon the lot and removed some of the tombstones erected thereon, and means to dispossess the plaintiffs and to remove the tombstones and graves. The bill therefore prays that they may be quieted in their possession, and that a writ of injunction may issue, and for further relief.

The defendants put in a joint answer. They admitted that the lot was so marked in the plot as the bill states, and that it was Charles Beatty's intention to appropriate the same to the use of the Lutheran congregation, provided they would build thereon, within a reasonable

time, a house of public worship. They deny that the German Lutherans were ever organized, as stated in the bill, or that any such church has been built, or that there has been any such possession or inclosure as the bill asserts; or that Charles Beatty ever made any conveyance of the property to transfer his title. They admit that the lot has been used as a grave-yard, but not exclusively appropriated to the use of the Lutheran congregation. They admit that a building was erected thereon, but that it was used as a school-house. They admit that the defendant, Beatty, is heir-at-law, and as such that he claims the lot in question, and has authorized the defendant, Ritchie, to take possession thereof. They deny all the equity in the bill, as well as the authority of the plaintiffs to sue; declaring them to be mere volunteers, and demanding proof of their authority, &c.

The general replication was filed, and the cause came on for a hearing upon the bill, answer, exhibits and depositions; and the court decreed a perpetual injunction against the defendants with costs. The appeal is brought from that decree.

Upon examining the evidence, it appears to us that the material allegations of the bill are satisfactorily established. It is proved that, shortly after the appropriation, and more than fifty years ago, the Lutherans [*581] of Georgetown proceeded to erect a log house on the lot, which was used as a church for public worship by that denomination of Christians; and was also occasionally, and at different times since, used as a school-house under their direction. That at a much later period a steeple and bell were added to the building; that the land was used as a church-yard; that a sexton appointed by Lutherans had the direction of it; that more than half of the lot is covered with graves; and others as well as Lutherans have been buried there; that the Lutherans have caused the lot to be inclosed from time to time, as the fences fell into decay, and procured subscriptions for that purpose; that the possession of the Lutherans, in the manner in which it was exercised over the lot by erecting a house, by public worship, by inclosing the ground, and by burials, was never questioned by Charles Beatty in his lifetime, or in any manner disturbed until a short period before the commencement of the present suit. That Charles Beatty in his lifetime constantly avowed that the lot was appropriated for the Lutherans, and that they were entitled to it.

The Lutherans have constituted but a small number in the town of Georgetown; they have not been able, therefore, to maintain public worship constantly in the house so erected during the whole period, and sometimes it has been intermitted for a considerable length of time. But efforts have been constantly made, as far as practicable, to keep together a congregation, to use the means of divine worship, and to support public preaching. The house, however, in consequence of inevitable decay, fell down some time ago; the exact period of which, however, does not appear; but it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful.

The Lutherans in Georgetown who have possessed the lot in question are not and never have been incorporated as a religious society. The congregation has consisted of a voluntary society, acting in its general arrangement by committees and trustees chosen from time to time by the Lutherans belonging to it. There **582** does not appear to have been any formal records kept of their proceedings, and there have been periods of considerable intermission in their appointment and action. There is no other proof that the plaintiffs are a committee of the congregation than what arises from the statement of witnesses, that they were so chosen by a meeting of Lutherans, and that their appointment has always been acquiesced in by the Lutherans, and they have assumed to act for them without any question of their authority; that they are themselves Lutherans, living in Georgetown and forming a part of the voluntary society, is not disputed.

There is decisive evidence, also, that the defendant Beatty has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them as it had been originally appropriated. No assertion of ownership was ever made by him until the acts were committed which form the *gravamen* of the present bill.

Such are the material facts; and the principal questions arising upon this posture of the case, are, first, whether the title to the lot in question ever passed from Charles Beatty, so far at least as to amount to a perpetual appropriation of it to the use of the Lutheran Church, or to the pious uses to which it has been in fact appropriated. And, second, if so, whether it is competent for the plaintiffs to maintain the present bill.

As to the first question, it is not disputed that Charles Beatty did originally intend that this lot should be appropriated for the use of a Lutheran Church in the town laid off by him. But as there was not at that time any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same immediately by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran Church there capable of taking the donation. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the donation in this case, it would be utterly void at law, and the **583** land might be resumed at pleasure. *To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon, with the consent of Beatty, that might furnish a strong ground why a court of equity should compel him to convey the same to trustees in perpetuity for their use; or at least to execute a declaration of trust that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church that he would perfect the donation in their favor, and a refusal to do it would be a fraud upon them which a court of equity ought to redress. And if the town of Georgetown had been capable of holding such a lot for such uses, there would be no difficulty in

considering the town as the grantee under such circumstances; since the uses would be of a public and pious nature, beneficial to the inhabitants generally. But it does not appear that Georgetown, in 1769, or indeed until its incorporation in 1789, was a corporation, so as to be capable of holding lands as an incident to its corporate powers.

If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee. And we think it may be supported as a dedication of the lot to public and pious uses. The Bill of Rights of Maryland gives validity to "any sale, gift, lease or devise of any quantity of land not exceeding two acres for a church, meeting or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose." To this extent, at least, it recognizes the doctrines of the statute of Elizabeth for charitable uses, under which it is well known that such uses would be upheld, although there were no specific grantee or trustee. In the case of *The Town of Pawlet v. Clarke* (9 Cranch, 292, 331), this court considered cases of an appropriation or dedication of property to public or religious uses as an exception to the general rule requiring a particular grantee, and like the dedication of a highway to the public. (See also *Brown v. Porter*, 10 Mass. Rep., 93; *Weston v. Hunt*, 2 Mass. Rep., 500; *Inhabitants of Shapleigh v. Gilman*, 13 Mass. Rep., 190; *Burrard's case*, 12 Jac. C. B.; 2 Mod. Ent., 413, b.) There **584** is no pretense to say that the present appropriation was ever attempted to be withdrawn by Charles Beatty during his lifetime, and he did not die until about sixteen years ago. On the contrary, the original plan and appropriation were constantly kept in view by all the legislative acts passed on the subject of this addition. The plan was required to be recorded as an evidence of title, and its incorporation into the limits of Georgetown had reference to it. We think, then, it might at all times have been enforced as a charitable and pious use through the intervention of the government as *parens patriæ*, by its Attorney-General or other law officer. It was originally consecrated for a religious purpose; it has become a depository of the dead; and it cannot now be resumed by the heirs of Charles Beatty.

The next question is as to the competency of the plaintiffs to maintain the present suit. If they were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit.

It is a case where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass, but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion and the sentiment

of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love to the memory of the good are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be **585*** redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead and the religious sensibilities of the living.

The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because we think it one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest as part of the same society for purposes common to all and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others without joining all. (Cooper's Eq. Plead., 40, 41; Mitf. Plead., 145.)

And upon the whole we are of the opinion that the decree of the Circuit Court ought to be affirmed with costs.¹

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof it is considered, ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—6 Pet., 436; 9 How., 31; 17 How., 384; 5 Otto 313; 2 Cliff., 492.

586* WILLIAM S. BUCKNER, a Citizen of New York,

v.

FINLEY AND VAN LEAR, Citizens of the State of Maryland.

Bills of exchange—relations of the States to each other.

Bills of exchange drawn in one State of the Union on persons living in another State, partake of the

1.—If a layman, by the dissolution of monasteries, hath a monastery in which there is a church, part of it, and he suffers the parishioners for a long time to come there to hear divine service and to use it as a parish church, that shall give a jurisdic-

character of foreign bills, and ought to be so treated in the courts of the United States.

For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign and independent of each other. [590]

THIS case came before the court from the Circuit Court of the United States for the Maryland District. The action was instituted in the Circuit Court on a bill of exchange drawn on the 16th of March, 1819, by the defendants at Baltimore, on Stephen Dever, at New Orleans, in favor of Roswell L. Colt or order, of Baltimore, and by him indorsed, for value received, to the plaintiff, a citizen of New York.

A judgment was confessed by the defendants for \$2,100, subject to the opinion of the court upon a case stated, and which presented the question whether the Circuit Court had jurisdiction in the case.

The defendants objected to the jurisdiction on the ground that the bill was an inland and not a foreign bill of exchange, and, therefore, the defendants and the drawee, Roswell L. Colt, being citizens of Maryland, although the bill was regularly in the hands of the plaintiff as indorsee, who is a citizen of a different State, the Circuit Court had no cognizance of the claim.

The provision of the Act of Congress upon which the question arises is in the 11th section of the "Act to establish the judicial powers of the courts of the United States," passed September 24th, 1789. The words of the Act are, "nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made; except in cases of foreign bills of exchange."

*The judges of the Circuit Court divided in opinion on the question of jurisdiction, and ordered the record to be certified to this court.

The case was argued by *Mr. Hoffman* for the defendants, no counsel appearing for the plaintiff.

He contended, 1. That in all cases of promissory notes, inland bills of exchange, and other choses in action, an assignee or an indorsee is incompetent to sue the maker in the courts of the United States except where such suit might have been there prosecuted had there been no assignment or indorsement; and that as a payee of this bill of exchange when calling on the makers must have resorted to the state tribunals, the indorsee must be referred to the same tribunals.

tion to the ordinary to order the seats; because that now, in fact, it becomes the parish church, which before was not subject to the ordinary. Adjudged, 12 Ja., C. B.; Buzzard's case, 2 Mod. E., 413, 6.

NOTE.—Bills of exchange drawn in one State on persons living in another are foreign bills.

A bill of exchange drawn in one of the States of this Union, on a person in another, is a foreign bill, and to be treated as such. In this respect the States of the Union are to be considered foreign to each other, though they are otherwise as to all the purposes of the federal constitution. Dickens v.

Beal, 10 Pet., 572; Buckler v. Finley, *supra*; Bank of United States v. Daniel, 12 Pet., 32.

A bill of exchange drawn in Kentucky by one resident of that State on another resident there, but payable in New Orleans, is a foreign bill, and the holder is entitled, by the law merchant, to recover of the drawer, after protest for non-payment, damages for re-exchange; the parties having liqui-

2. That this being a bill of exchange drawn within this Union and payable there, viz., between citizens of sister States, cannot be regarded as a foreign bill within the sound interpretation of the 11th section of the Judiciary Act of 1789; but that it is an inland bill, which, like promissory notes, remains forever subject to State jurisdiction, though transferred to citizens of another State.

3. That Congress did not design by the exception contained in that section to legislate in reference to citizens of the different States of this Union, or to confer on the circuit courts a jurisdiction in regard to them so as to comprehend in their favor as "foreign bills" those that should be drawn between citizens of sister States.

4. That Congress used this expression in its popular sense, which, indeed, is the only one in which that body could have thus legislated; and that bills foreign to the Union, viz., bills drawn in or on countries alien to the sovereignty of the United States, were the only foreign bills that either the policy or the obvious meaning of the exception embraces.

5. That foreign countries and foreign bills are correlative expressions; whereas, no sister State is foreign to the Union, nor is any sister State truly foreign to any other State of the Union. Congress, therefore, when legislating in reference to jurisdiction, must have had that **588***] Union and foreign states *in its view, and designed to legislate under this exception only in reference to bills drawn in or on the Union, but in or on any country other than one of the States of this Union; they being in regard to the Union itself one, and not foreign; and also in regard to each other, not foreign either in a popular or strictly legal sense.

6. That the exception in regard to foreign

bills was, perhaps, founded on the policy of extending to aliens (who were most likely to become the holders of bills drawn here on foreign countries, or drawn in foreign countries on this) the benefit of the national tribunals, and was not designed to embrace citizens of different States or to distinguish such bills from promissory notes which remain with the State courts, though in the hands of citizens of different States. Such citizens, though *bona fide* indorsees, and for full value, being incompetent to sue makers in the federal courts, though they are competent to sue their own indorsers, because every indorsement is a new and independent contract as between indorser and indorsee.

7. That the legal, no less than the popular understanding, has classed such bills under the head of inland; and that being the *norma loquendi*, renders it highly probable that Congress had no other bills in view than such as are drawn in or on countries wholly foreign to the jurisdiction and sovereignty of this Union.

8. That although most of the Legislatures of the different States have allowed damages on the protest of bills drawn on sister States, yet nearly without exception the word "inland" has been applied to such bills, and the word "foreign" to those drawn in or on other countries.

For the popular and legal sense of the expression "inland bills," see 4 Griffith's Law Register, 627, 699, 697, 799, 943, 1006, 1007, 1067, 1140.

9. The question is *res nova* in this court, but has been the subject of judicial discussion in three instances, viz., in *Millar v. Hackley* (5 Johns. Rep., 375), and 1 S. C. Const. Rep., 100; and in *Lonsdale v. Brown* (1821), before Mr. Justice Washington. (See appendix II.)

dated those damages, it was presumed they adopted the proper rate. Bank of the United States v. Daniels, 12 Pet., 32.

Bills drawn in one State upon another State, by the general custom of merchants, if dishonored, are protested by a notary; and the production of such protest is the customary proof of dishonor. This practice has been adopted for the same reasons which apply to foreign bills. Townsley v. Sumrall, ante, 170.

Bills of exchange are foreign when drawn in one State or country, and made payable in another State or country. Daniel on Negot. Instr., sec. 6.

The chief difference between foreign and inland bills is this: that the former *must* be protested in order to charge the drawer, while the latter need not be. Daniel on Negot. Instr., sec. 7.

There is no doubt that the several States of the United States are foreign to each other; for though in the aggregate they form a confederated government, yet the several States retain (theoretically) their individual sovereignties, and with respect to their municipal regulations, are foreign to each other; and a bill drawn by a person residing in one State of the Union upon a person residing in another State, is a foreign bill. Warder v. Arell, 2 Wash. (Va.), 298; Brown v. Ferguson, 4 Leigh, 37; Lonsdale v. Brown, 4 Wash. C. C., 86, 153; 2 Pet., 688; Chenoweth v. Chamberlin, 6 B. Mon. 60; Duncan v. Course, 3 Const. R. (So. Car.), 100; Cape Fear Bank v. Stinemetz, 1 Hill, 44; State Bank v. Hayes, 3 Ind., 400; Warren v. Coombs, 20 Me., 139; Ticonie Bank v. Stackpole, 41 Me., 302; Daniel Neg. Instr., sec. 9; Phoenix Bank v. Hussey, 12 Pick., 483; Carter v. Union Bank, 7 Humph., 548; Carter v. Burley, 9 N. H., 558; Wells v. Whitehead, 15 Wend., 527; *Contra*, Miller v. Hackley, 5 John., 375.

If a drawer and drawee reside in Kentucky and the bill be payable in New Orleans, La., it is a foreign bill; though if it be drawn in Kentucky on a New Orleans merchant and be payable in Kentucky.

tucky, it would be inland. 2 Daniel Neg. Instr., sec. 9. Amner v. Clark, 2 Crompt. M. & R., 463.

Where a bill was drawn in Wisconsin, but dated East Fork, in Illinois, it was held in the latter State that it must be treated and considered as an inland bill. Strawbridge v. Robinson, 5 Gilman, 472.

Courts of the several States and countries do not take judicial notice of the divisions of foreign States into counties, towns and cities. Thus in England, the averment that a bill was drawn in Dublin was not held equivalent to averring that it was an Irish bill, for, as one of the judges says, "There may be a Dublin in America or Scotland." The Supreme Court of Texas have held that they could not judicially know that a note payable in New Orleans was payable in Louisiana, or a bill dated there was drawn in Louisiana, or that a note dated "Philadelphia" was made in Pennsylvania. In Missouri, as to New Orleans, the court would not take judicial notice that a note dated there was foreign. Kearney v. King, 18 E. C. L. R., 28; Andrews v. Hoxie, 5 Tex., 171; Cook v. Crawford, 4 Tex., 427; Yale v. Wood, 30 Tex., 17; Riggins v. Collier, 6 Mo., 563; Daniel Neg. Instr., sec. 11.

A bill of exchange drawn in one State upon a citizen of another State is a foreign bill, and protest is necessary to charge the indorser. Commercial Bank of Kentucky v. Varnum, 49 N. Y., 269.

A draft drawn in Missouri on a bank in New York is a foreign bill; and in order to charge the indorser, presentment and protest, in case of non-payment, must be made by a notary public. Commercial Bank of Ky. v. Varnum, 3 Lans., 86.

As to the law of what place or State governs bills of exchange, and the liabilities of the several parties thereto, as drawer and indorser, see note to Slacum v. Pomeroy, 6 Cranch, 221.

That no protest of an inland bill of exchange is necessary, see note to Young v. Bryan, 6 Wheat., 146.

589*] *Mr. Hoffman* stated that he was not informed whether in this last case the point turned on the question of jurisdiction or only on the necessity of protest, as was the case in two other cases. The case in New York holds such bills to be inland. But had the decisions in the State courts been uniformly otherwise, it is difficult to conceive how the States are to be regarded as foreign to each other in the national tribunals. A bill may well be foreign in the State courts and inland in the federal courts; and the constitutionality of the very exception contained in the 11th section of the Judiciary Act, if designed to embrace within its jurisdiction bills between State and State, seems to have been doubted by *Mr. Justice Story* in 1 *Mason*, 251. But if this point be waived, the only inquiry is as to the probable intention of Congress; which, the plaintiff contends, was to embrace only such bills as are drawn between countries actually foreign to each other. *Chancellor Kent*, in his commentaries (Vol. III., p. 63), inclines to the opinion that bills between the States of the Union are foreign in all courts; but the point of protest appears to have mainly occupied the mind of the learned writer, and the question of jurisdiction arising from the sound construction of the Act of Congress does not specially claim his attention.

Mr. Justice WASHINGTON delivered the opinion of the court:

This is an action of *assumpsit* founded on a bill of exchange drawn at Baltimore, in the State of Maryland, upon Stephen Dever at New Orleans, in favor of R. L. Colt, a citizen of Maryland, who indorsed the same to the plaintiff, a citizen of New York. The action was brought in the Circuit Court of the United States for the District of Maryland, and upon a case agreed, stating the above facts, the judges of that court were divided in opinion whether they could entertain jurisdiction of the cause upon the ground insisted upon by the defendants' counsel, that the bill was to be considered as inland. The difficulty which occasioned the adjournment of the cause to this court is produced by the 11th section of the Judiciary Act of 1789, which declares that no District or Circuit Court shall have "cognizance **590*]** of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

The only question is, whether the bill on which the suit is founded is to be considered a foreign bill of exchange.

It is to be regretted that so little aid in determining this question is to be obtained from decided cases, either in England or in the United States.

Sir William Blackstone, in his commentaries (Vol. II., 467), distinguishes foreign from inland bills by defining the former as bills drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and the latter as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. Chitty (p. 16), and the other writers (Bayley, Kyd) on bills of exchange, are to the same effect; and all of them agree that until

the statutes of 8 and 9 W. III., ch. 17, and 3 and 4 Anne, ch. 9, which placed these two kinds of bills upon the same footing, and subjected inland bills to the same law and custom of merchants which governed foreign bills, the latter were much more regarded in the eye of the law than the former, as being thought of more public concern in the advancement of trade and commerce.

Applying this definition to the political character of the several States of this Union in relation to each other, we are all clearly of opinion that bills drawn in one of these States upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed with **[*591]** great force by the President of the Court of Appeals of Virginia, in the case of *Warder v. Arrell* (2 Wash., 298); where he states that in cases of contracts, the laws of a foreign country where the contract was made must govern; and then adds as follows: "The same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign."

This character of the laws of one State in relation to the others is strongly exemplified in the particular subject under consideration; which is governed, as to the necessity of protest and rate of damages, by different rules in the different States. In none of these laws, however, so far as we can discover from Griffith's Law Register, to which we were referred by the counsel, except those of Virginia, are bills drawn in one State upon another designated as inland; although the damages allowed upon protested bills of that description are generally, and with great propriety, lower than upon bills drawn upon a country foreign to the United States, since the disappointment and injury to the holder must always be greater in the latter than in the former case. It is for the same reason, no doubt, that by the laws of most of the States, bills drawn in and upon the same State, and protested, are either exempt from damages altogether, or the rate is lower upon them than upon bills drawn on some other of the States.

The only case which was cited at the bar, or which has come to our knowledge, to show that a bill drawn in one State upon a person in any other of the States is an inland bill, is that of *Miller v. Hackley* (5 Johns. Rep., 375). Alluding to this case, in the third volume of his Commentaries (p. 63), in a note, *Chancellor Kent* remarks very truly, that the opinion was not given on the point on which the decision rested; and he adds that it was rather the opinion of *Mr. Justice Vau Ness* than that of the court. It is not unlikely, besides, that that opinion was in no small degree influenced by what is

said by Judge Tucker in a note to 2 Black. 592*] Com., *467; which was much relied upon by one of the counsel in the argument, where the author would appear to define an inland bill as being one drawn by a person residing in one State on another within the United States. He is so understood by Chancellor Kent in the passage which has been referred to: but this is undoubtedly by a mistake, as the note manifestly refers to the laws of Virginia; and by an Act of that State passed on the 28th of December, 1795, it is expressly declared that all bills of exchange drawn by any person residing in that State on a person in the United States shall be considered in all cases as inland bills. The case of *Miller v. Hackley*, therefore, can hardly be considered as an authority for the position which it was intended to maintain. We think it cannot be so considered by the courts of New York, since the principle supposed to be decided in that case would seem to be directly at variance with the uniform decisions of the same courts upon the subject of judgments rendered in the tribunals of the sister States. In the case of *Hitchcock v. Aicken* (1 Caines, 460), all the judges seem to have treated those judgments as foreign in the courts of New York; and the only point of difference between them grew out of the construction of the 1st section of the 4th Article of the Constitution of the United States, and the Act of Congress of the 26th of May, 1790 (ch. 38), respecting the effect of those judgments, and the credit to be given to them in the courts of the sister States.

It would seem from a note to the case of *Bartlett v. Knight* (1 Mass. Rep., 430), where a collection of State decisions on the same subject is given, that these judgments had generally, if not universally, been considered as foreign by the courts of many of the States. If this be so, it is difficult to understand upon what principle bills of exchange drawn in one State upon another State can be considered as inland; unless in a State where they are declared to be such by a statute of that State.

It has not been our good fortune to see the case of *Duncan v. Course* (1 South Carolina Constitutional Reports, 100); but the note above referred to in 3 Kent's Com. informs us that it decides that bills of this description are to be 593*] considered *in the light of foreign bills; and the learned commentator concludes, upon the whole, and principally upon the ground of the decision just quoted, that the weight of American authority is on that side.

That it is so, in respect to the necessity of protesting bills of that description, was not very strenuously controverted by the counsel for the defendant. But he insists that under a just construction of the 11th section of the Judiciary Act, concerning the jurisdiction of the federal courts, these bills ought to be considered and treated as inland. The argument is that the mischief intended to be remedied by the provisions in the latter part of that section, by the assignment of promissory notes and other choses in action, is the same in relation to bills of exchange of the character under consideration.

We are of a different opinion. The policy which probably dictated this provision in the above section was to prevent frauds upon the jurisdiction of those courts by pretended as-

signment of bonds, notes, and bills of exchange strictly inland; and as these evidences of debt generally concern the internal negotiations of the inhabitants of the same State, and would seldom find their way fairly into the hands of persons residing in another State, the prohibition as to them would impose a very trifling restriction, if any, upon the commercial intercourse of the different States with each other. It is quite otherwise as to bills drawn in one State upon another. They answer all the purposes of remittances and of commercial facilities equally with bills drawn upon other countries, or *vice versa*; and if a choice of jurisdictions be important to the credit of bills of the latter class, which it undoubtedly is, it must be equally so to that of the former.

Nor does the reason for restraining the transfer of other choses in action apply to bills of exchange of this description, which, from their commercial character, might be expected to pass fairly into the hands of persons residing in the different States of the Union. We conclude, upon the whole, that in no point of view ought they to be considered otherwise than as foreign bills.

*This cause came on to be heard on the [*594 transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, and was argued by counsel; on consideration whereof, it is the opinion of this court that the bill of exchange on which this action is brought ought to be considered as a foreign bill within the meaning of the 11th section of the Judiciary Act of the 24th of September, 1787, and that the said Circuit Court has jurisdiction of this cause; whereupon it is considered, ordered and adjudged by this court, that it be certified to the said Circuit Court for the District of Maryland that the bill of exchange on which this action is brought ought to be considered as a foreign bill, within the meaning of the 11th section of the Judiciary Act of the 24th of September, 1787; and that that court has jurisdiction of the cause.¹

Cited—5 Pet., 47, 56, 57; 10 Pet., 579; 12 Pet., 54, 55, 720; 13 Pet., 605; 2 Otto, 132; 6 Otto, 592; Bald., 299; 1 McLean, 318, 336; 4 Wash., C. C., 158 (n).

*ENGLISH, SMITH, MACKALL [*595
AND HOFFMAN, *Appellants*,

v.

CATHARINE FOXALL, *Appellee*.

ENGLISH, SMITH, MACKALL, HOFF-
MAN, M'KENNEY ET AL., *Appellants*,

v.

CATHARINE FOXALL, *Appellee*.

*Construction of marriage settlement of will—
chancery practice.*

A marriage settlement provided that the trustees, after the death of the husband, should stand

1.—The opinion of Mr. Justice Washington, in the case of *Lonsdale v. Brown*, in which the same point was ruled in the Circuit Court of the United States for the Eastern District of Pennsylvania, will be found in the appendix, No. II.

possessed of a bond executed to them by the husband, and of the sum of \$37,038 to be received by them upon trust, to place out the same when it shall come into their hands at interest on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of the wife; and to call in and replace the same and re-invest the same and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of the wife.

It is not an unreasonable interpretation to say that the wife, who survived the husband, was to have a controlling agency within the limitation prescribed by the contract. She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment. The trustees are bound to make the investment in any one of the funds mentioned which the wife might request or direct.

The husband by his will confirmed the marriage settlement, and he further declared, "that if the sum of \$37,038 secured to be paid to the trustees should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of \$2,222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves as trustees of the settlement out of the residuum of his estate such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that in no event, less than \$2,222.22 shall be raised annually for his wife, or for her benefit in the United States.

The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested in six per cent. stock of the United States the \$37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate. The wife has a right to claim this deficiency to be so made up.

There is no doubt but that under the general prayer in a bill in chancery for general relief other relief may be granted than that which is particularly prayed for; but such relief must be agreeable to the case made by the bill.

APPEAL from the Circuit Court of the county of Washington.

596*] *The appellee in these cases is the widow of Henry Foxall, and the appellants in the first case are the trustees named in a marriage settlement executed by Henry Foxall at the time of his marriage with the appellee; and in the second they are the trustees, executors and legatees named in the will.

On the marriage of Henry Foxall with the appellee in England in 1816, a contract was entered into for an annual income of £500 sterling, or \$2,222.22, for the life of Mrs. Foxall, to commence at his death; for her jointure, and in lieu of her dower; and, on the decease of Mr. Foxall, the sum of \$37,038, was then to be raised and paid to the trustees for the purpose of securing the same.

In the settlement it is declared that upon the treaty for the marriage it was agreed between the parties thereto, Henry Foxall and Catharine Holland, that should she survive him, he would provide and settle on her an annual income of £500 sterling, equal to \$2,222.22, in the nature of a jointure for life and in bar of dower; that he should devise to her his messuage in Georgetown, and assign her his furniture and carriage for life in increase of her jointure; that her property, which was wholly personal, should vest in her, but that all future property should be at her disposal as if she were a *femme sole*;

and that the children of the marriage, as well as a present daughter of Henry Foxall, should be dependent on him for support. The marriage settlement also recites that, in part performance of the same, Henry Foxall had made his bond in the penalty of \$74,116, to the trustees, to be void on payment by his executors within six months from his death, of \$37,038, with interest at six per cent.

It is then declared by the deed that in case the appellee should survive said Henry Foxall, the said trustees should stand possessed of said bond and said \$37,038 to be received by them "upon trust to place out the same when it shall come into their hands at interest on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of said Catharine Holland, and to call in *and replace and re-invest the same, [*597 and the produce thereof, from time to time, upon or in such securities or stock with the approbation of said Catharine Holland; and to pay the interest and dividends of the said sum, securities or stocks, from time to time, as the same should be received, to her, the said Catharine Holland, or her assigns, or permit her or them to receive such interest or dividends for her life, for her separate use," &c. And after her death upon trust to pay, transfer, and assign said \$37,038 and the securities or stocks in or upon which it should be placed out or invested, and the dividends, &c., unto the executors or assigns of the said Henry Foxall.

Mr. Foxall died in England in 1823, having left a will dated the 12th of April, 1823. The first clause in the will is in these words: "First, I do hereby ratify and confirm in every respect the settlement made upon my marriage with my dear wife Catharine, and do direct the provisions and trusts of the same, and the condition of the bond entered into by me upon my said marriage, to be faithfully performed and observed;" and afterwards, "I do further direct that if the sum of \$37,038, secured to be paid to the trustees of said settlement, should at any time and from time to time be found insufficient to raise within these United States and bring into the hands of the said trustees of said settlement there the clear annual sum of \$2,222.22, the annuity secured to be paid to my said wife by the said settlement; then, and in such case, the trustees of this my will do and shall, from time to time, transfer to themselves as trustees of said settlement out of the residuum of my estate, such sum or sums of money as may from time to time be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of said principal sum and the amount of said annuity, so as that, in no event, less than the said sum of \$2,222.22 shall be annually raised for my said wife, or for her benefit, within the United States."

He also gives her, over and above the provisions made for her benefit by said settlement, a legacy of \$500; the *plate, &c., purchased since the marriage, and all his servants.

He then gives the \$37,038, "stipulated to be raised and paid to the trustees of his marriage settlement," after the death of his said wife, "to the children of the marriage absolutely;" and if none, directs it after the death

of his wife to sink into the residuum of his estate.

The will contained a proviso, that any depreciation in the value of his property should be borne equally by all his legatees, "his wife, and any child or children he might have by her, excepted."

Hoffman, Smith, McCall and McKenney, were appointed executors of the will. There were no children of the marriage, and but one daughter, Mrs. McKenney, by a former wife. The estimate placed by Mr. Foxall upon his property at the time of his decease was \$270,000. In December, 1827, the trustees valued the real estate at \$70,000, and the personalty at \$88,000.

At the decease of Mr. Foxall in 1823, \$32,645, of six per cent. stock of the United States stood in his name; and at that time the government stocks were as much above par as they were when this bill was filed. Mr. Foxall was at that time well acquainted with the price of government stocks, and of the stocks of the local banks, the latter of which it was in evidence could have been purchased at that time at ninety-six per cent.

On the 17th of July, 1824, Mrs. Foxall being then in England, the executors addressed the following letter to her:

"The executors of your late husband are desirous of paying over to the trustees of the marriage settlement the sum of \$37,038, according to the directions in the will. It is deemed necessary that you should give instructions to the trustees named in the marriage settlement before they can feel themselves authorized to invest the money. You will please to communicate, at as early a date as convenient, your wishes on this subject."

And on the same day the trustees addressed the following:

"The executors of your late husband, 'the 599*] Rev. Henry *Foxall,' are ready to pay over to us, the trustees named in the marriage settlement, the sum of \$37,038 for the purpose of providing the annuity secured to you in said settlement. In said settlement it is stipulated that we are to place it out 'at interest on freehold security, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of Mrs. Foxall.' We are therefore compelled to wait for your instructions. The will, you will doubtless have perceived, has made provision that in case the said fund of \$37,038 should not produce in interest the annual payment to be made to you of \$2,222,22, there shall be provided from his estates whatever may be deficient, so that in no case shall you receive a less amount.

"It is presumed, therefore, you will give the trustees a general authority to manage such trust fund, so as to produce the best interest which can be safely done; unless such general authority be given, we should have to wait for new instructions whenever any payment of principal may come into our hands. It is highly probable that when you answer the letter sent with a copy of the will, you will give such directions as we have alluded to. If you have not, you will perceive the necessity of having it done without delay, as we cannot move in the business until we have your di-

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rections, which may be given either by letter or any other authentic writing. It will be necessary, in case you do not come to this country, that you authorize some person here to receive for you the annuity, as we are bound to pay it within the United States. We are thus particular, as it takes at least three or four months to get an answer from the interior of England."

To these letters the following answer was written by Mrs. Foxall and received by the executors and trustees:

"Gentlemen—In reply to your letter of the 17th of July last, in which you request my approbation relative to the investment of the \$37,038 to provide my annuity according to my marriage settlement, I acquaint you that, in the judgment of my late husband, and according to my own, the stock of the United States of North America is preferred by me to *freehold security or bank stock; and [*600 that I shall approve of the investment of the principal sum in that fund, and not on real security or bank stock, and beg it may be so invested."

Mrs. Foxall returned to the United States in December, 1824, and a similar application was made to her by the trustees, with the same effect; and she remained in the belief that the investment was made according to her wishes in stocks of the United States. Ten thousand six hundred and forty-five dollars, six per cent. stock, were afterwards paid off by the government without the knowledge of Mrs. Foxall; and of this sum \$10,000 were also, without her knowledge, loaned to one of the trustees and to another person, on their promissory note, secured by a pledge of \$12,000 stock of the Farmers' and Mechanics' Bank of Georgetown.

In 1826 Mrs. Foxall came to know that no separate investment had been made for her annuity; and she then, in writing, requested that the sum of \$37,038 should be invested in stock of the United States for that purpose. This was refused by the executors and trustees; they contending that the right was with them to make the investment as they should think best, free from the control of Mrs. Foxall, and without her approbation.

Upon this refusal Mrs. Foxall filed the bill in the Circuit Court against the trustees, claiming to have the provisions of the marriage settlement carried into effect, and to have the amount of the same invested in some of the government stocks in her and their joint names. The bill calls for a discovery where the \$37,038 had been invested, and to whom in particular it had been loaned, and for general relief.

The trustees in their answer submit themselves to the court, admitting they have ample funds for the purpose, but raise the question whether Mrs. Foxall has the right to have the \$37,038 invested in the stock of the United States, referring to a cross bill filed by them, for the reasons why they suppose she has not that right. They state that \$22,000 were then invested in United States stock, and that all the residue of the personal estate was in their hands and vested in real *securities of [*601 the most undoubted safety, producing an interest of six per centum per annum.

They deny the right of Mrs. Foxall to the benefit of the provision of the settlement re-

quiring her approbation to the investment, and of that of the will throwing the loss of such investment upon the residue of the estate, averring them to be inconsistent; and required that she be held to elect between them. And that if her bill, already filed, be considered as an election to take under the settlement, and the investment prayed by her shall be decreed, that it shall be further decreed that she shall receive the interest of the same, so to be invested, in bar of all claim upon the residuum of the estate, under the provision of the will for any deficiency.

In December, 1827, a statement was filed by the trustees showing the nature of the securities in which the estate was invested, and to whom the moneys paid in had been loaned.

The trustees in the marriage settlement, the executors of the will of Mr. Foxall, and the daughter of Mr. Foxall with her husband, Samuel M'Kenney, filed a bill against Mrs. Foxall, the appellee, the object of which is to keep the \$37,038 in the hands of the trustees of the will mixed up with the general mass of Mr. Foxall's estate, and to prevent the investment of that sum in the stock of the United States; because so invested, the stocks being above par, it would not produce the full amount of the annuity. The bill denies the right of Mrs. Foxall to select the fund for the investment of the sum of \$37,038, and asserts that if she has that right she must forego the same in order to enjoy the benefit of the provisions in the will, asserting that the testator, by inserting that clause in his will providing that every deficiency in the amount of the annuity should be borne by his general estate, intended to curtail the rights of the settlement, and that she must be put to her election between the provisions of the will and those of the settlement.

The answer of Mrs. Foxall to this bill denies the inconsistency between the provisions of the settlement and the will; contends that she is entitled to the benefit of both; that she has a right to choose the funds for investment, and to call on the residuum of the estate to make good **602*** the deficiency *that may arise from its not producing six per centum to pay her annuity, and declaring that her husband always advised and recommended her to invest it in United States stock, and intimates her desire to insist on its being so done, even if the loss to arise from it is to fall upon her.

The causes were, by consent, heard together in the Circuit Court; and that court decreed in the first cause, that the investment of the \$37,038 should be made as she desired and the interest paid annually to her; and that if such interest fell short of producing \$2,222.22 (that is, 6 per cent.) per annum, the deficiency should be paid to her annually out of the residuum of the estate in the hands of the trustees.

In the second case the court decreed the bill to be dismissed.

From these decrees the defendants in the court below in the first case, and the complainants in the second case, appealed to this court.

The cases were argued by *Mr. Key* for the appellants, and by *Mr. Jones* for the appellee.

For the appellants it was contended:

1. That the provisions of the deed of settlement and of the will are inconsistent, and that the widow is not entitled to the benefit of both;

that she cannot choose the fund for investment under the deed and throw the loss from such investment upon others, under the will.

2. That part of the decree which directs the payment of the deficiency from the residuum is erroneous, according to the true construction of the will, which only authorizes such payment when the funds shall be found insufficient to raise within the United States the clear income of \$2,222.22; and the proof taken in the cause, shows that the funds are sufficient, and are now so invested as to produce that sum.

3. The construction of the clause of the deed of settlement, giving the widow the exclusive direction of the investment, is erroneous. The deed requires it to be made by the trustees, with her approbation, so that both must concur in the investment.

*For the appellee it was argued that [**603** she can require the \$37,038 to be separated from the general estate and invested in the stock of the United States.

And if there be any deficiency in the income from the investment she can charge the same to the general estate, 1st, under the settlement; and 2d, under the will.

Mr. Justice THOMPSON, delivered the opinion of the court:

These cases come before the court on appeal from the Circuit Court of the District of Columbia, and have been argued together. The first was a bill filed by Mrs. Foxall against the appellants as trustees in a marriage settlement contract entered into between her and her late husband, Henry Foxall, deceased. The object of this bill was to compel the trustees to carry into effect the marriage contract, according to her construction of it, by separating \$37,038 from the general mass of her late husband's estate and investing the same in stock of the United States.

The appellants, in their answer, admit that they have received funds of the estate of Henry Foxall, to a much larger amount than the \$37,038, but allege that they are also trustees under the provisions of the will of Henry Foxall, and have not invested it in stock of the United States because it could not be done without great loss; and that they considered such an investment injudicious and prejudicial to the estate, and to the rights of others interested in the residuum of the estate and its income. And they aver that they have securely vested in real securities and bank stocks, producing an interest of six per cent., the whole of the personal estate, except \$22,645 in United States stock, purchased by H. Foxall in his lifetime. They admit they have ample funds, and are willing to make the investment required by the appellee if the construction of the deed of settlement, which she contends for, should be deemed by the court to be correct.

With this answer, and referring to it, was filed the cross bill in the second cause, in which the trustees in the marriage settlement and Samuel M'Kenney, who are the executors named in the will of Henry Foxall, together with *sundry other persons who are the [**604** *cestuis que trust* under the will are complainants, and Catherine Foxall, defendant.

In this bill the appellants set forth the will of Henry Foxall, and aver that by it the whole

real and personal estate of the testator is bound to secure to the appellee her annuity. That the investment in United States stock of the \$37,038 would occasion a loss in the income of the whole estate of six or seven hundred dollars a year, which would fall, according to the will, upon the other *cestuis que trust*. They deny the right of the appellee to claim the benefit of the provision of the settlement requiring her approbation to the investment, and also that of the will to make up the deficiency, and thereby throwing the loss of such investment upon the residue of the estate; averring the two provisions to be inconsistent, and requiring the appellee to elect between them; and praying that if her bill, already filed, be considered an election to take under the settlement, and the investment prayed by her shall be decreed, that it may be further decreed that she shall receive the interest of the same, so to be invested, in bar of all claim upon the residuum of the estate under the provisions of the will for any deficiency.

The answer in this case denies the inconsistency between the provisions of the will and the marriage settlement, and claims that the appellee is entitled to the benefit of both. That she has the right to choose the funds for investment, and to look to the residuum of the estate to make good the deficiency that may arise from the investment not producing six per cent., so as to pay her annuity of \$2,222.22.

The court below decreed in the first cause that the appellants, as trustees in the will, should transfer to themselves as trustees in the marriage settlement the sum of \$37,038, and should invest the same in the purchase of stock of the United States, and pay the dividends from time to time as received to Catharine Foxall, for and during the term of her life; and that the appellants should make the investment of the said principal sum jointly in the names of themselves and the said Catharine, and cause the trust upon which the same is to be invested to be expressed in the certificates of investment and upon the books of the Treasury Department. **605***] And *further, in case the said principal sum of \$37,038 so invested should be found insufficient to raise and pay the annuity of \$2,222.22, that the deficiency should from time to time be made good out of the residuum of the estate, &c. And in the second cause the court decreed the bill to be dismissed. From both these decrees appeals have been brought to this court.

The two questions which arise upon these cases are:

1. Whether the appellee, Mrs. Foxall, has a right, under the marriage settlement, to require the trustees to separate the \$37,038 from the general mass of the estate and invest the same in stock of the United States.

2. If such investment should be insufficient to pay her the annuity of \$2,222.22, has she a right to have the deficiency made up out of the general estate, either under the marriage settlement or under the will of her deceased husband.

The answers to these questions will depend upon the construction to be given to the marriage settlement and the will of Henry Foxall.

The settlement recites that a marriage was in-
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tended to be solemnized between Henry Foxall and the appellee, then Catharine Holland; that upon the treaty for such marriage it was agreed between the said Henry Foxall and Catharine Holland that he should provide and settle on her, in case she should survive him, an annual income of \$2,222.22, equal to £500 sterling, in the nature of a jointure for her, for life, and in bar of dower, &c.; and also reciting that in part performance of said agreement the said Henry Foxall had made his bond in the penalty of \$74,116 to the trustees named in the settlement, to be void on payment by his executors within six months from his death to the said trustees of \$37,038 with interest at six per cent. from his decease. It is then declared by the deed that in case the said Catharine Holland should survive the said Henry Foxall, the trustees should stand possessed of said bond and the \$37,038 to be received by them upon trust, to place out the same, when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock *of the United States of North [***606** America, or bank stock there, with the approbation of said Catharine Holland; and to call in and replace, and re-invest the same, and the produce thereof, from time to time, upon or in such securities or stock, with the approbation of the said Catharine Holland; and to pay the interest and dividends of said sum, securities or stocks from time to time, as the same shall be received, to her or her assigns, or permit her or them to receive such interest or dividends for her life for her separate use.

That the appellee has a right to require the \$37,038 to be separated from the general mass of the estate and invested in funds for her use, according to the trusts declared in the marriage settlement, cannot admit of a doubt.

The circumstance that the trustees are also executors named in the will, cannot affect the rights of Mrs. Foxall. This contract was entered into in the year 1816, long before the will was made, or it could be known who would be appointed executors; and besides, the trustees are not the only executors. But it would be immaterial if they were. They are acting in separate and distinct capacities, and are bound to execute the respective trusts according to the provisions of the marriage settlement and the will. This settlement was accompanied with a bond given by H. Foxall, by which he bound his executors to pay over to the said trustees the \$37,038 within six months from his death. And the settlement declares that the trustees shall stand possessed of said bond and the \$37,038 to be received by them upon trust to place out the same, when it shall come into their hands, at interest, &c., in the manner therein directed. Whether Mrs. Foxall had a right to control the investment of this money when it came into the hands of the trustees may admit of more doubt.

The trust declared is that the \$37,038, when it shall come into the hands of the trustees, shall be placed out at interest on freehold security, or invested in the purchase of stock of the United States of North America, or bank stock there, with the approbation of the said Catharine Holland; and the re-investments, when necessary, were to be made in like manner with her approbation; and the interest and dividends

607*] *to be paid to her during her life for her separate use.

The question is not whether she is at present in danger of losing her annuity, nor does she in her bill charge the trustees with misconduct. She is, in judgment of law, a purchaser of this annuity; her rights rest in contract, and she seeks to have that contract carried into execution. And whether this will work an injury to third persons or not, cannot control her rights secured to her by the marriage settlement. When this contract was entered into there was no existing interest in any third parties. And no subsequent act of one of the contracting parties can change the rights of the other. This fund, or the securities or stock in which it should be invested, were, after her death, to be transferred to the executors or assigns of Henry Foxall. But no disposition which he could make of them could abridge the rights of Mrs. Foxall under the settlement. What, then, is to be understood by the stipulation that the investment was to be made with her approbation? That she was to have some agency in this investment cannot be questioned. And it is an unreasonable interpretation to say that she was to have a controlling agency, within the limitation prescribed by the contract. She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment. Nor can she approve or disapprove of any other. All such acts, both in them and her, would be without authority. She is the party beneficially interested in the investment; and it is fairly to be presumed that her intended husband meant to leave it to her to elect between the different objects of investment. It cannot be presumed that she would withhold her approbation from all, and if she did the loss would be her own, and not to the prejudice of anyone else. It is very probable that different persons with equally honest and upright motives might differ in opinion with respect to the three different modes of investment pointed out in the settlement. And when that occurs between Mrs. Foxall and the **608***] trustees, one *or the other party must yield, and the contract must determine their respective rights. That declares that the investment is to be made with her approbation; which would seem necessarily to imply that it could not be made without it, and, at all events, not directly against it. And such appears to have been the construction put upon it by the trustees themselves. For in July, 1824, after the death of her husband, they wrote her two letters; one in their character of executors, and the other as trustees in the settlement. In the first they say: "The executors of your late husband are desirous of paying over to the trustees of the marriage settlement the sum of \$37,038, according to the directions of the will. It is deemed necessary that you should give instructions to the trustees named in the marriage settlement before they can feel themselves authorized to invest the money." And in their letter written as trustees they say: "The executors are ready to pay over the sum of \$37,038 to the trustees named in the marriage settlement, for the purpose of providing the annuity

secured to you in the settlement, in which it is stipulated that we are to place it out at interest, on freehold security, or invest it in the purchase of stock of the United States of North America, or bank stock there, with the approbation of Mrs. Foxall. We are, therefore, compelled to wait for your instructions."

In September following she answered their letters, in which she says: "I acquaint you that in the judgment of my late husband, according with my own, the stock of the United States of North America is preferred by me to freehold security or bank stock; and that I shall approve of the investment of the principal sum in that fund, and not on real security or bank stock, and beg it may be so invested." We think the trustees were bound to make the investment according to this request. That it was a right secured to her under the marriage settlement.

We will not say but that a state of things might exist in which a court of chancery would be authorized to control her election; as if she should act from mere caprice, and with a manifest purpose of throwing a loss upon the residuum *of the estate. But there is nothing [***609** in this case to warrant such an imputation against her. And it is not very certain that she even erred in judgment, if she had herself to sustain the loss. The object of the settlement was to give her a certain, safe, and secure income. And it was not unreasonable for her to place more confidence in government stock than in mortgages, where it is well known there is less punctuality in the payment of interest; or in bank stock, with the hazard of insolvency. She acted, as she states in her letter to the trustees, according to the judgment of her late husband; and which, no doubt, had great influence with her in preferring such investment. And the sincerity of his advice is manifest from the circumstance that he left, as a part of his estate, upwards of thirty-two thousand dollars in United States stocks.

2. The next inquiry is, whether, if the investment of the \$37,038 in stock of the United States should be insufficient to raise the annuity of \$2,222.22, the deficiency is chargeable upon the residuum of the estate.

In determining this question it is unnecessary to say how it would stand if the claim rested entirely upon the marriage settlement.

The provision intended to be made for Mrs. Foxall was clearly an annuity; and where that is the nature of the settlement, the cases in the books are very strong to show how far courts of equity will go to guard against any deficiency. But in the present case the will of Henry Foxall puts that question at rest.

This will bears date the 12th of April, 1823, the first part of which is as follows: "I do hereby ratify and confirm in every respect the settlement made upon my marriage with my dear wife Catharine, and do direct the provisions and trusts of the same, and the conditions of the bond entered into by me upon my said marriage, to be faithfully performed. I do farther direct that if the sum of \$37,038 secured to be paid to the trustees of said settlement should at any time, and from time to time, be found insufficient to raise within these United States and bring into the hands of the said trustees of

said settlement there the clear annual sum \$2,-**610***) 222.22, *the annuity secured to be paid to my said wife by the said settlement, then, and in such case, the trustees of this my will do and shall from time to time transfer to themselves as trustees of said settlement, and out of the residuum of my estate, such sum or sums of money as may from time to time be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of said principal sum and the amount of said annuity; so as that, in no event, less than the said sum of \$2,222.22 shall be annually raised for my said wife or for her benefit within the United States."

It is difficult to conceive how a more ample provision could have been made to secure to the appellee the full amount of her annuity, and is a strong corroboration of what she stated to the trustees, that in selecting United States stock for the investment, she acted in accordance with the judgment of her late husband. For it is admitted that when the will was made, government stock was above par, and that the stock of the local banks of the District of Columbia might be so purchased as to pay six per cent. interest, and that this was known to the testator, H. Foxall. A deficiency must therefore necessarily arise from an investment in government stock, but not from an investment in bank stock; and his being so very particular in providing by his will for a deficiency, shows he had reasons to believe it would occur.

It has been urged by the appellants' counsel that the provisions of the deed of settlement, and of the will are inconsistent, and that the appellee is not entitled to the benefit of both, but must make her election between them. That she cannot choose the fund for investment under the deed, and throw the loss from such investment upon others under the will.

It is not perceived how this can, in any sense, be considered a case for election. There is no inconsistency whatever between the two provisions. The will expressly refers to and confirms the settlement, and provides for any deficiency that might occur by reason of an investment that would not raise the stipulated **611***) annuity. There is nothing in *the will affording the least color for the conclusion that the testator intended any provision therein made for his widow should be in satisfaction of the settlement, but clearly as an accumulated bounty over and above it.

Again, it is said the will only authorizes payment of the deficiency when the funds shall be found insufficient to raise within the United States the clear income of \$2,222.22; and that the proofs taken in the cause show that the funds are sufficient, and are now so invested as to produce that sum. The answer to this objection is given in the examination of the first point, that such investment was not authorized under the marriage settlement, it having been made without the approbation of the appellee, and directly against her instructions. We are accordingly of opinion that the appellee has a right to claim of the trustees in the marriage settlement, by virtue of the will of her deceased husband, out of the residuum of his estate, whatever the annual amount of the product of \$37,038 invested in stock of the United States

shall from time to time fall short of the annuity of \$2,222.22, secured to her in the marriage settlement.

The merits are, therefore, with the appellee in both cases, and the only difficulty presented is as to the forms of the decree in the first cause.

The bill in that case filed by Mrs. Foxall is founded altogether upon the marriage settlement. It prays a discovery as to the situation of the fund of \$37,038, and that the whole of it may be invested in stock of the United States, and concludes with a prayer for general relief, but sets up no claim under the will for any deficiency.

It is in the cross bill that the question in relation to the deficiency arises, under the will. This bill was filed for the purpose of compelling Mrs. Foxall to elect between the provisions of the marriage settlement and those of the will. The appellants, in their answer to the first bill, refer to the cross bill and the will set out therein, and pray that they may be taken as a part of their answer, and that the two causes may be heard and determined together. They are, however, two distinct causes, with additional parties in the *cross bill, and require [**612** separate decrees. The decree as to the deficiency cannot be sustained, unless it can be done under the prayer for general relief. There is no doubt but that, under the general prayer, other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency. This part of the deed must therefore be reversed. The residue is affirmed, omitting the name of Mrs. Foxall in the investment directed to be made. There is nothing in the marriage settlement which entitles her to be joined with the trustees in the investment.

In the other cause, the decree dismissing the bill is affirmed.

In the first case the following decree was rendered:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof this court is of opinion that the decree of the said Circuit Court in this cause is erroneous, in this, that there is nothing in the first bill to sustain the particular relief granted as to the deficiency; whereupon it is considered, ordered and decreed by this court, that the decree of the said Circuit Court, so far as it grants the particular relief as to the deficiency in this cause, be, and the same is hereby reversed and annulled; and that the residue of said decree in all things else be, and the same is hereby affirmed, omitting the name of Mrs. Foxall in the investment directed to be made; and that the cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, according to law and justice.

Cited—10 Pet., 209; 17 How., 455; 10 Wall., 86; 6 Otto, 615; 2 Wood. & M., 198.

613*] *ANTHONY TAURIN CHIRAC ET AL., *Plaintiffs in Error*,

v.

GEORGE REINECKER, *Defendant in Error*.

Ejectment—evidence as to pedigree—record of recovery in ejectment as evidence—instructions of the court to the jury—Maryland law of descent.

After the plaintiffs had proved by a surveyor that most of the lines and streets in "Howard's late addition to Baltimore town" had been run by him as the same were marked in a particular plot upon which was the lot of ground for which the ejectment was brought, they gave the plot so authenticated in evidence. This was contained in a volume in which were also other plots. The defendant then offered in evidence another plot in the same volume, but gave no evidence to authenticate it, claiming to use the same in evidence as it was authenticated in the same volume in which was that exhibited by the plaintiffs. It was held that the whole volume was not in evidence; and if the defendant meant to use any plot in the same it was his duty to establish it by competent proof of its particular authenticity. [619]

Evidence to establish heirship and pedigree had been obtained under a commission issued for that purpose to France, in an action of ejectment, in which the plaintiffs had recovered the lots of ground for which this suit was instituted. In the course of that trial a bill of exceptions was tendered by the plaintiffs and sealed by the court, in which the evidence contained in the commission was inserted. The commission and the testimony obtained under it were afterwards lost. In an action for mense profits, brought by the plaintiffs in the ejectment against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit on the record, it was held that the testimony, as copied into the bill of exceptions, was legal and competent evidence of pedigree. [620]

It is well known that in cases of pedigree the rules of law have relaxed in respect to evidence to an extent far beyond what has been applied to other cases. This relaxation is founded on principles of public convenience and necessity. [621.]

Where A was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery in the ejectment, when offered in evidence in an action of trespass for mense profits against B, is not conclusive evidence of title in the plaintiffs, but is *prima facie* evidence thereof, and is evidence of the plaintiffs' possession; but B may controvert the title of the plaintiffs. As to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs. [622]

When the court was asked to instruct the jury upon a particular point, if they believe from the evidence certain facts, and there was not the slightest evidence from which the jury had a right to believe the existence of any such facts, the court ought not to have given such instructions, since they were calculated to mislead them and raise a mere speculative question. [623]

By the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last seized of the estate; and if an intestate leaves a brother of the whole blood who survived him and died without issue, and without having ever been actually seized of the estate, the estate will descend to the half blood of the person so seized. [625.]

614*] *ERROR to the Circuit Court of Maryland.

NOTE.—As to evidence of pedigree and facts of family history.

See note to Elliott v. Peirsol, 1 Pet., 328.

As to description of lands in an entry or deed, see note to Watts v. Lindsay, 7 Wheat., 158; and note to Melver v. Walker, 9 Cranch, 173.

That in determining boundaries of land, course and distance, yield to monuments or natural objects; and if there be nothing to control the course and distance, the line is run by the needle. See note to Newsom v. Pryor, 7 Wheat., 7.

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An action of trespass for mense profits was instituted by the plaintiffs in error in the Circuit Court of the United States for the Maryland District, *Anthony Taurin Chirac et al. v. the defendant in error*; upon the recovery of certain real estate in the city of Baltimore, by the judgment of this court at February term 1817. (2 Wheaton, 259.) The ground lies in a section of Baltimore called "Howard's late addition to Baltimore town," and is part of the lot designated in that addition by the number 803. The parties, plaintiffs in this action, were the same with those in the ejectment, with the addition of the husband of Maria Bonfils Desportes, one of the plaintiffs, with whom he has since intermarried.

The defendant in the ejectment was John Charles Francis Chirac. This action was brought against the defendant in error on the ground that he was, in fact, the real defendant in that suit; he having taken on himself the defense, employed counsel, and being the real party in interest; as he had been the receiver of the rents and profits of the estate during the whole period for which they were claimed by the plaintiffs in this action.

After a trial of this case in the Circuit Court of Maryland, it was removed by the plaintiffs, by writ of error, to this court; and at February term, 1826, the court decided, among other points which were presented by the record, "That the action for mense profits may be maintained against him who was the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit, although he was not a party to that suit, and did not take upon himself the defense thereof upon the record, but another did as landlord." Also, that "a recovery in ejectment is conclusive evidence in an action for mense profits against the tenant in possession, but not in relation to third persons. But when the action is brought against the landlord in fact, the record in the ejectment suit is admissible to show the possession of the plaintiff connected with his title, although it is not conclusive upon the defendant in the same manner as if he had been a party on the record."

*At the trial of this case in the Circuit Court in December, 1827, after the same had been returned to that court under the mandate of this court, the plaintiffs gave evidence to show that the defendant in error was, before the institution of the ejectment, the claimant and actual landlord of the property, and had continued such until the recovery of the same; and that he had employed counsel, and had sustained the defense by his funds exclusively. They also proved that the property had been conveyed to him by the defendant in the ejectment. The evidence of title exhibited by the plaintiffs showed the property to be in John Baptiste Chirac, as whose heirs the plaintiffs claimed and recovered the same in the ejectment; and, in order to show the location of the ground, the plaintiffs exhibited in evidence to the jury the public plot of "Howard's late addition to Baltimore town;" by which it appeared that the lot embraced part of a street called Walnut street, which the plaintiffs further proved by the city records, had been shut up, and the ground included in

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it divided between the owners of lots bounding upon it.

The plaintiffs then offered in evidence the record of the proceedings, judgment, and writ of possession in the ejectment; but the defendant objected to the reading of the same, except to show the possession of the property of the plaintiffs mentioned in the record. The court admitted the parts of the record as *prima facie* evidence of title in the plaintiffs, and permitted them to be read in evidence as such proof of title.

The defendant then offered to exhibit in evidence a plot from the volume of plots, in which was that already mentioned of "Howard's late addition," to show that the whole of Walnut Street was out of the limits of "Howard's late addition;" and that the parties under whom John B. Chirac claimed and John B. Chirac, had no title to a certain portion of the ground recovered in the ejectment. The plaintiffs objected to the use of the plot in evidence, and for that purpose. The court allowed the testimony, and the plaintiffs excepted.

The plaintiffs then read in evidence certain depositions taken under a commission issued in 616*] this cause to France, *showing the kindred of John Baptiste Chirac, and the marriage of Maria Bonfils; and also offered evidence by Mrs. Lafolloniere of the death, before John B. Chirac, of Gabriel Chirac, the only brother or relation in that degree of the whole blood, of John Baptiste Chirac. And they then proved that the original depositions taken in the ejectment cause were lost; and, therefore, in order to show the pedigree of the plaintiffs' family, offered to read in evidence the bill of exceptions, which embodies these depositions contained in the record and proceedings of the recovery in ejectment; but the court, upon the defendant objecting, refused to allow it to be so read in evidence, and the plaintiffs excepted.

After this evidence was given and the testimony was closed on both sides (none having been offered on the part of the defendant, except that stated in the first exception on the point of location), the plaintiffs offered in evidence the record of recovery in the ejectment as conclusive evidence of the right and title of the plaintiffs to the premises, against John Charles Francis Chirac, and against the defendant holding under that title; but the court refused to admit the evidence so offered. The plaintiffs excepted.

The plaintiffs then prayed the court to instruct the jury that if the jury believed the evidence given, the plaintiffs had shown a sufficient title to the premises in the declaration to entitle them at law to maintain this action against the defendant. The court refused to give this instruction, and the plaintiffs took a further exception.

The defendant then prayed the court as follows:

1. That if from the evidence the jury believed that John B. Chirac, who died seized of the premises in the declaration mentioned, had any brother or brothers, sister or sisters of the whole blood, or their descendants, who survived the said John B. Chirac the younger, then the plaintiffs are not entitled to recover.

2. That if the jury believe that the said Peters 2.

John B. Chirac the elder, had by his second wife another son beside the said John B. Chirac, the intestate, then it is incumbent upon the plaintiffs to show, before they can entitle themselves to *recover, that such son died [*617 before the said John B. Chirac, the intestate, without lawful issue.

3. That if the jury believe that the said John B. Chirac, the elder, had by his first wife a daughter who married a certain Samuel Bonfils, by whom she had a son named John Baptiste Bonfils, who married Ann Coton, who had a daughter named Maria Bonfils, who married Desportes, one of the plaintiffs, then it is incumbent upon the plaintiffs, before they can entitle themselves to recover, to show the death of the great-grandfather, grandmother, and father, before the impetration of the original writ in this cause; and that the plaintiffs have offered no evidence of these facts.

All these prayers of the defendant were granted by the court, and the plaintiffs excepted to all of them; and they prosecuted this writ of error.

The case was argued for the plaintiffs in error by *Mr. Hoffman* and *Mr. Mayer*, and for the defendant by *Mr. Wirt*, Attorney-General.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error from the Circuit Court of the District of Maryland. The original suit was an action for mesne profits brought by the plaintiffs in error against Reinecker; and is the same cause which came before this court, and is reported in 11 Wheaton's Reports, 280. The cause now comes again before this court upon certain bills of exceptions taken by the plaintiffs in error at the new trial had under the mandate issued upon the former judgment of reversal.

Without going at large into the facts as they came formerly before us, it is sufficient to state that the action is for taking the mesne profits of a certain parcel of land lying in a part of Baltimore called Howard's late addition to Baltimore town, and is designated as lot No. 802 in that addition. Before the commencement of this suit a recovery of the same premises was had in ejectment by the same plaintiffs (the husband of one of them being now added as *a party) as lessors, against [*618 one John C. F. Chirac, who was admitted upon his prayer as landlord to defend the premises. The record of that recovery was offered in evidence at the former trial against Reinecker and rejected by the court; and that rejection constituted one of the grounds of the reversal.

At the new trial, after the introduction of certain evidence, which will be hereafter stated, the plaintiffs offered the same record in evidence, including the execution of the writ of possession and other proceedings in the same cause; to the admissibility of which, as evidence of the plaintiffs' possession, the defendant's counsel did not object; but did object to it as evidence of the plaintiffs' title to the property. The court, however, admitted the record as *prima facie* evidence of the plaintiffs' title; and thereupon the defendant filed an exception, which, however, is not now before this court.

The evidence alluded to consisted of the testimony of witnesses to establish the facts that Reinecker had received, as landlord, the rents of the premises during the period sued for; that he exercised the right of ownership over the same; that he was, at the time of the ejectment brought, the real landlord, and had notice of the suit, employed counsel to defend it, and was, in fact, the substantial litigant party; and that he derived his title to the premises under the defendant in ejectment, John C. F. Chirac, by intermediate conveyances executed before the ejectment. The evidence further established a strict deduction of title by mesne conveyances of the lot in question down to John Baptiste Chirac (the intestate), under whom the plaintiffs claimed the same as heirs.

The plaintiffs then proved by a surveyor that he had surveyed most of the lines and streets in Howard's late addition to Baltimore town in 1782, according to the official plot and location thereon in the mayor's office (which plot was also then given in evidence by the plaintiffs to the jury); that he had run the lines of Luu's lot according to the patent or certificate there-**619*** of, and that the premises described *in the plaintiffs' declaration and in the writ of possession were in Luu's lot, and also within the said addition, and were known as lot 802, &c.

The plaintiffs, after having given in evidence the plot aforesaid, upon which was located lot No. 802 and Walnut street, then gave in evidence from the original book of entry and record in the mayor's office certain proceedings condemning Walnut street to be shut up, and ordering that each person interested by having lots in the street be entitled to one-half of such street on each side, &c.

The defendant then offered in evidence another plot in the same volume of city plots, being a plot of Howard's addition to Baltimore in 1766, in order to show that the whole of Walnut street was contained within such last-mentioned addition, already read in evidence, to the admission of which the plaintiffs objected, but the court overruled the objection and permitted the plot to go to the jury.

The admission of this evidence constitutes the first exception of the plaintiffs. It is in the first place said that it was not proper evidence against the plaintiffs after the recovery in ejectment, even if the plot in question had been duly authenticated. But, at all events, it is contended that it is not, *per se*, evidence, merely from the fact that it is found in a volume of city plots which contained the general plot already in evidence, and which had been specially authenticated by the surveyor. We are of opinion that this last objection is well founded. The book itself had not been authenticated as a book of public plots regularly made, but a single plot only in the volume had been authenticated. The whole volume, therefore, was not in evidence; and if the defendant meant to use any other plot, it was his duty to establish it as evidence by competent proofs of its particular authenticity.

The other objection assigned for rejection of it admits of more doubt. It is said that the effect of this evidence would be to establish that John B. Chirac (the intestate) had no title to a certain portion of the land recovered in

the ejectment. Unless the defendant was absolutely concluded by the judgment in that suit, he was certainly at liberty to dispute any part of that title. And, if it were material for the plaintiffs *to prove the actual loca- **[*620]** tion of the lot 802 and Walnut street in Howard's late addition in 1782, no reason occurs to us why the defendant was not at liberty to disprove the fact by showing that Walnut street was in Howard's former addition in 1766. It is merely evidence to rebut other parol evidence of the plaintiffs as to the location.

The plaintiffs then further read in evidence the depositions of certain witnesses in France, taken under a commission to establish their pedigree. The testimony was to this effect: that J. B. Chirac, the father of the intestate, had three wives; that by his second wife he had two sons, the intestate and one Gabriel B. R. Chirac; that the intestate died in 1799; that his brother Gabriel left France and went to the islands. One of the witnesses said he died in the islands. Another witness stated that before 1797 she resided in St. Domingo, and lived on a plantation near that of J. B. Chirac (the intestate); that she heard in St. Domingo that his brother came to the intestate's residence there, and it was publicly reported in the neighborhood that the said brother had died; that she heard this at the house of a friend where the intestate visited, and heard it very often, and that it was generally stated as a fact; that she never saw the brother, and never heard that he was married, and never heard of him as being alive since the report of his death; that she is no relation of the family, and never was at the intestate's house while he was at St. Domingo; and did not know or believe that there were any ladies living there when the brother died.

The plaintiffs then offered to prove that the original commission for taking the testimony issued in the said ejectment cause, with the depositions taken under the same, were lost; and then offered to read to the jury the bill of exceptions contained in the record aforesaid, in order to show the pedigree of the plaintiffs' family. But the court refused to allow the same to be read in evidence to the jury. This refusal constitutes the second exception of the plaintiffs. The bill of exception so rejected was taken by the plaintiffs, and did not refer to any depositions; but it stated that the plaintiffs gave in evidence to the jury that the intestate was a *native of France; that **[*621]** the lessors of the plaintiffs (naming them) were the brothers and sisters, and grandniece, &c., of the intestate, &c.; "and that neither the father nor mother, nor any brother or sister of the whole blood of the said intestate, nor their issue or descendants, were living at the time of his death.

Upon consideration, we are of opinion that under the circumstances of this case the evidence was admissible for the purpose of establishing the pedigree of the plaintiffs' family; and this is the only view in which it was presented to the court. It is well known that in cases of pedigree the rules of law have been relaxed in respect to evidence to an extent far beyond what has been applied to other cases. This relaxation is founded upon principles of public convenience and necessity. In a case

between the parties to the suit in which this bill of exceptions was taken, the evidence would have been conclusive. Although Reinecker was not the defendant in that suit, yet he was the real landlord and party in interest, and conducted the suit; and the evidence of the facts so proved as to pedigree ought, under such circumstances, we think, to be admitted as *prima facie* evidence against him. He had the means of contesting those facts, and if he did not avail himself of those means, it may fairly be presumed that he yielded to the sufficiency of the proofs.

This was the whole evidence in the cause; and it being closed on both sides, the plaintiffs offered the same record of the recovery in the ejectment cause as conclusive evidence of their right and title to the premises against J. C. F. Chirac (the defendant therein), and against the defendant Reinecker holding under that title, which the court refused to admit. This refusal constitutes the third exception of the plaintiffs. The plaintiffs then prayed the court to instruct the jury that if they believed the evidence, the plaintiffs have shown a sufficient title to the premises in the declaration to entitle them in law to maintain their action against the defendant, which the court refused to give. And this refusal constitutes the fourth exception of the plaintiffs. There was a fifth exception, but it is unnecessary to refer to it, because it is a mere repetition (apparently by mistake) of the fourth.

622*] *Before proceeding to consider these exceptions, it may be proper to say a few words explanatory of that part of the former decision of this court as it stands reported in 11 Wheaton's Reports, 280, *et seq.* The record of the ejectment suit had been rejected by the court below as any evidence against Reinecker, although it was offered, in connection with other evidence, to establish that Reinecker, although not a party on the record, was the real landlord, and had received the rents and profits, and had notice of the suit, and had employed counsel to defend it, and resisted the recovery. In the opinion of the court upon this point, it was stated that, in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence in an action for mesne profits against the tenant in possession or other defendant on record. But in relation to third persons the judgment is not conclusive; and if they are sued in an action for mesne profits, they may controvert the plaintiff's title at large. In such a suit (that is to say, against third persons) the record of the ejectment is not evidence to establish the plaintiff's title, but is admissible to show the possession of the plaintiff. This proposition has been supposed at the bar to indicate an opinion that in the case then before the court, with reference to all the circumstances of notice and rating of the rents, &c., by Reinecker, the record was only evidence of the possession and not of the title of the plaintiffs. Such was not the understanding of the court. The proposition was asserted as to third persons generally, who were strangers to the suit. Even as to such persons, it was asserted that the record was admissible to show the possession of the plaintiff.

The particular circumstances of Reinecker's case, as connecting him with the parties, were

not, in that part of the opinion, in the view of the court. In the subsequent commentary of the court on the case of *Hunter v. Britts* (3 Campbell's Rep., 455), a doubt was intimated whether a mere notice, *in pais*, to the landlord, who was not a party to the record, was conclusive upon him; but not the slightest doubt was intimated that it was *prima facie* evidence of title as well as of possession against him under such circumstances. The point whether the record in the ejectment suit was **[*623]** not *prima facie* evidence of title in the plaintiffs as against a person standing in the predicament of Reinecker, was not decided at that time, and was not necessary to the decision.

Upon consideration of the question presented by the third exception above mentioned, we retain the opinion that the record in the ejectment suit was not conclusive evidence upon persons not parties to the record; but we are also of opinion that it was *prima facie* evidence of the plaintiffs' title and possession against Reinecker under the circumstances adduced in evidence. He had full notice of the suit, and had the fullest means to defend it. The parties upon the record were his agents or tenants, and he, in effect, though not in form, took upon himself the defense of the suit. The case is stronger than that of *Hunter v. Britts*, and fairly within the reach of the principle decided by it. There was, then, no error in the court in refusing to give this instruction.

The fourth exception can be sustained only upon the ground that there was no fact in the cause upon which there was any doubtful or contradictory evidence. If there was any such evidence, it would have been improper for the court to withdraw the question of its credibility from the jury. And if the evidence was merely of a presumptive nature, it was not for the court to decide as a point of law how much it ought to weigh with the jury. It was properly their province to draw the conclusions of fact arising from such presumptions. They might have believed the evidence, but at the same time not have been satisfied that it justified them in inferring from it other facts not positively proved.

The real difficulty in the case arises from the peculiar structure of the prayer of the plaintiffs, and the introduction of parol evidence at the trial by them, to fortify what had been already declared by the court to be *prima facie* evidence—record evidence of title.

If the court had been asked to instruct the jury that the evidence of the plaintiffs, if believed by the jury, was competent in point of law, from which they might infer all the necessary facts to maintain the action unless it was rebutted on the part of the defendant, it would have been unobjectionable. *It would **[*624]** have left the matters of fact for the just consideration of the jury upon the *prima facie* evidence of the plaintiffs. But the difficulty is that a matter of fact, of vital consequence to the plaintiffs was, whether Gabriel B. R. Chirac, the brother of the whole blood of the intestate, was dead without leaving lawful issue upon the death of the intestate. The plaintiffs very unnecessarily introduced parol evidence on this subject, after the court had ruled that there the ejectment was *prima facie* evidence of their title. The parol evidence did not particularly

establish the death of Gabriel (for the bill of exceptions had been rejected as evidence), although it was exceedingly strong, as presumptive proof; and as such, it was the province of the jury to pass upon it. The court was right, therefore, in refusing the prayer of the plaintiffs, because it trenchanted upon the proper province of the jury by requiring the court to assume a fact which was not absolutely proved, but was matter of inference and presumption upon the whole testimony.

The defendant afterwards prayed the court to instruct the jury as follows: 1. That if from the evidence the jury believed that J. B. Chirac, who died seized of the premises in the declaration mentioned, had any brother or brothers, sister or sisters, of the whole blood, or their descendants, who survived the said J. B. Chirac the younger, then the plaintiffs are not entitled to recover. 2. That if the jury believe that the said John B. Chirac the elder, had by his second wife another son besides the said son J. B. Chirac the intestate, then it is incumbent upon the plaintiffs to show, before they can entitle themselves to recover, that such son died before the said intestate, without lawful issue. 3. That if the jury believed the said John B. Chirac the elder, had by his first wife a daughter, who married a certain Samuel Bonfils, by whom she had a son named John Baptiste Bonfils, who married Ann Coton, who had a daughter named Maria Bonfils, who married Desportes, one of the plaintiffs; it is incumbent upon the plaintiffs, before they can entitle themselves to recover, to show the death of the great-grandfather, grandmother and father, before the impetration of the original writ in this cause; and that the plaintiffs have offered no evidence of these [625*] facts. The court gave the *instructions so prayed for, and the plaintiffs filed their exception thereto.

The first instruction is open to two objections. It asks the court to instruct the jury that, if from the evidence they believed (among other things) that the intestate had any sister or sisters of the whole blood or their descendants, who survived him, &c., the plaintiffs were not entitled to recover. Now, there was not the slightest evidence from which the jury had a right to believe the existence of any such sister or sisters; and without such evidence the court ought not to have given the instruction, since it was calculated to mislead them and to raise a mere speculative question.

But a still more decisive reason against it is, that by the law of descent of Maryland a person claiming as heir must prove himself heir of the person last actually seized of the estate; and if the intestate had left a brother of the whole blood who survived him and died without issue, and without ever having been actually seized of the estate, the plaintiffs would still have been entitled to recover as heirs of the half blood of the person last seized.

The second instruction was rightly given. It was not sufficient for the plaintiffs to show that Gabriel was dead, but that he died without lawful issue; for otherwise such issue were entitled to recover. The *onus probandi* was upon them to establish every fact necessary to their own heirship; and it cannot admit of doubt that this was necessary. The same rule is laid down in 3 Starkie on Evidence, 1099,

and is supported by the case of *Richards v. Richards*, there cited from Mr. Ford's MSS. and also by *Doe v. Griffin* (15 East's Rep., 293).

The third instruction assumes to decide a question of fact upon which we think there was evidence before the jury. The record of the recovery in the ejectment suit was *prima facie* evidence of the plaintiffs' title; and the depositions in the cause, and the structure of the interrogatories and answers, presupposed the death of the great-grandfather, grandmother, and father of the intestate. There was error, then, in the court, in giving this instruction.

*Upon the whole, the judgment must [*626 be reversed and the cause remanded, with directions to award a *venire facias de novo*.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof this court is of opinion that the said Circuit Court erred in admitting the plot offered in evidence by the defendant's counsel, as stated in the plaintiffs' first bill of exceptions. And also erred in refusing to admit as evidence the bill of exceptions stated in the plaintiffs' second bill of exceptions. And the said Circuit Court also erred in granting the instructions firstly and thirdly prayed for by the defendants, as stated in the plaintiffs' sixth bill of exceptions. Whereupon, it is considered, ordered and adjudged by this court, that, for the errors aforesaid, the judgment of the said Circuit Court in this cause be, and the same is, hereby reversed and annulled; and that the said cause be, and the same is, hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

See S. C., 11 Wheat., 280.

Cited—20 How., 249; 17 Wall., 292.

*DAVID WILKINSON, Plaintiff in Error, [*627

v.

THOMAS LELAND ET AL.,
Defendants in Error.

Devise of realty situate in Rhode Island by a resident of New Hampshire—State laws—rights of property under a free government—title of heir—real estate of intestate liable for debts—construction of legislative Acts.

J. J. died in New Hampshire, seized of real estate in Rhode Island, having devised the same to his daughter, an infant. His executrix proved the will in New Hampshire, and obtained a license from a probate court in that State to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the Legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. Held, that the Act of the Legislature of Rhode Island, which confirmed the title of the purchasers, was valid.

The legislative and judicial authority of New Hampshire were bounded by the territory of that State, and could not be rightfully exercised to pass estates lying in another State. The sale of real estate in Rhode Island, by an executrix, under a li-

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cense granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. [655]

By the laws of Rhode Island, the probate of a will in the proper Probate Court is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. [655]

That government can scarcely be deemed to be free where the rights of property are left solely dependent on the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being without very strong and direct expressions of such an intention. [657]

It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is upon the death of the party under whom he claims immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens which have been created by the party in his lifetime, or, by law, at his decease. It is not an unqualified, though it may be a vested interest, and it confers no title except to what remains after every such lien is discharged. [658]

By the laws of Rhode Island, as well as of all the New England States, the real estate of intestates stands chargeable with the payment of their debts upon a deficiency of assets. [658]

A legislative act is to be interpreted according to the intention of the Legislature apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature. [662]

628*] *ERROR to the Circuit Court of Rhode Island.

This case came before the court upon a bill of exceptions tendered by the plaintiff in error, they having been defendants below, on the trial of the cause in the Circuit Court. In that court the defendants in error instituted an ejectment for the recovery of a lot of ground called "the swamp lot," lying in North Providence, in the State of Rhode Island; which lot of ground was, with other lands, devised by Jonathan Jenekes, of Winchester, in the State of New Hampshire, by his last will and testament, dated the 17th of January, 1787, to his daughter, Cynthia Jenekes; subject to a life estate therein of his sister, Lydia Pitcher, who was then in possession of the same, and so continued until her death on the 10th of August, 1794.

Jonathan Jenekes was also seized of other lands in North Providence and in Smithfield, Rhode Island; and also of real estate in New Hampshire and in Vermont, most of which were devised to his daughter, Cynthia. A small part of his New Hampshire lands was devised for the payment of his debts. Cynthia Jenekes his wife, and Arthur Fennor, of Providence, Rhode Island, were appointed the executors of his will. Cynthia Jenekes, alone, qualified as executrix. The testator died at Winchester in New Hampshire, on the 31st of January, 1787, a few days after making his will.

No probate of the will of Jonathan Jenekes was made in the State of Rhode Island.

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The plaintiffs in the ejectment are the heirs of Cynthia Jenekes, and claim the premises under the devise to her, she having afterwards intermarried with Joel Hastings.

The title of the plaintiff in error was as follows:

Cynthia Jenekes, the widow and executrix of Jonathan Jenekes, having been qualified in New Hampshire to act as executrix, on the 18th of August, 1790, returned to the Probate Court of the county of Cheshire an inventory of the real and personal estate in New Hampshire and Vermont, amounting to £1,792 12 9. A commission of insolvency was afterwards granted by the Probate Court, and on the 3d of January, 1792, the commissioners reported the whole amount of debts due by the estate; of which £920 19 were due to citizens of Rhode Island. In February, 1792, the executrix *settled her account in the Probate [*629 Court, and a balance of £15 7 7 remained in her hands, "the guardian of the heirs appearing and consenting" to the settlement.

On the 22d of July, 1790, a license to sell the real estate of Jonathan Jenekes to pay and discharge the debts of the estate, was granted by the Probate Court of Cheshire county; and on the 12th day of November, 1791, Cynthia Jenekes, as executrix of Jonathan Jenekes, sold and conveyed by deed to Moses Brown and Oziel Wilkinson the reversion of the three-acre swamp lot, the premises in dispute. The other real estate in Rhode Island was also sold and conveyed by her at the same time.

On the day the sale was made Cynthia Jenekes executed a bond to the purchasers, reciting that by virtue of the licence and in pursuance of its directions a sale had been made of all the estate which belonged to the testator in the towns of Providence, Smithfield, and North Providence, in the county of Providence, and State of Rhode Island, and that she had received pay for the same; "and whereas some doubts may arise whether a sale and conveyance so made by virtue of the licence of the Judge of Probate in the State of New Hampshire will give a good and sufficient title to lands and tenements lying in the State of Rhode Island and Providence plantations, now, for the clearing of all doubts respecting the premises, I, the said Cynthia Jenekes, in my said capacity, do covenant and engage for myself, my heirs, executors and administrators, to and with the said Moses Brown, Oziel Wilkinson, and Thomas Arnold, their heirs, executors and administrators, that I will procure an act to be passed by the Legislature of the State of Rhode Island ratifying and confirming the title by me granted and conveyed as aforesaid to them and their heirs and assigns forever; or, in failure thereof, that I will repay the purchase money which I have received for the same with lawful interest and such reasonable costs and damages which they may or shall thereby sustain as shall sufficiently indemnify and save them free from loss in the premises, to all intents and purposes."

At the June sessions of the Legislature, Cynthia Jenekes, *by her attorney reg- [*630 ularly constituted, petitioned the Legislature of the State of Rhode Island, representing "that the personal estate of the said Jonathan Jenekes being insufficient to pay his debts,

your petitioner obtained authority from the Honorable John Hubbard, Judge of Probate for the county of Cheshire, in said State of New Hampshire, where the said Jonathan last lived, to make sale of so much of the real estate of the said Jonathan Jenckes as should be sufficient for the purpose of paying his debts; that your petitioner, in pursuance of said authority, sold and conveyed a part of said deceased's estate situate in this State; that for the said estate your petitioner received a part of the consideration money, and the residue thereof is to be paid when the deed executed by your petitioner shall be ratified by this Assembly; your petitioner would further show that the residue of the said purchase money is absolutely necessary to pay the debts due from said estate, and which are now running in interest. She therefore humbly prays your honors will be pleased to ratify and confirm the sale aforesaid, being by a deed made by your petitioner unto Moses Brown and others on the 12th day of November, A. D. 1791, for the consideration of five hundred and fifty dollars; whereby your petitioner conveyed the right of redemption to a certain mortgaged estate, and also other lands in said deed mentioned, situate in Smithfield and North Providence."

Whereupon the Legislaturc passed the following Act:

State of Rhode Island, sc.

At June session of the General Assembly, A. D. 1792.

Whereas, Cynthia Jenckes, late of Winchester, in the State of New Hampshire, now of the State of Vermont, executrix of the last will and testament of Jonathan Jenckes, late of Winchester aforesaid, deceased, preferred a petition and represented unto this Assembly that his personal estate being insufficient for the payment of his debts, she obtained authority from the Honorable John Hubbard, Esq., the Judge of Probate for the county of Cheshire, in the State of New Hampshire aforesaid, where the said Jonathan last lived, to make sale of so much of the real estate of the said Jonathan Jenckes as should be sufficient to pay **631** his debts; that *by virtue of said authority she made sale to Moses Brown and others of part of the said real estate situate within this State; that she hath received part of the consideration money, and the remainder is to be paid when the sale aforesaid shall be ratified by this Assembly; and that the residue of said purchase money is necessary for the payment of said debts; and thereupon the said Cynthia prayed this Assembly to ratify and confirm the sale aforesaid, which was made by a deed executed by her on the 12th day of November last past, for the consideration of five hundred and fifty dollars, whereby she conveyed the right of redemption to a certain mortgaged estate, and also other lands in the said deed mentioned, situate in Smithfield and North Providence.

On due consideration whereof, it is enacted by this General Assembly, and by the authority thereof, that the prayer of the said petitioner be granted, and that the said deed be, and the same is, hereby ratified and confirmed, so far as respects the conveyance of any right or interest in the estate mentioned in said deed which be-

longed to the said Jonathan Jenckes at the time of his decease.

A judgment *pro forma* for the plaintiffs was entered in the Circuit Court, and this writ of error was sued out.

The case was argued by *Mr. Whipple* and *Mr. Wirt* for the plaintiff in error, and by *Mr. Webster*, with whom was *Mr. Hubbard*, for the defendants.

Mr. Whipple, for the plaintiffs in error, after stating the facts of the case, proceeded to say that the whole case before the court turns upon the constitutional validity of the Act of the Legislature of Rhode Island.

All the lands of Jonathan Jenckes in the State of New Hampshire were sold for the payment of debts. A large amount of debt was due in Rhode Island; and it is admitted that the proceeds of the sale of the swamp lot were applied to the payment of the debts of the testator. It is also admitted that all the personal estate had been absorbed by the payment of debts in New Hampshire. The question arising from these facts of the case is, whether a deed of land in Rhode Island, made by a New Hampshire executor, qualified *in New Hampshire [**632** and not in Rhode Island, the sale being fairly made for the payment of debts, and the deed being subsequently ratified and confirmed by the Legislature of Rhode Island, constitutes a valid conveyance. It is contended that it does; and it is at the same time conceded that such a deed without such confirmation is absolutely void. This view of the case presents necessarily the question of the power of the Legislature to pass the law.

No other limit to the power of the Legislature of Rhode Island is known than that which is marked out by the Constitution of the United States. If any clause in that instrument is expressly or virtually infringed by the Confirmatory Act of 1792, such a violation would render the Act a nullity. The National Constitution being the only limitation, the court has no right to pronounce a law of Rhode Island void upon any other ground. It has been said in England that an Act of Parliament, contrary to the principles of natural justice, would be void. Such an opinion, in reference to a law of a State, has never been intimated in this court.

But, suppose the people to make an express grant authorizing the Legislature to appoint a man a judge in his own case; or to pass any law contrary to natural justice; so long as none of the prohibitions of the Constitution are violated, what right has this court to interfere?

What was done in the case before the court was with the full knowledge, concurrence and assent of the people of Rhode Island. Acts authorizing foreign executors to sell real estate, and acts confirming void deeds, have been passed ever since the settlement of the State. Having no written Constitution, usage is the law of Rhode Island. The papers in the case clearly show that the Legislature of that State always has exercised supreme legislative, executive, and judicial power.¹ There is an executive magistrate, but he is *totally [**633**

1.—In the course of the argument of the case the counsel of the plaintiff in error cited from the statute of the State of Rhode Island a number of

destitute of executive power. He cannot pardon the slightest offense; he has no veto on **634** legislation, and he cannot *appoint a single officer in the State; all the executive powers are exercised by the Legislature.

So of its judicial powers. We have courts acting under standing laws; but one of those standing laws authorizes the Legislature upon a petition for a new trial to set aside judgments at its pleasure. Originally the Legislature was the only court in the State. It exercised common law, chancery, probate and admiralty jurisdiction. Its chancery jurisdiction it has never parted with. It is the best court of chancery in the world. Its probate power, though conferred upon inferior courts, has always been exercised concurrently with them. Accordingly we find frequent instances of wills proved and administration granted by the Legislature.

The power of granting license to sell real estate, of proving wills, and of confirming void deeds, has been so long and so frequently exercised, that it has been known by almost every man in the State. The people, knowing this usage, have acted under it, and there is hardly an acre of land in Rhode Island which, in some period or other, has not been sold by executors, administrators or guardians licensed by the General Assembly; or conveyed by void deeds confirmed by that body. To draw into question the validity of such conveyances would shake almost every title in the State.

laws passed by the Legislature of the State, in which the powers asserted to be vested in that body were exercised.

August, 1773. *Randall v. Robinson*. A petition for a new trial, after a new trial had been given by the court. Granted.

Ross v. Stow. Petition for a new trial after two verdicts had passed against the petitioner, and to remove the cause into another county. Granted.

August, 1774. Petition of Augustus Mumford for leave to amend a judgment he recovered against Simon Hazard, from twenty-four to seventy-four dollars. Granted.

Petition from John Randall, stating that he had again obtained a verdict against Matthew Robinson for thirty-five pounds, which the Supreme Court, on motion of Robinson, had set aside, and praying that the judgment be set aside and "the verdict remain fair as at first received, and that the next Superior Court may be empowered to enter up judgment thereon in his favor for his damages and costs by the said last jury found." Granted.

Petition of George Elam, stating that a final decree of the king in council had been obtained by him against John Dorkray, and praying that the Supreme Court be ordered to carry the same into effect. Granted.

March, 1776. Petition of Benoni Pearee, administrator, to sell real estate to pay debts. Granted.

June, 1776. Petition of Mary Mason to appoint some person to sell the estate of orphans, one of them having gone to sea two years ago, and not since heard of. Granted.

December, 1776. Petition stating that judgment had been obtained against the petitioner for more than the debt due. Granted, and the judgment declared null and void, and the court directed to characterize the bond.

March, 1777. Petition of Caleb Fuller, stating that he and Shore Fuller, of Rehoboth, Massachusetts, are joint owners of a ferry, and that Fuller refuses to use it by turns, the one during one week, and the other the next; and praying "the Assembly to grant that he shall improve said ferry with said Fuller in turns, exchanging every other week, and that his turn may begin the first day of next week, as has been customary for a number of years heretofore, &c." Granted.

Petition of Samuel Brown, administrator, stating that the intestate covenanted to give a deed to Nathan Cray, of the State of Connecticut, of a house and lot, but died before executing it; that

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*Resort, however, to the extraordinary [***635** powers of the Rhode Island Legislature to protect the present conveyance is unnecessary. Every Legislature in the Union possesses similar authority, unless expressly restrained by its local constitution. The subject-matter of the conveyance was land lying within the State; and, consequently, exclusively within the jurisdiction of the State. How the land shall pass from one man to another, whether by deed under seal or by mere delivery; how it shall be appropriated to the payment of debts, whether by attachment and sale or by mesne or final process, or whether it shall be totally exempted from attachment; what form shall be observed by executors and administrators selling for the payment of debts; how they shall be qualified, and from whom they shall obtain a license; whether the deed shall precede the license or the license precede the deed, are all questions to be decided by the Legislature, and their decision is conclusive upon all mankind. Whether they decide by a general law or a special act, is matter exclusively of legislative discretion.

It is, however, considered unnecessary to attempt to ascertain the extreme limits of State power in regard to its domain. All the power over that subject, whatever may be its measure, is in the States. A very small portion of it was exercised in the present case. The principles of natural justice were not violated, un-

the estate of the intestate is insolvent, and prays to be authorized to give the deed to Cray in pursuance of said covenant. Granted.

February, 1778. Petition of Benoni Pearee, praying to be released from his executorship on paying the balance in his hands to the town council of Providence. Granted.

August 1779. Petition of Othniel Goston, stating that administration had been granted upon his daughter's estate, and that the administrators had brought actions against him; and praying that the administration might be set aside. Granted, and that the town council be directed to revoke the same and to grant administration to the petitioner.

1781. Petition of Sylvester Gardner, deputy-quartermaster, stating that he, by order of his superior officer, seized a quantity of stock and sold it for the benefit of the United States; that he issued for taking said stock, and prays that the action may be stopped. Granted.

Petition of Martha Hartshorn, stating that her husband devised certain real estate to her for life, remainder to his son in fee, praying that she may sell part of the estate for her support. Granted.

1782. Petition of Archibald Young and others, praying that part of the real estate of a *non compos* may be given in fee to such person as will give bond to support her; remainder to be divided among the heirs in fee, provided they give bond to restore it in case she is restored to her mind. Granted; and the Superior Court ordered to carry the prayer of the petition into equitable execution.

1783. Petition of Z. Hopkins, stating that he was treasurer of Gloucester, was sued upon notes given by him officially, and judgment has been recovered against him, and praying that execution may be issued against the present treasurer. Granted.

1783. Petition of William Haven, praying that a decree of the Admiralty Court may be set aside and a trial allowed. Granted.

1784. On petition, a deed of gift from Gideon Sissor to his infant children was declared void and fraudulent, and the estate was restored to him.

1786. Stephen and Daniel Stanton were appointed guardians of their father, and allowed to sell his real estate to pay debts, &c.

1791. Petition of Mary Dennison, of Stonington; Connecticut, executrix, for the sale of real estate in South Kingston to pay debts, and to account with the Judge of Probate in Connecticut. Granted.

less it is unjust to appropriate the property of a debtor to the payment of his debts. No vested rights were disturbed, because Cynthia Jenekes, the devisee, took the estate subject to the debts of the testator. The general law of Rhode Island furnished the creditors with various direct remedies against the estate itself. It was liable in an action against the devise to have been attached on an original writ and sold upon execution. A creditor might have taken administration and petitioned the Supreme Court for a license to sell. The right of the devisee, therefore, was subject to such remedies as had been previously provided by the general law, and also to such remedies as the Legislature chose subsequently to provide. The application of the general or the special remedy would alter, but not impair, the rights of the **636*** parties. Previous to the sale the *right of the creditor was to obtain payment either from the devisee or the estate. The right of the devisee was to hold the estate subject to this elder right of the creditor. It was at her election to discharge the debts voluntarily and remove the incumbrance from the estate, or to allow the creditor to proceed under the best remedy he could obtain. The deed of the executrix and the act of the Legislature constituted a cheap and summary remedy for the enforcement of the rights of the creditor. If the estate had not come to the hands of the devisee loaded with a lien of the creditors, it might have been difficult to have considered the act as merely remedial; for it would have bestowed new rights upon the creditor and heaped new obligations upon the devisee.

Three propositions, then, may safely be advanced in relation to this act: 1. That no injustice was done; 2. That vested rights were not disturbed; and, 3. That the obligation of contracts was not impaired.

The power of the Legislature to furnish remedies in favor of existing rights was exercised to a much greater extent in the cases of *Calder v. Bull* (3 Dall., 386), *Underwood v. Lilly* (10 Serg. & Rawle, 97), and *Foster v. The Essex Bank* (16 Mass. Rep., 245), than in the cases before the court.

It may be urged that no notice was given to the devisee; that her title was divested by the void deed of an unauthorized executrix, confirmed by an act to which she was not a party, and of the existence of which she was ignorant until her estate was taken from her.

If notice was necessary, it may safely be presumed at the end of thirty-six years. (15 Mass. Rep., 26.) But notice was not necessary. It was not an adversary proceeding. If the creditors had petitioned for a remedy against the estate, common justice would have required notice to the devisee. But the petition was by the legal representative of the estate; the legal representative in Rhode Island as well as in New Hampshire. The power of an administrator is confined to the State for which he is appointed. He is not the representative of the intestate in any other State. But the power of an executor is co-extensive with the estate of the testator. He derives his power from the **637*** will, and he has *an exclusive right to administer wherever any estate may be found. The moment the testator died the power of his executrix over his estate in Rhode Island was

precisely the same as over his estate in New Hampshire. It was complete in both States, except as to the bringing actions and the sale of real estate. She could bring no action in either until she qualified by giving bond. She could not sell real estate in either until she had obtained a license. In all other respects her power was the same in both States. The will gave her the exclusive right to administer in both States. She had a right to apply for a probate of the will, and for license to sell in both States. The will was the power. The executrix was the attorney; and every act which the power authorized her to do, she could rightfully perform without notice. There is no difference, in this respect, between a will and any other power. The executrix in petitioning the Legislature of Rhode Island for power to sell, was acting as the representative of Jonathan Jenekes—was taking a step she had a right to take without consulting heirs or devisees, and without giving them notice. The general law of Rhode Island authorized an executor to petition the Supreme Court for a license without giving notice. Why should she give notice when she petitioned the Legislature?

There is a wide difference between the right to sell and the right to apply for a license to sell. The former is derived from the decree of a court or legislative act. The latter is from the will itself. These positions are fully sustained in Toller on Wills, 41, 65, 66, 70; Lord Raym., 361; Strange's Rep., 672; 1 Dane's Abridg., 558; *Burnley v. Duke* (1 Rand., 108), *Jackson v. Jeffries* (1 Marshall, 88), and *Ruliff's ease* (1 Mass., 240), *Rice v. Parkman* (16 Mass., 326.)

It must be admitted, then, that as this Act of the Legislature impaired no contracts, and interfered with no vested rights, that they had the constitutional power to pass it. It must also be admitted that the executrix had a right to apply for a license to sell wherever real estate could be found until the debts were paid, and that there was no more necessity *of [**638** giving the heirs notice of such an application in Rhode Island than there would have been upon a similar application in New Hampshire.

The cases in 3 Dallas, 386; 12 Wheaton's Rep., 378; 9 Mass. Rep., 151, 360; 4 Conn. Rep., 209, and 16 Mass. Rep., 260, also show that it is no objection to the Act that it is retrospective and private.

These constitute all the objections that are anticipated against the legal validity of the Act. The principal, if not the only objection that will be much relied upon, relates to its legal effect rather than to the power of the Legislature to pass it.

The grounds that will be mainly contended for, it is supposed, will be these: that, admitting that the Legislature had sufficient power to have authorized the executrix to make a future sale, yet, instead of this, they undertook to confirm a previous sale; that they passed an Act of June, 1792, confirming a void deed made in November, 1791. As the executrix in November, 1791, acted under the license of the Court of Probate in New Hampshire, and had obtained no authority to sell from any court in Rhode Island, it is very clear that the deed, without such authority, was a mere nullity.

The bond entered into by the parties providing that unless the executrix obtained a ratification of the sale by the Legislature, is satisfactory evidence that the parties considered the deed of no validity.

The Act of the Legislature, then, confirms a void deed, and the old principle of the common law, that a deed of confirmation will not validate a previous void deed, will be relied upon. In. Co. Litt., 295, *b*, it is said "a confirmation doth not strengthen a void estate, for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law." This is the uniform language of the ancient books, and the reason of the principle is found in Gilbert's Tenures, 75, 78. "A confirmation passes no new estate to the grantee; it is the assent of the confirmer that the grantee may hold the estate previously granted."

This being the rule between parties to conveyances, it is *supposed that a confirmation by the Legislature is to be construed by the same rule. Cynthia Jenckes, the executrix, in November, 1791, made a deed of all the right, title and interest, to Jonathan Jenckes, the testator, in the demanded premises. Having obtained no previous license, the deed was void. The argument is that a deed of confirmation by Cynthia Jenckes, the devisee, would have been of no force, and that therefore a confirmation by the Legislature was equally void.

Two answers may be given to this very plausible reasoning: 1. We deny that a confirmation by the devisee of the void deed of the executrix would have been invalid; and if it would, we deny, 2. That it necessarily follows that a confirmation by the Legislature is of the same character.

Would a confirmation by the devisee have been binding? It is admitted that in general a confirmation of a void deed is inoperative. An examination of the reason of the rule, however, will show its inapplicability to this case. It applies to a deed void for want of estate in the first grantor. As, for instance, A is the owner in fee of a lot of land. B, having no title, makes a deed to C, which is a mere nullity. Afterwards, A confirms to C the deed of B. What does this amount to? Why, in the language of the books, "to the assent of the confirmer, that C may hold the estate conveyed by B." What was that estate? The title of B. If Cynthia, the mother, had conveyed to Brown and Wilkinson her title to the land of Jonathan Jenckes, a confirmation of such a deed, upon strict principles, would have been inoperative. But she acted as executrix; she conveyed not her own, but the title of Jonathan Jenckes. A confirmation by the devisee would have been an assent that the grantee should hold "the estate" conveyed by the deed. Whose estate? Why, the estate of the grantor. Who was the grantor? Jonathan Jenckes, by his agent, Cynthia Jenckes. A confirmation of a deed is a confirmation of the title professed to be conveyed by that deed. Had Cynthia Jenckes conveyed her title, a confirmation would have established her title. As she conveyed the title of Jonathan Jenckes, **640*** it *established his title in the grantee. The deed of the executrix was void for want of

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authority, not for want of estate; and a subsequent confirmation of a void authority is equivalent to a previous grant.

It is therefore denied that a confirmation by the devisee of such a deed would have been inoperative. But suppose it would; does the consequence drawn from that position necessarily follow that a confirmation by the Legislature must share the same fate? Is an Act of the Legislature to be construed by technical rules of conveyances, or by its main scope and design? What was the sole object of applying to the Legislature? The answer must be, to authorize the executrix to convey the title of Jonathan Jenckes to the grantee. The language of the petition and the Act are very pointed to this effect.

The whole doctrine of confirmation, however, is applicable only to deeds which contain no other than technical words of confirmation. Whenever an intention is manifested to enlarge the estate of the grantee, such intention shall prevail. (Co. Litt., 296, *a*.)

Without any further refining upon obsolete rules, however, it is enough for our purpose that even in England none of these rules ever applied to a confirmation by act of Parliament.

One other view may be taken of the case which will relieve it of all objections arising from its retrospective and confirmatory character.

This view is to consider the deed, the bond, and the Act of the Legislature as one conveyance, having a present operation. The parties knew that the deed was void; they knew that no title passed to the grantee. How, then, could they intend that it should operate until after the Act was obtained? It would be idle to contend that the parties meant a deed to operate which they themselves declare to be inoperative and void. The deed was executed and delivered in November, 1791, but the deed was only a part of the conveyance. The Act of the Legislature was contemplated as another essential part; and when the Act was obtained *it was in its legal effect a license to [**641** sell the estate, and the deed was given subsequent to, and under the license. The authorities fully sustain this position.

"In the execution of a power, in order that the deficiency of an instrument may be supplied by the sufficiency of another, it must appear that the parties intended they should operate conjointly." (3 East's Rep., 410, 438; *Earl of Leicester's* case, 1 Ventris, 278; *Herring v. Brown*, Carthew, 22; 3 Mass. Rep., 138; 1 John. Ch. Rep., 240.)

If, however, there had been originally an incurable defect in this conveyance, an acquiescence of thirty-six years estops the parties from now making their claim.

"Yet, even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of authority is accepted instead of proof." (15 Mass. Rep., 26.)

Mr. Webster, for the defendant in error.

The history of the case is that there lived a man of the name of Jenckes, who had acquired real estate in Rhode Island; he made his will in 1774, in which he devised his estate to his daughter Lydia for life, and the reversion to his son Jonathan Jenckes. Lydia survived

Jonathan Jenckes, who, eight years after the death of his father, made his will, and gave the reversion of the estate to his daughter, Cynthia Jenckes. At this time Jonathan Jenckes lived at Winchester, in New Hampshire, where he died in 1787. He appointed his wife, whose name was Cynthia, the executrix of his will, with another person who never acted.

The will provided for the payment of debts; and if there was a deficiency in the personal estate, that specific portions of the real estate should be sold for the purpose. Unhappily, the executrix entrusted a person who was employed by her, and who took upon himself to do everything. He acted as agent, commissioner, and purchaser. He also got an agreement for her dower, and sent her to Vermont, where she died. It also happened that a large estate, at that time, turned out to leave but **642*** £15 7 6. *The minors came of age; by good conduct they raised themselves from penury, and have brought their case before this court.

There is no dispute down to the will of the elder Jonathan Jenckes or of his son. The plaintiffs below claim under the will. The will was proved and admitted, and the question is whether the plaintiffs in error are entitled to hold the property. First, it was pleaded that the plaintiffs below were barred by the statute of limitations, but this has been overruled. They had a title by devise and inheritance, and the question is whether anyone has derived a title from their ancestor which can take it away.

The question turns only on the validity of the title of the plaintiffs in error, who say they are purchasers under Moses Brown and Oziel Wilkinson. That the land in controversy went out of the family; Jonathan Jenckes, the ancestor, having died, leaving debts, and the executrix having made sale of the lands for their payment.

The will of Jonathan Jenckes was proved in New Hampshire in 1787; the debts there were all paid.

The defendants in the Circuit Court produce a deed from Cynthia Jenckes to Moses Brown and Oziel Wilkinson, of November 12, 1791, and a confirmation by the Assembly of Rhode Island. What is the character and what are the powers of the Legislature of Rhode Island, will be examined in the course of the argument. The deed purports to proceed by the authority of a license granted by the Judge of Probate of New Hampshire. It is not material now to show that all the proceedings in New Hampshire were void; they were all contrary to the law of the State. If the land laid there the deed would be declared void.

One view is to be taken of this question which is not to be lost sight of. The laws of the New England States make lands subject to debts. What is the nature of this liability? Where is the title of the land, until it shall be known that it will be wanted for the payment of debts? It is in the heir or the devisee, and the personal representative has nothing but a power to sell **643*** it for the payment of debts. *He has a power to sell only on the arrival of certain events; and he who is to exercise that power, must show that those events have arisen.

This power does not exist until the event

happens to make it necessary to sell the land.

Every principle of law requires that when this power is exercised it shall be proved that the case exists to require its employment.

The cases decided in the courts of Massachusetts upon the statute of that State, which is like the statute of New Hampshire, show that the party claiming under a deed for lands sold for the payment of debts must show that the event on which the power to sell depended had occurred.

By the laws of New Hampshire the heirs are always to have notice when the estate is to be sold. They also require an inventory of the estate and an order to sell; in this case there was nothing of that kind; there was only a license to sell without any other proceedings. No account was filed in New Hampshire which took any notice of the debts or property in Rhode Island. (Cases cited, 11 Mass., 511; 12 Mass., 503; 6 Mass., 149; 3 Mass., 259; 1 Mass., 40, 46.)

It will be seen from the record that the will was proved in March, and the license to sell was granted in July, without an inventory and account being made out. The cases cited show that the Judge of Probate has no jurisdiction, unless it appear that there was occasion to sell. It is contended that if the proceedings in New Hampshire could give no authority there, they could give none in the State of Rhode Island.

There were no proceedings in Rhode Island except the fiat of the Legislature. It is not pretended that there were any proceedings in Rhode Island required by the laws of New Hampshire.

Then, the first proposition is, that the deed from Cynthia Jenckes to Brown and Wilkinson was a nullity. It created no right in law or equity. It was as the act of a stranger to grant land which did not belong to him.

*This follows, because, 1st, the deed [**644** would have been void in New Hampshire.

2d. Because proceedings to divest rights to land must be according to the law of the land.

It is contended that the powers of the Legislature of Rhode Island are unlimited and unrestrained; that they transcend all the powers of the other branches of the government. It is not sufficient to show that the power to divest this property would be limited in England, for the powers of the Legislature of Rhode Island are beyond those of the English Parliament. It would be well to consider how Rhode Island can be a member of this Union with such a form of government as is asserted to exist there. By the Constitution of the United States, every State must be a republic, every State must have a judiciary, Legislature and executive, or it has no constitution.

It is said that Rhode Island has no constitution; that she has grown up without a constitution. If her government has no form it cannot be a republic, and has no right to come into the Union. But it will be found that Rhode Island has a constitution. The charter of Charles II. contains all the provisions for the organization of a government with legislative, judicial and executive branches. It declares that courts of justice shall be established, and thus to them is given the exercise of judicial functions. The Legislature is es-

established by the same charter, and its functions cannot be judicial. The powers of a court and of a Legislature cannot be blended; nor are they properly under the charter referred to.

If the Legislature of Rhode Island has judicial powers, why does not a writ of error lie from this court to its judgments? Writs of error go from this court to the highest judicature of the States; but it is not denied that Rhode Island has courts of judicature separate from the Legislature, taking cognizance of all cases for judicial decision. The Legislature, therefore, in assuming the powers of a court, which was done when they authorized the sale of the land for the payment of the debts, did what, even under the Rhode Island constitution, they could not do.

645*] *A long list of instances of legislative interference has been exhibited by the counsel for the appellees. Some of these cases proves too much. Authority is given in one of them to sell lands in New Hampshire.

It is necessary for the plaintiffs in error to show that the power has been exercised against the bill, *in invitum*. Parliament, in England, never proceeds upon any private bill without notice to all the parties; and there is no case in which Parliament exercises its authority to dispose of land without the consent in writing of everyone who is interested.

The consent of the heirs of Jonathan Jenckes is not recited in the Act of the Legislature of Rhode Island. To establish a usage for legislation of this kind, it should be shown that there have been a series of proceedings against the will of parties interested, and without notice.

There is but one of the cases referred to in which the Legislature of Rhode Island has undertaken to act in reference to private rights, which shows that they have given authority to sell lands out of the State. The power must be exercised legislatively, or judicially. Is the resolution of 1792 an act or a decree? Is it a decree of a Probate Court? If it is, then it should be shown that the parties were before the court, or that notice was given to them.

It is immaterial which it is. The case will always be, that the devisees of Jonathan Jenckes had this land until the deed; and that deed is, by the counsel of the plaintiffs, admitted to be void. It remained, therefore, with the heirs, until the resolution or Act of the Legislature.

Even taking the land to be public domain, the deed would not pass it. It is not operative. It contains no terms of grant or language of transfer.

The resolution only establishes the deed in its form. There are no words giving, granting, vesting, or divesting of the estate; all that is done is to ratify and confirm the deed. If the confirmation contained words of grant, it would enure as a grant; but this is not the fact.

If the preceding act—that of making the deed for the land to Brown & Wilkinson—was void, there are no words in the law to give it validity.

646*] *From Bracton down it has been law that a confirmation cannot help a void deed. (2 Thomas's Coke, 516; Gilbert on Tenures, 75, 78.)

If there is no precedent estate, the confirmation is void. (4 Danv. Abrid., 410.) There is Peters 2.

no case where confirming words go further than to apply to the thing itself.

The deed was a nullity; to confirm it in its then state was to keep it such. At that moment it was void; to confirm it was to render it void permanently.

It is as if A, a creditor of B, should go to the Legislature and ask that B's property be transferred to him without a trial. It is a condemnation without a hearing, a confiscation of property in time of peace. There is no case in which such legislative proceedings have stood the test of this court. It is a case where land was vested in those who claim it, and has been taken from them. There was no application to the Legislature of Rhode Island by the creditors; no evidence that the interference of the Legislature was claimed by them. What, then, are the facts of the case? The lands descended to the heirs of Jonathan Jenckes. The heirs were in New Hampshire. No creditors applied for the aid of the Legislature. There was no notice to the heirs. The deed of the executrix was entirely void; and there is no pretense for saying that the interests of the heirs were in any manner regarded in the course of the proceedings. Under these facts the law was passed; and whatever words were used, it could not have had any effect for want of power in the body which enacted it.

This is a private act; and upon every principle and rule of legislative proceedings, all the parties to be affected by it should have had notice, and should have consented to it. This is the course of legislation in the British Parliament. (3 Black. Com., 345.)

It is of no importance to the question before the court whether there are restrictions or limitations to the power of the Legislature of Rhode Island imposed by the constitution. If at this period there is not a general restraint on Legislatures in favor of private rights, there is an end to private property.

*Though there may be no prohibition [**647** in the constitution, the Legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty and of the social compact; such as giving the property of A to B. (Cited, 2 Johns., 248; 3 Dall., 386; 12 Wheaton, 303; 7 Johns., 93; 8 Johns., 511.)

In this case it may be considered that the Legislature gave the Act, but did not guaranty its validity. They gave it because it was asked for, but subject to all exceptions. They put it in the power of the persons who were interested in its operation to make it valid by obtaining the assent of the devisees, and of doing all other acts which were necessary to give it validity.

It is said that were the State of Rhode Island under the restrictions of a written constitution, like other States, the power to pass such a law might not exist; but there the Legislature acts by the sovereign authority of the people, who may build up and destroy. This is denied. Rhode Island must be a republican State, and the government must be divided into departments, and must be a government of laws. These departments may exist, although the same body exercises the functions of both. This is done in New York. But where a Legislature acts judicially, it proceeds according to

the forms and upon the principles which regulate courts. In this case the Legislature acted legislatively. The language is, Resolved: judicial tribunals decree, adjudge.

As to the precedents which have been referred to from the proceedings of the Legislature of Rhode Island, it may be well observed that the same irregularities will be found in the early proceedings of the governments of all the States before the principles of government were understood or applied. The answer to them is that the rights of property were not then well understood.

Or, if we consider the words operating not on the instrument but on the title; if they had been, "confirm and ratify the title set forth in the deed;" still it passes no title. There was nothing in the grantees to confirm. Confirmation, to enable it to operate, requires privity.

648* Where was the fee in the property from November, 1791, until 1792? It was with the heirs, and from them it could not be taken but by a course of judicial proceeding. The Legislature, by no form of words, could have divested the land out of the heirs and vested it in the purchasers.

The general ground assumed by the defendants in error is that the Act of the Legislature is inoperative because it does not divest their rights, for the Legislature of Rhode Island had no right to pass such a law. The law itself is intended as a remedy, and was no more. Its purport is to establish a sale made for the payment of debts, and its terms import no more.

It is said that no interest in the land existed in the devisees of Jonathan Jenckes, because they took the estate loaded with the debts of the devisor. This inference is incorrect; that their estate might be made subject to these debts did not prevent its vesting in the claimants and those under whom they make title. It is agreed that this estate might be divested; but only by judicial proceedings. The argument is that the property could not be taken away without proceedings of a judicial character.

It is said the statute gave a remedy because the creditors had a right to be paid out of the estate, and that this was an interference for their benefit. If it had been a proceeding to bring rights into adjudication, it would be so; but in this case the rights of the devisees were adverse to those of the executors, and to the claims of the creditors.

Mr. Wirt, in reply.

It is a matter of surprise how the strongest minds will err when they look through the mist of prejudice. Nothing more has been done in this case than is done by the courts of probate in Vermont and Massachusetts. What is the monster that the gentleman has created? It is that the Legislature has authorized an executrix to sell lands for the payment of debts. "This is the very head and front of their offending." It was a mere act of common justice, due and performed in the course of justice in all the States of the Union. The facts of the case may be briefly stated from the bill **649*** of exceptions. Jonathan Jenckes died in 1787, seized of the lands, subject to a life estate to Lydia, his sister. That estate was devised to his daughter, subject to the life estate. Cynthia Jenckes, his wife, was executrix, and

qualified. At the time of his death there were debts which absorbed all his personal estate, and ultimately all his real estate but a small portion. The Judge of Probate, after examination, gave a license to sell the real estate. It was sold by the executrix to those under whom the plaintiff in error claims the sale to be confirmed by an Act of the Legislature of Rhode Island where the lands laid. The Legislature passed a confirming Act, and the purchase money was paid and the debts of Jonathan Jenckes were discharged.

The purchase was made on the faith of the law of Rhode Island; the money paid upon the faith of that law; and all this was done thirty-four years before the ejectment was brought in the Circuit Court of Rhode Island. In the meantime other *bona fide* purchasers have become possessed of the land; and who come forward now to claim it?—not other *bona fide* purchasers, but the heirs of Jonathan Jenckes.

The attempt here is to make the lands fulfil two purposes: 1. The payment of the debts of their father by the sale; and, 2. Then to recall that sale, that the lands may support the heirs of the debtor. The claim is against all the policy and the course of proceeding in New England.

The case comes here under a *pro forma* judgment of the Circuit Court. The inquiry is, whether the court erred in giving the instructions asked for; in saying that the conveyance and proceedings by which the title was intended to be vested in the purchasers did not divest the legal estate of the heirs of Jonathan Jenckes.

In Massachusetts and Rhode Island all the estate, real and personal, of the deceased, is subject to the payment of debts. All the statutes of the Northern States, although they vary in detail, contain this principle. (Bigelow's Digest, 350; 4 Mass., 354; 18 Mass., 157; 4 Mass., 654; 3 Mass., 258; 1 Mass., 340.)

By a reference to these authorities, it will appear that in order to justify a license to sell in either of those States, *nothing [***650** more is necessary but to satisfy the judge that the personal estate is not sufficient to discharge the debts of the deceased. No form of proceeding is required. It is done by presenting the account of the debts and personal estate, the judge then gives the license.

Objections have been made by the counsel for the defendants in error to the proceedings in New Hampshire. It is said they were a nullity that they were irregularly granted. This is denied, and no authorities have been shown in support of the objections. It has been urged that notice should have been given to the heirs. There has been no case cited in Massachusetts which looks to the necessity of notice to the heirs of the application for a license to the Judge of Probate.

The regularity of the proceedings is to be presumed after so long a lapse of time. If notice is required; if evidence different from that which is shown to have been exhibited before the Judge of Probate was necessary, it is and ought to be considered that it was furnished.

In legal contemplation, both the real and personal estate of a deceased person go into the hands of the executor for the payment of debts. (4 Mass., 354; 18 Mass., 157.) Executors have

no right to take possession of the lands, but it is often done with the approbation of courts.

To show how completely lands are in the hands of executors, where a judgment is obtained against executors for the debt of the testator, the plaintiff may issue his execution against the lands in the hands of the heir. (3 Mass., 258.)

It is true the title descends to the heir, but it descends subject to the debts. The heir takes the lands, liable to their being taken from him when the debts require it; without proceedings against him, and without notice to him. (Bigelow's Dig., 355.) Nor is it only in the hands of the heir they are thus liable, they continue so when they have passed to his alienee.

Such is the law of vested estates, with which it is said the Legislature has interfered. The estate upon which the law operated was held by the heirs, subject to the exercise of the very power by which it was taken from the heir.

651* The law of New Hampshire is the same as that of Massachusetts. In New Hampshire the proper tribunal to authorize the sale of the land was applied to; and thus the acts done by the executrix were those which the testator, who directed a sale of his real estate for the payment of his debts, authorized her to do.

But if these proceedings were irregular it would not affect the case. It is not meant to contend that the license to sell given by the judge in New Hampshire authorized the sale in Connecticut. What was the power of the executrix under the will? As an executrix she had the power to do all and everything an executrix could do by law. In some of the States, executors who have been qualified in one State can act in all. This is the law of Pennsylvania, and of North Carolina, and of Mississippi. Under the will of her husband, Cynthia Jenckes could do anything in Rhode Island which she could do in New Hampshire. She entered Rhode Island as the regular agent to pay the debts due by the testator. The probate of the will only was necessary. In this character she made a sale of a portion of the estate, having no authority to do so; this is admitted. In order to induce the purchase she gave her bond, by which it was stipulated that she would obtain an Act of the Legislature to make the sale valid, and this was done. Thus the principles of the laws of Rhode Island were applied, and the estate became the means of discharging the debts of the testator.

By a comparison of the acts of the courts of other States, we shall see how far the Act of Rhode Island exceeded the powers exercised by them. It is said that this is a case of a trial without notice—a confiscation! In no case where proceedings against executors are resorted to for the purpose of making lands a fund to pay debts, is notice given to heirs—not in the courts of other States—but in the Court of Probate in Rhode Island or New Hampshire. The reproaches which have been cast upon the acts of Cynthia Jenckes apply, therefore, with equal right to all proceedings of this description; nor is there any reason why notice should be given to the heirs; they take the estate, as has been stated, subject to the debts of the ancestor.

652* It has been said that in the proceedings Peters 2.

ings there was fraud; that the Legislature were deceived. This is denied; but if it were so, would this court set aside the law? The remedy in such a case would be by an application to the sovereign who had been deceived.

The Legislature passed the law for the purpose of giving validity to an act which all knew without it would not pass the estate.

The petition of Cynthia Jenckes was not that they should ratify the deed, but the sale; that is, that the sale should be effectual to convey the estate of the testator.

Who is the sovereign that can give validity to measures which are intended to pass the title to lands within the State? Is it not the Legislature of the State, and are not its acts effectual to do this unless they come in contact with the great principles of the social compact? What power has this court to say this deed shall not pass the estate? With which of the principles of the Constitution of the United States is it in conflict? Where is the provision which it opposes? It is not an *ex post facto* law. The prohibition in the Constitution in reference to *ex post facto* laws applies to criminal enactments. Is it a law which impairs the obligation of a contract? It affirms a contract. It is said to be incompatible with a republican government.

It denied that legislative, executive and judicial powers must be in different hands to constitute a republican form of government. That this should be so is a great and important principle, but it is not a test of republican government. There is nothing which prohibits the exercise of all the powers of government by a Legislature. If the guarantee of a republican form of government by the United States was violated by the government of Rhode Island, why had not the United States interfered?

The charter of the government of Rhode Island is a skeleton: it does not form the government. It is the usages of Rhode Island that compose the Constitution. The people say their Legislature shall have certain powers and be unlimited; this is, therefore, the form of government with which they are satisfied. Politicians may protest and orators may *de-**653** claim, but this does not affect the case. This court will not take away from them what they have said they will have.

The references which have been made to the proceedings of the Legislature show that it exercises all kinds of power. It is said this is a new case; suppose it is so, is it necessary to show the authority for the first law? The authority is that of the people. The Legislature always has acted as the emergency presented. Whom do they injure? They do not infringe their own constitution; and when they do so, it is for the people of the State to interfere. They do nothing which is contrary to the Constitution of the United States.

If the Legislature of Rhode Island possessed the power to order a sale, why not have power to confirm the sale? There is no exercise of a greater power here. A Court of Probate might not do it, but that court is limited in its powers. A subsequent ratification is equivalent to a prior authority.

It is said that the State has done what Parliament could not have done. Blackstone has been referred to, to show that private acts do

not pass without notice. Parliament cuts the knot and destroys contracts, and therefore notice is necessary.

There is no violation of contract in this act; the law only supposes an omitted case, and gives a remedy where the principles of law require it.

It is contended that the confirmation has no effect, because it operates on a void deed. A reference to authorities will show the error of this assumption. (1 Roll. Ab., 483; Ld. Raym., 292, 297.)

Cannot Parliament confirm a void deed? They can do so, and the right has never been questioned.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the Circuit Court of the District of Rhode Island in a case where the plaintiff in error was defendant in the court below. The original action was an ejectment, in the nature of a real action according to the local practice, to recover a parcel of land in North Providence in that State. There were several pleas pleaded of the statute of limitations, upon which it is unnecessary to say **654** *] anything, as the questions thereon have been waived at the bar. The cause was tried upon the general issue; and, by consent of the parties, a verdict was taken for the plaintiffs and a bill of exceptions allowed upon a *pro forma* opinion given by the court in favor of the plaintiffs, to enable the parties to bring the case before this court for a final determination. The only questions which have been discussed at the bar arise under this bill of exceptions.

The facts are somewhat complicated in their details, but those which are material to the points before us may be summed up in a few words.

The plaintiffs below are the heirs-at-law of Cynthia Jenckes, to whom her father, Jonathan Jenckes, by his will in 1787, devised the demanded premises in fee, subject to a life estate then in being, but which expired in 1794. By his will, Jonathan Jenckes appointed his wife Cynthia, and one Arthur Fenner, executrix and executor of his will. Fenner never accepted the appointment. At the time of his death Jonathan Jenckes lived in New Hampshire, and after his death his widow duly proved the will in the proper Court of Probate in that State, and took upon herself the administration of the estate as executrix. The estate was represented insolvent, and commissioners were appointed in the usual manner to ascertain the amount of the debts. The executrix, in July, 1790, obtained a license from the Judge of Probate in New Hampshire to sell so much of the real estate of the testator as, together with his personal estate, would be sufficient to pay his debts and incidental charges. The will was never proved, or administration taken out in any probate court of Rhode Island. But the executrix, in November, 1791, sold the demanded premises to one Moses Brown and Oziel Wilkinson, under whom the defendant here claims, by a deed, in which she recites her authority to sell as aforesaid, and purports to act as executrix in the sale. The purchasers, however, not being satisfied with her authority

to make the sale, she entered into a covenant with them on the same day, by which she bound herself to procure an Act of the Legislature of Rhode Island, ratifying and confirming the title so granted; and, on failure thereof, to *repay the purchase money, &c., &c. [**655** She accordingly made an application to the Legislature of Rhode Island for this purpose, stating the facts in her petition, and thereupon an Act was passed by the Legislature at June session, 1792, granting the prayer of her petition and ratifying the title. The terms of this Act we shall have occasion hereafter to consider. In February, 1792, she settled her administration account in the Probate Court in New Hampshire, and thereupon the balance of £15 7 7 only remained in her hands for distribution.

Such are the material facts; and the questions discussed at the bar ultimately resolve themselves into the consideration of the validity and effect of the Act of 1792. If that Act was constitutional, and its terms, when properly construed, amount to a legal confirmation of the sale and the proceedings thereon, then the plaintiff is entitled to judgment, and the judgment below was erroneous. If otherwise, then the judgment ought to be affirmed.

It is wholly unnecessary to go into an examination of the regularity of the proceedings of the Probate Court in New Hampshire, and of the order or license there granted to the executrix to sell the real estate of the testator. That cause could have no legal operation in Rhode Island. The legislative and judicial authority of New Hampshire were bounded by the territory of that State, and could not be rightfully exercised to pass estates lying in another State. The sale, therefore, made by the executrix to Moses Brown and Oziel Wilkinson, in virtue of the said license, was utterly void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity.

Upon the death of the testator, his lands in Rhode Island, if not devised, were cast by descent upon his heirs, according to the laws of that State. If devised, they would pass to his devisees according to the legal intentment of the words of the devise. But, by the laws of Rhode Island, the probate of a will in the proper Probate Court is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. No probate [**656** of this will has ever been made in any court of probate in Rhode Island, but that objection is not now insisted on; and if it were, and the Act of 1792 is to have any operation, it must be considered as dispensing with or superseding that ceremony.

The objections taken by the defendants to this Act are, in the first place, that it is void as an act of legislation, because it transcends the authority which the Legislature of Rhode Island can rightfully exercise under its present form of government. And, in the next place, that it is void as an act of confirmation, because its terms are not such as to give validity to the sale and deed so as to pass the title of the testator, even if it were otherwise constitutional.

The first objection deserves grave considera-

tion from its general importance. To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation in general, and of acts of the character of the present in particular, this court has listened with attention, and felt the full force of the reasoning. It is an exercise of power which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary to their injury, and sometimes to their ruin, that a Legislature invested with the power can scarcely be too cautious or too abstemious in the exertion of it.

We must decide this objection, however, not upon principles of public policy, but of power; and precisely as the State Court of Rhode Island itself ought to decide it.

Rhode Island is the only State in the Union which has not a written constitution of government, containing its fundamental laws and institutions. Until the Revolution in 1776, it was governed by the charter granted by Charles II. in the fifteenth year of his reign. That charter has ever since continued in its general provisions to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people; and, except so far as it has been modified to meet the exigencies of the Revolution, may be considered as now a fundamental law. By this charter the power to make laws is granted **657***] to the General *Assembly in the most ample manner, "so as such laws, &c., be not contrary and repugnant unto, but as near as may be agreeable to the laws, &c., of England, considering the nature and constitution of the place and people there." What is the true extent of the power thus granted must be open to explanation, as well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of *Magna Charta* were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offense. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong

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and direct expressions of such an intention. In *Terrett v. Taylor* (9 Cranch, 43), it was held by this court that a grant or title to lands once made by the Legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative Act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully *acquired. We know of no **658** case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island have ever delegated to their Legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine.

The question then arises, whether the Act of 1792 involves any such exercise of power. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him is, upon the death of the party under whom he claimed, immediately involved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens which have been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested interest; and it confers no title, except to what remains after every such lien is discharged. In the present case, the devisee under the will of Jonathan Jenckes without doubt took a vested estate in fee in the lands in Rhode Island. But it was an estate still subject to all the qualifications and liens which the laws of that State annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover to establish the fact that the estate so vested has been divested; but that it has been divested in a manner inconsistent with the principles of law.

By the laws of Rhode Island, as, indeed, by the laws of the other New England States (for the same general system pervades them on this subject), the real estate of testators and intestates stands chargeable with the payment of their debts upon a deficiency of assets of personal estate. The deficiency being once ascertained in the Probate Court, a license is granted by the proper judicial tribunal, upon the *petition of the executor or adminis- **659** trator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island the license to sell is granted, as matter of course, *without notice* to the heirs or devisees, upon the mere production of proof from the Probate Court of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may

enter and recover the possession of the estate, notwithstanding any intermediate descents, sales, disseisins, or other transfers of title or seisin. If, therefore, the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operations of law, divested and superseded; and so, *pro tanto*, in case of a partial sale.

From this summary statement of the laws of Rhode Island, it is apparent that the devisee under whom the present plaintiffs claim, took the land in controversy subject to the lien for the debts of the testator. Her estate was a defeasible estate, liable to be divested upon a sale by the executrix in the ordinary course of law for the payment of such debts; and all that she could rightfully claim would be the residue of the real estate after such debts were fully satisfied. In point of fact, as it appears from the evidence in the case, more debts were due in Rhode Island than the whole value for which all the estate there was sold; and there is nothing to impeach the fairness of the sale. The probate proceedings further show that the estate was represented to be insolvent, and, in fact, it approached very near to an actual insolvency. So that upon this posture of the case, if the executrix had proceeded to obtain a license to sell, and had sold the estate according to the general laws of Rhode Island, the devisee and her heirs would have been divested of their whole interest in the estate, in a manner entirely complete and unexceptionable. They have been divested of their formal title in another manner in favor of creditors entitled to the estate; or, rather, their formal title has been made subservient to the paramount title of the **660***] creditors. *Some suggestions have been thrown out at the bar intimating a doubt whether the statutes of Rhode Island, giving to its courts authority to sell lands for payment of debts, extended to cases where the deceased was not, at the time of his death, an inhabitant of the State. It is believed that the practical construction of these statutes has been otherwise. But it is unnecessary to consider whether that practical construction be correct or not, inasmuch as the laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts, whether inhabitants or not. If the authority to enforce such a charge by a sale be not confided to any subordinate court, it must, if at all, be exercised by the Legislature itself. If it be so confided, it still remains to be shown that the Legislature is precluded from a concurrent exercise of power.

What, then, are the objections to the Act of 1792? First, it is said that it divests vested rights of property. But it has been already shown that it divests no such rights, except in favor of existing liens, of paramount obligation; and that the estate was vested in the devisee expressly subject to such rights. Then, again, it is said to be an act of judicial authority, which the Legislature was not competent to exercise at all; or if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the Act is to be considered as a judicial act; but as an exercise of legislation. It purports to be a legislative

resolution, and not a decree. As to notice, if it were necessary (and it certainly would be wise and convenient to give notice where extraordinary efforts of legislation are resorted to which touch private rights), it might well be presumed, after the lapse of more than thirty years, and the acquiescence of the parties for the same period, that such notice was actually given. But, by the general laws of Rhode Island upon this subject, no notice is required to be, or is in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange if the Legislature might not do without notice the same act which it would delegate authority to another to do without notice. If the Legislature had authorized a future sale by the executrix *for the payment of debts, [**661**] it is not easy to perceive any sound objection to it. There is nothing in the nature of the Act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate, instead of the Legislature itself. It is remedial in its nature, to give effect to existing rights.

But it is said that this is a retrospective Act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith (for it is not attempted to be impeached by fraud); and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the Legislature was satisfied that the sale was *bona fide*, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the Legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that in a State not having a written constitution, acts of legislation having a retrospective operation are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed as a general principle by courts of justice. The present case is not so strong in its circumstances as that of *Calder v. Bull* (3 Dall. Rep., 386), or *Rice v. Parkman* (16 Mass. Rep., 226); in both of which the resolves of the Legislature were held to be constitutional.

Hitherto, the reasoning of the court has proceeded upon the ground that the Act of 1792 was in its terms sufficient to give complete validity to the sale and deed of the executrix, so as to pass the testator's title. It remains to consider whether such is its predicament in point of law.

For the purpose of giving a construction to the words of the Act, we have been referred to the doctrine of confirmation *at the [**662**] common law, in deeds between private persons. It is said that the Act uses the appropriate words of a deed of confirmation, "ratify and confirm;" and that a confirmation at the common law will not make valid a void estate or Act,

but only one which is voidable. It is in our judgment wholly unnecessary to enter upon any examination of this doctrine of the common law, some of which is of great nicety, and strictness; because the present is not an act between private persons having interests and rights to be operated upon by the terms of their deed. This is a Legislative Act, and is to be interpreted according to the intention of the Legislature apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the Legislature. It cannot be doubted that an Act of Parliament may by terms of confirmation make valid a void thing if such is its intent. The cases cited in Plowden, 399; in Comyn's Dig., Confirmation, D; and in 1 Roll. Abr., 583, are directly in point. The only question then is, what is the intent of the Legislature in the Act of 1792? Is it merely to confirm a void act, so as to leave it void; that is, to confirm it in its infirmity? or is to give general validity and efficacy to the thing done? We think there is no reasonable doubt of its real object and intent. It was to confirm the sale made by the executrix, so as to pass the title of her testator to the purchasers. The prayer of the petition, as recited in the Act, was that the Legislature would "ratify and confirm the sale aforesaid, which was made by a deed executed by the executrix, &c." The object was a ratification of the sale, and not a mere ratification of the formal execution of the deed. The language of the Act is, "on due consideration whereof it is enacted, &c., that the prayer of the said petitioner be granted, and that the deed be, and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in the estate mentioned in said deed which belongs to the said Jonathan Jenckes at the time of his decease." It purports, therefore, to grant the prayer, which asks a confirmation of the sale, and confirms the deed as a conveyance of the **663** right and interest of the testator. It is not an act of confirmation by the owner of the estate; but an Act of confirmation of the sale and conveyance by the Legislature in its sovereign capacity.

We are, therefore, all of opinion that the judgment of the Circuit Court ought to be reversed, and that the cause be remanded with directions to the court to award a *venire facias de novo*.

See S. C., 6 Pet., 317; 10 Pet., 294.

Cited—3 Pet., 154; 5 Pet., 401; 6 Pet., 715; 10 Pet., 296; 3 How., 565; 6 How., 443; 7 How., 69; 24 How., 296; 1 Wall., 204; 7 Wall., 624; 8 Wall., 603; 12 Wall., 671; 13 Wall., 662; 23 Wall., 149; 4 Otto, 148; 10 Otto, 244; 4 Dill., 344; 1 Story, 444; Bald., 72, 220; 1 Blatch., 109; 7 Bank. Reg., 208; 3 Biss., 235; Abb. Adm., 139; 2 Paine, 80.

664*] *CLAUDIUS F. LE GRAND,
Appellant,

v.

NICHOLAS DARNALL, *Appellee*.

Maryland Act as to manumission—effect of devise of property to slave.

The Act of the Legislature of Maryland, passed in 1796, ch. 47, sec. 13, declares "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of

any slave or slaves belonging to such person or persons, by his, her, or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence." The time of freedom of the appellee in this case commenced when he was about eleven years old. Held, that his manumission by will was valid.

The Court of Appeals of Maryland has decided that a devise of property real or personal by a master to his slave, entitles the slave to his freedom by necessary implication. This court entertains the same opinion. [670]

A PPEAL from the Circuit Court of the United States for the District of Maryland.

The facts of the case appear on the argument of the counsel for the appellee, and in the opinion of the court.

Mr. Taney, for the appellant, submitted the case without argument; stating, that it had been brought up merely on account of its great importance to the appellee; which rendered it desirable that the opinion of the Supreme Court should be had on the matters in controversy.

Mr. Stewart, for the appellee.

The case presented by the bill, answers and depositions, is as follows:

Bennett Darnall, of Ann Arundel county, in the State of Maryland, by his will dated August 4th, 1810, devised to his son, Nicholas Darnall, the defendant in this case, certain lands lying in the county and State aforesaid.

The mother of the said Nicholas was the slave of the testator, and Nicholas was born a slave to his father.

*Bennett Darnall, in his will, refers [**665** to two deeds of manumission executed by him, one in 1805 and the other in 1810, in both of which it seems Nicholas was included with other slaves designed to be emancipated by these deeds. By some omission neither of these deeds are exhibited.

The testator made two codicils to his will, the last of which is dated January 20th, 1814, and was proved before the register of wills, January 31st, 1814. Bennett Darnall must therefore have died in January, 1814. Nicholas Darnall, the defendant, sold the land referred to in the proceedings to Le Grand, the complainant, and it appears by the agreements exhibited with the bill that at the time the contract was first made neither party supposed there was any question about the title. But afterwards, it seems, doubts were suggested to Darnall, which he communicated to Le Grand, and the agreements above mentioned were thereupon made with full knowledge on both sides of the supposed defect in the title, and were framed with reference to it.

Le Grand gave his notes for the purchase money, according to the agreement, and a suit was brought on one of them, and judgment recovered in the Circuit Court for the District of Maryland; whereupon he filed his bill in that court, praying an injunction on the ground that Darnall was unable to convey him a good title to the land.

The defect supposed to exist, and alleged in the bill, is this; that Darnall was not more than ten years of age at the time of his father's death, and at that tender age was unable to work and gain a sufficient maintenance and livelihood, and was incapable, therefore, of receiving manumission by the laws of Maryland.

The answer of Nicholas Darnall insists that he was, at the time of the testator's death, able to work and gain a sufficient livelihood and maintenance.

Four witnesses were examined.

John Mercer and Robert Welch prove that Nicholas was about eleven years of age at the time of his father's death, and describe him as a fine, healthy, intelligent boy, able by his work to maintain himself. Dr. James Stewart **666***] and Samuel *Moore state that boys of eleven years of age in Maryland are able to support themselves by their own labor, and specify the kind of work in which they may be usefully employed.

Upon this answer and evidence the court dissolved the injunction and dismissed the bill.

It is proper to say that the whole of these proceedings have been amicable; that Le Grand is willing to pay if his title is a safe one, and that Darnall does not wish Le Grand to pay unless he can make a good title to him.

By the Act of 1796, chap. 67, sec. 13, slaves may be manumitted in Maryland by last will; provided they be under forty five years of age, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence.

In the case of *Hall v. Mullin* (5 Harris & Johns., 190), the Court of Appeals have decided that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication.

Under this decision the will of Bennett Darnall gave freedom to Nicholas, provided he was in a condition to receive it at the testator's death. The omission, therefore, to produce the deeds of manumission is not material. If they are regarded as not proved, or as not effective for the purpose intended, still the defendant may rely on his title under the will.

In the case of *Hamilton v. Cragg* (6 Harris & Johns., 16), it was held that an infant slave (only three years of age at the time of the death of the testator who attempted to manumit him), unable to gain a sufficient maintenance and livelihood, could not be manumitted. It was this decision that created the doubt in regard to the title of Nicholas Darnall; for until that case was decided, it had been generally supposed that this provision in the statute was intended to guard against the manumission of slaves who, although under forty-five years of age, were suffering under incurable diseases or constitutional infirmities which would most probably always disable them from maintaining themselves by their own labor, and make them **667***] a charge upon the public. It had *not been generally supposed to apply to the case of children for whose maintenance provision could, perhaps, always be made by binding them to serve as apprentices, and especially was considered inapplicable to those children for whose support abundant provision was made by the testator who gave the freedom.

But without attempting to disturb the au-

thority of that case, the proof in this cause brings it expressly within the principle decided in *Hamilton v. Cragg*; and entitles the party to his freedom. The defect of title alleged in the bill is consequently without foundation, and the decree of the court below fully justified.

Mr. Justice DUVAL delivered the opinion of the court:

This case is brought up by appeal from a decree of the Circuit Court for the District of Maryland, sitting as a court of equity; and is submitted on written argument. The principal facts are the following:

Bennett Darnall, late of Anne Arundel county, Maryland, on the 4th day of August, 1810, duly made and executed his last will and testament, and thereby devised to his son, the appellee, several tracts of land in fee, one of which was called Portland Manor, containing by estimation five hundred and ninety-six acres. The mother of Nicholas Darnall was the slave of the testator, and Nicholas was born the slave of his father, and was between ten and eleven years old at the time of the death of the testator. Bennett Darnall, in his will, refers to and confirms two deeds of manumission executed by him; one bearing date in 1805 and the other in 1810. In both of those deeds Nicholas Darnall and a number of other slaves were included, and emancipated after his decease. The testator died in the month of January, 1814.

Nicholas Darnall, on his arrival to full age, took possession of the property devised to him, and on the 26th of April, 1826, he entered into a contract with Le Grand, the appellant, for the sale of the tract called Portland Manor for the consideration of twenty-two dollars per acre, amounting to the sum of thirteen thousand one hundred and twelve dollars, payable *by agreement in six annual payments [***668** with interest. Le Grand passed his notes pursuant to the terms of the agreement, and received the bond of Darnall to convey to him the property in fee-simple upon payment of the purchase money. Le Grand was thereupon put into possession of the land. At the time the contract was made, the parties believed the title to the land to be unquestionable. Soon afterwards, however, doubts were suggested to Darnall, and he communicated them to Le Grand, and they entered into a supplementary and conditional agreement, without varying in substance the original contract. Darnall was not more than ten or eleven years of age at the time of the death of his father; and, by a law of the State of Maryland, it is provided that no manumission by last will and testament shall be effectual to give freedom to any slave, unless the said slave shall be under the age forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom intended to be given shall take place.

A decision had lately been made by the Court of Appeals of Maryland in the case of *Hamilton v. Cragg*, that an infant (whose age did not exceed two years when his title to freedom commenced) was not able to work and gain a sufficient maintenance and livelihood, and was therefore adjudged to be a slave. This decision of the highest court of law in the State gave rise to doubts concerning the capability

of the appellee to make a good title to the land which he had sold to the appellant. Darnall deposited the amount of the first payment—that is to say, \$3,000—in the hands of Benjamin Tucker, of Philadelphia, to be held with the consent of the appellant, subject to the result of an examination into the title. In consequence of the decision of the Court of Appeals of Maryland, the heir-at-law of Bennett Darnall, the testator, made claim to the land; and threatened to commence suit for the recovery of it. Le Grand, being alarmed about the title, refused to make any further payment; and an action was commenced against him and judgment recovered for the second payment. To prevent an execution, and to ascertain under all the circumstances of the case whether the appellee could make a good title to the land which he 669*] had sold to him, he filed his bill of complaint in equity in the Circuit Court, stating the circumstances, and obtained an injunction against any further proceedings at law. The appellee put in his answer, admitting all the facts stated in the bill except that of his inability to gain a maintenance and livelihood by labor when his right to freedom commenced. The case was submitted to the court upon the bill, answer, exhibits and proof which had been taken; and the court, upon due consideration, ordered the injunction to be dissolved and decreed the bill to be dismissed. From this decree an appeal was taken to this court, and the cause is now to be finally decided.

There is one question only to be discussed. If the appellee, at the time of the death of the testator, was entitled to his freedom under the will and deeds of manumission before mentioned, then his title to the land sold was unquestionable. His claim to freedom under the instruments above referred to depends upon a just construction of the Act of the Legislature of Maryland passed in the year 1796, ch. 47, sec. 13.

The words of the Act are these: “that all persons capable in law to make a valid will and testament, may grant freedom to and effect the manumission of any slave or slaves belonging to such person or persons by his, her, or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided, always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves if the same shall be to prejudice of creditors; nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence.” The time of the freedom of the appellee commenced immediately after the death of the testator, when, according to the evidence, he was about eleven years old. Four respectable witnesses of the neighborhood were examined. They all agree in their testimony that Nicholas was well grown, healthy and intelligent, and of good bodily and mental 670*] capacity; that he and his brother Henry could readily have found employment, either as house servant boys, or on a farm, or as apprentices; and that they were able to work and gain a livelihood. The testator devised to

each of them real and personal estate to a considerable amount. They had guardians appointed, were well educated, and Nicholas is now living in affluence. Experience has proved that he was able to work and gain a sufficient maintenance and livelihood. No doubt as to the fact has ever been entertained by any who know him. Of course he was capable in law to sell and dispose of the whole or any part of his estate, and to execute the necessary instruments of writing to convey a sufficient title to the purchase.

The Court of Appeals of Maryland, in the case of *Hale v. Mullin*, decided that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication. This court entertains the same opinion.

It is not the inclination of this court to express any opinion as to the correctness of the decision of the Court of Appeals of Maryland in the case of *Hamilton v. Cragg*. It is unnecessary in reference to the case under consideration.

The decree of the Circuit Court is affirmed; and, by consent of parties, without costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed without costs.

Cited—19 How., 423, 589, 600.

*THE BANK OF COLUMBIA, [*671
Plaintiffs in Error,
v.

GEORGE SWEENEY, *Defendant in Error.*

Construction of Maryland Act incorporating Bank of Columbia.

The Act of the Legislature of Maryland of 1793, incorporating The Bank of Columbia, one of the sections of which gives to the bank a summary proceeding against debtors to the bank, did not intend to interfere with any legal defense against the claim of the bank the party might have. It does not prescribe the nature of that defense, or deprive him of any which might have been used, had the action been commenced in the usual way.

THIS was a writ of error to the Circuit Court for the county of Washington. The same case was before this court at January term, 1828, on a motion for a *mandamus*. (1 Peters, 567.)

Upon issue being joined in the Circuit Court on the plea of the statute of limitations, that court decided that the defendant was entitled to avail himself of the statute against the claims of the plaintiffs proceeding under the provisions of their charter, which gives them summary process against their debtors.

The case was submitted to this court on a written argument by *Mr. Jones* and *Mr. Key*. The plaintiffs below prosecuted this writ of error, and sought to reverse the judgment of the Circuit Court.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

In 1793 the State of Maryland passed an Act incorporating The Bank of Columbia, which contains the following section: "And, whereas it is absolutely necessary that debts due to the said bank should be punctually paid to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes given or indorsed by **672***] them, with an express consent *in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same becomes due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his last place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the General Court, or of the county in which the said delinquent or delinquents may reside, or did at the time he or they contracted the debt reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue *capias ad satisfaciendum, fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the General Court, and the clerks of the several county courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same which shall first sit after the issuing thereof, and shall be as valid and as effectual in law to all intents and purposes as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court, and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor; provided, always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this State to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution the court before whom it is returned shall, and may order an issue to be **673***] joined, and trial *to be had in the same court at which the return is made; and shall make such other proceedings that justice may be done in the speediest manner."

In pursuance of these provisions of the act, a *capias ad satisfaciendum* was issued by the bank against the defendant on a promissory note signed by him and indorsed to the bank. The defendant appeared in court, and claimed

the right allowed by the act to dispute the debt; upon which the court ordered an issue to be made up between the parties.

The plaintiff offered to file a declaration, tendering an issue on a wager, to which the defendant objected, and the court sustained the objection. A declaration in *assumpsit* was then filed, to which the defendant pleaded the statute of limitations.

On the trial the defendant moved the court to instruct the jury, that if they should be satisfied by the evidence that three years had elapsed between the expiration of the time limited for the payment of the said note and the issuing of the execution by the clerk in this cause upon the letter and paper sent by the president of the bank and given in evidence, they ought to find a verdict for the defendant, on the issue joined on the plea of the statute of limitations.

The court gave the instruction required, and the jury found a verdict for the defendant. The counsel for the plaintiff excepted to the opinion, and has brought the cause into this court by writ of error.

The execution being the first process under this extraordinary act, its emanation must be equivalent, so far as respects the bar created by the act of limitations, to suing out original process in a suit commenced in the usual way. There is, therefore, no error in that part of the instruction which relates to the period to which time was to be calculated; and the only inquiry is, whether the defendant could avail himself of the act of limitations.

The great object of the Incorporating Act appears to have been to give the bank the most expeditious remedy possible for the collection of the money due to it. The affidavit of the president supplies the place of a judgment, and those proceedings after judgment which are allowed for the purposes *of justice, but [**674** may be used for mere delay, are taken away. The execution "shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor." But the law did not intend, by this summary process, to deprive the debtor of all defense. Although all delay was cut off, he was permitted, on the return of the execution, to dispute the whole, or any part of the debt. But while the law allows him to dispute the debt, it still guards against delay. An issue is to be made up immediately and tried at the same term. While the law thus carefully guards against procrastination, it does not interfere with the defense which the party is at liberty to set up. It does not prescribe the nature of that defense, or deprive him of any which might have been used, had the action been commenced in the ordinary way. Had The Bank of Columbia proceeded in the common course of law, the defendant could have pleaded the act of limitations in bar of the action. If we are correct in saying that the object of the section of the Incorporating Act which has been recited was expedition, not the ademption, of legal defenses we think this a mode of disputing the debt of which he might still avail himself.

There is no error in the judgment of the Circuit Court, and it is affirmed with costs.

This cause came on to be heard on a transcript of the record from the Circuit Court of

the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof it is considered, ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Aff'g, 2 Cranch, C. C., 704.

675* *GEORGE BEACH, Plaintiff in Error,*

v.

JONATHAN VILES ET AL., Defendants in Error.

Local statute—foreign attachment—assignee of insolvent debtor.

This being a suit upon a local statute, giving a particular remedy in the nature of a foreign attachment against garnishees who possess goods, effects, or credits of the principal debtor, the decisions which have been made on the construction of that statute by the State Court of Massachusetts are entitled to great respect; and ought, in conformity to the uniform practice of this court, to govern its decisions. [674]

Where, under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees under the assignment are insufficient to pay the amount of the just debts and dividends due to the assignees, the established doctrine in Massachusetts is that the assignees cannot be holden as trustees of the debtor to the creditor who is the plaintiff in an attachment, so as to be chargeable to him in the suit. Even if the assignment were held to be constructively fraudulent in point of law, they would be entitled to retain their own *bona fide* debts; for as to those, they stand upon equal grounds with any other creditors. This is understood to be the clear result of the cases decided in Massachusetts. [675]

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The original process in this case was founded on the statute of Massachusetts passed 28th of February, 1795, entitled, "An Act to enable creditors to receive their just demands out of the goods, effects, and credits of their debtors, when the same cannot be attached by the ordinary process of law." In said process it is alleged that Loud and Hunt, being indebted to George Beach, as set forth in the process, refused to pay the same, to his damage \$4,000; and in the process it is also alleged that Loud and Hunt had not in their own hands and possession goods or estate to the value of \$4,000, but had entrusted and deposited in the hands of said defendants, goods, effects and credits to the value; and the said defendants were summoned to show cause why execution to be issued on such judgment as George Beach might recover in said suit against Loud and Hunt should not issue against their goods, effects and credits in the hands and possession of these defendants. The process was dated the 21st day **676*** of November, 1826; service was made on the 23d of the same month, and it was entered at the May term of the Circuit Court of the United States in Boston, in 1827.

The defendants, the supposed trustees, appeared, and severally answered under oath, as set forth in the record. From their answers it appears that, on the 15th day of December, 1825, an indenture of assignment was made, which is also set forth in the record, in which

Loud and Hunt were parties of the first part; Nathan Viles, Henry Atkins, and Daniel Holbrook, preferred creditors, were parties of the second part; and sundry other persons, creditors of Loud and Hunt, who might execute the indenture within six months from its date, were parties of the third part.

By this indenture Loud and Hunt assigned to the defendants certain real and personal property, effects and demands, in trust, to sell and collect the same, and after defraying all expenses, first, to pay the parties of the second part all sums due them respectively, and all sums for which they were liable on account of Loud and Hunt as indorsers or otherwise; second, to pay the residue to such creditors mentioned in the schedule thereto annexed as should become parties in proportion to their demands, by an equal rate per dollar; third, to pay over the surplus, if any, and also the dividend which would have been payable to any creditor, if he had not neglected to become a party thereto, to Loud and Hunt.

There is a clause in the indenture providing for adding to and perfecting the schedules to carry into effect the intentions of the parties; a general power to receive and collect, and a clause accepting the property assigned in full; and each assignee is to be answerable for his own acts only.

The nominal amount or estimate of the property assigned exceeded the amount of debts and liabilities of the assignees; but by reason of losses on property then in hands of certain consignees and bad debts, the produce thereof fell much short of it.

The just claims of those creditors who became parties to the indenture, according to its terms, and before the process in this case was served, amount to about \$20,000. The parties of the *first and second part, and nearly all **677** those of the third part, signed and sealed the indenture on the day of its date, and all who are now parties became so within the term of six months therein prescribed. The assignees took possession of the property assigned on the same 15th of December, and fitted and prepared the same (a large portion of which consisted of materials in the hands of manufacturers in an unfinished state) for sale. They also collected the demands, as far as practicable, and realized in money from the whole personal property and effects, including the sums expended in completing and preparing for sale, the sum of \$8,309.28. They also advertised the real estate; but were prevented from effecting a sale by reason of certain attachments thereon. This real estate they estimate to be worth \$2,000, which cannot be reached by the trustee process. It also appears from the answers that the consideration for the said assignment was truly, as therein expressed, for sums justly due from Loud and Hunt to the said defendants and other creditors, and the liabilities before that time incurred by Holbrook for Loud and Hunt, to a greater amount than the whole value of the property so assigned; that the whole proceeds of the said property and effects had actually been applied in part discharge of the said dues and liabilities before the service of the plaintiff's process, and in pursuance of the provisions of said indenture; excepting the sum of \$805.44, in the hands of

Viles and Atkins, which last sum they held to be appropriated according to said trust, and that no farther sums would probably ever be realized therefrom. That the sums necessarily expended by the assignees in and about the premises amounted to \$1,626.57, that the assignment was made *bona fide* and without any intent to defraud, delay, or hinder any of the creditors of Loud and Hunt from recovering their debts.

And they further declared that the defendants had not at the time of the service of the plaintiff's writ upon them any goods, effects or credits in their hands or possession belonging to Loud and Hunt, or either of them. It also appears from said answers that Holbrook was perfectly solvent in his own affairs and free from **678***] debt, excepting as *the surety of Loud and Hunt, and that the assignment was expected to prevent his becoming insolvent on their account.

The question before the Circuit Court was, whether the defendants, upon their said answers and disclosures, should be charged as the trustees of said Loud and Hunt, or discharged.

The Circuit Court having intimated that this case fell within the principle of the decisions of the Supreme Judicial Court of Massachusetts, and particularly the case of *Andrews v. Ludlow et al.* (5 Pick. Rep., 28), the counsel for the plaintiff declined arguing the case; and judgment was rendered that the supposed trustees be severally discharged on their answers. The plaintiff then sued out his writ of error to have said judgment reversed.

The case was argued by *Mr. Webster* for the plaintiff in error; *Mr. D. A. Simmons* for the defendants.

Mr. Justice STORY delivered the opinion of the court. After stating the facts, he proceeded as follows:

The present being a suit upon a local statute, giving a particular remedy in the nature of a foreign attachment against garnishees who possess goods, effects or credits of the principal debtor, the decisions which have been made upon the construction of that statute by the

State courts are entitled to great respect; and ought, in conformity to the uniform practice of this court, to govern our own decisions. This consideration saves us from the necessity of discussing many of the questions which have been so elaborately argued at the bar. If we were called upon to decide them upon general principles applicable to conveyances, which are assailed as being in fraud of creditors, we should have much difficulty in arriving at a conclusion upon some of the points, and should require further time for deliberation. But we are of opinion that the case may be finally disposed of upon a single ground which has received the sanction of the highest State court of Massachusetts. It is this: It appears from the facts that the proceeds of all the property received by the assignees under this assignment are insufficient to pay *the amount of [**679** the just debts and demands due, *bona fide*, to the assignees. Under such circumstances the established doctrine in Massachusetts is that the assignees cannot be holden as trustees of the debtor under this process so as to be chargeable to the creditor, who is plaintiff in the suit. Even if the assignment were held to be constructively fraudulent, in point of law they would be entitled to retain for their own *bona fide* debts; for as to these they stand upon equal grounds with any other creditors. This is understood to be the clear result of the cases decided in Massachusetts; and it therefore becomes unnecessary to go into the more extensive inquiries presented by the arguments at the bar.

Upon this ground we are all of opinion that the judgment of the Circuit Court ought to be affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—1 Ware, 243.

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APPENDIX.

681*]

[*NO. I.]

Note by Mr. Justice Johnson, on the exposition of the phrase "ex post facto" in the Constitution of the United States.

The case in which the meaning of the phrase *ex post facto* in the Constitution came first to be considered, was that of *Calder et ux. v. Bull et ux.* (3 Dall., 386).

Mrs. Calder claimed as heiress to one Morrison, Bull and wife claimed by devise, and the question was *devisavit vel non*. The Court of Probate in Connecticut, having jurisdiction of the question, decided against the will; but there was a right of appeal from that decision to the Supreme Court of Errors, provided it was prosecuted within eighteen months. It was not prosecuted within the limited time, and thereby, it was contended, the decision of the Court of Probate became final against the will, and ought to have quieted Calder and wife in possession of the property.

But Bull and wife made application to the Legislature of Connecticut for relief, and obtained from them a resolution or law setting aside the decree of the Court of Probate, and granting Bull a new hearing in that Court. On that new hearing the decision was in favor of the will; and Calder and wife were, of course, evicted of an interest which they contended had been finally affirmed in them by the previous decision and the effect of the limitation barring the right of appeal.

The argument of counsel is not reported, but it is obvious from the opinions ascribed to the judges that, in behalf of Calder, it was contended that the Act of the Connecticut Legislature was an *ex post facto* law, in the sense of the Constitution, and void; and in behalf of Bull, that the Legislature had exercised a power constitutional in Connecticut, and, therefore, not *ex post facto* in the sense of the Constitution.

This appears distinctly the ground upon which Cushing, the presiding judge, places his opinion. "The case," says he, "appears to me to be clear of all difficulties, taken either way; if the act is a judicial act, it is not touched by the Federal Constitution; and if it is a legislative Act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut."

That State, it must be observed, had at that time no written constitution; and as in Rhode Island at the present day, what it could constitutionally do could only be decided by what it did habitually. The decision, therefore, rendered at this term in the case of *Wilkinson v. Leland et al.* was precisely that in the case of *Calder v. Bull*.

682*] *That the cause did not go off on the ground that the phrase *ex post facto* in the Constitution

was inapplicable to civil acts, is distinctly expressed also by Judge Iredell. "Upon the whole," says he, "though there cannot be a case in which an *ex post facto* law in criminal matters is requisite or justifiable, yet, in the present instance, the objection does not arise; because, 1. If the Act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution; and 2. Even if it was a legislative Act, it is not within the meaning of the prohibition." In the commencement of the opinion he expresses himself thus: "From the best information to be collected, relative to the constitution of Connecticut, it appears that the Legislature of that State has been in the uniform and uninterrupted exercise of a general superintending power over its courts of law by granting new trials." And again: "When Connecticut was settled, the right of empowering her Legislature to superintend the courts of justice was, I presume, early assumed; and its expediency, as applied to the local circumstances and municipal policy of the State, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative authority."

Here, then, is a positive opinion as to the judicial character of this transaction, and it shows that his vote upon the decision rendered must rest upon the first of the alternatives stated in his conclusion. And the mode in which he enters upon the examination of the second alternative shows that he attaches no importance to it. He enters upon it hypothetically, commencing with the words, "But let us for a moment suppose."

Judge Patterson also says: "True it is, that the awarding of new trials falls properly within the province of the judiciary; but if the Legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must in such cases respect their decisions as flowing from a competent jurisdiction or constitutional organ; and therefore we may, in the present instance, consider the Legislature of the State as having acted in their customary judicial capacity."

Judge Chase expresses himself thus: "Whether the Legislature of any State can revise and correct by law a decision of its courts of justice, although not prohibited by the constitution of the State, is a question of very great importance, and not necessary to be now considered; because the resolution or law in question does

not go so far." And again: "It does not appear to me that the resolution or law in question is contrary to the charter of Connecticut or its constitution, which is said by counsel to be composed of its charter, Acts of Assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the constitution thereof are void. In the present case they have, both in the inferior and superior courts, decided that the resolution or law in question was not contrary to either their State or the Federal Constitution.

Thus, it appears that all the judges who sat in the case of *Calder v. Bull* concurred in the opinion that the decision of the Court of Probate, and the lapse of the time given for an appeal to their Court of Errors, were not final upon the rights of the parties; that there still existed in the Legislature a controlling and revising power over the controversy; and that this was duly exercised in the reversal of the first decree of the Court of Probate. And who can doubt that the Legislature of a State may be vested by the State constitution with such a power? And what invasion of private right can result from the exercise of such a power when so delegated? All the rights claimed or **683** exercised in a State which thus *modify the administration of justice, are held and exercised under the restrictions which such a constitution imposes.

How, then, could the question whether the phrase *ex post facto* was confined to criminal laws, arise in this cause? the law complained of was equally free from that characteristic; though the phrase be held to extend to laws of a civil character.

I then have a right to deny that the construction intimated by three of the judges in the case of *Calder v. Bull* is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.

It is laid down, indeed, as a principle of the Roman civil law, "that in cases which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are of no value;" Ayliffe, 5: and the English law concurs with the Roman in this, "that an extrajudicial opinion, given in or out of court, is no good precedent; for it is no more than the *prolatum*, or saying, of him who gives it." An opinion given in court, if not necessary to the judgment given of record, is, according to Vaughan, no judicial opinion at all, and consequently no precedent; for the same judgment might as well have been given if no such, or a contrary opinion, had been brought; nor is such an opinion any more than a *gratisdictum*." Ayliffe, 9.

That the phrase *ex post facto* is not confined in its ordinary signification to criminal law or criminal statutes, admits of positive demonstration; and with great respect for my learned predecessors, but a due regard to what I owe to the discharge of my own duties, I will endeavor to show that they have not proved the contrary.

I think it will not be doubted by anyone who has considered the remarks made by the learn-

ed judges on the translation and construction of the phrase *ex post facto*, that some misapprehension must have prevailed as to the parts of speech of which it is composed. By applying the English preposition *after*, so often to the translation of *post*, in the sentence, I am warranted in believing that the latter word was mistaken for the Latin preposition *post*; whereas, it is unquestionably an abbreviation of the adjective *postremo*, as will appear by referring to the maxims of Sir Francis Bacon, and comparing the 8th in the table with the 8th maxim in the text; in the latter of which *post* is extended to *postremo*; and such must be the fact to comport with the sense attached to the phrase in its common use and application. But the phrase is of such antiquity, and so generally used in its abridged form, that its origin and derivation, as is the case with a vast proportion of every language, has been nearly forgotten.

I am indebted to a friend for a quotation from the Pandects, in which it appears, even in Justinian's time, to have been used as a quaint phrase; just as a *ca. sa.* or *writ*, in the *pone*, or *quo minus*, is used at the present day. (L. 34, Tit. 4, Law 15.) The antiquity of its use among the English jurists may be fairly inferred from its being ingrafted into the maxims of the law constituting its fundamental rules. As we see in Elements of the Com. Law, by Lord Verulam, Max. 8 and 21.

But my present purpose is to fix its signification and legal import, and this is best done by reference to an adjudged case.

At the time of the great speculation in England in South Sea stock, it was thought necessary, for the peace of the nation, to pass the stat. 7 Geo. I., sec. 2, ch. 8, which required a registry of contracts for South Sea stock to be made by the 29th of September, 1721, and if not so registered, they were declared void. W. *bought of M., stock to a large amount, [**684** for which an assignment was duly executed, dated 19th August, 1720 (which was prior to the passing of the Act); but exception was taken on the ground of defect in the form of registration, on which the defendant insisted that the contract was voided by the statute.

Raymond, Justice: "This Act being *ex post facto*, the construction of the words ought not to be strained in order to defeat a contract to the benefit whereof the party was well entitled at the time the contract was made." (*Wilkinson v. Meyer*, 2 Lord Raym., 1350-1352.)

This case is authority to three points: 1st. To show that the phrase is used in a sense equally applicable to contracts and to crimes. 2d. That it was applied to statutes affecting contracts; and 3d. That as late as Lord Raymond's time it had not received a practical or technical construction which confined it to criminal cases.

The learned judges in the case of *Calder v. Bull* rely on Blackstone and Wooddeson for a contrary doctrine; but on examining these writers, the latter will be found to be anything but an authority to their purpose; and that in the former there is nothing furnished that can be held conclusive on the subject.

The passage in Wooddeson will be found in 2 W., 641. The author is animadverting upon bills of attainder, bills of pains and penalties, and other laws of that class, and his words are

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these: "It must be admitted that in all *penal statutes* passed *ex post facto*, except where the innovation mollifies the rigor of the criminal code, justice wears her sternest aspect."

Penal statutes, passed *ex post facto*; but why say *penal statutes*, and not simply statutes passed *ex post facto*, if the use of the phrase was exclusively limited to penal statutes? And with what propriety could the phrase be applied to statutes *mollifying the rigor* of the criminal law, if it had the fixed restriction, since attached to it, which they propose to assign to it in their reasoning upon that cause?

Judge Blackstone is by no means conclusive, if any authority at all upon the subject. (Arch. & Christ. Black., 41; Old edit., 46.) He is commencing upon the definition of a law generally; and that member of the definition which designates it as "a rule prescribed." And when illustrating the nature and necessity of this attribute of a law, he illustrates it by referring to the laws of Caligula, written in small characters and hung up out of view to ensnare the people; and then remarks: "There is still a more unreasonable method than this, which is called making of laws *ex post facto*; where, after an action indifferent in itself has been committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it."

This is precisely what Wooddeson calls a penal statute, passed *ex post facto*; but it by no means follows that because a penal statute may be *ex post facto*, that none other can be affected with that character; and certainly his commentator, Mr. Christian, in his note upon the phrase *ex post facto*, seems to have had no idea of this restrictive application of it. His words are: "an *ex post facto* law may be either of a public or a private nature; and when we speak generally of an *ex post facto* law, we perhaps always mean a law which comprehends the whole community. The Roman *privilegia* seem to correspond to our bills of attainder and bills of pains and penalties, which, though in their nature they are *ex post facto* laws, yet are seldom called so." Here he speaks of a law, not of a *penal* law, which comprehends the whole community; and of certain penal laws, in their nature *ex post facto*; that is, of the description of *ex post facto* laws; which they certainly are, without being exclusively so.

The "Federalist" also is referred to for an 685*] exposition of the phrase. The passage *is found in the 44th number, and is from the pen of Mr. Madison. But the writer has made no attempt at giving a distinct exposition of the phrase as used in the Constitution. Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are all considered together; and regarded, as they really are, as forming together "a bulwark in favor of personal security and private rights;" but on the separate office of each, in the work of defense, he makes no remark, and attempts no definition or distribution.

Some of the State constitutions are also referred to as furnishing an exposition of the words *ex post facto*, which confine its application to criminal cases. But of the four that have been cited, it will be found that those of Massachusetts and Delaware do not contain Peters 2.

the phrase; and, as if sensible of the general application of its meaning to all laws giving effects and consequences to past actions which were not attached to them when they occurred, simply give a description of the laws they mean to prohibit, without resorting to the aid of a quaint phrase which can only be explained by an extended periphrasis.

The constitutions of Maryland and North Carolina would seem to have applied the phrase in the restricted sense. And yet there is good reason to think that in the application of those articles to questions arising in their courts of justice before the provision in the Constitution of the United States superseded the necessity of resorting to their own constitutions in the defense of private rights when invaded by *ex post facto* laws, a general application of the phrase as well to civil as to criminal cases would have been justified by the generality of the prohibition to pass *ex post facto* laws, as used in both those constitutions.

But if otherwise, why should the erroneous use of language in two instances only control the meaning of it everywhere? or anywhere, but in the construction of the particular instrument in which it is so used?

It is obvious in the case of *Calder v. Bull* that the great reason which influenced the opinion of the three judges who gave an exposition of the phrase *ex post facto* was that they considered its application to civil cases as unnecessary, and fully supplied by the prohibition to pass laws impairing the obligation of contracts.

Judge Chase says: "If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and, therefore, improper; for both of them are retrospective."

Judge Patterson says: "Where is the necessity or use of the latter words, if a law impairing the obligation of contracts be comprehended within the terms *ex post facto* law? It is obvious from the specification of contracts in the last member of the clause that the framers of the Constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains and penalties, and no farther. The arrangement of the distinct members of this section necessarily points to this meaning."

Judge Iredell considers the extended construction of the phrase as unnecessary for another reason. "The policy, the reason and humanity of the prohibition do not, I repeat," says the judge, "extend to civil cases, to cases that merely affect the private property of citizens."

On these opinions a variety of remarks may be made.

And the first is, that the learned judges could not then have foreseen the great variety of forms in which the violations of private right have since been presented to this court. The case of a Legislature declaring a void deed to be a valid *deed is a striking one to [*686 show both that the prohibition to pass laws

violating the obligation of contracts is not a sufficient protection to private rights, and that the policy and reason of the prohibition to pass *ex post facto* laws does extend to civil as well as criminal cases. This court has had more than once to toil up hill in order to bring within the restriction on the States to pass laws violating the obligation of contracts, the most obvious cases to which the Constitution was intended to extend its protection; a difficulty which it is obvious might often be avoided by giving to the phrase *ex post facto* its original and natural application. It is, then, due to the venerable men whose opinion I am combating to believe that had this and the many other similar cases which may occur and will occur been presented to their minds, they would have seen that in civil cases the restriction not to pass *ex post facto* laws could not be limited to criminal statutes without restricting the protection of the Constitution to bounds that would import a positive absurdity.

2. High and respectable as is the authority of these distinguished men, it is not unpermitted to say that when they speak of the known and settled and technical meaning of words, they submit their opinions to that arbiter of truth to whose jurisdiction all men have an equal right to appeal. I think I have gone far to show that their quotations do not fix the meaning of the phrase under consideration with immovable firmness. Maryland first used it in this restricted sense, and North Carolina copied from Maryland; and if the evidence of contemporaries may be relied on, Mr. Chase was one of the committee who reported the constitution of Maryland, and thus stands the authority for the restricted use. Very many instances of the more general use of the phrase may be added to the authority of Lord Raymond, some of which I will mention. Certainly, in Lord Raymond's time, it had not received this technical established signification, and how it can be proved to have acquired it since, is not very easy to perceive.

The following instances of its ancient general use will show that if acquired, it must be in modern times, and, therefore, the proof ought to be the more accessible.

In Sir F. Bacon's Maxims. Max. 8. *Estimatio preteriti delicti ex post facto nunquam crescit.*

And all the cases given to illustrate the maxim are cases at common law, such as "slander of one who after becomes noble; this is not *scandalum magnatum*." Thus showing that it has no peculiar connection with statute law.

Max. 21. *Clausula vel dispositio inutilis per præsumptionem vel causam remotam ex post facto non fulcitur.*

And all the examples furnished on this maxim are cases of civil rights and liberties.

1 Sheppard's Touchstone, 63. "It is a rule that if a contract be not in its inception usurious, no matter *ex post facto* shall make it so."

1 Sheppard's Touchstone, 63. "Where a deed good in its creation shall become void *ex post facto*; by rature, &c."

1 Sheppard's Touchstone, 20. "Where a deed is void *ab initio*, and where it doth become void by matter *ex post facto*."

Godolphin's View of the Admiralty, 109.

"And the performance of something *ex post facto* within the realm, in pursuance of a pre-

ceding contract, &c., doth not make it cease to be maritime." The same, in his Law of Executors, Table D. "How a devise originally void may become good *ex post facto*."

Bulstrode, 17, 5, B. a, p. 416. "Where the first contract is not usurious, it shall never be made so by matter *ex post facto*."

3. It is a remark of Judge Patterson that the arrangement of the distinct members of this *section in the Constitution necessarily [*687 points to the restrictive meaning which he assigns to this phrase. But with all deference, I must contend that if anything is to be deduced from the arrangement of the three instances of restriction, the argument will be against him. For, by placing *ex post facto* laws between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that *ex post facto* laws partook of both characters, was common to both purposes.

4. There is one view in which the consistency and comprehensiveness of the views of the learned judges, whose opinions I have ventured to examine, may be well defended. And it presents an alternative to which I have no doubt that this court will sooner or later be compelled to resort in order to maintain its own consistency, and yet give to the Constitution the scope which is necessary to attain its general purposes in this section, and to rescue it from the imputation of absurdity in guarding against the minor evil and making no provision against a greater; in leaving uncontrolled the exercise of a power to create the contracts of parties, while they restrict the exercise of a power to violate those contracts when made by parties themselves.

That is, to bring cases similar to the present within what the law terms the equity of a statute. According to my construction, this is unnecessary, and I shall never be compelled to resort to this application of a principle so exceptionable in its influence upon a fundamental law. But I see not how those who think differently from me will be able to advocate it, unless by an amendment of the Constitution.

If the correct exposition of "the equity of a statute," be "a construction made by the judges, that cases out of the letter of the statute which are within the same mischief or cause of making the statute, shall be within the remedy thereby given" (1 Instr., 24); or as another author defines it, "*verborum legis directio efficiens, cum una res solummodo legis cavetur verbis, ut omnis alia in æquali genere eisdem cavetur verbis*" (Plowden, 407); there could be no objection to bringing the case of making a void deed valid, within the provision of the Constitution against violating the obligation of contracts, if we were construing a statute. And then, the protection which is lost to the Constitution by the restricted construction of *ex post facto* laws would be, I believe, wholly restored. But whether this latitude of construction can be safely and on principle applied to the Constitution, is with me a serious doubt; and hence I have felt an interest in endeavoring to avoid the necessity of resorting to it, by showing that the case of *Calder v. Bull* cannot claim the pre-eminence of an adjudged case upon this point, and if adjudged, was certainly not sustained by reason or authorities.

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[*No. II.]

Opinion of Mr. Justice Washington in the Circuit Court of the United States for the Eastern District of Pennsylvania in 1821, in the case of Lonsdale v. Brown.

Among the reasons assigned for a new trial is the following:

That a protest for nonacceptance of an inland bill of exchange was admitted in evidence.

The inquiry then is, whether a bill drawn in New Orleans upon a person living in Pennsylvania is an inland or a foreign bill?

To this inquiry my attention has been directed, because to this alone the arguments of the counsel were applied. The question is in a great measure new as well as difficult, and involves general principles in relation to the federal union of these States, which I consider as being highly important.

Foreign and inland, when applied to bills of exchange, are terms merely technical which we have borrowed from the English law, to which it is proper we should refer for their true meaning. The English elementary writers, in distinguishing the one kind of bill from the other, make use of different expressions, all of which, however, seem to be intended to mean the same thing. Kyd, in his treatise, p. 8, describes foreign bills to be those which pass from one country to another, and inland bills such as pass between persons residing in the same country. Evans, p. 2, states a foreign bill to be one which is drawn by a creditor in one kingdom upon his debtor in another, and an inland bill as one where the drawer and the drawee reside in this kingdom. Blackstone, in his Commentaries, Vol. II., p. 407, uses the word *abroad*, when speaking of a foreign bill; and *kingdom*, in reference to an inland bill.

If the phrase *kingdom* is to be taken in the strict sense, to mean the territories belonging to the king, it would follow that bills drawn in the West Indies upon England would be considered as inland; which they most unquestionably are not. No direct authority was produced by the counsel on either side, nor have I been able to meet with any, as to the particular character of bills drawn out of England, but within the king's dominions, on England. It was said by Treby, in the case of *Bromwick v. Lloyd* (2 Luter, 1585), "that bills of exchange at first extended only to merchant strangers trading with English merchants, and afterwards to inland bills between merchants trading the one with the other here in England, and afterwards to all traders, and of late, to all persons trafficking or not;" from which expressions it would seem that inland bills were confined to persons residing in England.

In the argument of this cause it was said by counsel that bills drawn in Scotland upon England since the union were treated as inland, and if any direct decision to that effect had been produced, I should have deemed it worthy of serious consideration. I have spared no pains during the vacation in searching for such a decision, but without success. Mareus, p. 2, uses

some loose expressions to that effect, but it would be very unsafe to rely upon them as authority. In Swift's Treatise on Bills, p. 291, the learned author lays it down that bills drawn in Ireland before the union, and in their colonies, on England, were treated as foreign bills. He adds, "I know not whether the question has arisen how a *bill shall be [*689 considered drawn in any other State in the Union; but the practice has been to admit protests for nonacceptance and nonpayment of bills, under the official seal of notaries public, to be conclusive evidence of the fact, in like manner as in the case of foreign bills; of course they may be considered to be foreign bills." I refer to what is here stated, not as the kind of authority which I was in search of, but as the statement of a learned judge, in a highly commercial state, in relation to the practice of lawyers and merchants upon this subject. In the case of *King v. Walker* (1 Black. Rep., 286), it was said by counsel, and not contradicted by the bench or bar, "that it had been questioned whether Scotch bills of exchange were inland or foreign bills, and been determined by Chief Justice Ryder, at Guildhall, that they were foreign bills."

That inland bills, prior to the statute of the 8th and 9th of W. III., c. 17, were considered as confined to England, is strongly to be inferred from the provisions of that statute, which speaks of bills drawn at any place in the Kingdom of England, Dominion of Wales, or town of Berwick upon Tweed; although Wales and Berwick had been, previous to that statute, as firmly united to England as Scotland was after the union. It is possible that naming Scotland and the town of Berwick was unnecessary, and that they might have been considered as included under the general terms, *Kingdom of England*. However this might have been, it would seem that the Legislature which enacted that statute thought otherwise, or it is not likely that they would have been included by express words.

If bills drawn in England on Scotland be inland bills, they are of a particular character, as it is perfectly clear that they are not within the provisions of the above statute, and consequently cannot be protested; nor are they entitled to any of the other privileges bestowed by that statute upon inland bills. And if, in fact, they are so treated, it is inconceivable that that portion of the British dominions, and even England, should, for so long a period, have been subjected to the inconvenience of having a species of commercial paper which is neither a foreign bill nor a statutory inland bill. Unless they are considered and treated as of the former description, it is highly probable that the statutes 8th and 9th W. III. would have been extended to Scotland, as it was to Wales, and the town of Berwick.

If, in point of fact, those bills are treated as foreign (a conclusion to which my mind strongly inclines), it cannot but have a strong bearing upon this case. The union between England and Scotland is, politically speaking, as intimate as between England and Wales, or between the different counties of either. They form one kingdom; are subject to the same government; and are represented in the same legislative body; and although the laws and customs of Scotland in force at the time of the union were suffered to continue, yet they are alterable by the parliament of Great Britain, even as they relate to private rights, if the alteration should be deemed for the evident utility of the people of Scotland.

How different is the union of these States! They are, in their separate political capacities, sovereign and independent of each other, except so far as they have united for their common defense and for national purposes. They have each a constitution and form of government, with all the attributes of sovereignty. As to matters of national concern they form one government, are subject to the same laws, and may be emphatically denominated one people. In all other respects, they are as distinct as different forms of government and different laws can render them. It is true, that the citizens of each State are entitled to all the privileges and immunities of citizens in every other State; that the sovereignty of the States in relation to fugitives from justice and from service is limited; **690***] and that each State is bound to give full faith and credit to the public Acts, records and judicial proceedings, of her sister States. But these privileges and disabilities are mere creatures of the Constitution; and it is quite fair to argue that the framers of that instrument deemed it necessary to secure them by express provisions.

In the case of *Warder v. Arrell* (2 Wash. Rep., 282), the question, in part, was whether the tender laws of Pennsylvania, where the contract was made, ought to be regarded by the courts of Virginia, where the suit was brought? and throughout the opinions delivered by the judges, Pennsylvania was treated as a foreign country. The president of the court is express upon this point. He observes that "in cases of contracts, the laws of a foreign country where the contract is made must govern. The same principle applies, though with no greater force, to the different States of America; for though they form a confederated government, yet the several States retain their individual sovereignties, and with respect to their municipal laws, are to each other foreign."

If the union between the States be so complete that a bill drawn in one State upon another is to be treated as an inland bill, one would suppose that a discharge under the insolvent laws of one State, though the creditor resided in another State, would be regarded as a discharge in every other State. And yet the law is otherwise laid down in Massachusetts and New York, and perhaps in other States. (*Vanraugh v. Arsdaln*, 3 Caines, 154; *Smith v. Smith*, 2 Johns. Rep., 236). These decisions are in strict conformity with the rule in England, that a discharge under a foreign bankrupt law is no bar of a debt contracted in Eng-

land, due to a creditor residing there. (1 East, 6.) In Pennsylvania the rule of reciprocity is observed, and the courts here will discharge on common bail a person who has been discharged by the insolvent laws of another State, if the courts of that State use the same courtesy towards the citizens of Pennsylvania. (2 Binn., 20.)

Even the judgments of other States are considered in the courts of Vermont, Massachusetts and New York, as being so far foreign that the grounds of them may be inquired into when impeached by the defendant. (*Stoddart v. Allen*, Chip., 44; *Bartlett v. Knight*, 1 Mass. Rep., 401; *Hitchcock v. Aicken*, 1 Caines' Rep., 460.) In *Hubbell v. Coudrey* (5 Johns. Rep., 132), the court considered a judgment rendered in the State of Connecticut as a simple contract debt; and so a judgment rendered in a French tribunal would be considered in the English and American courts.

It seems very clear that all the above cases proceed upon the principle laid down by President Pendleton, before noticed, "that with respect to their municipal laws, the States are foreign to each other." And if this be so, I am at a loss to conceive how a bill of exchange, drawn in one State, upon a person residing in another, can be considered as an inland bill. The inconveniences which would result by so considering them would lead me to hesitate long before I could be induced to do it; unless, indeed, I were pressed by decisions of the courts of the United States, or a current of State decisions. It may be sufficient to point out one of the inconveniences alluded to, viz., the necessity of proving by depositions or witnesses, in every suit upon such a bill, presentation and a demand; since the protest could not be given in evidence to prove those facts. It is greatly to be feared that such a necessity would, in no small degree, cramp the circulation of this species of paper.

The only case I have met with in which these bills have been considered as inland is that of *Miller v. Hackley* (5 Johns., 375); which I acknowledge to be the decision of a court greatly to be respected. It is, however, a single authority, *and this particular question [**691**] does not appear to have been very minutely examined by the bench or bar. Indeed, as the cause was decided upon the ground of want of notice of the protest, it was immaterial whether the bill was foreign or inland; since the objection was equally fatal in both cases; and it was, therefore, the less necessary to examine with attention the other point. It may be worthy of remark that the counsel for the plaintiff in that case placed great reliance upon a note in the 2d vol. of Tucker's Blackstone (p. 467); in which the learned editor, speaking of inland bills of exchange in reference to Virginia, describes them as bills drawn in that State on any other of the States. But the counsel could not have been apprised of the circumstance that by a law of that State passed on the 28th of December, 1798, it was declared that bills of exchange drawn by any person residing in Virginia on any person in the United States should be considered as an inland bill; and the Act proceeds to give damages and interest in case the same should be protested. I remark, further, that it is not easy to reconcile the decision in *Miller v.*

Hackley as to this point, with those before mentioned, which treat the States, in respect to their municipal laws, as foreign to each other.

I believe that the general opinion of commercial and legal men in the United States has not corresponded with the doctrine laid down in the above case. This may fairly be concluded from the circumstance that those bills have uniformly been protested; and, as far as I am informed, this is the second case only in which the validity of those protests, or their admissibility in evidence, has been questioned. In *Swift's Essay on Bills*, before referred to (p. 336), the author observes that "it is generally

understood by merchants in this State that on bills drawn here on a foreign country and returned protested, twenty per cent. damages is allowed; and that on bills drawn on any other State in the Union (which are to be considered as foreign bills), two and a half per cent. shall be allowed in lieu of all costs, charges, and damages."

Upon the whole, I am of opinion that upon principle, as well as for the sake of commercial convenience, the bill in question is to be considered as a foreign bill, and, therefore, that the protest was properly admitted in evidence.¹

1.—By an Act of the State of Pennsylvania, passed the 2d of January, 1815, it is enacted "that the official acts, protests and attestations of all notaries public, acting by the authority of the Commonwealth, certified according to law under their respective hands and seals of office, may be read and received in evidence of the facts therein certified in all suits that now are or hereafter shall be depending; provided that any party may be permitted to contradict by other evidence any such certificate." The question, of course, in the above

case, whether the protest was or was not an official act, depended, in the view of the counsel who argued this cause, upon the main question whether the bill was foreign or inland. If the former, the protest was necessary, and was therefore an official act. The case of *Brown v. The Philadelphia Bank* (6 Serg. & Rawle, 484), in which it was decided that a notarial protest is evidence of demand, and of notice to the indorser of a promissory note under the above act, was not in point; nor was it cited by counsel when the above case was decided.

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II PETERS.

2 Pet. 1-24, 7 L. 327, PENNOCK v. DIALOGUE.

Bill of exceptions.—Where no exception is taken to the competency or sufficiency of evidence, it should not be included in the bill of exceptions, p. 15.

Cited and followed in *Johnston v. Jones*, 1 Black. 219, 17 L. 120, holding bill of exceptions should contain only so much of the evidence as is necessary to present the legal questions raised; *Generes v. Campbell*, 11 Wall. 199, 20 L. 112, evidence will not be considered on writ of error, where no motion for new trial is made; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 414, 36 L. 488, 12 S. Ct. 682, bill of exceptions should not contain evidence upon matters about which there is no controversy; *Locke v. United States*, 2 Cliff. 577, F. C. 8,442, only so much of evidence as is necessary to present questions raised and noted should be embodied in bill of exceptions; and *Prichard v. Budd*, 76 Fed. 716, 42 U. S. App. 182, to same effect; *Peden v. Moore*, 1 Stew. & P. 81, 21 Am. Dec. 656, where exception is to instruction given, no evidence need be given in bill, but when exception is to instruction refused, evidence must be set out; also *Duggins v. Watson*, 15 Ark. 121, 60 Am. Dec. 562, and *Powers v. Bridges*, 1 G. Greene, 246, to same effect; *Eaton v. Railway Co.*, 22 Or. 500, 30 Pac. 312, only so much evidence should be in bill as is necessary to explain exceptions, reviewing authorities. Cited generally, *Comstock v. Smith*, 26 Mich. 324; *Oliver v. Phelps*, 20 N. J. L. 185, condemning practice of spreading whole charge of court on the record; *Sloan v. Territory*, 6 N. Mex. 85, 27 Pac. 418, presumed that omitted evidence sustains the judgment.

Instructions.—Court need not give directions to the jury upon any points of law not requested at the trial, p. 15.

Cited and rule followed in *Texas & Pac. Ry. Co. v. Volk*, 151 U. S. 78, 33 L. 80, 14 S. Ct. 240, holding that omission to give instruction not requested cannot be the subject of a bill of exceptions; *Isaacs v. United States*, 159 U. S. 491, 40 L. 230, 16 S. Ct. 53, applying rule; and also *Humes v. United States*, 170 U. S. 212, 42 L. 1012, 18 S. Ct. 603; in *Williams v. Simons*, 70 Fed. 43, 36 U. S. App. 16, no error for court to omit to instruct upon a particular point in absence of particular request; so held also in *Hunt v. Toulmin*, 1 Stew. & P. 182, 185, *Alsop v. Swathel*, 7 Conn. 504, *Torry v. Holmes*, 10 Conn. 512, *Ogle v. Railroad Co.*, 3 Houst. 324, *Carter v. Bennett*, 4 Fla. 341, *Haber v. Nassitts*, 12 Fla. 618, *Chamberlain v. Porter*, 9 Minn. 266,

U. S. Notes 2 Peter, 7 L. Ed. 568—96 p.

Merrill v. St. Louis, 12 Mo. App. 479; Cole v. Taylor, 22 N. J. L. 61, Hetfield v. Dow, 27 N. J. L. 448, Law v. Merrills, 6 Wend. 274, 275, and Frisbie v. McCarty, 1 Stew. & P. 60. Cited without particular application of the rule in Western Union Tel. Co. v. Eyser, 2 Colo. 168; Armour v. Pecker, 123 Mass. 147; Emerson v. Hogg, 2 Blatchf. 7, F. C. 4,440, exception allowed for instruction requested and refused; Allen v. Blunt, 2 Wood. & M. 148, F. C. 217, new trial will not be granted for cause existing but not excepted to; Chapman v. McCormick, 86 N. Y. 482, holding refusal to instruct when requested is error. Cited also in Territory v. Padilla, 8 N. Mex. 519, 46 Pac. 348, to point that court should have given an instruction specially requested.

Patents.—The phrase “not known or used before the application for a patent,” means not known to or used by the public with the knowledge of the inventor, p. 18.

Cited in Kendall v. Winsor, 21 How. 329, 330, 331, 16 L. 168, 169, holding surreptitious use of invention does not affect rights of inventor; McCay v. Burr, 6 Pa. St. 153, 47 Am. Dec. 442, use by special permission of patentee held not use by the public.

Statutory construction.—When English statutes have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, p. 18.

Cited in Warner v. Railway Co., 164 U. S. 423, 41 L. 500, 17 S. Ct. 149, applying rule to statute of frauds; Willis v. Trust Co., 169 U. S. 307, 42 L. 758, 18 S. Ct. 352, to State statute re-enacted by congress; also Goodall v. Tuttle, 3 Biss. 233, F. C. 5,533; Case of the Sewing Machine Cos., 18 Wall. 584, 21 L. 922, same rule applies to re-enacted statute; so held also in The Devonshire, 8 Sawy. 213, 13 Fed. 42. Cited and rule applied in Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 493, to statute concerning fraudulent conveyances; Talcott v. Township of Pine Grove, 1 Flipp. 158, F. C. 13,735, applying rule to constitutional provisions respecting municipal aid to railroads in sister States; Ullman v. Meyer, 10 Fed. 242, to statute of frauds; Chicago, etc., Ry. Co. v. Stahley, 62 Fed. 364, 27 U. S. App. 157, to State statute re-enacted by another State; Commonwealth v. Hartnett, 3 Gray, 451, to English statute against larceny; Ingraham v. Regan, 23 Miss. 226, to English statute of limitations; McDonald v. Hovey, 110 U. S. 628, 28 L. 272, 4 S. Ct. 146, to statute of limitations. Cited in Bowers v. Smith, 111 Mo. 79, 20 S. W. 111, dissenting opinion, rule should apply to election law borrowed from Australia; Price v. Lush, 10 Mont. 68, 24 Pac. 750, 9 L. R. A. 469, so to English election law re-enacted by State; Hunter v. Truckee Lodge, 14 Nev. 38, to State lien law re-enacted in another State; Perea v. Bank, 6 N. Mex. 4, 27 Pac. 323, to State law on execution, re-enacted by another State; Cortesy v. Territory, 7 N. Mex. 96, 32 Pac. 507, hold-

ing same construction follows after revision as before, where change of phraseology is merely for the sake of abbreviation; *Snoddy v. Cage*, 5 Tex. 118, dissenting opinion, contending for the rule against contrary opinion of the court. Cited in notes, 12 Am. Rep. 550, and 33 Am. St. Rep. 506.

Distinguished in *Morgan v. Davenport*, 60 Tex. 234, holding where statute contains modification showing legislature did not intend to adopt original construction, rule does not apply.

Patents.—Under our statute, the invention must not have been known or used before the time of “the application,” p. 21.

Cited in *Bate R. R. Co. v. Sulzberger*, 157 U. S. 20, 39 L. 605, 15 S. Ct. 510, discussing history of patent legislation; *Whitney v. Emmett*, Bald. 309, F. C. 17,585, applying rule.

Patents.—To entitle inventor to patent, it must be new to the world, p. 20.

Cited generally, *Whitney v. Emmett*, 1 Bald. 311, F. C. 17,585.

The English statute of monopolies though not identical in language with ours, and while its construction is not to be considered incorporated into our law, nevertheless by its principles and practices affords materials to illustrate our law, p. 18.

Cited generally, *Hogg v. Emerson*, 6 How. 483, 12 L. 524, commenting on difference between English and American patent laws.

Patents.—The first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use or to be publicly sold for use before he makes application for a patent, p. 23.

Cited and rule applied in *Shaw v. Cooper*, 7 Pet. 318, 322, 8 L. 698, 700, holding intention of inventor immaterial if he suffers invention to go into public use; *Grant v. Raymond*, 6 Pet. 248, 12 L. 387, holding by analogy, that inventor cannot acquire valid patent where specifications are defective; *McClurg v. Kingsland*, 1 How. 207, 210, 11 L. 104, 105, affirming principal case and applying rule; *Andrews v. Hovey*, 124 U. S. 707, 31 L. 560, 8 S. Ct. 680, reviewing authorities and applying rule; *Gill v. United States*, 160 U. S. 430, 40 L. 482, 16 S. Ct. 324, holding, by analogy, employee estopped from recovering from his employer, royalty for invention which he has devised, through using the property or labor of his employer, and to whose use of the invention he has assented; *Ellithorp v. Robertson*, 8 Fed. Cas. 563, public use includes use by public under patent to another patentee; *Hunt v. Howe*, 12 Fed. Cas. 922, evidence of sale and public exhibition of invention held conclusive proof of abandonment; *Lovering v. Dutcher*, 15 Fed. Cas. 1001, holding mere delay evidence of abandonment; *Manning v. Isinglass Co.*, 16 Fed. Cas. 644, whether use is public depends upon its nature, not intention of inventor; *Marcy v. Trotter*, 16 Fed. Cas. 706, holding delay of

eight years after second inventor's patent a bar to application for patent; *Savary v. Lauth*, 21 Fed. Cas. 553, delay of four years, during which second inventor secures patent, held a bar; *Spear v. Belson*, 22 Fed. Cas. 903, similar delay for five years held bar; *Earl v. Page*, 6 N. H. 479, 26 Am. Dec. 712, affirming and applying rule. Cited, in course of discussion, generally, *Whitney v. Emmett*, 1 Bald. 310, F. C. 17,585. Cited in *Cooper v. Mattheys*, 6 Fed. Cas. 486, injunction will not issue where invention has long been used adversely until right of patent is established at law; *Judson v. Bradford*, 14 Fed. Cas. 9; *Ryan v. Goodwin*, 3 Sumn. 578, F. C. 12,186, affirming rule in instructions to jury; and in note on abandonment of right to patent, 40 Am. Dec. 468, collecting cases, and 47 Am. Dec. 443, 445, 446, 449, exhaustive notes containing citation of authorities on general principles of abandonment of invention.

Distinguished in *Bates v. Coe*, 98 U. S. 46, 25 L. 73, rule has been modified by statute; and also, *Kelleher v. Darling*, 4 Cliff. 441, F. C. 7,653; *Henry v. Tool Co.*, 11 Fed. Cas. 1188; *Noe v. Prentice*, 18 Fed. Cas. 284; *Agawam Co. v. Jordan*, 7 Wall. 608, 19 L. 183, mere forbearance to apply for a patent during progress of experiments and testing of its value by actual practice affords no presumption of abandonment; *Pierson v. Screw Co.*, 3 Story, 408, F. C. 11,156, nor sale made wrongfully and fraudulently and without knowledge or consent of inventor; *Allen v. Blunt*, 2 Wood. & M. 142, F. C. 217, public use must be with knowledge of inventor; *Adams v. Jones*, 1 Fed. Cas. 127, application filed in patent office is conclusive evidence that inventor does not intend to abandon to the public; *Heath v. Hildreth*, 11 Fed. Cas. 1007, mere delay in applying for patent without intermediate use does not amount to abandonment; *Campbell v. Mayor*, 47 Fed. 520, 521, nor wrongful manufacture and sale without knowledge of inventor during period of perfection of invention.

Miscellaneous.—Cited generally, *Burr v. Des Moines Co.*, 1 Wall. 103, 17 L. 563. Cited in *Parton v. Prang*, 3 Cliff. 550, F. C. 10,784, discussing effect of sale of manuscript; *Whitney v. Emmett*, 1 Bald. 313, 317, F. C. 17,585; *State v. Lord*, 5 N. H. 336, manner of settlement of exceptions.

2 Pet. 25-57, 7 L. 335, *COLUMBIAN INS. CO. v. LAWRENCE*.

Exceptions.—Questions of the admissibility of evidence and of its legal effect and sufficiency arise at different stages of the trial and cannot with propriety be propounded at the same time, p. 44.

Cited in *McKown v. Powers*, 86 Me. 295, 29 Atl. 1080, discussing generally proposition that exceptions to rulings of court below must be expressly stated at the time. Cited generally, *Butler v. Stocking*, 8 N. Y. 412; *Valentine v. Conner*, 40 N. Y. 259, dissenting opinion.

Instructions.— Where an instruction requested is correct in part and incorrect in part, the judge may refuse it altogether, p. 44.

Cited and rule applied in *Pelzer Mfg. Co. v. Insurance Co.*, 36 S. C. 271, 15 S. E. 583; *Martin v. Suber*, 39 S. C. 535, 18 S. E. 130; *First Nat. Exch. Bank v. Sherman*, 9 S. Dak. 494, 70 N. W. 648, holding by analogy that same rule applies to request for ruling as to admission of evidence.

Insurance.— An equitable interest in property, such as an interest under an executory contract of sale, may be insured, p. 46.

Cited and rule applied in *Insurance Co. v. Stinson*, 103 U. S. 29, 26 L. 477, holding mechanic's lien gives insurable interest; *Hancox v. Fishing Co.*, 3 Sumn. 140, F. C. 6,013, interest in nature of a lien is insurable; *Dupuy v. Insurance Co.*, 63 Fed. 687, vendee's interest under contract of sale is insurable; *Commercial Fire Ins. Co. v. Insurance Co.*, 81 Ala. 323, 60 Am. Rep. 164, 8 So. 223, builder's interest under building contract is insurable, collecting cases; *Ayres v. Insurance Co.*, 17 Iowa, 181, 85 Am. Dec. 554, possession under executory contract gives insurable interest; *Franklin Ins. Co. v. Drake*, 2 B. Mon. 50, husband entitled to estate by curtesy has insurable interest; *Cumberland Bone Co. v. Insurance Co.*, 64 Me. 470, bargainee of goods who has advanced money upon them may insure his interest, even before the goods are separated from those of the bargainor; *Gilman v. Insurance Co.*, 81 Me. 492, 493, 494, 17 Atl. 544, 545, equitable interest under executory contract is insurable, collecting and reviewing authorities; *Strong v. Insurance Co.*, 10 Pick. 43, 20 Am. Dec. 509, a right to redeem an equity of redemption is an insurable interest; *Allyn v. Allyn*, 154 Mass. 573, 28 N. E. 779, an agreement of sale gives an insurable interest in vendee; *French v. Rogers*, 16 N. H. 183, mortgagor has insurable interest; *Burbank v. Insurance Co.*, 24 N. H. 561, 57 Am. Dec. 304, holder of bond on property has insurable interest; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 571, 573, 29 Am. Rep. 273, 274, so has one in possession under contract for conveyance; also so held in *Tuckerman v. Insurance Co.*, 9 R. I. 417. Cited generally, *Goodall v. Insurance Co.*, 25 N. H. 186, and also in 20 Am. Dec. 513, in a very full note on the insurance interests of vendor and vendee.

Insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest, p. 49.

Quoted, *Schultz v. Insurance Co.*, 14 Fla. 117, holding rule of marine insurance to be that failure on part of assured to exercise ordinary prudence in management of vessel will defeat recovery for loss; *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 940, where assured only owned part though representing he owned all.

Insurance.— It is not necessary to constitute an insurable interest that insured have absolute, unqualified property in effects insured, p. 49.

Cited, *Motley v. Insurance Co.*, 29 Me. 340, 50 Am. Dec. 592, every person having a bona fide interest in property may protect such interest by insurance.

Distinguished, *Traders' Ins. Co. v. Newman*, 120 Ind. 559, 22 N. E. 430, husband has no insurable interest in separate property of wife.

Insurance.— Trustee may insure if the nature of his property be specified, p. 49.

Cited, *Insurance Co. v. Chase*, 5 Wall. 513, 18 L. 526, holding trustees of church may insure church even though loss be made payable to third party in no way connected with church; and in note 20 Am. Dec. 515, collecting authorities on right of trustee to insure.

Distinguished, *Rafel v. Insurance Co.*, 7 La. Ann. 246, trustee must state that he holds property insured in trust.

Insurance.— It is the duty of the assured to state every fact connected with his interest which would influence the insurer in forming or declining the contract, p. 49.

Cited and affirmed, *Columbia Ins. Co. v. Lawrence*, 10 Pet. 515, 9 L. 516, holding policy avoided by concealment of such state of title as would have materially increased the risk; *Waller v. Assurance Co.*, 2 McCrary, 639; S. C., 10 Fed. 234, holding policy avoided when insured, although holding record title, had merely a lien on the property; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 171, 27 U. S. App. 564, 27 L. R. A. 618, avoiding policy to stockholders of entire capital stock upon property of corporation; *Equitable Life Assur. Co. v. McElroy*, 83 Fed. 637, 49 U. S. App. 560, applying rule and holding policy void for concealment of illness by applicant for life insurance; *Liberty Ins. Co. v. Boulden*, 96 Ala. 512, 11 So. 772, policy avoided when assured concealed fact that his interest was only conditional; *Manchester Fire Assur. Co. v. Abram*, 89 Fed. 940, where assured owned but part, though representing himself as absolute owner; *Adema v. Insurance Co.*, 36 La. Ann. 663, policy held void where insured omitted to state that his interest was only one-eighth; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 540, 17 Atl. 401, 5 L. R. A. 479, if policy expressly requires interest of assured to be truly stated, policy will be avoided by failure of assured to state existence of mortgage; *Clay F. & M. Ins. Co. v. Manufacturing Co.*, 31 Mich. 357, vendor under contract of sale is not an unconditional and sole owner; *Catron v. Insurance Co.*, 6 Humph. 181, 183, holding policy void where interest of assured was represented larger than it really was; *Hinman v. Insurance Co.*, 36 Wis. 165,

rule a fortiori true when stipulation concerning representation as to interest is contained in the policy, collecting cases; *Fuller v. Insurance Co.*, 36 Wis. 604, subsequent incumbrance without notice to company will avoid the policy; *Ryan v. Insurance Co.*, 46 Wis. 675, 1 N. W. 429, misrepresentation of amount of existing mortgage at time of application for insurance will invalidate policy. See note, 35 Am. Rep. 630, discussing materiality of representations as to incumbrances. Cited generally, *Carpenter v. Insurance Co.*, 16 Pet. 505, 10 L. 1949; *Holbrook v. Insurance Co.*, 1 Curt. 197, F. C. 6,589; *Illinois Mut. Ins. Co. v. Manufacturing Co.*, 1 Gilm. 266; *Sun Fire Office v. Clark*, 53 Ohio St. 424, 42 N. E. 250, 36 L. R. A. 414, & n., mortgaging property is not change of interest within terms of an insurance policy.

Distinguished in *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 509, 20 L. 731, holding interest may be immaterial when property in custody of third persons, to whom insurer looks to preserve property in case of fire; *Lewis v. Insurance Co.*, 24 Blatchf. 183, 29 Fed. 497, whether state of title is material depends upon whether the insured is the real and substantial owner, collecting cases; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 577, 1 So. 206, existence of party-wall known to agent of insurer is not such deviation from unqualified and sole ownership as to avoid the policy; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 298, holding that even as to questions of title materiality of concealment is one of fact for jury; *Washington Fire, etc., Ins. Co. v. Kelly*, 32 Md. 446, statement of interest of assured, made by company in policy, is ordinarily immaterial to the risk; and in *Planters' Mut Ins. Co. v. Engle*, 52 Md. 478, this is stated to be the established rule; *Hill v. Insurance Co.*, 2 Mich. 485, pendency of litigation affecting title to property is immaterial unless particularly inquired into by terms of policy; *Tyler v. Insurance Co.*, 12 Wend. 512, to render innocent misrepresentation material there must be inquiry by the company. Criticised as against weight of authority in *Protection Ins. Co. v. Harmer*, 2 Ohio St. 474, 59 Am. Dec. 703, in so far as requiring a disclosure of extent of assured's interest.

Insurance.—Misrepresentation material to the risk avoids the policy, p. 50.

Cited and rule applied, *Clark v. Insurance Co.*, 8 How. 248, 12 L. 1066, holding misrepresentation as to use of lamps in factory will avoid policy; and also in *Clark v. Insurance Co.*, 2 Wood. & M. 481, 489, 493, F. C. 2,829; *Nicoll v. Insurance Co.*, 3 Wood. & M. 535, F. C. 20,259, policy avoided though misrepresentation has nothing to do with cause of loss; *Penn. Mut. L. Ins. Co. v. Bank*, 72 Fed. 431, 37 U. S. App. 692, 38 L. R. A. 64, & n., materiality of misrepresentation is question of fact for the jury; so held also in *Lyon v. Insurance Co.*, 2 Rob. (La.) 271; in *Morrison v. Insurance Co.*, 18

Mo. 267, 59 Am. Dec. 302, misrepresentation as to title falls within the rule and question of materiality is one for the jury: so held also in *Sussex Co. Ins. Co. v. Woodruff*, 26 N. J. L. 552. Cited generally, but without particular application of rule, in *Cady v. Insurance Co.*, 4 Cliff. 210, F. C. 2,283; *James v. Insurance Co.*, 4 Cliff. 282, F. C. 7,182.

Distinguished, *Marshall v. Insurance Co.*, 27 N. H. 166, holding innocent misrepresentation immaterial where truth was known to agent of insurer; and same held in *Continental Ins. Co. v. Kasey*, 25 Gratt. 271, 18 Am. Rep. 683.

Insurance.—In this case the nearest magistrate's certificate required by policy as part of proof of loss was not in the form required by the policy, and insufficiency was assumed and treated as material, p. 50.

Cited, and relied upon as precedent, in *Perry v. Phoenix Co.*, 8 Fed. 645, 646, certificate of magistrate to proof of loss must be in form required by policy; so held also in *Æthna Ins. Co. v. Bank*, 62 Fed. 226, 8 U. S. App. 554, and *Great Western Ins. Co. v. Staaden*, 26 Ill. 364, to same effect; *Protection Ins. Co. v. Pherson*, 5 Ind. 420, holding there could be no recovery where nearest magistrate refused certificate and it was given by next nearest one: *Home Ins. Co. v. Duke*, 43 Ind. 422, no recovery can be had until certificate of nearest disinterested magistrate is filed; *Leadbetter v. Insurance Co.*, 13 Me. 268, 29 Am. Dec. 506, policy cannot be satisfied by certificate of any but nearest magistrate; *Johnson v. Insurance Co.*, 112 Mass. 52, 17 Am. Rep. 67, production of certificate is condition precedent to suit; so held also in *Lane v. Insurance Co.*, 50 Minn. 230, 52 N. W. 650, 17 L. R. A. 199, and *Roumage v. Insurance Co.*, 13 N. J. L. 114, in dissenting opinion, p. 124, and *Kelly v. Insurance Co.*, 141 Pa. St. 21, 23 Am. St. Rep. 257, 21 Atl. 448. Cited generally, *McCann v. Insurance Co.*, 3 Neb. 207, production of proofs of loss prerequisite to suit; *Chism v. Schipper*, 51 N. J. L. 20, 16 Atl. 321, 2 L. R. A. 548; *O'Brien v. Insurance Co.*, 63 N. Y. 111.

Insurance.—In this case the notice of loss, etc., was received by the secretary of the insuring company, p. 52.

Cited, *Lewis v. Insurance Co.*, 52 Me. 498, as impliedly recognizing that secretary is proper officer for that purpose.

Insurance.—Misdescription of insured premises to avoid the policy must not only be untrue but must be such as would occasion the insurance to be made at lower premium than would be otherwise demanded, p. 51.

Affirmed, *Columbia Ins. Co. v. Lawrence*, 10 Pet. 518, 9 L. 517, holding misdescription not a ground for invalidating policy unless accompanied by reduction of premium; *Allen v. Insurance Co.*, 34 La. Ann. 765, misdescription must be material.

Qualified in *Hartman v. Insurance Co.*, 21 Pa. St. 477, holding true rule to be that misrepresentation must be such as to increase the risk.

Insurance.—Waiver of defect in proof of loss will not be inferred from mere failure of insurer to specify it, nor from investigation and examination into the loss, p. 54.

Cited in *Gauche v. Insurance Co.*, 4 Woods, 106; S. C., 10 Fed. 350, holding investigation of claim by insurer does not dispense with proof of loss by assured; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 18, dissenting opinion, arguing question of waiver is one for jury, collecting cases; *Central City Ins. Co. v. Oates*, 86 Ala. 569, 11 Am. St. Rep. 70, 6 So. 85, failure to demand proofs is not a waiver of them; *Roumage v. Insurance Co.*, 13 N. J. L. 118, nor is receipt of defective certificate a waiver of the defect. Cited generally in note to *Hambleton v. Home Ins. Co.*, 6 Biss. 97, F. C. 5,972; *Keenan v. Insurance Co.*, 12 Iowa, 136, 137; *Shawmut Sugar Co. v. Insurance Co.*, 12 Gray, 540.

Distinguished in *Tayloe v. Insurance Co.*, 9 How. 403, 13 L. 192, holding delay in presenting proofs excused by refusal of company to issue policy; *Roumage v. Insurance Co.*, 13 N. J. L. 129, notice by insured of intention to defend on the merits is a waiver of technical defect in proof of loss. So held also in *Basch v. Insurance Co.*, 35 N. J. L. 433, remarking that the principal case is overruled by *Tayloe v. Insurance Co.*, supra, also in *Jones v. Insurance Co.*, 36 N. J. L. 36, 38, 15 Am. Rep. 411, 412; in *Ætna Ins. Co. v. Tyler*, 16 Wend. 401, 30 Am. Dec. 98, reviewing and criticising the principal case; and in *West Rockingham, etc., Ins. Co. v. Sheets*, 26 Gratt. 871.

Miscellaneous.—Referred to for statement of facts upon later appeal; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 510, 9 L. 514; *Perry v. Insurance Co.*, 11 Fed. 480, no insurable interest can exist under contract ab initio void; *Phenix Ins. Co. v. Stocks*, 149 Ill. 335. citation should be 10 Pet. 507, and in connection with later appeal; *Continental, etc., Ins. Co. v. Lippold*, 3 Neb. 395. Cited erroneously, *Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 85; *Duclos v. Insurance Co.*, 23 La. Ann. 333, holding policy void for failure to notify company of subsequent insurance; *Miltensberger v. Beacom*, 9 Pa. St. 199, insurance effected without knowledge of one interested may be after loss recovered by him from insured, who has collected it from the insurer. Cited in note, 50 Am. Dec. 104; *Clark v. Insurance Co.*, 8 How. 248, 12 L. 1066.

2 Pet. 58-95, 7 L. 347, *GARDNER v. COLLINS*.

Statutes—**Local law.**—Judicial construction of State law affecting real property is recognized by Federal courts as part of the local law, p. 85.

Cited and followed in *Beals v. Hale*, 4 How. 54, 11 L. 873, judicial construction must be made by court of last resort; *Webster v. Cooper*, 14 How. 504, 14 L. 517, collecting cases, and applying rule to decision of State court that statute of State was unconstitutional; *Thompson v. Phillips*, Bald. 285, F. C. 13,974, following State construction as to effect of judicial sales; *In re Wyllie*, 2 Hughes, 459, F. C. 18,112, construing State homestead law, applying rule and reviewing authorities; *Mitchell v. Lippincott*, 2 Woods, 473, F. C. 9,665, applying rule to State law regulating effect of mortgages by married women; *McClure v. Owen*, 26 Iowa, 254, denying authority of United States Supreme Court to disregard construction which highest tribunal of State has placed on its own statute; *Hiller v. Shattuck*, 1 Flipp. 274, F. C. 6,504, adhering to State construction of Michigan law as to effect of judgment in ejectment upon the title; *Bloodgood v. Grasey*, 31 Ala. 589, holding by analogy that foreign laws are to receive construction given in the courts of their own country, collecting cases. Cited generally, *Lane v. Ruhl*, 103 Mich. 42, 61 N. W. 348.

Distinguished in *Burgess v. Seligman*, 107 U. S. 34, 27 L. 365, 2 S. Ct. 22, collecting authorities, and holding that in matters of general commercial law the Federal courts are not bound by State law.

Statutes.—Uniform course of practice of long continuance is of great authority in construing ancient statutes, p. 85.

Cited in *Ikelheimer v. Chapman*, 32 Ala. 697, dissenting opinion, remarking that uniform practice is one of the lights by which statutes are to be construed; *Wetmore v. State*, 55 Ala. 201, construing penal statute and holding that long-continued construction adopted by administrative authorities is legitimate aid to statutory construction.

Statutes.—The legislative intention must be derived from the words of the act and not from conjectures aliunde, p. 86.

Cited in *Davis v. Justice*, 31 Ohio St. 367, dissenting opinion, construing statute against sales of intoxicating liquors; *Henry v. Trustees*, 48 Ohio St. 683, 30 N. E. 1126, dissenting opinion, construing statute authorizing town trustees to acquire lands for certain purposes; *Irwin v. Irwin*, 2 Okl. 220, 37 Pac. 560, dissenting opinion, construing divorce law; *McFarren v. Umatilla Co.*, 27 Or. 313, 40 Pac. 1013, construing act granting certain jurisdiction to justices' court; *State ex rel. v. Switzler*, 143 Mo. 327, 65 Am. St. Rep. 668, 45 S. W. 252, 40 L. R. A. 289, construing inheritance tax law. Cited in note, 27 Am. Rep. 519.

Descent.—A person is of the blood of another who has any portion of the same blood derived from a common ancestor, p. 87.

Cited to this point, *Miller v. Speer*, 38 N. J. Eq. 572.

Succession.—The phrase “of the blood” in a statute of descents includes the half blood as well as the whole blood, p. 89.

Cited in *Cole v. Batley*, 2 Curtis, 563, F. C. 2,977, holding maternal grandfather is “of the blood” of the intestate’s mother; *Stallworth v. Stallworth*, 29 Ala. 79, remarking that distinction between whole and half blood has been abolished in Alabama by statute; *Kelly v. Maguire*, 15 Ark. 589, 596, following rule; *Anderson v. Bell*, 140 Ind. 382, 39 N. E. 737, 29 L. R. A. 554, & n., “brother” includes “half brother;” so held also in *Rowley v. Stray*, 32 Mich. 75, *Wheeler v. Clutterbuck*, 52 N. Y. 70, *Cliver v. Sanders*, 8 Ohio St. 507, and *Hart’s Appeal*, 8 Pa. St. 37, all to same effect; *Beebe v. Griffing*, 14 N. Y. 243, 245, applying rule to construction of New York statute; *Baker v. Chalfant*, 5 Whart. 481, to Pennsylvania statute; and cited, 61 Am. Dec. 656, 660, in extended notes on inheritance by the half blood.

Distinguished in *Robertson v. Burrell*, 40 Ind. 335, where there was express statutory provision regulating inheritance by kindred of the half blood, and also in *Amy v. Amy*, 12 Utah, 335, 42 Pac. 1133.

Descent.—Where statute provides that an estate of inheritance in case of intestacy shall go to the kin next to the intestate of the blood of “the person from whom such estate came,” it is the next of kin of the immediate ancestor making the gift or devise who are entitled to share, p. 90.

Cited and principle followed in *Cole v. Barley*, 2 Curt. 564, F. C. 2,977, holding under same statute maternal grandfather takes estate which descended to intestate from her mother to exclusion of brothers and sisters of the mother; *West v. Williams*, 15 Ark. 693, arguing that one taking by devise from his grandmother is in by purchase and becomes himself a stock of descent. Followed, *Buckingham v. Jacques*, 37 Conn. 405, adopting above rule under similar statute, and again in *Clark v. Shailer*, 46 Conn. 123; *Smith v. Croom*, 7 Fla. 174, 178, applying rule and holding words in statute “gift, devise and descent from father” to mean, mediate and not immediate descent from father; *Case v. Wildridge*, 4 Ind. 54, holding “descent from mother” does not mean or include “descent from maternal grandfather;” *Murphy v. Henry*, 35 Ind. 450, descents under Indiana statute must be direct and immediate; *Stewart v. Jones*, 8 Gill & J. 28, discussing Maryland statute of descents and holding that though descent is immediate from person last seized the inheritable blood is derived from the ancestor from whom it descended to him; *Cutter v. Waddingham*, 22 Mo. 264, applying rule to construction of Missouri statute; *Wheeler v. Clutterbuck*, 52 N. Y. 71, to New York statute; *Prickett v. Parker*, 3 Ohio St. 396, to Ohio statute; and also in *Brower v. Hunt*, 18 Ohio St. 340; *Morris v. Potter*, 10 R. I. 70, following principal case

and adopting rule. Cited generally in *Roundtree v. Pursell*, 11 Ind. App. 538, 39 N. E. 751, construing statute relating to succession of personal property, and in 12 Am. St. Rep. 104, 110, in exhaustive note, collecting authorities on this and other propositions relating to succession to estates of intestates generally.

Miscellaneous.—Cited generally, *Saunders v. Gould*, 4 Pet. 392, 7 L. 897. Erroneously cited, *Clark v. Manufacturers' Ins. Co.*, 8 How. 248, 12 L. 1066, and *Coover v. O'Conner*, 8 Watts, 477.

2 Pet. 96-106, 7 L. 360, **WILLIAMS v. BANK OF UNITED STATES.**

Bills and notes.—If parties reside in the same town, the indorser must be personally notified of dishonor, either verbally or in writing, or a written notice left at his office or place of business, p. 101.

Cited, *Bowling v. Harrison*, 6 How. 257, 12 L. 428, holding notice through the post-office may not ordinarily be substituted for that required by above rule; *Stephenson v. Primrose*, 8 Port. 159, 33 Am. Dec. 283; discussing question generally; *Rives v. Parmley*, 18 Ala. 261, if left at place of business notice should be given to clerk or person in charge; *Brindley v. Barr*, 3 Harr. 419, notice by post insufficient; *Grinman v. Walker*, 9 Iowa, 428, notice by mail is sufficient if it be shown that it actually reached party; *Bank v. Baldwin*, 17 N. J. L. 489, applying rule; *Brown v. Bank*, 85 Va. 98, 7 S. E. 358, rule applies when parties live within same postal delivery, though not exactly in same town. Cited generally, *Gindrat v. Bank*, 7 Ala. 332; *Wallace v. Crilley*, 46 Wis. 578, 1 N. W. 302, and collected with other cases in note, 38 Am. Dec. 608.

Bills and notes.—It is sufficient diligence in giving notice of dishonor if the indorsee's agent call at indorser's residence and finding the place locked and upon inquiry learning that he has left the town but for how long is unknown, makes no further effort to give notice, pp. 101, 106.

Cited in *Dickins v. Beal*, 10 Pet. 581, 9 L. 541, collecting cases on what acts constitute due diligence; *Wiseman v. Chiappella*, 23 How. 377, 16 L. 469, holding demand sufficient when notary went several times to office of acceptors on day when bill was due and found doors closed and nobody to answer any demand; *McGrew v. Toulmin*, 2 Stew. & P. 434, holding notice mailed to place where maker had been in habit of receiving his mail sufficient, although some three months before he had changed his place of receiving mail to a nearer post-office; *Howe v. Bradley*, 19 Me. 35, if door is locked during business hours further effort to give notice unnecessary; *Thompson v. Bank*, 3 Hill L. 83, 30 Am. Dec. 358, reasonable diligence is question of fact for the jury; *Clark v. Bigelow*, 16 Me. 249, due diligence to give notice excuses failure; so also held

in *Kleekamp v. Meyer*, 5 Mo. App. 448; *McVeigh v. Bank*, 26 Gratt. 806, collecting authorities on what constitutes due diligence, and see valuable note in 38 Am. Dec. 616.

Bills and notes.—If when notice of nonpayment is to be given the party entitled to it be absent from the State and has left no agent to receive it, the law dispenses with giving him regular notice, p. 102.

Cited in *Atherton v. Thornton*, 8 N. H. 182, applying rule by analogy to notice to fix liability of bail.

Bills and notes.—Notice of dishonor should be given at the residence of the indorser, p. 103.

Cited in *Foard v. Johnson*, 2 Ala. 568, 36 Am. Dec. 423, holding that notice by mail to place of date of bill is not sufficient unless it appears that that is residence of drawer or indorser, or that residence is unknown; and so also in *Branch Bank v. Peirce*, 3 Ala. 325; *Stamps v. Brown*, Walk. (Miss.) 530, where parties reside in different towns, notice by mail suffices.

Distinguished in *Tunstall v. Walker*, 2 Smedes & M. 659, where indorser has no known residence or place of business, no notice is necessary; *Brown v. Jones*, 113 Ind. 49, 3 Am. St. Rep. 625, 13 N. E. 858, holding, where place of payment is specified in bill, presentment must be made there.

Bills and notes.—If giving of notice of dishonor is prevented by the act of the person entitled to it, the performance of the condition is excused, p. 102.

Cited in *The Steamboat Joseph E. Coffee*, Olcott, 404, F. C. 7,536, it is an inherent quality of every condition dependent on the volition of a party that he shall not be prevented from performing it by one to whose benefit the nonperformance is to inure; *City Bank of Racine v. Babcock*, 1 Holmes, 184, F. C. 2,741, where bank had no place where notice could be served in order to entitle pledgee to sue, it was held that notice was dispensed with; *Stephenson v. Primrose*, 8 Port. 162, 33 Am. Dec. 284, holding notice excused if drawer absent from his place of business during business hours; *John v. Bank*, 57 Ala. 99, where absence from place of business is relied upon to excuse notice, it must be shown that absence was during business hours.

Contracts — Performance.—If a party to a contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition, p. 102.

Cited and principle followed in *Hamilton v. Mutual Life Ins. Co.*, 9 Blatchf. 256, F. C. 5,986, where insurance company prevented punctual payment of premiums by withdrawal of agency; *Brady v.*

Stillman, 31 Fed. 793, holding defendant cannot plead nonperformance of condition which he himself has prevented; *Risinger v. Cheney*, 2 Gilm. 90, where performance was prevented by injunction, held that party was in default who permitted continuance of injunction; *Attix v. Pelan*, 5 Iowa, 342, holding agents to sell excused from showing performance as condition precedent to recovery for commissions, where owner himself had previously sold property in question; *Padden v. Marsh*, 34 Iowa, 524, holding offer to return property excused by notice that it will not be received; *Larned v. Dubuque*, 86 Iowa, 181, 53 N. W. 110, noncollection of full amount sued for by attorney excused by compromise by his client; *Smith v. Railroad Co.*, 36 N. H. 489, agreement to refer as condition precedent to suit cannot be set up by party who has prevented reference, collecting cases; *Schwartzbach v. Union*, 25 W. Va. 649, holding surrender of insurance policy waived by notice that it would not be accepted; *Boyington v. Sweeney*, 77 Wis. 68, 45 N. W. 942, offer of performance excused by notice that it will not be accepted, collecting cases. Affirmed generally in *Doyle v. Teas*, 4 Scam. 263, collecting authorities; *Car Co. v. Menzies*, 90 Ind. 85, 46 Am. Rep. 198; *Viele v. Insurance Co.*, 26 Iowa, 52, 96 Am. Dec. 98; *Eliot Nat. Bank v. Beal*, 141 Mass. 569, 6 N. E. 744; *Schmidt v. Insurance Co.*, 2 Mo. App. 341.

Rules of practice.—The court refused to hear argument upon the proposition that rules adopting the practice of State courts must be in writing, and expressed itself as satisfied with the contrary conclusion reached in *Fullerton v. Bank*, 1 Pet. 604, 7 L. 280, p. 106.

Cited generally in *Citizens' Bank v. Farwell*, 56 Fed. 574, 12 U. S. App. 409.

Miscellaneous.—Cited in *Whitaker v. Morrison*, 1 Fla. 33, 44 Am. Dec. 631, reasonableness of notice is mixed question of law and fact; *Railroad Co. v. Frederic*, 46 Miss. 11; *Conkling v. King*, 10 N. Y. 442.

2 Pet. 107-120, 7 L. 368, *VENABLE v. BANK OF UNITED STATES*.

Fraudulent conveyance.—A deed made by a person upon the eve of a decree being rendered against him for a large sum, conveying all his property to his brother-in-law, who was not known to possess property sufficient to pay the purchase money, and suffered the property to remain in the possession of the grantor will be set aside as fraudulent, p. 112, et seq.

Cited in *Marshall v. Croom*, 60 Ala. 132, holding void a deed of insolvent, pending suits against him, conveying all his property to near relation, as against grantee who knows of existence of the debts of grantor; *Clark v. Snelling*, 1 Ind. 382, holding void a deed executed without consideration and mala fide; *Weber v. Rothchild*, 15 Or. 392, 3 Am. St. Rep. 168, 15 Pac. 654, actual payment of pur-

chase money essential to bona fides; and in note to 42 Am. Dec. 631, on acts of vendor when admissible as against vendee, to show fraud, collecting authorities.

Parties to actions.—In proceedings to set aside conveyance of real estate made in fraud of rights of creditors, it is not necessary to make mortgagee of estate a party, his rights not being brought into question, p. 112.

Evidence.—Acts and confessions of grantor, though not admissible after conveyance to prejudice his grantee's title, may be admissible to disprove a grantor's answer in a cause, p. 119.

Miscellaneous.—Cited generally in *Harris v. Alcock*, 10 Gill & J. 252, 32 Am. Dec. 166. Cited erroneously in *Railroad Co. v. Ragsdale*, 51 Miss. 454. Cited in *Williams v. Eikenberry*, 25 Neb. 725, 13 Am. St. Rep. 519, 41 N. W. 771, remarking principal case incorrectly cited in *Bump on Fraudulent Conveyances*; *Magniac v. Thompson*. 1 Bald. 357, F. C. 8,956.

2 Pet. 121-135, 7 L. 368, *BANK OF UNITED STATES v. CORCORAN*.

Bills and notes.—Notice of nonpayment is sufficient to charge indorser, if actually received by him, though left at an improper place, p. 132.

Cited and rule applied in *Dickins v. Beal*, 10 Pet. 579, 581, 9 L. 541, 542, holding notice may be established either directly or by proof of due diligence; *McClain v. Waters*, 9 Dana, 57, rule particularly applicable where person to be noticed has no known residence; *Bradley v. Davis*, 26 Me. 52, applying rule; *Hallowell v. Curry*, 41 Pa. St. 326, applying rule and collecting cases; *Grinman v. Walker*, 9 Iowa, 428, holding analogously, that notice of suit through the mail is sufficient, accompanied by proof that it was actually received by the sendee on the proper day; *First Nat. Bank v. Wood*, 51 Vt. 474, 31 Am. Rep. 693, and *Terbell v. Jones*, 15 Wis. 256, holding similarly. Cited, arguendo, *Cabot Bank v. Warner*, 10 Allen, 524, and collected with other cases in note on this point, 38 Am. Dec. 607.

Evidence.—Presumptions from evidence given in a cause, of the existence of particular facts, are in many cases mixed questions of law and fact, p. 133.

Cited in *Bell v. Bank*, 7 Gill, 232, holding question of due diligence is one of law; *Wright v. Schroeder*, 2 Curt. 552, F. C. 18,091, holding question whether evidence has any legitimate tendency to prove matter in issue is one for the court; *Butler v. Stocking*, 8 N. Y. 412, holding similarly to last case. Cited generally in *Trott v. West*, 9 Yerg. 436.

Bills and notes.—Rule that notice of nonpayment must be given at indorser's residence or place of business cannot be escaped by

leaving notice at another place, where notices were sometimes left, p. 134.

Cited and applied in *Fowler v. Warfield*, 4 Cr. C. C. 71, F. C. 5,004, holding notice addressed to one town when indorser lived at another cannot be made good by proof of a custom at the post-office to forward letters to addressee when he was a known resident of the latter town.

Distinguished in *Wilkins v. Bank*, 6 How. (Miss.) 222, notice may be left with one whom the person to be noticed has by usage impliedly constituted his agent for the receipt of letters; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 521, holding desk in the custom-house may be place of business within rule; and cited in note, 38 Am. Dec. 614, collecting cases.

Miscellaneous.—Cited generally in *Hitchcock v. McGehee*, 7 Port. 562. Cited erroneously in *Allen v. Kirk*, 81 Iowa, 664, 47 N. W. 908.

2 Pet. 136, 7 L. 374, JACKSON v. TWENTYMAN.

Federal courts.—The judicial power of United States courts does not extend to suits where an alien is a party, unless a citizen is the adverse party, p. 136.

Cited and rule followed in *Prentiss v. Brennan*, 2 Blatchf. 164, F. C. 11,385; in *Hinckley v. Byrne*, Deady, 227, F. C. 6,510; in *Pooley v. Lucio*, 72 Fed. 561, and also in *Orosco v. Gagliardo*, 22 Cal. 85; in *Cissel v. McDonald*, 16 Blatchf. 151, F. C. 2,729, holding citizen of District of Columbia not a citizen of a State within the rule; *Stuart v. Easton*, 156 U. S. 47, 39 L. 341, 15 S. Ct. 268, holding allegation that party is "of a certain place," insufficient allegation of citizenship of that place; *Rateau v. Bernard*, 3 Blatchf. 248, F. C. 11,579, holding no jurisdiction where the parties are all aliens except one immaterial party; *Blair v. Manufacturing Co.*, 7 Neb. 155, if Circuit Court wrongfully assume jurisdiction its judgment is void.

Distinguished in *State v. Lewis*, 12 Fed. 3; S. C., 14 Fed. 67, holding Federal courts have jurisdiction of action between a State and subjects of a friendly foreign power.

Federal courts — Citizenship.—Where diverse citizenship confers jurisdiction on the Federal courts, citizenship must appear on the record, p. 136.

Cited in *Grace v. Insurance Co.*, 109 U. S. 284, 27 L. 935, 3 S. Ct. 211, *Herndon v. Insurance Co.*, 107 N. C. 195, 12 S. E. 242, *Donaldson v. Hazen*, Hemp. 424, 425, F. C. 3,984, applying rule. Cited, arguendo, *Tunstall v. Worthington*, Hemp. 664, F. C. 14,239, refusing to entertain action where the only party who was a citizen of a different State was a garnishee and an immaterial party. Cited in *United States v. Woolsey*, 28 Fed. Cas. 767, on general proposition that United States courts being of limited jurisdiction, pleadings must show jurisdiction.

2 Pet. 137-149, 7 L. 374, VAN NESS v. PACARD.

Fixtures.—General rule is that whatever is once annexed to the freehold becomes part of it and cannot be removed except by him who is entitled to the inheritance, p. 143.

Cited and principle followed in *Mitchell v. Billingsley*, 17 Ala. 393, holding fruit trees fixtures; *Harkness v. Sears*, 26 Ala. 497, 62 Am. Dec. 744, holding stationary machinery fixtures as between vendor and vendee; *Marks v. Ryan*, 63 Cal. 111, barn and dwelling-house are fixtures; *Hamilton v. Huntley*, 78 Ind. 524, 41 Am. Rep. 595, reviewing authorities and holding machinery attached so as to be easily removed, fixtures as between seller of same and mortgagee of premises; *Davis v. Eastham*, 81 Ky. 118, holding mill a fixture and part of realty, notwithstanding express exception in mortgage; *McKim v. Mason*, 3 Md. Ch. 195, holding boiler and engine of cotton factory part of the realty; *Stillman v. Hamer*, 7 How. (Miss.) 423, buildings erected without any contract with owner belong to the land; *Switzer v. Allen*, 11 Mont. 164, 27 Pac. 400, buildings erected by lessee under agreement that they were to be paid for by lessor are part of the realty; *Conner v. Coffin*, 22 N. H. 541, manure on a farm is part of the realty. Cited, *arguendo*, in *Jones v. Railroad Co.*, 70 Ala. 230; *Central Branch R. R. Co. v. Fritz*, 20 Kan. 436, 27 Am. Rep. 180, holding fixture part of realty remains property of owner of realty, notwithstanding it has been wrongfully severed and affixed to lands of another; *Coombs v. Jordan*, 3 Bland, 312, 22 Am. Dec. 260, what are fixtures depends on the circumstances of each particular case; *Horne v. Smith*, 105 N. C. 325, 18 Am. St. Rep. 905, 11 S. E. 374, engine and boiler affixed by vendor are fixtures; *McCullough v. Irvine*, 13 Pa. St. 441, as also a substantial brick building erected by tenant for life; *Henderson v. Ownby*, 56 Tex. 649, 42 Am. Rep. 692, and erections by defendant pending ejectment; *Leland v. Gassett*, 17 Vt. 410, 411, buildings erected by son upon lands of father, relying upon promise to convey to him, are part of the realty.

Distinguished in *Croomie v. Hoover*, 40 Ind. 56, tenant may remove any buildings erected by him for the better enjoyment of the leased premises; *Howard v. Fessenden*, 14 Allen, 128, collecting cases, dwelling-house erected by tenant of tenant for life may be removed by the former; *Gregg v. Railway Co.*, 48 Mo. App. 498, tenant may remove fixtures erected under special agreement to permit removal; *Lanphere v. Lowe*, 3 Neb. 136, 137, improvements so made as to be easily removed are treated as personal property, and subjected to levy and sale as such; *Dame v. Dame*, 38 N. H. 430, 75 Am. Dec. 197, house erected by one on lands of another under an agreement that he may remove it at pleasure does not become part of the realty; *Teaff v. Hewitt*, 1 Ohio St. 532, 59 Am. Dec. 647, holding machinery in woolen mill attached only by cleats, not fixtures; *Ross's Appeal*, 9 Pa. St. 494, engine-house erected by vendee may

be removed by him; *Hill v. Wentworth*, 28 Vt. 436, machinery fastened by cleats, held not part of realty.

Fixtures erected for purposes of trade may be removed by the tenant during his term, pp. 143, 144.

Cited and rule applied in *Freeman v. Dawson*, 110 U. S. 270, 28 L. 143, 4 S. Ct. 98, and *Lemar v. Miles*, 4 Watts, 332, they may be taken in execution against the lessee; *Hensley v. Brodie*, 16 Ark. 523, sale and delivery of possession of machinery is sufficient severance to give title to buyer as against subsequent purchaser of the freehold; *Crippen v. Morrison*, 13 Mich. 31, where estate of tenant is indefinite, fixtures may be removed after lapse of the tenancy; *Bircher v. Parker*, 40 Mo. 120, or where removal has been enjoined; *Goodman v. Railroad Co.*, 45 Mo. 35, 100 Am. Dec. 336, holding similarly to preceding case; *Wiggins Ferry Co. v. Railway Co.*, 142 U. S. 416, 35 L. 1063, 12 S. Ct. 194, rails of railway company are trade fixtures within the rule; *Brown v. Reno Co.*, 55 Fed. 234, also buildings and machinery of electric light company; *Carr v. Railroad Co.*, 74 Ga. 81, 82, a railway depot; *Moore v. Smith*, 24 Ill. 516, distillery machinery; *Searl v. School District*, 133 U. S. 561, 33 L. 746, 10 S. Ct. 376, *arguendo*, rule does not apply where agreement raises no presumption that improvements were intended to be transferred; *State v. Bonham*, 18 Ind. 233, sawmill and machinery are trade fixtures; *Russell v. Richards*, 10 Me. 431, 25 Am. Dec. 255, a mill; *Northern Central Ry. Co. v. Canton Co.*, 30 Md. 353, railway depots, road-bed and rails; *Hanrahan v. O'Reilly*, 102 Mass. 204, a bowling alley; *Firth v. Rowe*, 53 N. J. Eq. 525, 32 Atl. 1066, a livery-stable; *Ombony v. Jones*, 19 N. Y. 243, a ballroom; *Western N. C. Ry. Co. v. Deal*, 90 N. C. 112, a railway depot; *Oregon R. & N. Co. v. Mosier*, 14 Or. 522, 58 Am. Rep. 324, 13 Pac. 302, railway improvements; *Hill v. Sewald*, 53 Pa. St. 274, 91 Am. Dec. 211, so boilers in a mill may be removed by tenant; *Padgett v. Cleveland*, 33 S. C. 348, 11 S. E. 1072, as also sash and door manufacturing machinery; *Texas & Pac. Ry. Co. v. Hays*, 3 Tex. Civ. App. 82, railway improvements; *Wing v. Gray*, 36 Vt. 268, hop poles; *Second Nat. Bank v. Merrill*, 69 Wis. 511, 34 N. W. 517, also paper manufacturing machinery; *Dawson v. Daniel*, 2 Flipp. 317, F. C. 3,669, holding machinery part of a leasehold. Cited generally, *Steers v. Daniel*, 4 Fed. 599, discussing nature of levy under execution when fixtures consist of ponderous machinery; *Ross v. Campbell*, 9 Colo. App. 40, 47 Pac. 465, tenant may remove whatever fixtures can be removed without injury to the freehold; *La Salle Co. Mfg. Co. v. Ottawa*, 16 Ill. 421, fixtures for purposes of trade are real chattels; *Crippen v. Morriso*, 13 Mich. 34, test is whether fixtures can be removed without injury to the freehold.

Distinguished in *Sampson v. Camperdown Mills*, 64 Fed. 942, fixtures must be removed during the term; *Dostal v. McCaddon*, 35

Iowa, 321, collecting cases and ruling similarly to preceding case; *White v. Arndt*, 1 Whart. 93, ruling similarly; *Doak v. Wiswell*, 38 Me. 572, tenant by curtesy not a tenant within the rule; *Collamore v. Gillis*, 149 Mass. 581, 14 Am. St. Rep. 461, 22 N. E. 47, 5 L. R. A. 152, & n., baker's oven not removable without destruction of building is not a trade fixture; *Perkins v. Swank*, 43 Miss. 361, fixtures erected by a vendee are not severable. Cited, but not followed, *Freeman v. Lynch*, 8 Neb. 196, reviewing cases at length and holding house erected by claimant a fixture; *Comer v. Coffin*, 22 N. H. 541, reviewing cases and holding manure a fixture not removable by farm tenant.

Common law.—Only those principles of the common law were adopted in this country which were applicable to its situation, p. 144.

Cited in *Simpson v. State*, 59 Ala. 13, 31 Am. Rep. 7, refusing to apply common law on subject of spring guns; *Wagner v. Bissell*, 3 Iowa, 403, refusing to apply common law as to trespass by cattle, reviewing authorities; *Pierson v. Lane*, 60 Iowa, 64, 14 N. W. 92, refusing to apply statute de donis; *Perrin v. Lepper*, 34 Mich. 295, refusing to apply common-law doctrine of attornment; *Reno, etc., Works v. Stevenson*, 20 Nev. 277, 19 Am. St. Rep. 368, 21 Pac. 319, 4 L. R. A. 63, refusing to apply its doctrine of riparian rights; *Lisbon v. Lyman*, 49 N. H. 582, refusing to apply common-law rule as to presumptions. Cited generally, *Shively v. Bowlby*, 152 U. S. 52, 38 L. 350, 14 S. Ct. 567, holding jurisprudence of Oregon founded on the common law; *United States v. New Bedford Bridge*, 1 Wood. & M. 448, F. C. 15,867, discussing effect of Constitution on common law; and in note, 49 Am. Dec. 618, and in note, 7 Am. St. Rep. 430.

Common law.—The general principles of the common law were brought to America by our ancestors and adopted here so far as applicable, p. 144.

Cited approvingly in *Murray v. Railway Co.*, 62 Fed. 27, reviewing authorities and holding in the absence of legislation by congress, interstate commerce is subject to rules of the common law; *Mobile, etc., Ins. Co. v. McMillan*, 31 Ala. 719, common law applies to law of insurance in absence of statutory enactment; *Ex parte Holman*, 28 Iowa, 126, applying common law as to habeas corpus; *Clark v. Clark*, 17 Nev. 129, 28 Pac. 238, applying doctrine of common law as to descents; *Lynch v. Clarke*, 1 Sandf. Ch. 646, applying common-law doctrine that alien may not inherit lands, reviewing authorities. Cited, arguendo, *United States v. Wong Kim Ark*, 169 U. S. 709, 42 L. 912, 18 S. Ct. 480, dissenting opinion, discussing question of citizenship under fourteenth amendment. Cited generally, *Gratton v. Railway Co.*, 95 Iowa, 117, 63 N. W. 591, 28 L. R. A. 558, discussing how far common law is part of national jurisprudence.

Fixtures.— Whether fixtures for the purposes of trade are removable or not does not depend on their form, size, or construction, but solely upon whether they are erected for purposes of trade or not, p. 146.

Residence.— Whether building is occupied primarily for business or residence purposes depends upon whether the residence is a mere accessory to the beneficial exercise of the trade, p. 147.

Cited in *Phelps v. Rooney*, 9 Wis. 96 (715), dissenting opinion, discussing character of building for purpose of homestead.

Evidence.— Jury are sole judges whether evidence is such as ought to satisfy their minds on a question of fact, p. 148.

Cited and quoted in *Gleason v. Walsh*, 43 Me. 400.

Parol evidence is competent to establish usage, p. 148.

Custom — Fixtures.— Contracts between landlord and tenant, in respect to matters as to which the parties are silent, is presumed to be made with reference to the usage and custom of the district where the land lies; accordingly evidence is admissible of custom in particular locality, permitting tenants to remove dairy buildings erected on leased premises, p. 148.

Approved and followed in *Cochrane v. Mining Co.*, 16 Colo. 419, 26 Pac. 781, construing lease according to customs of mining district; *Keogh v. Daniell*, 12 Wis. 170, 172, sustaining custom permitting removal of buildings erected by tenant; *Brown v. Atkinson*, 91 N. C. 397, holding, by analogy, evidence of usage admissible to show custom regarding payment of license tax; *Snowden v. Warder*, 3 Rawle, 106, to show custom that vendor shall be liable for latent defects in cotton sold; *Adams v. Insurance Co.*, 95 Pa. St. 355, 40 Am. Rep. 662, to show custom of steamboat captains to give premium notes for insurance. Cited generally in *Gleason v. Walsh*, 43 Me. 399, usage may be general although confined to a particular district; *Long v. Armsby Co.*, 43 Mo. App. 267, collecting authorities on general subject of usages; *Farnsworth v. Chase*, 19 N. H. 541, 51 Am. Dec. 208, discussing usage and custom generally. Cited, without particular application, in *Foster v. Robinson*, 6 Ohio St. 96, and cited in note, 69 Am. Dec. 515, collecting authorities.

Distinguished in *Thomas v. Davis*, 76 Mo. 78, 43 Am. Rep. 761, custom as between landlord and tenant to regard certain fixtures as chattels may not be admitted to affect conveyance between, by owner of fee who has annexed chattels to the realty.

Trial.— The trial court cannot be required to give to the jury its opinion on the weight and credibility of the testimony, p. 149.

Cited in *Insurance Co. v. Rodel*, 95 U. S. 238, 24 L. 435, whether judge shall do so or not is entirely in his discretion; *Butler v. Stocking*, 8 N. Y. 412, ruling similarly; and cited in notes, 72 Am.

Dec. 541, 546, collecting authorities and discussing general scope of judge's authority in commenting on evidence, etc.; *Gamble v. Johnson*, 9 Mo. 625 (617), in general discussion.

Miscellaneous.—Cited in *Allen v. Railroad Co.*, 106 N. C. 528, 11 S. E. 827, after revocation of license, licensee has right of re-entry for purpose of removing personal property placed on land by him.

2 Pet. 150-156, 7 L. 379, *BOYCE v. ANDERSON*.

Common carriers.—Law of common carriers is one of great rigor, and although its necessity and policy are admitted, it ought not to be carried further, p. 154.

Cited in *The Neaffie*, 1 Abb. (U. S.) 467, F. C. 10,063, holding owner of steam tug is not liable as common carrier for injury to the tow; *Varble v. Bigley*, 14 Bush, 706, 29 Am. Rep. 441, owners of towboats are not common carriers; *Lewis v. The Success*, 18 La. Ann. 7, carrier not liable for delays caused by weather; *Alexander v. Greene*, 7 Hill, 545, owners of towboats are not common carriers; *Ingalls v. Bills*, 9 Met. 13, 43 Am. Dec. 353, coach proprietors not liable as common carriers; *Sheldon v. Robinson*, 7 N. H. 165, 26 Am. Dec. 728, nor a driver of a stage coach; *McKee v. Owen*, 15 Mich. 140, refusing to extend innkeeper's liability to steamboat carriers of passengers and baggage. Cited generally in *Powell v. Myers*, 26 Wend. 598, discussing when liability of carrier of baggage terminates.

Distinguished in *Smith v. Pierce*, 1 La. 356, and *Alexander v. Greene*, 7 Hill, 550, owners of tugboats are common carriers.

Liability of carriers of slaves is regulated by law of carriers of passengers rather than of goods, p. 155.

Cited in *Folse v. Transportation Co.*, 19 La. Ann. 200, and followed on the precise point; *Scruggs v. Davis*, 3 Head, 665, 666, applying rule; *Clarke v. Railroad Co.*, 14 N. Y. 573, 67 Am. Dec. 206, *Rixford v. Smith*, 52 N. H. 360, 13 Am. Rep. 47, *White v. Winnissimet Co.*, 7 Cush. 158, *South & North Carolina R. R. Co. v. Heinlein*, 52 Ala. 614, 23 Am. Rep. 586, and *Hussey v. Saragossa*, 3 Woods, 382, F. C. 6,949, holding, analogously, that carrier of animals is not liable for injuries growing out of natural propensity of animal; *Williams v. Taylor*, 4 Port. 238, holding liability of carrier of slaves not regulated by law of carrier of goods; *Sill v. Railroad Co.*, 4 Rich. L. 161, refusing to hold innocent carrier liable for loss by escape of slave; *Perkins v. Reeds*, 8 Mo. 35, holding by analogy that bailee of slave is not liable for loss occasioned by slave's running away without fault on his part; and *Spencer v. Pilcher*, 8 Leigh, 583, discussing generally liability of bailee of slave. Cited in note, 67 Am. Dec. 209, collecting authorities on liability of carriers of animals.

Distinguished in *Railroad Co. v. Reynolds*, 8 Kan. 640, re-reported, 12 Am. Rep. 502, note, arguing general rule that carriers of animals

are liable as carriers of goods; *Richards v. Fuqua*, 28 Miss. 801, 64 Am. Dec. 124, holding carrier of slaves liable for loss resulting from defective boat.

Carriers of passengers are responsible for injuries resulting from their negligence or unskillful conduct and not otherwise, p. 155.

Cited in *Sales v. Stage Co.*, 4 Iowa, 549, holding carrier is liable for slightest neglect; *Lusby v. Railroad Co.*, 41 Fed. 186, holding unusual jerking of train negligence; *Hall v. Steamboat Co.*, 13 Conn. 326, carrier is bound to use the highest degree of care.

Common carriers.—When the carriage is gratuitous, the carrier is responsible only for gross neglect, p. 156.

Cited in *Brown v. The Elvira Harbeck*, 4 Fed. Cas. 372, applying rule.

Distinguished in *Macon, etc., R. R. Co. v. Holt*, 8 Ga. 164, 165, rule not applicable where carrying is under such circumstances as to constitute it a conversion.

Carrier of passengers is liable only for ordinary neglect, p. 156.

Cited in *Brock v. King*, 3 Jones (N. C.), 49, holding by analogy, jailer having custody of runaway slave is bound to use only ordinary care.

Modified in *Stokes v. Saltonstall*, 13 Pet. 192, 10 L. 122, holding carrier liable for slight neglect. Criticised in *Pendleton v. Kinsley*, 3 Cliff. 421, F. C. 10,922, holding rule to be that proof of accident, prima facie, affords presumption of negligence; *Fairchild v. Stage Co.*, 13 Cal. 603, criticising principal case and holding same as preceding citation; *Farish v. Reigle*, 11 Gratt. 710, 712, 62 Am. Dec. 670, 672, holding principal case practically overruled by *Stokes v. Saltonstall*, supra. Criticised in *Chicago, etc., R. R. Co. v. Hazzard*, 26 Ill. 387, holding rule is now that carrier is liable for the least negligence; *Edwards v. Lord*, 49 Me. 281, holding similarly. Distinguished in *Smith v. Pierce*, 1 La. 356, as not authority against holding a towing steamer liable as a common carrier.

Miscellaneous.—Cited generally in *Baxter v. Leland*, Abb. Adm. 359, F. C. 1,124, tendency of law is to place responsibility of common carrier on same footing with that of other parties performing undertakings of trust for reward; *Murray v. Railroad Co.*, 62 Fed. 40, common law of carriers applicable to carriage interstate; *Creswell v. Walker*, 37 Ala. 236, moral and intellectual qualities of slaves are looked to in ascertaining the rights and liabilities of others to them as articles of property; *Forsyth v. Perry*, 5 Fla. 344, contract by which slave is hired is one of bailment.

2 Pet. 157-169, 7 L. 381, THOMPSON v. TOLMIE.

Appeal and error.—Errors and irregularities are to be corrected by some direct proceeding, either before the same court or in an appellate court, p. 163.

Cited in *Waters v. Stickney*, 12 Allen, 10, 90 Am. Dec. 129, holding probate judge may admit to probate a codicil to will already admitted, which was on the back of original will but unnoticed at the time.

Judgment.— If no jurisdiction exists, proceedings are void and may be rejected on collateral attack. p. 163.

Cited with approval in *Thornhill v. Bank*, 1 Woods, 5, F. C. 13,992, holding proceedings under superseded insolvency law void; *Lavin v. Bank*, 18 Blatchf. 27, 1 Fed. 665, reviewing principal case, and holding administration on estate of living person void; *McCartney v. Calhoun*, 11 Ala. 120, sale in absence of jurisdiction does not divest title; *Bishop v. Hampton*, 15 Ala. 767, applying rule and holding similarly to preceding case; *McGehee v. Wilkins*, 31 Fla. 86, 12 So. 229, where defendant is not before the court, judgment is void and open to collateral attack; *Railroad v. Davis*, 13 Ga. 76, holding judgment of arbitrators void on collateral attack for failure to follow jurisdictional requirement; *Reed v. Wright*, 2 G. Greene, 35, holding judgment rendered under unconstitutional act void; *Seely v. Reid*, 3 G. Greene, 379, holding sale where there was no service of process void, collecting cases; *Ex parte Holman*, 28 Iowa, 178, dissenting opinion, arguing, State court may review void proceeding in Federal court by habeas corpus; *Lowry v. Erwin*, 6 Rob. (La.) 205, holding void a judgment of Federal court where both parties resided without the State; *Vick v. Vicksburg*, 1 How. (Miss.) 440, 31 Am. Dec. 180, holding void an appointment of administrator cum test. an. in case falling without the statute; *Tarleton v. Cox*, 45 Miss. 438, judgment rendered after death of party without revivor by scire facias is void; *Kittredge v. Emerson*, 15 N. H. 263, 267, decree of Federal court under bankruptcy act enjoining proceedings in State court; *Miltimore v. Miltimore*, 40 Pa. St. 155, decree of divorce; *James v. Smith*, 2 S. C. 188, attachment for contempt; *Adams v. Agnew*, 15 S. C. 42, judgment by default entered by clerk in term time; *Sutherland v. De Leon*, 1 Tex. 309, 46 Am. Dec. 107, proceeding by attachment; *Sitzman v. Pacquette*, 13 Wis. 318, appointment of administrator d. b. n. in absence of contingency contemplated by statute.

Judgments.— When jurisdiction over the subject-matter appears on the face of the proceedings, errors or mistakes of the court cannot be corrected or examined collaterally, pp. 163, 169.

Cited and applied in *United States v. Arredondo*, 6 Pet. 730, 8 L. 561, holding rule extends to executive and legislative as well as judicial acts, collecting cases; *Cocke v. Halsey*, 16 Pet. 87, 10 L. 897, holding when court has jurisdiction, decision presumed correct; *Harvey v. Tyler*, 2 Wall. 345, 17 L. 874, refusing to question, collaterally, judgment of competent court declaring lands redeemed

from forfeiture; *Keyes v. United States*, 109 U. S. 340, 27 L. 956, 3 S. Ct. 204, refusing to question collaterally decision of court-martial; *White v. Crow*, 110 U. S. 189, 28 L. 115, 4 S. Ct. 74, everything presumed in favor of judgment on collateral attack; *United States v. Land Co.*, 148 U. S. 44, 37 L. 360, 13 S. Ct. 463, refusing to question decision of State governor exercising power conferred on him by act of congress; *In re Lennon*, 166 U. S. 553, 41 L. 1112, 17 S. Ct. 660, allegation of citizenship in bill cannot be questioned on habeas corpus; *Derby v. Jacques*, 1 Cliff. 437, F. C. 3,817, erroneous decision binding until reversed; *Cassels v. Vernon*, 5 Mason, 335, F. C. 2,503, decree of Probate Court establishing will cannot be attacked collaterally on ground of incompetency of testator; *Starr v. Stark*, 2 Sawy. 621, F. C. 13,317, applying rule to ruling of court in progress of trial, compelling election between counts; *Tompkins v. Tompkins*, 1 Story, 553, F. C. 14,091, applying rule to decree of Supreme Court as to validity of will; *Lincoln v. Tower*, 2 McLean, 485, F. C. 8,355, record is conclusive on all matters which might have been traversed, collecting cases; *Sprague v. Litherberry*, 4 McLean, 452, F. C. 13,251, reviewing principal case and refusing to question collaterally appointment of guardian; *McArthur v. Allen*, 3 Fed. 322, reviewing authorities and refusing to question collaterally decree setting aside will; *In re Wilson*, 18 Fed. 37, on habeas corpus every presumption is in favor of jurisdiction, collecting cases; *Walker v. Sturbans*, 38 Fed. 300, refusing to disturb decree establishing priority of liens on collateral attack; *Reinach v. Railroad Co.*, 58 Fed. 43, collecting authorities and distinguishing between jurisdictional and quasi-jurisdictional allegations. The following State court cases also affirm and follow the syllabus doctrine: *Ryder v. Innerarity*, 4 Stew. & P. 30, refusing to permit collateral attack on decision of land commissioner; *Evans v. Percifull*, 5 Ark. 429, on decision of Circuit Court in action of ejectment; *Borden v. State*, 11 Ark. 548, 54 Am. Dec. 238, holding when jurisdiction of subject-matter exists jurisdiction of the person cannot be inquired into collaterally; and in dissenting opinion, S. C., 11 Ark. 564; *Conway v. Ellison*, 14 Ark. 363, refusing to enjoin proceedings on erroneous judgment of sister State; *In re Warfield*, 22 Cal. 63, 83 Am. Dec. 51, refusing to question collaterally decree of Probate Court admitting will to probate; *Corrigan v. Jones*, 14 Colo. 314, 23 Pac. 914, holding similarly to preceding case; *Holcomb v. Phelps*, 16 Conn. 132, applying rule to decree of foreign court; *Camp v. Moseley*, 2 Fla. 196, holding officer protected in executing writ irregularly issued from court of competent jurisdiction; *Muncey v. Joest*, 74 Ind. 412, holding conclusive a finding of board of commissioners that facts sustaining their own jurisdiction exist; *Hampson v. Weare*, 4 Iowa, 16, 66 Am. Dec. 118, refusing to question collaterally a judgment directing execution against stockholders for corporate debt; *Orr v. Thomas*, 3 La. Ann. 584, as also

adjudication of community property; Jeannet v. Ricker, 10 La. Ann. 67, a decree constituting infant a major; Salisbury Assn. v. Wicomico Co., 86 Md. 622, 39 Atl. 427, a decision of State board of appeals; Parker v. Parker, 11 Cush. 526, a decree of foreign court admitting will to probate; Watson v. Ulbrich, 18 Neb. 189, 24 N. W. 733, a decree questioning title; Foster v. Dugan, 8 Ohio, 107, 31 Am. Dec. 434, and Pillsbury v. Dugan, 9 Ohio, 120, 34 Am. Dec. 429, denying collateral inquiry into decree in partition; Williams v. Saunders, 5 Cold. 78, as also foreign decree establishing will; Yates v. Houston, 3 Tex. 447, decree of Probate Court establishing title to property by succession; Lynch v. Baxter, 4 Tex. 446, 51 Am. Dec. 743, holding similarly to preceding case; Giddings v. Steele, 28 Tex. 752, 91 Am. Dec. 342, decree and orders of Probate Court.

Cited, but without particular application of the rule, in Decatur v. Paulding, 14 Pet. 600, 10 L. 609, dissenting opinion; Holmes v. Jennison, 14 Pet. 628, 10 L. 627; Noble v. Railroad Co., 147 U. S. 174, 37 L. 126, 13 S. Ct. 273, holding decision of secretary of interior affecting property rights cannot be revoked by his successor; Bell v. Trust Co., 1 Biss. 270, F. C. 1,260, discussing general subject of nature of jurisdiction; In re McKibben, 16 Fed. Cas. 212, discussing subject of jurisdictional allegations, collecting cases.

Judicial sales.—Where jurisdiction of subject-matter exists sale by Probate Court cannot be avoided on collateral attack, pp. 163, 169.

Cited and rule applied in Voorhees v. Bank, 10 Pet. 477, 478, 9 L. 501, refusing to set aside judicial sale on collateral attack for error anterior to judgment, reviewing authorities; Grignon v. Astor, 2 How. 342, 343, 11 L. 292, refusing to set aside sale by County Court upon collateral attack; Beauregard v. New Orleans, 18 How. 503, 15 L. 472, refusing to allow probate sale to be attacked collaterally; Parker v. Kane, 22 How. 14, 16 L. 290, refusing to set aside administrator's sale, collaterally, where no guardian has been appointed to represent the heirs; Cooper v. Reynolds, 10 Wall. 316, 19 L. 932, collecting cases and refusing to question collaterally execution sale founded on judgment in rem; Hall v. Law, 102 U. S. 464, 26 L. 218, refusing to set aside partition proceedings on collateral attack, when record failed to show they were founded on petition; Davis v. Gaines, 104 U. S. 391, 26 L. 759, reviewing authorities, and refusing to vacate probate sale on collateral attack when proceedings had been invalidated by subsequent discovery of a will; Thaw v. Ritchie, 136 U. S. 548, 34 L. 538, 10 S. Ct. 1044, refusing to impeach collaterally order of sale in probate for want of notice to heirs; Manson v. Duncanson, 166 U. S. 547, 41 L. 1110, 17 S. Ct. 652, refusing to permit collateral attack on probate sale for want of notice to nonresident minor; Thompson v. Phillips,

Bald. 272, F. C. 13,974, refusing to question, collaterally, erroneous sale under fi. fa.; Bank of United States v. Voorhees, 1 McLean, 225, F. C. 939, reviewing principal case and refusing to permit collateral attack on sale under attachment; Sumner v. Moore, 2 McLean, 62, F. C. 13,070, refusing to question collaterally execution sale under voidable levy; Miller v. Sullivan, 4 Dill. 343, F. C. 9,592, or a guardian's sale; Daily v. Doe, 3 Fed. 913, 914, or a marshal's sale in admiralty; Garrett v. Boeing, 68 Fed. 61, 37 U. S. App. 42, or an administrator's sale.

In the State courts citing cases affirm and follow the doctrine thus: Wyman v. Campbell, 6 Port. 234, 235, 241, 31 Am. Dec. 684, 685, 689, sale under decree of Orphans' Court may not be collaterally avoided, collecting and reviewing authorities; Cole v. Connolly, 16 Ala. 281, or foreclosure sale; King v. Kent, 29 Ala. 554, or probate sale; Wright v. Ware, 50 Ala. 558, or administrator's sale; George v. Norris, 23 Ark. 129, probate sale; Finlayson v. Lipscomb, 16 Fla. 763, foreclosure sale; Grier v. McLendon, 7 Ga. 365, guardian's sale; Tucker v. Harris, 13 Ga. 14, 58 Am. Dec. 497, administrator's sale; Swiggart v. Harber, 4 Scam. 371, 39 Am. Dec. 423, execution sale; Lane v. Bommelmann, 17 Ill. 98, administrator's sale, collecting cases; Ponder v. Moseley, 2 Fla. 267, 48 Am. Dec. 201, title of purchaser at execution sale not affected by subsequent reversal of judgment; Tiffany v. Clover, 3 G. Greene, 402, arguendo, attachment sale not void for irregular return of sheriff; Hain v. Smith, 1 Ind. 460, refusing to question collaterally commissioner's sale in probate; Anderson v. Wilson, 100 Ind. 407, foreclosure sale; Johnson v. Carson, 3 G. Greene, 501, sheriff's sale in partition; Cavender v. Smith, 1 Iowa, 348, sheriff sale under execution; Morrow v. Weed, 4 Iowa, 89, administrator's sale; Denegre v. Haun, 14 Iowa, 248, 81 Am. Dec. 485, sale of homestead under execution; Pursley v. Hayes, 22 Iowa, 34, 92 Am. Dec. 368, guardian's sale; Paine v. Spratley, 5 Kan. 541, execution sale; Mills v. Ralston, 10 Kan. 212, foreclosure sale; Depuy v. Bemiss, 2 La. Ann. 515, sale under order of United States Circuit Court; Nisdom v. Buckner, 31 La. Ann. 57, 58, mortgage sale under decree of Probate Court; Cockey v. Cole, 28 Md. 285, 92 Am. Dec. 686, a foreclosure sale, reviewing principal case; Schley v. Baltimore, 29 Md. 47, sale under decree in chancery; Long v. Long, 62 Md. 63, sale under decree, collecting cases; Sanders v. McDonald, 63 Md. 512, foreclosure sale; Jones v. Talbot, 9 Mo. 124 (125), sale under decree setting aside deed of trust; Trumble v. Williams, 18 Neb. 154, 24 N. W. 720, and Gordon v. Gordon, 55 N. H. 405, administrator's sale; Blanchard v. Webster, 62 N. H. 468, executor's sale; Monroe v. Douglas, 4 Sandf. Ch. 197, 205, trustee's sale; Glover v. Ruffin, 6 Ohio, 270, and Ewing v. Higby, 7 Ohio, 200, 28 Am. Dec. 636, administrator's sale; Sydnor v. Roberts, 13 Tex. 620, 65 Am. Dec. 92, execution sale; Alexander v. Maverick, 18 Tex. 194, 67 Am. Dec.

696, administrator's sale; *Hawley v. Bullock*, 29 Tex. 224, sheriff's sale; *Hudson v. Jurnigan*, 39 Tex. 588, probate sale; *Quesenberry v. Barbour*, 31 Gratt. 500, trustee's sale; *Pennybacker v. Switzer*, 75 Va. 686, guardian's sale, reviewing authorities; *Allan v. Hoffman*, 83 Va. 137, 2 S. E. 606, sale in chancery; *Ryan v. Fergusson*, 3 Wash. 368, 28 Pac. 914, and *Jackson v. Astor*, 1 Pinn. 161, 39 Am. Dec. 294, administrator's sale, and cited in note, 79 Am. Dec. 164, collecting cases on collateral attack on attachment proceedings.

Distinguished in *Sabariego v. Maverick*, 124 U. S. 282, 31 L. 439, 8 S. Ct. 472, holding no presumption of jurisdiction exists in proceedings, not according to the common course of justice; *Adams v. Jeffries*, 12 Ohio, 272, 40 Am. Dec. 479, holding void an administrator's sale when heirs not parties to proceedings.

Courts.—Every reasonable intendment is made in favor of the proceedings of a court of competent jurisdiction, p. 165.

Cited, *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 194, applying rule to sustain foreclosure sale attacked for irregularity; *Bumpus v. Fisher*, 21 Tex. 568, to proceedings in criminal case attacked for malice; *Shadracks v. Woolfolk*, 32 Gratt. 709, judgment presumed regular on collateral attack; *Horner v. Doe*, 1 Ind. 133, 48 Am. Dec. 358, jurisdiction of person and subject-matter will be presumed in case of court of competent jurisdiction, collecting cases.

Distinguished, *Cooper v. Sunderland*, 3 Iowa, 129, 66 Am. Dec. 61, reviewing authorities, and holding that presumption of jurisdiction does not apply to court exercising functions out of the ordinary course of judicial acts.

Deed — Recitals.—It is sufficient to recite the substance of the proceedings in a commissioner's deed, under act requiring their recital, without selling them out in *haec verba*, p. 167.

Cited and approved, *Grignon v. Astor*, 2 How. 339, 340, 11 L. 291, holding jurisdiction sufficiently shown if anything appears on the record showing the subject-matter and the exercise of the judicial power.

Judicial sales.—Purchaser at judicial sale is not bound to look further back than the order of the court, p. 168.

Cited, approved and followed in *Simmons v. Saul*, 138 U. S. 455, 34 L. 1061, 11 S. Ct. 374, *Sumner v. Moore*, 2 McLean, 64, F. C. 13,610, *Price v. Winter*, 15 Fla. 106, *Buckmaster v. Carlin*, 3 Scam. 108, reviewing authorities, *Mills v. Ralston*, 10 Kan. 212, *Lalanne v. Moreau*, 13 La. 437, *McCullough v. Minor*, 2 La. Ann. 468, *Succession of Hebrard*, 18 La. Ann. 494, *Howard v. Moore*, 2 Mich. 232, reviewing principal case, *Seward v. Didier*, 16 Neb. 62, 20 N. W. 13, reviewing authorities, *Sheldon v. Newton*, 3 Ohio St. 500, and *Dancy v. Stricklinge*, 15 Tex. 559, 65 Am. Dec. 182. Affirmed in *Burdett v.*

Silsbee, 15 Tex. 618, 619, George v. Watson, 19 Tex. 370, Zickle v. McCue, 26 Gratt. 528, and Hull v. Hull, 26 W. Va. 30.

Distinguished in Williamson v. Berry, 8 How. 554, 12 L. 1195, holding sale under private act not a judicial sale and reviewing principal case.

Miscellaneous.—Cited, without particular application, Burnham v. Webster, 1 Wood. & M. 180, F. C. 2,179, discussing judgments generally. Cited erroneously, Smith v. Gayle, 58 Ala. 604, Bull v. Rowe, 13 S. C. 368, and Douglass v. Craig, 13 S. C. 373, discussing voidable assignment of homestead.

2 Pet. 170-185, 7 L. 386, TOWNSLEY v. SUMRALL.

Bills of exchange payable at a given time after date need not be presented for acceptance, but payment may be demanded at maturity, pp. 178, 179.

Cited in Evans v. Bridges, 4 Port. 351, applying rule; Smith v. Roach, 7 B. Mon. 19, applying rule, but holding that when presentation is made, notice of dishonor must be given; Whiteford v. Burckmyer, 1 Gill, 149, 39 Am. Dec. 652, and Plato v. Reynolds, 27 N. Y. 590; both applying rule; Allen v. Bank, 22 Wend. 222, 34 Am. Dec. 291, and Allen v. Suydam, 20 Wend. 324, 32 Am. Dec. 557, applying rule and holding, when presentment is made, notice of dishonor must be given; Terbell v. Downer, 27 Vt. 510, 65 Am. Dec. 213, and Walker v. Stetson, 19 Ohio St. 404, 2 Am. Rep. 407, applying rule.

Distinguished in Hart v. Smith, 15 Ala. 808, 50 Am. Dec. 161, holding bill payable at sight must be presented for acceptance.

Bills and notes.—Certificate of protest of foreign bill is sufficient proof of dishonor, p. 179.

Cited in Pierce v. Indseth, 106 U. S. 549, 27 L. 255, 1 S. Ct. 421, applying rule; Indseth v. Pierce, 13 Fed. Cas. 34, applying rule and collecting cases; Donegan v. Wood, 49 Ala. 252, 20 Am. Rep. 280, it seems the notarial certificate must be under seal; Ticonic Bank v. Stackpole, 41 Me. 305, holding the bill payable in another State foreign within the rule; Johnson v. Brown, 154 Mass. 106, 27 N. E. 994, holding similarly; Chew v. Read, 11 Smedes & M. 189, Carter v. Burley, 9 N. H. 568, and Halliday v. McDougal, 20 Wend. 85, all applying rule; Peabody Ins. Co. v. Wilson, 29 W. Va. 547, 2 S. E. 898, holding certificate of protest prima facie proof of all the facts contained therein. Cited, but without particular application, in McAfee v. Doremus, 5 How. 63, 12 L. 51, stating rule as above; Green v. Gross, 12 Neb. 124, 10 N. W. 461, arguendo, seal of notary prima facie proves itself; and cited in note on protest as evidence, 96 Am. Dec. 603.

Distinguished in White v. Englehard, 2 Smedes & M. 40, holding rule does not apply to promissory note.

Foreign bill.—A bill drawn in one State upon resident of another, is to be treated as foreign, and a notary's protest is per se evidence, p. 179.

Cited, *Musson v. Lake*, 4 How. 282, 285, 11 L. 975, 977, dissenting opinion, holding such bill is foreign; *Case v. Heffner*, 10 Ohio, 183; *Wells v. Whitehead*, 15 Wend. 530, *Halliday v. McDougall*, 20 Wend. 84, *Grafton Bank v. Moore*, 14 N. H. 147, *Carter v. Burley*, 9 N. H. 566, and *Atwater v. Streets*, 1 Doug. (Mich.) 455, all holding such bill is foreign, and dishonor may be proved by certificate of protest. Cited in *Williams v. Putnam*, 14 N. H. 541, 40 Am. Dec. 205, *arguendo*, where note is drawn in one State and indorsed in another, dishonor may be proved by protest.

Bills and notes — Contracts.—A pre-existing debt is a valid consideration for a bill of exchange, and for a promise to accept, p. 182.

Cited in *Swift v. Tyson*, 16 Pet. 20, 10 L. 872, applying rule; *Railroad Co. v. National Bank*, 102 U. S. 43, 26 L. 72, discussing subject generally; *Riley v. Anderson*, 2 McLean, 593, F. C. 11,835, applying rule and collecting cases; *Jewett v. Hone*, 1 Woods, 534, F. C. 7,311, applying rule and reviewing authorities; *Brush v. Scribner*, 11 Conn. 403, 29 Am. Dec. 316, applying rule even when bill had been obtained by fraud; *Bond v. Bank*, 2 Ga. 104, applying rule; *Johnson v. Barney*, 1 Iowa, 535, rights of holder are same whether debt pre-existing or contracted at the time of transfer; *Bostwick v. Dodge*, 1 Doug. (Mich.) 416, 41 Am. Dec. 586, applying rule and collecting cases; *Fellows v. Harris*, 12 Smedes & M. 466, approving and following principal case and reviewing authorities; *Boatman's Savings Inst. v. Holland*, 38 Mo. 51, holding similarly; *Doe v. Burnham*, 31 N. H. 433, applying rule and collecting cases. Cited casually in *Proctor v. Baldwin*, 82 Ind. 376, questioning whether there must be actual surrender of the evidence of the antecedent debt.

Distinguished in *Williams v. Little*, 11 N. H. 70, holding rule aliter where transfer is by way of pledge.

Consideration — Bills and notes.—Damage to the promisee constitutes a good consideration, p. 182.

Cited and rule applied in *Gillespie v. Battle*, 15 Ala. 283, holding that parting with possession under voidable contract of sale is sufficient consideration to support note for purchase money; *Fearnley v. De Mainville*, 5 Colo. App. 445, 39 Pac. 74, holding loss of rent sufficient to support promise to pay part of loss; *Clark v. Sigourney*, 17 Conn. 518, holding release of interest in land, however trivial, is sufficient to support promissory note; *Tompkins v. Phillips*, 12 Ga. 55, holding expenditure of time and money in pursuit of property sufficient to support agreement to release lien thereon; *Gordon v. Dalby*, 30 Iowa, 228, holding agreement to perform contract of another sufficient to support promise to be allowed to receive the proceeds thereof, collecting cases; *Bason v. Hughart*, 2 Tex. 479,

relinquishing a judgment may be a good consideration. Cited casually, *Robt. E. Lee Silv. Min. Co. v. Omaha & G. Smelting Co.*, 16 Colo. 132, 26 Pac. 331, stating rule as above; *Lane v. Scott*, 57 Tex. 372, discussing consideration generally. Cited, but without particular application, in *United States v. Linn*, 15 Pet. 314, 10 L. 751, stating the general rule; *Piatt v. United States*, 22 Wall. 507, 22 L. 861, discussing subject casually.

Statute of frauds—Bills and notes.—Where there is an independent consideration moving from promisor to promisee, a promise to pay the debt of another is without the statute; accordingly a parol promise to accept a bill of exchange sufficiently identifying it, although it be not yet drawn, is binding, p. 182.

Cited in *Emerson v. Slater*, 22 How. 43, 16 L. 365, holding direct contract of stockholder for benefit of corporation without the statute, collecting cases; *Brown v. Harrell*, 40 Ark. 430, applying rule, and holding, where credit is given to promisor and not to third party, it is an original obligation and without the statute; *Simonton v. Gandolpho*, 2 Fla. 396, holding promise by purchaser of land to pay mortgage debt in consideration of release, without the statute; *Hackleman v. Miller*, 4 Blackf. 324, holding promise of administrator to purchaser of note of deceased that it would be paid, not within the statute; *Horn v. Bray*, 51 Ind. 564, 19 Am. Rep. 746, promise of surety to indemnify co-sureties, made to induce them to sign, is not within the statute; *Kohn v. Bank*, 15 Kan. 435, holding promise to pay draft of one's agent if he fail to meet it, without the statute; *Jones v. Palmer*, 1 Doug. (Mich.) 382, collecting cases, and holding guaranty of note of third person transferred in payment of existing indebtedness, not within the statute; *Green v. Brookins*, 23 Mich. 53, 9 Am. Rep. 76, promise made as inducement to surrender claim, that a certain note would be paid is not within the statute; *Muller v. Riviere*, 59 Tex. 642, 46 Am. Rep. 292, holding promise of wife to pay debt of husband in consideration of forbearance to foreclose, not within the statute; *Heidenheimer v. Johnson*, 1 Tex. Civ. App. 349, holding verbal promise to indemnify officer not within the statute; *Hewett v. Currier*, 63 Wis. 395, 23 N. W. 888, promise of owner to pay subcontractor in consideration of forbearance to file lien is without the statute; and cited in exhaustive series of notes on collateral agreements under statute of frauds, 95 Am. Dec. 253, 255, and in note on contracts of indemnity under statute of frauds, 42 Am. St. Rep. 188.

Distinguished in *Morse v. Bank*, 1 Holmes, 214, F. C. 9,857, reviewing principal case, and holding verbal promise of bank to pay check, if presented through the clearing-house, within the statute; *Plummer v. Lyman*, 49 Me. 234, reviewing principal case and holding verbal promise to accept nonexistent bill within the statute, there being no independent consideration for the promise; *Nelson v. Boynton*, 3 Metc. 401, 37 Am. Dec. 150, holding promise to pay

note of third person in consideration of discontinuance of attachment suit thereon is within the statute; *Hetfield v. Dow*, 27 N. J. L. 451, 453, reviewing principal case and holding it contrary to weight of authority so far as it holds that liability of principal debtor does not render engagement of third party collateral.

Bills and notes.—Recovery may be had on a binding oral promise to accept a bill, although there be no virtual acceptance, p. 183.

Cited and rule applied in *Scudder v. Bank*, 91 U. S. 414, 23 L. 249, and *Putnam, etc., Bank v. Snow*, 52 N. E. 1079, both collecting cases; *Bayard v. Lathy*, 2 McLean, 464, F. C. 1,131, holding promise to accept amounts to an acceptance; *Russell v. Wiggin*, 2 Story, 238, F. C. 12,165, applying rule and reviewing cases; *Kennedy v. Geddes*, 3 Ala. 585, 37 Am. Dec. 715, rule applies, although at time of promise both amount and time of payment are unknown; *Lafargue v. Harrison*, 70 Cal. 386, 59 Am. Rep. 419, 9 Pac. 262, holding signer of special letter of credit liable to third party who advances money on the faith of the promise to accept therein contained; *Nelson v. Bank*, 48 Ill. 41, 95 Am. Dec. 514, promise of bank to pay checks may be enforced by third party who took checks on the faith of such promise; *Nimocks v. Woody*, 97 N. C. 5, 2 Am. St. Rep. 270, 2 S. E. 251, bill must follow terms prescribed in promise to accept; *Strohecker v. Cohen*, 1 Spear L. 353, 354, reviewing principal case and applying rule; *Kelley v. Greenough*, 9 Wash. 663, 38 Pac. 159, applying rule. Cited, without particular application, in *Rice v. Porter*, 16 N. J. L. 446, 449, discussing conditional acceptances.

Bills and notes.—Acceptance of drawee binds him, even though it be known to the holder that he has no funds of drawer in his hands, p. 183.

Cited approvingly, *Law v. Brinker*, 6 Colo. 556, holding drawee cannot plead want of consideration after acceptance. Cited casually, *Diversy v. Moor*, 22 Ill. 333, 74 Am. Dec. 158, holding acceptor of bill is principal debtor.

Partnership.—The mere fact that drawer and acceptor of a bill are partners does not make it a partnership bill, pp. 183, 184.

Cited generally, in *Le Roy v. Johnson*, 2 Pet. 200, 7 L. 397, and *Fillyan v. Laverty*, 3 Fla. 102.

Miscellaneous.—Cited, without particular application, in *Exchange Nat. Bank v. Bank*, 112 U. S. 291, 28 L. 727, 5 S. Ct. 148; *Hopkins v. Richardson*, 9 Gratt. 495, discussing liability of assignor of indemnity bond.

2 Pet. 186-200, 7 L. 391, *LE ROY v. JOHNSON*.

Evidence.—Testimony of party in interest is admissible where he testifies against his interest, p. 195.

Cited and rule applied in *Brooks v. McKinney*, 4 Scam. 316, hold-

ing party in interest, who is not a party to the suit, may be compelled to testify against his interest. Cited, without particular application of rule, *McLelland v. Ridgeway*, 12 Ala. 486, holding judgment not admissible against a party unless a contrary judgment would have been admissible in his favor; *Lefferts v. De Mott*, 21 Wend. 138, collecting cases and holding release of partner restores his competency.

Distinguished in *Latham v. Kenniston*, 13 N. H. 208, holding partner incompetent as witness to prove partnership.

Evidence.—One who is named in action as party, but who is not brought into the suit by process, is not disqualified from testifying on the ground that he is a party, p. 195.

Cited, *arguendo*, in *Wright v. Boynton*, 37 N. H. 20, 72 Am. Dec. 321, stating rule and collecting cases.

Bills and notes — Partnership.—Bill drawn or accepted by a firm in their usual name is presumed to be on their joint account, p. 197.

Cited in *Faler v. Jordan*, 44 Miss. 288, holding presumption is that partner has authority to sign firm name to negotiable paper.

Partnership.—Third persons, in contracting, are not bound to inquire whether partner is acting for the firm account or for his own individual advantage, p. 197.

Cited and rule applied, *McKinney v. Bradbury*, Dall. (Tex.) 444.

Partnership.—Firm is not bound where partner acts on his separate account, and those with whom he is dealing have reason to believe that to be the case, p. 197.

Cited in *Winship v. Bank*, 5 Pet. 576, 577, 8 L. 233, 234, dissenting opinion, reviewing principal case at length and *arguendo*, bank having knowledge of irregularity in discounting firm note is not an innocent indorsee; *Bloom v. Helm*, 53 Miss. 30, holding where transaction was not in usual course of business, transferee was put upon inquiry. Cited casually, *Cook v. Bloodgood*, 7 Ala. 686, discussing liability of partnership for note made by partner for his individual benefit. Cited in note, 56 Am. Dec. 149, discussing liability of dormant partners, collecting cases.

Distinguished in *Richardson v. Farmer*, 36 Mo. 43, 88 Am. Dec. 131, holding rule aliter in case of dormant partnership.

Partnership name.—A name assumed and publicly used becomes the firm name, though not contained in the articles of co-partnership, p. 198.

Cited and rule applied in *Pursley v. Ramsey*, 31 Ga. 409, proving signature to promissory note to be firm name; *Kelley v. Bourne*, 15 Or. 482, 16 Pac. 44, applying rule and collecting cases.

Partnership.—The fact that the proceeds of a bill drawn in the name of one partner were applied in payment of a partnership debt does not make it a partnership obligation, p. 199.

Cited and applied in *Goodrich v. Leland*, 18 Mich. 120, holding mode in which commercial paper is used cannot alter the legal effect of the contract by which it was obtained; *National Bank v. Thomas*, 47 N. Y. 20, applying rule.

Partnership.—Where one deals with partner in his individual capacity, the fact that he had no knowledge of dissolution of the firm is immaterial, pp. 199, 200.

Cited in *Dawson v. Pogue*, 18 Or. 125, 22 Pac. 643, 6 L. R. A. 181, holding no notice of withdrawal of dormant partner is necessary, collecting cases.

Miscellaneous.—Cited, without particular application, in *Burnham v. Whittier*, 5 N. H. 334, holding partner has authority to indorse firm note to himself and sue in his own name; *McIntire v. McLaurin*, 2 Humph. 72, assignment of partnership note by individual partner in his own name does not pass title.

2 Pet. 201-215, 7 L. 397, *HUNT v. WICKLIFFE*.

Public lands.—If defendant have prior patent, plaintiff can prevail in equity only by showing prior valid entries, p. 208.

Public lands.—Entry is not vitiated from fact that it is made in the name of heirs of deceased generally, instead of by names of such heirs, p. 208.

Cited, *Hart v. Young*, 3 J. J. Marsh. 418, holding entry in name of "heirs" will vest equity in devisees.

Public lands.—Entry describing lands by reference to certain surveys "which are legal," merely affirms the legality of those surveys and is not void for uncertainty, p. 209.

Equity.—Possession which will bar an ejectment will also be a bar in equity, p. 212.

Adverse possession.—Where both parties occupy portion of property in controversy, the one having the better right has constructive possession of all the land not occupied in fact by his adversary, p. 212.

Cited and rule applied in *Wilkins v. Pensacola City Co.*, 36 Fla. 59, 18 So. 26, collecting cases; *Young v. Campbell*, 6 J. J. Marsh. 492, reviewing principal case *arguendo*, and *Tribble v. Frame*, 7 J. J. Marsh. 610, dissenting opinion, stating rule as above. Cited, *Sawyer v. Oliver*, 7 J. J. Marsh. 180, discussing question whether rule applies in favor of junior patentee against prior possession of elder patentee.

Distinguished in *Smith v. Frost*, 2 Dana, 151, and *White v. Bates*, 7 J. J. Marsh. 546, holding rule not applicable where only one party had possession within the disputed strip.

Service of process.—Where statute requires publication of notice to absent defendants for two calendar months, eight weeks' publication will not confer jurisdiction, and decree founded thereon is void, p. 215.

Cited and rule followed, *Guaranty, etc., Trust Co. v. Railroad Co.*, 139 U. S. 147, 35 L. 120, 11 S. Ct. 516, reviewing authorities and holding publication on foreclosure must be for full statutory period; *Guaranty T. & S. D. Co. v. Buddington*, 27 Fla. 226, 9 So. 249, 12 L. R. A. 774, & n., to same effect; *Mercantile Trust Co. v. Residence Co.*, 94 Ky. 274, 22 S. W. 314, applying rule to publication of warning order under Federal statute. Cited, but without particular application, in *Nations v. Johnson*, 24 How. 206, 16 L. 632, holding service of process may be made by publication.

Practice.—Where claim is made under conveyance, founded on decree of court of competent jurisdiction, bill should not be dismissed for want of parties, but leave should be given to bring them into court, p. 215.

Miscellaneous.—Erroneously cited in *Decatur v. Paulding*, 14 Pet. 603, 10 L. 612. Cited in *Johnson v. Towsley*, 13 Wall. 86, and 2 Neb. 490, 20 L. 487, as illustrating a case where court of equity has interfered in question of priority of patents. Cited, without particular application, in note to *Carpenter v. Lockhart*, 1 Ind. 444, and *Walsh v. Smyth*, 3 Bland Ch. 25. Cited in *Greiner v. Klein*, 28 Mich. 18, holding decree in equity only binds parties and privies.

2 Pet. 216-238, 7 L. 402, *PATTERSON v. JENKS*.

Grants.—Presumption is in favor of the validity of every grant of land issued in the forms prescribed by law, and burden of proof lies upon him who controverts it, p. 227.

Cited and rule applied in *Reynolds v. West*, 1 Cal. 326, holding grant of land made by Mexican alcalde will be presumed made within his authority; *Hart v. Burnett*, 15 Cal. 553, approval of supreme executive where necessary to give validity will be presumed; *Payne v. Treadwell*, 16 Cal. 227, 228, 241, reviewing authorities and applying rule; *Parkison v. Bracken*, 1 Pinn. 180, 39 Am. Dec. 297, patent is presumed properly executed until contrary appear; *Frampton v. Wheat*, 27 S. C. 294, 3 S. E. 465, holding burden of proof on party attacking grant to show improper location. Cited casually, *Webb v. Haley*, 7 Baxt. 603, stating rule *ut supra*.

Boundaries.—In this case the Supreme Court determined in a collateral action, what was the boundary between jurisdiction of a State and that of an Indian tribe within its borders, p. 227.

Cited in *Rhode Island v. Massachusetts*, 12 Pet. 746, 9 L. 1269, *arguendo*, the Supreme Court may, in an action for that purpose, determine the boundary between two States.

Trial.—Prayer that court declare certain legal consequences as resulting from the testimony, is properly refused; it should be that the court instruct as to the legal consequence if certain facts are believed by the jury, p. 227.

Construction of treaty.—If a State has, by its own acts, adopted a construction of a treaty with Indians, the Supreme Court will adopt the same construction, p. 231.

Cited in *Lattimer v. Poteet*, 14 Pet. 18, 10 L. 335, *arguendo*, State is bound by her own recognition of boundary line fixed by Indian treaty; *Brown v. Brown*, 106 N. C. 455, 11 S. E. 648, affirming right of State to construe her own treaties.

Public lands.—A grant of lands, part of which are ungrantable by reason of lying within the Indian boundaries, is, nevertheless, valid as to the residue, pp. 235, 236.

Affirmed in *Winn v. Patterson*, 9 Pet. 680, 9 L. 272.

A grant of land may be void as to part and valid as to the residue, p. 235.

Cited and rule applied in *Mitchel v. United States*, 9 Pet. 733, 9 L. 291, and *Mitchel v. United States*, 15 Pet. 88, 10 L. 671, holding grant by Indians valid notwithstanding it embraced a tract as to which the grant was void; *Wallace v. Harris*, 32 Mich. 401, holding grant embracing homestead valid as to residue; *Weitzner v. Thingstad*, 55 Minn. 248, 56 N. W. 818, holding similarly to preceding citation; *People v. Mauran*, 5 Den. 397, holding grant not void for failure to reserve minerals; *People v. Van Rensselaer*, 9 N. Y. 324, holding patent containing void grant of manorial privileges valid as to residue; *Curtis v. Leavitt*, 15 N. Y. 124, holding the same instrument may contain several trusts, some of which are valid and others invalid; *Den v. Nixon*, 10 Yerg. 519, holding grant of lands void as to part adversely occupied and valid as to residue.

Distinguished in *Frampton v. Wheat*, 27 S. C. 292, 3 S. E. 464, holding rule has no application if title exists to whole tract.

Miscellaneous.—Cited erroneously in *Pollard v. Kibbe*, 14 Pet. 376, 389, 10 L. 501, 508. Cited, without particular application, *Railroad Co. v. Spratt*, 12 Fla. 101.

2 Pet. 239-240, 7 L. 410, *HARPER v. BUTLER*.

Executors and administrators — Assignment.—Where an executor has assigned a chose in action, suit may be brought by the assignee thereon in a State permitting suits by assignees in their own name, notwithstanding there has been no administration in the State in which the suit is brought, p. 240.

Cited and rule applied in *May v. Logan Co.*, 30 Fed. 253, holding executor may assign right of action for infringement of patent; *Campbell v. Brown*, 64 Iowa, 427, 52 Am. Rep. 447, 20 N. W. 746, applying rule and reviewing authorities; *Putnam v. Pitney*, 45 Minn. 247, 47 N. W. 792, 11 L. R. A. 43, refusing to appoint local administrator where general administrator could collect assets; *Wilkins v. Ellett*, 108 U. S. 259, 27 L. 718, 2 S. Ct. 643, *arguendo*, payment to administrator appointed in another State is valid against administrator afterwards appointed in the State where payment is made; *Van Bokkelen v. Cook*, 5 Sawy. 591, F. C. 16,831, *arguendo*, executor must account to estate for property in foreign jurisdiction voluntarily delivered to him; *Owen v. Moody*, 29 Miss. 82, 83; *Gove v. Gove*, 64 N. H. 504, 15 Atl. 122; *Petersen v. Bank*, 32 N. Y. 42, 46, 88 Am. Dec. 302, 305, and *Solinsky v. Bank*, 82 Tex. 245, 17 S. W. 1051, all applying rule; *Giddings v. Green*, 4 Hughes, 448, 48 Fed. 491, holding executor may sue on note of deceased in State in which no administration has been taken out; *Lucas v. Byrne*, 35 Md. 495, administrator may indorse note to himself and sue in his own name; *Smith v. Mercer*, 22 Fed. Cas. 599, *arguendo*, administrator may surrender patent of intestate for purpose of securing amended patent. Cited without particular application in *McCully v. Cooper*, 114 Cal. 262, 55 Am. St. Rep. 70, 46 Pac. 83, 35 L. R. A. 494, discussing general proposition in syllabus; *Taylor v. Barren*, 35 N. H. 496, and in *In re Cape May, etc., Navigation Co.*, 51 N. J. L. 82, 16 Atl. 193, discussing generally powers of administrators.

Distinguished in *Reynolds v. McMullen*, 55 Mich. 575, 54 Am. Rep. 392, 22 N. W. 45, holding rule does not apply to mortgage secured by real property in another State; *McCarthy v. Hall*, 13 Mo. 484, reviewing principal case and holding *contra*; *Stagg v. Green*, 47 Mo. 502, foreign executor may not act until he has taken out letters within the State; *Dial v. Tappan*, 14 S. C. 582, 37 Am. Rep. 741, reviewing authorities and refusing to apply rule.

Choses in action.—Under law of Mississippi choses in action are assignable, p. 240.

Distinguished in *Scott v. Metcalf*, 13 Smedes & M. 566, holding assignment of promissory note must be by indorsement.

2 Pet. 241-242, 7 L. 411, **POWELL v. HARMAN.**

Statute of limitations.—Where statute made possession for seven years protection only when held under a grant or valid mesne conveyance, possession founded on a void deed of conveyance will not be protected by the statute, p. 241.

Cited, but without particular application, in *Balkam v. Woodstock Iron Co.*, 154 U. S. 188, 38 L. 957, 14 S. Ct. 1014; *Bauserman v. Blunt*, 147 U. S. 653, 37 L. 318, 13 S. Ct. 469, and *Gelpcke v. Dubuque*, 1 Wall. 212, 213, 17 L. 528, dissenting opinion, discussing how far

Supreme Court will follow State's construction of its own statutes. Cited in note on necessity for color of title, 14 Am. Dec. 765, collecting cases.

Overruled in *Green v. Neal*, 6 Pet. 293, 301, 8 L. 403, 406, the rule being changed on account of a new construction of the statute by the State (Tennessee) court, it holding it unnecessary to show a connected legal or equitable title under the statute, reversing *Neal v. Green*, 1 McLean, 19, F. C. 10,065, where principal case is also cited; *Toll v. Wright*, 37 Mich. 98, refusing to apply principal case on the ground that it was overruled.

2 Pet. 243-244, 7 L. 411, *RITCHIE v. MAURO*.

Guardian and ward.—The value of the guardian's interest in the estate of his ward is not the value of the estate, but the value of the office, which is nothing except so far as it affords a compensation for services to be afterwards earned, p. 244.

Cited in *Ruddick v. Billings*, Woolw. 336, F. C. 12,110, discussing generally appellate jurisdiction in bankruptcy; *State v. Dews*, Charl. (Ga.) 425, arguendo, public officers have no proprietary interest in their offices.

Appeal and error.—Where the value of the office of the guardian independently of the value of the estate does not equal the jurisdictional amount, the Supreme Court has no jurisdiction on appeal, in controversy between persons claiming adversely as guardians, p. 244.

Cited in *Dryden v. Swinburn*, 15 W. Va. 249, reviewing principal case and holding where office of clerk of Circuit Court had value equal to jurisdictional amount, appeal would lie in contest for the office.

2 Pet. 245-252, 7 L. 412, *WILLSON v. BLACKBIRD CREEK MARSH CO*.

Appeal and error.—To sustain error to State court, it is not necessary that the record in terms state that the Constitution or a law of the United States was drawn in question. It is sufficient to show that the Constitution, a law, or treaty of the United States was in fact misconstrued, or the constitutionality of a State law upheld when questioned under Federal limitations, p. 251.

Cited and rule applied in *Harris v. Dennie*, 3 Pet. 302, 7 L. 687, where State court misconstrued revenue collection act of 1799; *Davis v. Packard*, 6 Pet. 48, 8 L. 315, where State court misconstrued statute regulating suits against consuls; Mo., etc., *R. Co. v. Haber*, 169 U. S. 622, 42 L. 881, 18 S. Ct. 492, involving construction of animal industry act; *Craig v. Missouri*, 4 Pet. 429, 7 L. 910, involving constitutionality of Missouri act for establishment of loan offices; *Kaukauna Co. v. Canal Co.*, 142 U. S. 269, 35 L. 1009, 12 S. Ct. 176, involving Wisconsin statute relating to improvements in certain rivers.

Distinguished in *Crowell v. Randell*, 10 Pet. 396, 9 L. 469, holding it is not sufficient to show that question might have arisen, but that it must have arisen, reviewing authorities; *Florida v. Gleason*, 12 Fla. 271, where no Federal question has arisen there is no ground for writ of error to United States Supreme Court.

Public uses.—Measures calculated to produce benefits to the public may be effected through the medium of private incorporations, p. 251.

Cited with approval in *Railroad Co. v. Stockton*, 41 Cal. 189, sustaining taxation in aid of a railroad; *Lux v. Haggin*, 69 Cal. 302, 10 Pac. 699, discussing public uses of water; *Whiteman v. Railroad Co.*, 2 Harr. 523, 33 Am. Dec. 419, holding right of eminent domain may be exercised for purpose of aiding construction of railroad; *Stewart v. Polk Co.*, 30 Iowa, 22, 1 Am. Rep. 247, upholding taxation by State for same purpose; *Hallenbeck v. Hahn*, 2 Neb. 411, holding similarly; *Gibson v. Mason*, 5 Nev. 309, State may authorize issuance of bonds for same purpose; *Beekman v. Railroad Co.*, 3 Paige, 74, 22 Am. Dec. 684, and *Freight Co. v. Memphis*, 4 Cold. 425, or exercise right of eminent domain. Cited in elaborate notes on eminent domain, 22 Am. Dec. 690, 705.

Commerce.—Where congress has passed an act in execution of the power to regulate commerce, any State law coming into conflict with such act is void, p. 252.

Cited and relied upon in *Wisconsin v. Duluth*, 96 U. S. 387, 24 L. 672, holding Supreme Court will not interfere with the execution by congress of its power to regulate commerce; *Gulf, etc., R. Co. v. Hefley*, 158 U. S. 104, 39 L. 912, 15 S. Ct. 804, holding statute regulating freight charges void, as in conflict with interstate commerce act; *Columbus Ins. Co. v. Curtenius*, 6 McLean, 216, F. C. 3,045, holding void, as in conflict with ordinance of 1787, statute authorizing obstructions in channel of navigable tributary of the Mississippi; *Minot v. Railroad Co.*, 2 Abb. 343, F. C. 9,645, holding void, a State law imposing tax on locomotives, passengers and freight; *United States v. Railroad Co.*, 5 Biss. 424, F. C. 15,779, where United States have acted, that action is exclusive; *Hawkins Pt. Lighthouse Case*, 39 Fed. 88, holding right of United States to use of submerged soil in navigable stream for lighthouse purposes, paramount to those of riparian proprietor under grant from State; *Decker v. Railway Co.*, 30 Fed. 725, discussing congressional authority over navigable waters; *Scranton v. Wheeler*, 57 Fed. 814, 16 U. S. App. 152, right of United States to submerged lands of navigable stream for purposes of a pier, paramount to those of riparian proprietor; *Mitchell v. Steelman*, 8 Cal. 371, holding State statute of frauds void as far as in conflict with Federal statute regulating mortgages on vessels; *North, etc., Min. Co. v. United States*, 88 Fed. 675, upholding act

of congress creating California debris commission, and regulating hydraulic mining along California rivers; *Lin Sing v. Washburn*, 20 Cal. 567, holding void a statute of State regulating immigration.

Commerce.—Where congress has passed no act regulating commerce in small navigable tide waters, act of State empowering construction of a dam therein is not unconstitutional, p. 252.

Cited in *New York v. Miln*, 11 Pet. 149, 9 L. 666, arguendo, where United States has not exercised its power to regulate commerce, State law cannot be held void on the ground that it presumes to regulate commerce; *Holmes v. Jennison*, 14 Pet. 592, 10 L. 605, arguing, by analogy, State may surrender fugitive on demand of foreign State where no extradition treaty has been made by the United States; *The License Cases*, 5 How. 583, 584, 604, 605, 625, 12 L. 292, 301, 302, 311, holding regulation of liquor traffic by State is not in conflict with power of congress to regulate commerce; *The Passenger Cases*, 7 How. 500, 555, 556, 560, 12 L. 793, 816, 817, 818, dissenting opinions, arguendo, that grant of power to congress is not ipso facto exclusive, unless similar authority in the States would be incompatible; *Cooley v. Board*, 12 How. 319, 13 L. 1005, holding State law regulating pilotage not in conflict with constitutional power to regulate commerce; *State v. Wheeling Bridge Co.*, 13 How. 585, 586, 599, 14 L. 277, 278, 283, dissenting opinion, arguendo, acts of State authorizing construction of bridge across navigable stream is not in conflict with power of congress to regulate commerce; *Gilman v. Philadelphia*, 3 Wall. 727, 18 L. 100, where bridge erected over navigable stream impedes navigation but assists commerce; United States courts are not bound to enjoin it; *The Passaic Bridges*, 3 Wall. 793, holding State has absolute power to erect bridges in absence of congressional legislation; *Osborne v. Mobile*, 16 Wall. 482, 21 L. 473, sustaining ordinance imposing license on railroads engaged in interstate commerce; *Railroad Co. v. Fuller*, 17 Wall. 569, 21 L. 714, sustaining acts of State requiring railroad to fix its rates annually, under penalties, even where railroad was engaged in interstate commerce; expressly affirmed in *Pound v. Turck*, 95 U. S. 463, 24 L. 527, holding State may authorize erection of dam across navigable stream in absence of legislation by congress; *Hall v. De Cuir*, 95 U. S. 514, 516, 24 L. 557, 558, dissenting opinion, arguendo, State has power to pass law requiring carrier engaged in interstate commerce to give all persons equal privileges, regardless of color; *Mobile v. Kimball*, 102 U. S. 700, 26 L. 240, sustaining power of county to improve harbor and issue bonds therefor; *Escanaba Co. v. Chicago*, 107 U. S. 683, 686, 27 L. 445, 446, 2 S. Ct. 189, 192, reviewing authorities, and holding State has full authority as to bridges over navigable streams until congress has acted; *Cardwell v. Bridge Co.*, 113 U. S. 208, 209, 28 L. 960, 5 S. Ct. 424, 425, affirming *Cardwell v. Bridge Co.*, 19 Fed. 562, 564, reviewing authorities and affirming doctrine of preceding

case; *Willamette Bridge Co. v. Hatch*, 125 U. S. 8, 31 L. 632, 9 S. Ct. 815, holding similarly; *Morgan v. Louisiana*, 118 U. S. 465, 30 L. 242, 6 S. Ct. 1119, State may pass quarantine laws until congress acts; *Hennington v. Georgia*, 163 U. S. 310, 41 L. 171, 16 S. Ct. 1090, State law prohibiting running of trains on Sunday is not a regulation of commerce; *Monongahela Navigation Co. v. United States*, 148 U. S. 330, 37 L. 469, 13 S. Ct. 628, expression by congress of its intention to regulate commerce does not destroy franchise previously created by a State; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 211, 38 L. 966, 14 S. Ct. 1089, collecting cases and holding regulation of charges on bridge over river between two States is regulation of interstate commerce; *Wabash, etc., R. R. Co. v. Illinois*, 118 U. S. 581, 582, 30 L. 252, 253, 7 S. Ct. 15, 16, dissenting opinion, *arguendo*, State may impose penalty for improper charges by carrier, reviewing authorities; *Leisy v. Harding*, 135 U. S. 132, 134, 149, 150, 154, 34 L. 140, 141, 146, 147, 148, 10 S. Ct. 692, 693, 698, 699, 700, dissenting opinion, and *Bowman v. Railway Co.*, 125 U. S. 521, 522, 31 L. 719, 720, 8 S. Ct. 712, 713, dissenting opinion, both reviewing authorities, and *arguendo*, State has power to forbid the importation of intoxicating liquors within its boundaries; *Kidd v. Pearson*, 128 U. S. 23, 32 L. 351, 9 S. Ct. 11, holding State has power to prohibit manufacture of intoxicants within its boundaries; *New York, etc., R. R. Co. v. New York*, 165 U. S. 631, 41 L. 854, 17 S. Ct. 419, State may pass law regulating heating of passenger cars in absence of congressional legislation; *Lake Shore, etc., Ry. Co. v. Ohio*, 165 U. S. 366, 41 L. 748, 17 S. Ct. 357, statute of United States authorizing secretary of war to regulate bridges over navigable waters does not take away right of State to authorize construction of bridge over such waters; *Silliman v. Bridge Co.*, 4 Blatchf. 408, 412, F. C. 12,852, State has power to authorize construction of bridge over navigable stream in absence of Federal legislation; *Silliman v. Bridge Co.*, 11 Blatchf. 286, 287, 288, F. C. 12,853, reviewing authorities and discussing what constitutes obstruction to navigation; *Miller v. Mayor of New York*, 13 Blatchf. 475, F. C. 9,585, reviewing authorities and holding State has power to authorize construction of bridge over navigable stream in absence of congressional legislation; *United States v. New Bedford Bridge*, 1 Wood. & M. 409, 415, 424, 426, 484, 500, F. C. 15,867, reviewing authorities and holding similarly to preceding citation.

Other citing cases rely upon this doctrine for the following holdings: *Hatch v. Wallamet Bridge Co.*, 7 Sawy. 134, 6 Fed. 332; *Atkinson v. Railroad Co.*, 2 Fed. Cas. 109, and *Easton v. Railroad Co.*, 8 Fed. Cas. 274, all affirming State power to authorize bridges over navigable streams in absence of congressional action; *Ormerod v. Railway Co.*, 21 Blatchf. 108, 13 Fed. 372, State may authorize construction of railway roadbed in navigable stream; *Woodman v. Kilburn Mfg. Co.*, 1 Biss. 551; S. C., 1 Abb. 163, F. C. 17,978, or a dam;

Heerman v. Slough Co., 8 Biss. 344, 1 Fed. 154, F. C. 6,320, a log boom; Huse v. Glover, 11 Biss. 552, 15 Fed. 294, dams and locks; United States v. Bain, 3 Hughes, 602, F. C. 14,496, a wharf; United States v. Bellingham Boom Co., 81 Fed. 661, 662, 48 U. S. App. 449, 450, a log boom, collecting cases; Groton v. Hurlburt, 22 Conn. 184, a highway; Savannah v. Georgia, 4 Ga. 41, a wharf; Depew v. Trustees, 5 Ind. 10, an aqueduct; Union Steamboat Co. v. Chicago, 39 Fed. 753; Rhea v. Railroad Co., 50 Fed. 20; Bailey v. Railroad Co., 4 Harr. (Del.) 395, 409, 44 Am. Dec. 597, 611, Chicago v. McGinn, 51 Ill. 273, 2 Am. Rep. 300, Green, etc., Co. v. Railroad Co., 88 Ky. 8, 10 S. W. 8, 2 L. R. A. 543; Hamilton v. R. R. Co.; 34 La. Ann. 973, 44 Am. Rep. 454, State v. Leighton, 83 Me. 421, 22 Atl. 381, and Adams v. Ulmer, 91 Me. 53, 39 Atl. 350, all bridge cases; Moor v. Veazie, 32 Me. 360, 52 Am. Dec. 662, a lock; Sinnickson v. Johnsons, 17 N. J. L. 152, 34 Am. Dec. 193; Stevens v. Railroad Co., 34 N. J. L. 552, 3 Am. Rep. 283, a railway; Milne v. New York, 2 Paine, 431, F. C. 9,618, State may impose penalty on carrier for failure to report passengers; The St. Joseph, 21 Fed. Cas. 177, State may improve harbor and impose tolls therefor; Kellogg v. Union Co., 12 Conn. 25, and Benjamin v. River Co., 42 Mich. 634, 4 N. W. 486, or a river; Morris v. State, 62 Tex. 739, or a bay; Smith v. State, 100 Tenn. 498, 46 S. W. 567, 41 L. R. A. 433, may require carriers to furnish separate accommodations for blacks and whites; Stockton v. Powell, 29 Fla. 45, 10 So. 693, 15 L. R. A. 47, may issue bonds to improve river; Santo v. State, 2 Iowa, 202, 63 Am. Dec. 501, holding State has power to regulate sale of intoxicating liquors; Kansas v. Fulker, 43 Kan. 241, 247, 22 Pac. 1022, 1024, 7 L. R. A. 185, 187, & n., holding similarly.

Other citing cases affirm the following in relying upon the doctrine of the leading case: Commonwealth v. Railroad Co., 62 Pa. St. 292, 1 Am. Rep. 403, holding valid a State tax upon railways, proportioned to tonnage carried; Ex parte Crandall, 1 Nev. 308, 310, holding valid a State law imposing tax on passengers carried out of the State; Commonwealth v. Manchester, 152 Mass. 242, 23 Am. St. Rep. 830, 25 N. E. 116, 9 L. R. A. 241, and Dunham v. Lamphere, 3 Gray, 273, State may regulate fishing along coasts and tide waters; Norris v. Boston, 4 Met. 296, holding valid a State law imposing tax on all passengers brought into State; Stewart v. Harry, 3 Bush, 446, arguendo, mere grant of power to congress is not exclusive until exercised; Newport v. Taylor, 16 B. Mon. 797, 798, holding, in absence of Federal legislation, State has right to regulate charges for ferriage; Port Wardens v. The Martha J. Ward, 14 La. Ann. 290, or warden's charges; Davis v. Jerkins, 5 Jones (N. C.), 292, Commissioners v. Board, 39 Ohio St. 634, Flanagan v. Philadelphia, 42 Pa. St. 231, Selman v. Wolfe, 27 Tex. 70, Talbot Co. v. Queen Anne's Co., 50 Md. 262, Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 63, Dover v. Portsmouth Bridge, 17 N. H. 226, 232, People v. Railroad Co., 15 Wend. 134, 30 Am. Dec. 42, and State v. Dibble,

4 Jones (N. C.), 112, all holding, in absence of congressional legislation, State may authorize construction of bridge over navigable stream; Glover v. Powell, 10 N. J. Eq. 227, or a dam; Dock Co. v. Trustees, 39 N. J. Eq. 417, 446, works of railway company; Galveston v. Menard, 23 Tex. 393, and Eisenbach v. Hatfield, 2 Wash. 243, 246, 26 Pac. 540, 541, and dissenting opinion, p. 275, 26 Pac. 550, or wharves; Newcomb v. Smith, 2 Pinn. 137, and Black River Improvement Co. v. Transportation Co., 54 Wis. 681, 41 Am. Rep. 72, 11 N. W. 453, dams; J. S. Keator Lumber Co. v. Boom Corporation, 72 Wis. 84, 7 Am. St. Rep. 850, 38 N. W. 537, log booms; Kerr v. West, etc., R. R. Co., 127 N. Y. 277, 27 N. E. 834, affirming power of State to authorize a railroad right of way interfering with access to plaintiff's wharf; Lemmon v. People, 20 N. Y. 613, State has power to legislate in general until congress acts; Utica v. Churchill, 33 N. Y. 241, *arguendo*, State may impose tax on national bank shares; Bagg v. R. R. Co., 109 N. C. 281, 26 Am. St. Rep. 572, 14 S. E. 80, 14 L. R. A. 597, impose penalty on railroad for failure to ship freights; Craig v. Kline, 65 Pa. St. 408, 409, 411, 3 Am. Rep. 641, 642, 645, upholding State law regulating floating of logs in navigable stream.

The following citing cases affirm the syllabus doctrine, but the issues involved did not necessitate decisions thereon: Transportation Co. v. Chicago, 99 U. S. 643, 25 L. 338, and Bridge Co. v. United States, 105 U. S. 475, 26 L. 1146, holding regulating bridges comes within power to regulate commerce, collecting cases; Shively v. Bowlby, 152 U. S. 23, 38 L. 340, 14 S. Ct. 556, discussing State proprietary rights in navigable streams; United States v. Boom Co., 1 McCrary, 605, 3 Fed. 552, discussing rights of public in navigable streams; Peters v. Railroad Co., 56 Ala. 536, collecting authorities and discussing what constitutes a navigable stream; People v. Naglee, 1 Cal. 235, 241, 52 Am. Dec. 315, 320, powers of national government will not be extended beyond those granted by the Constitution; Cox v. State, 3 Blackf. 197, holding State has right to make it misdemeanor to obstruct navigable stream; Stetson v. Bangor, 56 Me. 284, holding State may tax shares in national bank; Wharf Case, 3 Bland, 371, discussing rights of public in public ports; Gough v. Bell, 22 N. J. L. 459, discussing rights of owners upon shores of navigable waters; Lansing v. Smith, 4 Wend. 22, 21 Am. Dec. 95, discussing nature of wharfage franchise; Rumsey v. Railroad Co., 130 N. Y. 94, 28 N. E. 765, remarking United States has never asserted any authority over nonnavigable waters within State; Sage v. Mayor, 154 N. Y. 78, 61 Am. St. Rep. 603, 47 N. E. 1101, 38 L. R. A. 613, discussing riparian owners; Houston, etc., Navigation Co. v. Dwyer, 29 Tex. 383, discussing whether congress can legislate as to carriers entirely within one State. Cited in note on power of State to authorize bridging of navigable rivers, 44 Am. Dec. 620, in exhaustive notes on State regulation of interstate commerce, 27 Am. St. Rep. 566, and on national and State quarantine laws, 47 Am. St. Rep. 538.

Criticised in *The Passenger Cases*, 7 How. 397, 12 L. 750, holding invalid State law imposing tax on alien passengers; *Cooley v. Board*, 12 How. 324, 13 L. 1007, dissenting opinion, arguendo, regulation of pilotage is exclusively within power of congress to regulate commerce. Distinguished in *State v. Wheeling Bridge*, 13 How. 566, 14 L. 269, holding void, act of State authorizing construction of bridge across navigable stream; *Sinnot v. Davenport*, 22 How. 243, 16 L. 247, holding void, law of State imposing certain burdens on owners of vessel so far as applicable to interstate commerce; *Gilman v. Philadelphia*, 3 Wall. 743, 18 L. 105, dissenting opinion, arguendo, bridge constructed by municipality over navigable stream is an interference with commerce and should be abated; *Hall v. De Cuir*, 95 U. S. 488, 24 L. 548, holding void, as regulation of interstate commerce, act of State requiring carriers on vessels to give to all passengers equal rights regardless of color; *Western Union Telegraph Co. v. Pendleton*, 95 Ind. 13, 48 Am. Rep. 693, holding law imposing penalty on telegraph company for nondelivery of message not a regulation of interstate commerce within the rule. Questioned in *State v. Railroad Co.*, 30 N. J. L. 498, arguendo, tax on railroad graduated according to number of passengers carried is unconstitutional.

Miscellaneous.—Cited without particular application in *The Daniel Ball*, Brown, 197, F. C. 3,564, discussing what constitutes navigable waters; *Young v. Harrison*, 6 Ga. 142, holding State alone has right to franchise for ferriage, etc.; *Crow v. State*, 14 Mo. 300, and dissenting opinion, p. 334, discussing general subject of taxation; *Schneider v. McFarland*, 2 N. Y. 463, citing argument of counsel as to what is a suit.

2 Pet. 253-317, 7 L. 415, FOSTER v. NEILSON.

Louisiana territory was ceded by France to the United States, which thereby acquired full sovereignty, p. 301.

Cited in *Strother v. Lucas*, 12 Pet. 435, 9 L. 1147, reviewing history of Louisiana; *Bryan v. Kennett*, 113 U. S. 192, 28 L. 912, 5 S. Ct. 412; *Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 156, applying rule by analogy to California.

Treaties.—Where treaty provides that titles within the ceded territory "shall be ratified," such provision is not self-executing, p. 304.

Cited in *United States v. Arredondo*, 6 Pet. 756, 8 L. 571, applying rule; *Parker v. Duff*, 47 Cal. 563, 564, where treaty provided that Indians "shall be entitled" to certain amount of land, the proviso is not self-executing; *Boatner v. Ventress*, 8 Mart. (N. S.) 654, 20 Am. Dec. 271, discussing principal case; *United States v. Flint*, 4 Sawy. 67, F. C. 15,121, holding words "shall be protected" not self-executing. Cited in *Pollard v. Kibbe*, 14 Pet. 393, 396, 397, 10 L. 509, 511, reviewing history of treaty of St. Ildefonso.

Distinguished in *United States v. Percheman*, 7 Pet. 89, 8 L. 618, holding such words may imply ratified and confirmed by the treaty itself. Explained and declared to be overruled as to this point by *United States v. Percheman*, supra, in *Garcia v. Lee*, 12 Pet. 519, 520, 9 L. 1179, 1180. Disapproved in *Pollard v. Kibbe*, 14 Pet. 407, 408, 410, 411, 420, 421, 10 L. 516, 517, 518, 522, 523, arguendo, such stipulation is self-executing, reversing *Pollard v. Kibbe*, 9 Port. 723; *Holden v. Joy*, 17 Wall. 247, 21 L. 535, arguendo, sale of Indian lands may be made by treaty; *Godfrey v. Beardsley*, 2 McLean, 419, F. C. 5,497, words "shall be reserved" in Indian treaty are self-executing; *Minturn v. Brower*, 24 Cal. 661, holding treaty of Guadalupe Hidalgo confirming valid titles in ceded territory, self-acting; *Puget Sound Agricultural Co. v. Pierce Co.*, 1 Wash. Ter. 163, hold words "shall be confirmed" self-executing.

Louisiana territory, as ceded by treaty of 1803, embraces the tract between the Perdido and Mississippi rivers, p. 305.

Cited in *Pollard v. Kibbe*, 14 Pet. 370, 372, 385, 386, 387, 389, 10 L. 498, 499, 506, 507, 508, and *Pollard v. Hagan*, 3 How. 228, 11 L. 573, reviewing history of above tract.

Treaties.—In determining individual rights growing out of treaties with foreign powers, the judiciary will adopt the principles established by the political departments of the government, p. 307.

Cited and rule applied in *Cherokee Nation v. Georgia*, 5 Pet. 46, 8 L. 41, construing treaties with Cherokee Indians; affirmed in *United States v. Arredondo*, 6 Pet. 710, 711, 712, 8 L. 554, 555, construing Florida treaty of 1819; *Garcia v. Lee*, 12 Pet. 516, 517, 9 L. 1178, and *Innerrarity v. Mims*, 1 Ala. 675, applying rule to construction of treaty of St. Ildefonso, involved in principal case; *People v. Dibble*, 16 N. Y. 224, dissenting opinion, arguing rule applicable to Indian treaty; *Williams v. Insurance Co.*, 13 Pet. 420, 10 L. 228, action of executive branch of government in recognition of foreign sovereignty is conclusive; affirming *Williams v. Insurance Co.*, 3 Sumn. 275, F. C. 17,738.

Boundaries.—Questions of boundary are political ones in which the courts are bound to abide by the measures adopted by the government, p. 307.

Cited in *Lattimer v. Poteet*, 14 Pet. 15, 10 L. 333, dissenting opinion, recognizing rule as applied in majority opinion; *Pollard v. Kibbe*, 14 Pet. 416, 10 L. 521, citing rule casually; *United States v. Reynes*, 9 How. 154, 13 L. 85, adopting government's construction of treaty of St. Ildefonso; *Phillips v. Payne*, 92 U. S. 132, 23 L. 649, questions arising out of retrocession of portion of District of Columbia are political; *Harrold v. Arrington*, 64 Tex. 238, and *State v. Wagner*, 61 Me. 184, 186, courts will follow political branch of government in determining what is boundary; *The James G. Swan*, 50 Fed. 111,

question what is boundary of United States is political; *Watts v. United States*, 1 Wash. Ter. 295, holding question whether San Juan island is part of United States is political. Cited without particular application in *Rhode Island v. Massachusetts*, 12 Pet. 714, 727, 9 L. 1256, 1261, remarking, boundaries must be determined, in absence of compact, by the laws and rules appropriate to the case; *Binney's Case*, 2 Bland, 127, discussing boundary of Maryland.

Distinguished in *Rhode Island v. Massachusetts*, 12 Pet. 746, 747, 9 L. 1269, arguendo, questions of interstate boundary are not political; *United States v. Castillero*, 2 Black, 320, 17 L. 431, when United States appears as suitor to litigate her rights against private claimant, the ordinary rules prevail as in actions between private individuals. Denied in *United States v. Texas*, 143 U. S. 638, 639, 36 L. 290, 291, 12 S. Ct. 491, questions of State boundaries are not political.

Upon political questions the courts will follow the decision of the political departments of the government, p. 307.

Cited in *Luther v. Borden*, 7 How. 56, 12 L. 605, dissenting opinion, arguendo, controversies between citizens of State as to form and change of constitutions are political, collecting cases; *Jones v. United States*, 137 U. S. 212, 34 L. 696, 11 S. Ct. 83, questions of sovereignty are political questions, collecting cases; *In re Cooper*, 143 U. S. 503, 36 L. 242, 12 S. Ct. 460, arguing similarly; *United States v. One Hundred and Twenty-nine Packages*, 27 Fed. Cas. 289, *United States v. Tropic Wind*, 28 Fed. Cas. 219, *United States v. One Hundred Barrels of Cement*, 27 Fed. Cas. 293, *Perkins v. Rogers*, 35 Ind. 156, 9 Am. Rep. 664, *Fifield v. Insurance Co.*, 47 Pa. St. 172, 86 Am. Dec. 529, and *United States v. One Thousand Five Hundred Bales of Cotton*, 27 Fed. Cas. 328, all holding question whether peace or war exists is political; *In re Gunn*, 50 Kan. 224, 231, 232, 32 Pac. 951, 954, 19 L. R. A. 539, 542, dissenting opinion, discussing distinction between judicial and political questions. Cited in *Scott v. Jones*, 5 How. 374, 12 L. 196, collecting cases and querying whether question of lawful organization of State legislature is political; *Koehler v. Hill*, 60 Iowa, 659, 15 N. W. 636, dissenting opinion, arguendo, question whether Constitution exists is practical. Cited casually in *Leitensdorfer v. Campbell*, 5 Dill. 124, F. C. 8,225, validity of grants under former sovereignty is political question.

Treaties, where self-operative, are equivalent to acts of the legislature, p. 314.

Cited in *Strother v. Lucas*, 12 Pet. 439, 9 L. 1148, applying rule to Louisiana treaty of 1803; *Fellows v. Blacksmith*, 19 How. 372, 15 L. 686, to Indian treaty of 1838, with Senecas; *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 196, 23 L. 848, to treaty with Chippewas, extending United States liquor laws to Indian territory; *Hauenstein v. Lynham*, 100 U. S. 490, 25 L. 631, to Swiss treaty

of 1850, regulating rights of aliens to proceeds of lands, reviewing authorities and reversing *Hauenstein v. Lynham*, 28 Gratt. 75; *Chew Heong v. United States*, 112 U. S. 540, 28 L. 771, 5 S. Ct. 256, to Chinese treaty of 1880, permitting exclusion; *North German Lloyd Steamship Co. v. Hedden*, 43 Fed. 22, *Thomas v. Gay*, 169 U. S. 271, 42 L. 743, 18 S. Ct. 342, *Fong Yue Ting v. United States*, 149 U. S. 721, 37 L. 916, 13 S. Ct. 1025, and *The Cherokee Tobacco*, 11 Wall. 621, 20 L. 229, a treaty may be repealed by a subsequent act of congress; *Brown v. Walker*, 161 U. S. 607, 40 L. 825, 16 S. Ct. 651, discussing generally article VI of the Constitution; *In re Parrott*, 6 Sawy. 371, 1 Fed. 503, holding void a provision of the Constitution of the State in conflict with treaty; *United States v. Watts*, 8 Sawy. 371, 14 Fed. 131, holding extradition treaty self-operating; *In re Kaine*, 14 Fed. Cas. 87; *Commonwealth v. Hawes*, 13 Bush, 702, 26 Am. Rep. 245; *In re Metzger*, 17 Fed. Cas. 234; *State v. Vanderpool*, 39 Ohio St. 277, 48 Am. Rep. 435, and *Blandford v. State*, 10 Tex. App. 640, all holding an extradition treaty self-operating; *United States v. Crow Dog*, 3 Dak. Ter. 113, 14 N. W. 438, holding self-executing, a treaty with Indians; *Litte v. Watson*, 32 Me. 224, a boundary treaty. Cited without particular application in *Ex parte Rodriguez*, 39 Tex. 767; *Stockton v. Montgomery*, Dall. (Tex.) 483, and *Territory v. Cox*, 6 Dak. Ter. 521, discussing general relations of political and judicial branches of government. Cited without particular application in *United States v. Rauscher*, 119 U. S. 418, 30 L. 428, 7 S. Ct. 240, discussing general nature of treaties under the Constitution; *United States v. Reese*, 5 Dill. 409, F. C. 16.137, congress has no right to interfere with rights under treaties except in cases purely political, citing cases; *United States v. Johnson*, 26 Fed. Cas. 630, and *New Jersey v. Noyes*, 18 Fed. Cas. 86, discussing casually effect of extradition treaties. Cited also in note, 81 Am. Dec. 537, collecting authorities on general subject of treaties as supreme law of the land, and 81 Am. Dec. 539, note on power of congress to abrogate treaties by legislation.

Treaties.—Where either party to a treaty engages to perform a particular act, the legislature must execute the contract before it can become a rule for the court, p. 314.

Approved in *United States v. Arredondo*, 6 Pet. 743, 8 L. 566, citing rule *arguendo*. Cited in *Dred Scott v. Sandford*, 19 How. 630, 15 L. 794, dissenting opinion, *arguendo*, a law passed excluding slavery in violation of a treaty stipulation would not be *ipso facto* void; *Taylor v. Morton*, 2 Curt. 463, F. C. 13,799, applying rule and holding promise in treaty that products of one country shall not be subjected to a higher rate of duty than like products imported from other countries, is a mere contract. Cited, without particular application, *arguendo*, in *Baldwin v. Franks*, 120 U. S. 703, 30 L. 772, 7 S. Ct. 764.

Distinguished in *United States v. Arredondo*, 6 Pet. 734, 735, 737,

8 L. 563, 564, holding where United States disclaims right to treat question arising out of treaty as a political question, it becomes a judicial one for the courts; *United States v. Castillero*, 2 Black, 320, 17 L. 431, holding similarly.

Spanish grants.—Grants made by the Spanish government, after treaty of 1803, of lands between the Perdido and Mississippi rivers are invalid, p. 317.

Cited, examined at length and affirmed in *Garcia v. Lee*, 12 Pet. 516, 522, 9 L. 1178, 1181, and *Keene v. Whitaker*, 14 Pet. 171, 10 L. 405. Cited as establishing rule, in *Pollard v. Kibbe*, 14 Pet. 426, 427, 10 L. 525, 526, dissenting opinions; *Mobile v. Emanuel*, 1 How. 103, 11 L. 63, dissenting opinion. Followed in *Innerrarity v. Byrne*, 8 Port. 177; *Pollard v. Files*, 3 Ala. 50, and *Abbott v. Kennedy*, 5 Ala. 396; *Pijean v. Beard*, 8 Mart. (N. S.) 401; *Sullivan v. Richardson*, 33 Fla. 134, 14 So. 714, and *Bryan v. Kennett*, 113 U. S. 191, 28 L. 912, 5 S. Ct. 412, all holding grants made after date of treaty were void; *Coffee v. Groover*, 123 U. S. 25, 26, 31 L. 61, 8 S. Ct. 14, arguendo, grant by government exercising de facto jurisdiction over disputed territory, of land therein, is void as against rightful government. Cited without particular application in *Kennedy v. Townsley*, 16 Ala. 248.

Distinguished in *Pollard v. Kibbe*, 14 Pet. 365, 10 L. 496, holding rule not applicable where congress has subsequently passed confirmatory act; *Pollard v. Files*, 2 How. 602, 603, 11 L. 395 (reversing *Pollard v. Files*, 3 Ala. 50), *United States v. Lynde*, 11 Wall. 638, 640, 641, 643, 20 L. 232, 233, 234, *Hallett v. Hunt*, 7 Ala. 899, and *Harvey v. Rusch*, 67 Mo. 552, all holding similarly.

Miscellaneous.—Cited erroneously in *Remington v. Millerd*, 1 R. I. 97; *Mandeville v. Bank*, 19 La. Ann. 394, 92 Am. Dec. 544, *Brace v. Reid*, 3 G. Greene, 427, *Ealande v. McDonald*, 2 Idaho, 287, 13 Pac. 348, *Macon v. Franklin*, 12 Ga. 248, and *Setzer v. The Sylvia de Grasse*, 21 Fed. Cas. 1095. Cited without application, *Forsyth v. Hammond*, 71 Fed. 449, 34 U. S. App. 552, no right of appeal to the courts lies from discretionary orders of county board; *Hooker v. New Haven Co.*, 14 Conn. 166, dissenting opinion, discussing *damnum absque injuria*. Cited also incidentally in *Clark v. Bates*, 1 Dak. 55, 46 N. W. 512, respecting treaty with Dakota Indians; also in *Rhode Island v. Massachusetts*, 12 Pet. 734, 9 L. 1264, as to title of sovereign State.

2 Pet. 318-326, 7 L. 437, **BANK OF KENTUCKY v. WISTER.**

Constitutional law.—When a State associates itself in a private enterprise it divests itself, so far, of its sovereign character and takes that of a private citizen, p. 323.

Cited and followed in *Curran v. Arkansas*, 15 How. 309, 14 L. 708, State by becoming sole stockholder of a State bank exercises no

power not derived from the charter; *Southern Ry. Co. v. North Carolina R. R. Co.*, 81 Fed. 599, where State was part owner of a railway; *Bank of United States v. McKenzie*, 2 Brock. 402, F. C. 927, statute of limitations may run against bank, notwithstanding United States is a stockholder; *State Bank v. Gibson*, 6 Ala. 816, State bank must cause claim against deceased to be presented, as in case of other creditors; *Trustees Michigan, etc., Canal v. Brainard*, 12 Ill. 510, dissenting opinion, *arguendo*, where State has conveyed title to trustees for certain purposes, the property becomes subject to the incidents and liabilities of private property; *State v. Bank*, 1 D. C. 77, *arguendo*, fact of capital having been furnished by State does not vary rights or responsibilities of bank; *Fields v. Wheatley*, 1 Sneed, 354, debt due a State bank is not a debt to State; *White v. Railroad Co.*, 7 Heisk. 547, State does not figure as sovereign in lending its credit to railway company. Cited approvingly in *Charles River Bridge v. Warren Bridge*, 11 Pet. 585, 9 L. 839, dissenting opinion.

Note payable to bearer is not affected by disabilities of the nominal payee, p. 323.

Cited and applied in *Robinson v. Crenshaw*, 2 Stew. & P. 299, 316, holding illegality of consideration no defense to note payable to bearer in hands of original holder; *Neal v. Smith*, 5 Ala. 574, *arguendo*, holder of note payable to bearer has right of action by virtue of original promise, not through assignment; *Craig v. Vicksburg*, 31 Miss. 247, holding similarly as to bond payable to bearer.

Suits against States.—An action is maintainable against a bank of which a State is sole stockholder, as the State is by incorporating the bank deemed to have waived its nonsuability, p. 323.

Cited in *Owen v. Branch Bank*, 3 Ala. 264, holding notes of State Bank of Alabama not bills of credit; *Western Union v. Henderson*, 68 Fed. 591, *arguendo*, suit against State auditor to restrain him from enforcing unconstitutional statute, is not a suit against the State. Cited and affirmed in *Briscoe v. Bank of Kentucky*, 11 Pet. 324, 9 L. 735, and *Curran v. Arkansas*, 15 How. 309, 14 L. 708, both respecting bills issued by State banks.

Distinguished in *Lowry v. Thompson*, 25 S. C. 426, holding suit against State board to recover deed is suit against the State.

Bank deposits.—Where statute provided that bank might receive deposits without giving obligation under seal to repay it, *assumpsit* is implied and maintainable against the bank from the mere receipt of the deposit, p. 324.

State banks — Bills of credit.—Where a State imparts to a State bank its sovereign attributes, the issuance of bank paper becomes an emission of bills of credit and in violation of the Constitution, p. 324.

Cited in *Briscoe v. Bank*, 11 Pet. 341, 9 L. 742, dissenting opinion, arguing State may not accomplish indirectly what is directly forbidden to it by the Constitution.

Federal courts.—Suit on note payable to bearer may be brought in Federal court by subsequent holder, on ground of diverse citizenship, notwithstanding it could not have been brought on that ground by original payee, p. 326.

Approved and followed in *Smith v. Clapp*, 15 Pet. 129, 10 L. 685, holding holder of such note is not an assignee within the provisions of the judiciary act; *White v. Railroad Co.*, 21 How. 576, 16 L. 223, ruling similarly as to holder of railway bonds payable to bearer; *Bushnell v. Kennedy*, 9 Wall. 391, 19 L. 738, arguendo, judiciary act does not apply to rights of action founded on wrongful act; *Thompson v. Perrine*, 106 U. S. 593, 27 L. 300, 1 S. Ct. 568, holding holder of negotiable coupons not deprived of right to sue in Federal courts by reason of citizenship of any previous holder; *Chickaming v. Carpenter*, 106 U. S. 666, 27 L. 308, 1 S. Ct. 622, ruling similarly as to holder of municipal bonds; *Halsted v. Lyon*, 2 McLean, 227, F. C. 5,968, applying rule; *Cooper v. Thompson*, 13 Blatchf. 437, F. C. 3,202, applying rule to holder of coupons; *Codman v. Railroad Co.*, 17 Blatchf. 2, F. C. 2,936, applying rule to note made payable to bearer by indorsement; *Holmes v. Goldsmith*, 147 U. S. 160, 37 L. 122, 13 S. Ct. 291, applying rule to accommodation note payable to order, reviewing authorities; *Towne v. Smith*, 1 Wood. & M. 119, 135, F. C. 14,115, holding note made payable to bearer by indorsement, within the rule; *Brown v. Noyes*, 2 Wood. & M. 82, F. C. 2,023, arguendo, Federal courts have jurisdiction when original parties were citizens of different States; *Jerome v. Commissioners*, 5 McCrary, 641, 18 Fed. 873, and *Adams v. Commissioners*, 23 Fed. 212, rule applied to county warrants; *Keene, etc., Bank v. Lyon Co.*, 90 Fed. 530, to negotiable bonds payable to bearer.

Distinguished in *Parker v. Ormsby*, 141 U. S. 85, 35 L. 656, 11 S. Ct. 913, holding holder of promissory note payable to order not entitled to sue in Federal court unless original payee was; *Clarke v. Janesville*, 1 Biss. 104, F. C. 2,854, holding coupon on bond not within the rule; *Hill v. Winne*, 1 Biss. 277, F. C. 6,503, holding mortgage to secure note payable to bearer not within the rule; *Noell v. Mitchell*, 4 Biss. 348, F. C. 10,287, rule not applicable to accommodation note made payable to bearer by indorsement, unless it appear that diverse citizenship exists between bearer and indorser; *Bradford v. Jenks*, 2 McLean, 132, F. C. 1,769, assignee in insolvency is not holder within rule; *Fry v. Rousseau*, 3 McLean, 107, F. C. 5,141, rule obiter where note is taken by assignment.

Bank deposits.—Where law provides that bank bills shall be redeemable in gold and silver, one who makes a deposit in notes of the bank is entitled to be repaid in gold and silver, p. 326.

Cited with approval in *Thompson v. Riggs*, 5 Wall. 678, 18 L. 707, holding that customer of bank, depositing gold, may be repaid in legal tender currency; *Perley v. Muskegon Co.*, 32 Mich. 136, 20 Am. Rep. 639; *Chesapeake Bank v. Swain*, 29 Md. 498; *Wallace v. Bank*, 7 Ark. 66, and *Scammon v. Kimball*, 92 U. S. 370, 23 L. 486, title to money deposited passes to banker, who becomes liable for the amount as a debt; *Corbit v. Bank*, 2 Harr. (Del.) 265, 30 Am. Dec. 651, applying rule where bank notes were deposited as money. And see note on set-off of bank deposits, 19 Am. Dec. 421.

Distinguished in *Baker v. Ward*, 3 Ben. 506, F. C. 785, *arguendo*, that debt payable in money may be discharged by payment of any kind of legal money.

Estoppel.—Where a bank offered to pay the amount of its certificate of deposit in bills, which were refused, it cannot afterwards claim that the certificate should have been accompanied by check, p. 326.

Miscellaneous.—Cited without particular application in *Phillips v. Preston*, 5 How. 291, 12 L. 157; *Alabama State Land Co. v. Kyle*, 99 Ala. 479, 13 So. 45. Cited in note on bank bills, 52 Am. Dec. 448.

2 Pet. 327-330, 7 L. 440, *BANK OF KENTUCKY v. ASHLEY*.

Appeal and error.—The accidental entering of too large a judgment may be cured by remittitur from the appellate court, p. 329.

Cited in *Washington, etc., R. R. Co. v. Harmon*, 147 U. S. 590, 37 L. 292, 13 S. Ct. 563, where error consisted in allowance of interest, judgment will be affirmed upon remission of interest; *Hopkins v. Orr*, 124 U. S. 514, 31 L. 525, 8 S. Ct. 592, appellate court may make its affirmance of the judgment conditional upon remission of part of the recovery; *Koenigsberger v. Mining Co.*, 158 U. S. 53, 39 L. 893, 15 S. Ct. 756, and *Loewer v. Harris*, 57 Fed. 374, 14 U. S. App. 615, where damage to a certain amount is admitted and error consists in admission of evidence increasing that amount, judgment will be affirmed upon remission of excess; *Pickett v. Ford*, 4 How. (Miss.) 248, the remittitur may be made by the attorney; *Underwood v. Parrott*, 2 Tex. 181, remittitur may be made in the lower court. Cited casually, *Johnson v. Hawkins*, 2 Blackf. 460, holding erroneous a judgment for excessive amount; *Rowell v. Bruce*, 5 N. H. 382, discussing amendment after judgment.

Distinguished in *Kennon v. Gilmer*, 131 U. S. 29, 33 L. 113, 9 S. Ct. 699, holding, in action for damages for tort, court may not enter absolute judgment on remission of part of judgment, where judgment is for an entire sum; *Harrod v. Hill*, 2 Dana, 165, remission will not entitle to affirmance, unless judgment is thereby made free from error.

Appeal and error — Costs.—Where judgment is affirmed upon remission of excess, costs are paid by plaintiff in error, unless the writ is further prosecuted, p. 329.

Cited, approved and followed in *Fulton v. Hunt*, 3 Ark. 282, and *Gregory Co. v. Raber*, 1 Colo. 514.

2 Pet. 331-353, 7 L. 441, *BANK OF THE UNITED STATES v. WEISIGER*.

Bills and notes.—In Kentucky suit may be brought in equity directly against a remote indorser of promissory note, p. 348.

Cited in *Dorsey v. Hadlock*, 7 Blackf. 115, approving principal case and applying rule; *Turneys v. Hunt*, 8 B. Mon. 408, reviewing authorities and applying rule; *Clifford v. Keating*, 3 Scam. 252, suit may be brought at law in Illinois under local statute, reviewing authorities.

Consideration for accommodation indorsement is the credit given to maker by indorsee, p. 348.

Cited, applying principle, in *Greenway v. Grain Co.*, 85 Fed. 537, 56 U. S. App. 527, holding want of consideration no defense to suit by bona fide holder, collecting cases.

Bills and notes.—Before recourse can be had against indorser, every reasonable effort must be made to recover of the drawer by suit, p. 348.

Cited and rule applied in *Bank of the United States v. Tyler*, 4 Pet. 382, 384, 387, 7 L. 893, 894, 895, holding neglect to proceed against a sheriff for permitting escape of drawer imprisoned on ca. sa. a bar to suit against the indorser; *Long v. Pence*, 93 Va. 587, 25 S. E. 594, holding question is one for jury, whether suit against maker would have availed. Cited, arguendo, *Pococks v. Blount*, 6 Mo. 345, holding demand and notice unnecessary where note not negotiable under Missouri law.

Bills and notes.—Diligence in pursuit of maker is excused when he has been discharged in insolvency, and creditor need not procure issuance of execution, p. 349.

Cited and relied on in *Bank of United States v. Tyler*, 4 Pet. 386, 7 L. 895, holding delay of thirty-one days in procuring execution was not a want of due diligence.

Insolvency.—Under act of 1800, defendant imprisoned under ca. sa. may be discharged in thirty days, p. 350.

Insolvency.—Imprisonment under the insolvency act may be waived without prejudice to claims of judgment creditor against third persons, p. 351.

Discharge under insolvency laws does not exempt debtor's present effects or future acquisitions nor prevent his confinement for same debt in case of detection of fraud, p. 353.

Miscellaneous.—Cited, without particular application, in *Gundermann v. Gunnison*, 39 Mich. 318; *In re Drisco*, 7 Fed. Cas. 1093, and in *Emery v. Parrott*, 107 Mass. 104, discussing order nunc pro tunc. See 2 Pet. 481, 7 L. 492.

2 Pet. 354-357, 7 L. 449, *CAMPBELL v. PRATT*.

Reversal for error will not be granted, where it appears that no benefit will be derived by appellant, p. 357.

Cited and rule applied in *Brobst v. Brock*, 10 Wall. 528, 19 L. 1004, refusing to reverse erroneous judgment for defendant in ejectment, where it appeared that plaintiff could not recover, even if judgment were reversed; *In re Gribbon*, 55 Fed. 876, 14 U. S. App. 382, one in whose favor error is committed cannot be heard to complain.

2 Pet. 358-369, 7 L. 450, *AMERICAN FUR CO. v. UNITED STATES*.

Evidence.—Acts and declarations of agent with reference to the business of his employment, within the scope of his authority, may be proven as the acts or declarations of the principal in either criminal or civil actions, p. 364.

Cited and rule applied in *Barreda v. Silsbee*, 21 How. 165, 16 L. 92, holding declarations of agents of ship charterers admissible to show charter made in bad faith; *Cliquot's Champagne*, 3 Wall. 140, 18 L. 120, holding declarations of seller's agent admissible to show price of champagne; *Xenia Bank v. Stewart*, 114 U. S. 228, 29 L. 103, 5 S. Ct. 847, holding declarations of bank cashier admissible against bank to show payment of a note; *Aiken v. Bemis*, 3 Wood. & M. 355, F. C. 109, holding declarations of agent admissible to prove infringement of patent; *Norwich, etc., R. R. Co. v. Cahill*, 18 Conn. 492, railroad company bound by declarations of one director; *Chicago, etc., R. R. Co. v. Coleman*, 18 Ill. 299, 68 Am. Dec. 546, or of its president; *Stockwell v. United States*, 13 Wall. 550, 20 L. 496, holding knowledge of one partner imputable to firm; *McPherrin v. Jennings*, 66 Iowa, 624, 24 N. W. 242, and *Danville Bank v. Waddill*, 31 Gratt. 488, fact of agency must be established; *United States v. Amann*, 24 Fed. Cas. 780, holding principal may be criminally liable for omission of his agent; *Moore v. Davis*, 49 N. H. 55, 6 Am. Rep. 467, holding agent's motives and intentions those of his principal.

Cited, but rule not particularly applied, in *Morrill v. Cone*, 22 How. 82, 16 L. 255, discussing effect of deed executed by attorney in fact without his authority. And cited in 53 Am. Dec. 774, 775, in exhaustive note on admissions of agents as evidence.

Distinguished in *Newell v. Roberts*, 13 Conn. 71, acts and admis-

slons of thlrd persons cannot be given in evidence under the rule; *Underwood v. Hart*, 23 Vt. 129; *Phelps v. James*, 86 Iowa, 402, 41 Am. St. Rep. 499, 53 N. W. 275, and *Smith v. Bodfish*, 39 Me. 139, nor declarations made by agent after termination of his employment; *Franklin Bank v. Stewart*, 37 Me. 526, nor after transaction is completed, collecting authorities on general subject of declarations by agent; *Corbin v. Adams*, 6 Cush. 97, holding declarations of son, made while performing contract made by him as agent for his father, not admissible to prove terms of contract.

Indians—Penalties and forfeitures.—Where an Indian trader carries spirituous liquors into the Indian country and they are found among his goods, the burden of proof is thrown upon him to show that he did not violate the act of 1802, regulating trade with the Indians, p. 364.

Cited and principle applied in *State v. Cunningham*, 25 Conn. 203, holding proof of finding liquors in possession of accused, presumptive evidence that it was kept for sale contrary to the statute; *Lincoln v. Smith*, 27 Vt. 356, discussing same question; *State v. Intoxicating Liquors*, 58 Vt. 598, 4 Atl. 231, ruling similarly.

Evidence—Conspiracy.—When persons are associated for an illegal purpose, acts and declarations of one, in reference to the common object, and forming part of the *res gestæ*, may be given in evidence against all, p. 365.

Cited and principle followed in *Nudd v. Burrows*, 91 U. S. 438, 23 L. 289, and *Walton v. Bank*, 13 Colo. 271, 16 Am. St. Rep. 201, 22 Pac. 442, 5 L. R. A. 767, & n., bankrupt's declarations admissible as against preferred creditor, where they were the result of an agreement to give fraudulent preference; *Bannon v. United States*, 156 U. S. 468, 39 L. 496, 15 S. Ct. 469, where conspiracy is proven, overt acts of individual conspirators may be shown; *Wiborg v. United States*, 163 U. S. 657, 41 L. 298, 16 S. Ct. 1137, and *State v. Soper*, 16 Me. 298, 33 Am. Dec. 668, holding similarly; *Bloomer v. State*, 48 Md. 531, collecting cases, and *The Meteor*, 17 Fed. Cas. 197, declarations of conspirators admissible against co-conspirators; *Farley v. Peebles*, 50 Neb. 732, 70 N. W. 234, even where the evidence is such as *inter alia*, the jury may infer the conspiracy itself from; *United States v. Hartwell*, 3 Cliff. 228, F. C. 15,318, rule applies as between principal and accessories; *Cuyler v. McCartney*, 40 N. Y. 245, dissenting opinion, *arguendo*, rule applicable to all combinations for unlawful purposes, even where technical conspiracy is not shown; *State v. George*, 7 Ired. 323, rule applies between principal and accomplice. See also notes, 95 Am. Dec. 56, and 3 Am. St. Rep. 487, collecting cases on declarations of conspirators. Cited without particular application, in *United States v. Cole*, 5 McLean, 553, F. C. 14,832, upon proposition that combination is not ended until its purpose is accomplished.

Distinguished in *Reid v. State*, 20 Ga. 685, declarations of conspirators are not evidence against co-conspirators, when mere narratives of past occurrences; *Strout v. Packard*, 76 Me. 156, 49 Am. Rep. 605, conspiracy must be proven aliunde; *State v. Larkin*, 49 N. H. 44, declarations made two weeks after alleged offense was consummated are not part of the *res gestæ*; *State v. George*, 7 Ired. 327, dissenting opinion, arguendo, declaration not part of *res gestæ*, after common enterprise is at an end; *Patton v. State*, 6 Ohio St. 470, holding similarly; *Preston v. State*, 4 Tex. App. 200, evidence of threats, made previous to commission of crime, not admissible where agreement to commit the crime had not been made at time of making threats; *Fouts v. State*, 7 Ohio St. 476, previous declarations by one who commits a crime as to what he intended to do are not admissible against another person charged at the same time for same offense, even where agreement existed to perform the unlawful act previous to the making of the declaration.

Statutory. construction.—Penal laws should not be so strictly construed as to defeat the obvious intention of the legislature, p. 367.

Cited and followed in *In re Coy*, 127 U. S. 740, 31 Fed. 800, construing penal statute referring to elections; *United States v. Lacher*, 134 U. S. 628, 33 L. 1083, 10 S. Ct. 626, construing penal statutes relating to mails; *United States v. Willetts*, 5 Ben. 227, F. C. 16,699, construing revenue laws imposing forfeiture for fraud; *United States v. Mattock*, 2 Sawy. 151, F. C. 15,744, construing statute prohibiting depasturing of Indian lands; *United States v. Stone*, 8 Fed. 251, construing words "plunder, steal or destroy," in revised statutes, section 5358; *United States v. Ellis*, 51 Fed. 810, construing word "spirituous," in revised statutes, section 2139; *In re Moore*, 66 Fed. 951, construing order prohibiting introduction of liquors into Alaska; *Boyd v. Watt*, 27 Ohio St. 275, dissenting opinion, and *United States v. One Hundred and Twenty-nine Packages*, 27 Fed. Cas. 285, holding rule a fortiori, applicable when statute is not penal but merely civil act imposing penalty; *State v. Johnson*, 16 S. C. 189, construing "concealed," in statute forbidding carrying of concealed weapons; *Crosby v. Hawthorne*, 25 Ala. 225, construing "aid," in statute prohibiting aiding slaves to run away; *Merriam v. Langdon*, 10 Conn. 469, construing "trading, dealing and trafficking," in statute for suppression of peddling; *Rawson v. State*, 19 Conn. 299, construing "otherwise," in statute prohibiting person from keeping "by agent, or otherwise," any house for purpose of selling liquors; *State v. Main*, 31 Conn. 575, construing "houses," in statute prohibiting keeping houses of bawdry; *People v. Sweetser*, 1 Dak. 301, 46 N. W. 454, holding words "and" and "or" interchangeable as statute may require; *Keller v. State*, 11 Md. 536,

69 Am. Dec. 232, construing statute imposing penalty for failure to secure liquor license; *Parkinson v. State*, 14 Md. 195, 74 Am. Dec. 529, construing "give," in statute forbidding gift of intoxicants to minors. Cited, without particular application, in *Beley v. Naphtaly*, 73 Fed. 125, 44 U. S. App. 232, remarking remedial statutes should be broadly construed.

Indian country ceases to be such with the extinguishment of the Indian title to the soil, p. 368.

Cited and rule applied in *Bates v. Clark*, 95 U. S. 208, 24 L. 473, holding lands to which the Indian title had passed away, no longer Indian lands within the meaning of statute forbidding sales of liquor on Indian lands; *United States v. Richard*, 1 Ariz. Ter. 37, 40, holding similarly. Cited, arguendo, in *United States v. Seveloff*, 2 Sawy. 316, F. C. 16,252, holding Alaska not Indian country within act forbidding sales of liquor in Indian country; *Moore v. County Commissioners*, 2 Wyo. 22, discussing taxation within Indian reservations. See note on Indian relations, 3 McCrary, 516.

Distinguished in *United States v. Payne*, 2 McCrary, 304, 305, 8 Fed. 895, rule aliter where so provided by treaty, statute or executive order; *United States v. Richard*, 1 Ariz. Ter. 46, dissenting opinion, arguendo, rule not applicable to territory west of Mississippi.

2 Pet. 370-379, 7 L. 454, **DANDRIDGE v. WASHINGTON'S EXECUTORS.**

Parties to actions.—All participants in distribution of a fund should be parties to a suit for its distribution, p. 376.

Distinguished in *Evans v. Wall*, 159 Mass. 169, 38 Am. St. Rep. 407, 34 N. E. 184, holding possible remaindermen not necessarily parties.

Words and phrases.—"Trade" and "profession" are seldom confounded in common language, the former being generally received as denoting one of the mechanical arts, p. 377.

Parties to actions.—Residuary legatee is not a proper party in a suit against executors to fix amount of a prior legacy, p. 377.

Cited and rule applied in *Davison v. Rake*, 45 N. J. Eq. 772, 18 Atl. 754, holding executor only necessary party in suit by legatee to recover amount of legacy.

Distinguished in *Sears v. Hardy*, 120 Mass. 530, holding residuary legatee proper party in action to declare resulting trust in bulk of estate; *Read v. Patterson*, 44 N. J. Eq. 218, 6 Am. St. Rep. 880, 14 Atl. 493, residuary legatees are necessary parties to suit to construe residuary clause in will.

Executor is representative of and guardian of interests of residuary legatees, p. 377.

Cited and rule applied in *Ward v. Durham*, 134 Ill. 200, 25 N. E. 746, holding judgment against executor allowing claim conclusive on heirs and devisees; *Labitut v. Prewett*, 1 Woods, 147, F. C. 7,962, holding executor may bring bill to enjoin sale of property of estate without joining legatees; *Walsh v. Smyth*, 3 Bland, 25, representatives entitled to notice of dissolution of injunction obtained by deceased.

Distinguished in *Carey v. Roosevelt*, 81 Fed. 610, holding judgment against executor, after distribution, does not bind legatees.

Equity practice.—Dismissal of bill in equity for want of proper parties should be without prejudice, p. 378.

Cited in *Durant v. Essex Co.*, 7 Wall. 110, 19 L. 156, where words "without prejudice," are omitted from decree, it is presumed to be rendered on the merits.

Miscellaneous.—Cited, without particular application, in *Bona-parte v. Railroad Co.*, Bald. 217, F. C. 1,617; *Cross v. De Valle*, 6 Fed. Cas. 891, holding parties in equity must be served as well as sued.

2 Pet. 380-416, 7 L. 458, *SATTERLEE v. MATTHEWSON*.

Appeal and error.—Jurisdiction of Supreme Court is acquired on error to the Supreme Court of a State where it appears from the record that the repugnancy of a statute to the Constitution was drawn into question, although the record do not in terms so state, p. 410.

Cited to this point in *Harris v. Dennie*, 3 Pet. 302, 7 L. 687, applying rule where Federal statute misconstrued; *McCullough v. Virginia*, 172 U. S. 118, and *Water Power Co. v. Street Ry. Co.*, 172 U. S. 488, applying rule and collecting cases. Cited, without particular application, in *Stearns v. Lawrence*, 83 Fed. 745, 54 U. S. App. 532, referring to practice of examining opinions of courts to ascertain point decided.

Distinguished in *Crowell v. Randell*, 10 Pet. 396, 9 L. 469, reviewing authorities, and holding it must appear in some manner from the record that Federal question was raised and decided as required by judiciary act; *Hamilton v. Kneeland*, 1 Nev. 63, holding diverse citizenship no ground for writ of error.

Obligation of contracts.—A retrospective statute making valid a contract previously void impairs no Federal limitations, p. 412.

Cited, approved, and rule applied in *Skellinger v. Smith*, 1 Wash. Ter. 373, *McMasters v. Commonwealth*, 3 Watts, 294, *Watson v. Mercer*, 8 Pet. 110, 111, 8 L. 885, and *Randall v. Kreiger*, 23 Wall. 140, 147, 23 L. 126, affirming 2 Dill. 448, F. C. 11,554, all holding

valid statutes curing defective acknowledgments; *Atwater v. Seely*, 1 McCrary, 268, 2 Fed. 137, holding similarly; *Gelpcke v. Dubuque*, 1 Wall. 204, 17 L. 525, holding valid a statute curing defective bond issue; *Belolt v. Morgan*, 7 Wall. 624, 19 L. 207, *Bridgeport v. Railroad Co.*, 15 Conn. 497, *Bass v. Columbus*, 30 Ga. 851, collecting cases, *McMillan v. Lee Co.*, 6 Iowa, 394, all holding similarly; *Baughner v. Nelson*, 9 Gill, 305, 52 Am. Dec. 698, *Andrews v. Russell*, 7 Blackf. 475, *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 239, *Nichols v. Gee*, 30 Ark. 145, *Wilson v. Hardesty*, 1 Md. Ch. 68, *Danville v. Pace*, 25 Gratt. 10, 18 Am. Rep. 669, and *Ewell v. Daggs*, 108 U. S. 151, 27 L. 685, 2 S. Ct. 414, all holding that repeal of law making contract void for usury, validated the contract; *State v. Squires*, 26 Iowa, 348, upholding statute curing defective organization of school district; *Gross v. Mortgage Co.*, 108 U. S. 488, 27 L. 799, 2 S. Ct. 947, holding valid a statute curing invalidity of previous loans of foreign corporations; *Shields v. Land Co.*, 94 Tenn. 148, 152, 45 Am. St. Rep. 716, 718, 28 S. W. 674, 675, 26 L. R. A. 518, and *Cowell v. Col. Sp. Co.*, 3 Colo. 91, all holding valid, acts curing defective incorporations; *Milne v. Huber*, 3 McLean, 217, F. C. 9,617, holding valid as to pre-existing contracts, statute creating remedy when none had formerly existed; *Bloomer v. Stolley*, 5 McLean, 165, F. C. 1,559, *arguendo*, statute extending patent right is valid; *Green v. Collins*, 3 Cliff. 506, F. C. 5,755, applying rule holding right of action on contract valid in State where made, revived by repeal of prohibiting statute of State where suit brought; *Aycock v. Martin*, 37 Ga. 179, dissenting opinion, collecting cases and arguing that stay laws are constitutional; *Welborn v. Akin*, 44 Ga. 427, upholding retrospective statute requiring affidavit of payment of taxes on claim sued on; *Gibson v. Hibbard*, 13 Mich. 219, sustaining statute permitting validating of contracts void for want of stamp; *Phenix Ins. Co. v. Pollard*, 63 Miss. 663, sustaining statute removing bar to recovery on contracts previously barred by failure to pay tax; *Mutual Ben. L. Ins. Co. v. Winne*, 20 Mont. 40, 49 Pac. 452, sustaining statute curing invalid contracts of foreign corporations; *Mercer v. Watson*, 1 Watts, 357, holding valid a statute curing defective conveyances by married women; *Lane v. Nelson*, 79 Pa. St. 410, holding curative statute valid, providing its purpose be to correct what was defective, and not to validate what was void; dissenting opinion, *Bronson v. Kingie*, 1 How. 330, 11 L. 150, majority holding unconstitutional a law extending time for redemption of mortgages; *Reynolds v. Randall*, 12 R. I. 531, dissenting opinion, collecting cases and arguing statute changing rule of evidence as to adverse possession is retroactive and constitutional; *Blodgett v. Hitt*, 29 Wis. 178, *semble*, statute curing defective administrator's sale is valid and retroactive. See note on laws validating defective contracts by married women, 16 Am. Dec. 519, collecting cases; and note on curative acts, 37 Am. Rep. 398, collecting cases.

Distinguished in *Newman v. Samuels*, 17 Iowa, 554, and *Brinton v. Seevers*, 12 Iowa, 393, holding statute curing defective acknowledgments invalid, so far as impairing vested rights. Disapproved in *Pearce v. Patton*, 7 B. Mon. 169, 45 Am. Dec. 68, reviewing principal case and holding void a statute curing defective deed by married woman; *State v. Hernandez*, 24 La. Ann. 71, *arguendo*, statute curing fraudulent issue of municipal certificates is invalid; *Adams v. Palmer*, 51 Me. 494, refusing to construe as retroactive, a statute validating voidable releases of dower; *Forster v. Forster*, 129 Mass. 566, collecting cases and holding void a statute curing defective tax sales and exempting certain cases; *Grim v. School District*, 57 Pa. St. 435, 98 Am. Dec. 239, holding curative statute void when impairing vested rights, reviewing authorities; *Austin v. Burgess*, 36 Wis. 193, holding statute validating usurious contracts not retroactive.

Constitutional law.—A statute is not void because it is unwise, p. 412.

Cited in *Gibson v. Mason*, 5 Nev. 299, holding that words of Constitution furnish the only test as to the validity of statute; *Dover v. Portsmouth Bridge*, 17 N. H. 227, whether exercise of legislative power is discreet is not a question for the courts. Cited *obiter* in *Sharpless v. Philadelphia*, 21 Pa. St. 163, 59 Am. Dec. 767, remarking that State law is valid unless clearly forbidden.

Constitutional law.—Nothing in the Constitution of the United States forbids a State legislature to exercise judicial functions, p. 413.

Cited in *Trustees Internal Imp. Fund v. Bailey*, 10 Fla. 249, holding statute directing Supreme Court to rehear a particular case, an exercise of judicial functions, and void under State Constitution. Cited without particular application, in *Hepburn's Case*, 3 Bland, 98, discussing general scope of legislative authority.

Distinguished in *Lawson v. Jeffries*, 47 Miss. 699, 705, 12 Am. Rep. 349, 354, holding constitutional convention has no power to exercise judicial authority.

Retrospective laws are constitutional unless they impair the obligations of contracts, or are *ex post facto*, p. 413.

The following citing cases affirm and variously apply this doctrine: *Drehman v. Stifle*, 8 Wall. 603, 19 L. 511, holding valid a provision of the Constitution of Missouri, exempting all persons who acted under authority of the United States from civil suit, on account of any acts so done; *Gray v. Munroe*, 1 McLean, 532, F. C. 5,724, holding law relating to imprisonment of debtors applicable to pending cases; *Martindale v. Moore*, 3 Blackf. 287, reviewing authorities and construing law limiting liability of executors; *Johnston v. Vandyke*, 6 McLean, 441, F. C. 7,426, holding valid a retroactive law

limiting right of dower; McAfee v. Covington, 71 Ga. 274, 51 Am. Rep. 265, holding judgment founded on tort not a contract within constitutional inhibition; Albee v. May, 2 Paine, 80, F. C. 134, holding valid a retrospective act, giving ejected occupants of lands right to recover for improvements made while in possession; Ex parte Hull, 12 Fed. Cas. 854, holding bankruptcy act applicable to pre-existing debts; Elliott v. Mayfield, 4 Ala. 423, holding statute relating to execution against sureties retrospective and valid; Owen v. Peebles, 42 Ala. 343, holding valid a law abrogating previous forfeitures; Barbour Co. v. Horn, 48 Ala. 659, holding statutes giving right of action for defect in bridge, applicable to previously constructed bridge; Tilton v. Swift, 40 Iowa, 80, sustaining retroactive statute changing time of entry of judgment; Grand Lodge v. City, 44 La. Ann. 673, 11 So. 154, sustaining statute imposing taxation on property previously exempt; Oriental Bank v. Freese, 18 Me. 111, 36 Am. Dec. 702, holding retrospective and sustaining a statute repealing statute confirming right to penalty; Scott v. Smart, 1 Mich. 302, 303, sustaining statute transferring certain cases from Territorial Supreme Court to State Supreme Court; Cochran v. Van Surlay, 20 Wend. 372, 32 Am. Dec. 573, holding constitutional a private act authorizing sale of estate of infants; Burch v. Newbury, 10 N. Y. 391, holding statute permitting appeal where time had previously expired, not contrary to Constitution of United States; Green v. Shumway, 39 N. Y. 432, arguendo, test oath statute is constitutional; Leak v. Gay, 107 N. C. 478, 12 S. E. 314, holding statutes exempting homesteads from previously acquired judgment liens, retrospective and constitutional; Sandusky City Bank v. Wilbor, 7 Ohio St. 499, sustaining statute taxing State bank previously exempt by charter; Erie, etc., R. R. Co. v. Casey, 26 Pa. St. 321, holding statute to impair obligation of contract must operate directly upon some contract and literally save its obligation; Miles v. King, 5 S. C. 150, holding valid a statute requiring re-recording of destroyed documents of title; Bender v. Crawford, 33 Tex. 751, 7 Am. Rep. 272, sustaining retrospective statute suspending statute of limitations. Cited without particular application, in *In re Smith*, 22 Fed. Cas. 401, holding restriction relating to impairment of contracts applicable to States alone, not to congress; Larkin v. Saffarans, 15 Fed. 149, holding similarly; also in dissenting opinion, *Treadway v. Schrauber*, 1 Dak. 270, 46 N. W. 476. Cited casually in *Lewis v. Lewis*, 7 How. 784, 12 L. 913, stating rule *ut supra*; Ex parte Garland, 4 Wall. 390, 18 L. 374, discussing *ex post facto* laws; *Bukner v. Street*, 1 Dill. 254, F. C. 2,098, collecting cases and stating rule *ut supra*; *Gage v. Gage*, 66 N. H. 294, 29 Atl. 549, 21 L. R. A. 857, & n., stating rule that remedial statutes may be construed to be retrospective. Cited *obiter*, in *Sharpless v. Philadelphia*, 21 Pa. St. 165, 59 Am. Dec. 770, remarking that statute must clearly impair the obligation of contracts in order to be void.

Distinguished in *Forsyth v. Marbury*, Charl. (Ga.) 329, holding statute exempting certain property from levy previously subject, void as to existing judgment founded on contract; *Gunn v. Hendry*, 43 Ga. 563, holding unconstitutional, a statute permitting set-off on account of losses occurring during the war without connecting plaintiff with those losses; *Anderson v. Baker*, 23 Md. 566, *arguendo*, retrospective law depriving certain persons of rights of suffrage is *ex post facto*; *Rich v. Flanders*, 39 N. H. 386, 387, dissenting opinion, collecting cases, and arguing statute removing disability of witnesses should not be construed retrospective; *Berdan v. Van Riper*, 16 N. J. L. 11, refusing to construe as retroactive, a statute prescribing conditions as to creation of joint tenancies; *Vanderpool v. Railroad Co.*, 44 Wis. 659, refusing to construe mechanics' lien law retroactively.

Constitutional law.—A State law divesting vested rights violates no Federal limitation where it does not impair the obligation of a contract, p. 413.

Cited, approved, and rule applied in *Charles River Bridge v. Warren Bridge*, 11 Pet. 539, 580, 9 L. 821, 837, reviewing principal case and refusing to read certain implied terms into grant of charter by State; *Baltimore, etc., R. R. Co. v. Nesbit*, 10 How. 402, 13 L. 472, holding valid a retroactive law directing court to set aside inquisition condemning certain lands; *East Hartford v. Hartford Bridge*, 10 How. 539, 13 L. 530, holding similarly; *De Moss v. Newton*, 31 Ind. 220, sustaining statute reducing time of commencing actions for partition; *State v. New Orleans*, 32 La. Ann. 715, sustaining law limiting right of municipality as to taxation; *Hardeman v. Downer*, 39 Ga. 436, holding valid a retroactive homestead law; *Freeland v. Williams*, 131 U. S. 415, 420, 33 L. 197, 199, 9 S. Ct. 776, 778, holding valid provision in State Constitution nullifying judgments founded in tort; *Bennett v. Boggs*, 1 Bald. 74, 77, F. C. 1,319, holding valid a law regulating common right of fishery; *Holman v. Bank*, 12 Ala. 417, upholding statute giving administratrix power to sell land, although title had already descended to the heir; *Thompson v. Phillips*, 1 Bald. 284, F. C. 13,974, holding valid a law limiting lien of judgments; *Dodge v. Woolsey*, 18 How. 379, 15 L. 421, dissenting opinion, *arguendo*, proviso in charter of bank exempting it from taxation may be subsequently annulled by legislature; *Bonner v. Martin*, 40 Ga. 503, upholding statute re-opening judgments; *Shepherd v. Grimmer*, 2 Idaho, 1127, 31 Pac. 795, holding valid a law prescribing test oath, which, in effect, deprives certain voters of their franchise; *Myers v. Mitchell*, 20 La. Ann. 534, sustaining Constitution of State changing right of appeal; *New Orleans v. Railroad Co.*, 35 La. Ann. 682, sustaining law imposing assessment on taxable property previously omitted from the rolls, collecting cases; *McLure v. Melton*, 24 S. C. 570, 58 Am. Rep. 278, *argu-*

endo, rule applies to decision of State court modifying rule of property established by previous decision; *Ex parte Hunter*, 2 W. Va. 173, and *Ex parte Quarrier*, 4 W. Va. 223, upholding test oath act.

Distinguished in *Bonaparte v. Railroad Co.*, 1 Bald. 220, F. C. 1,617, holding act permitting taking of private property for public use without compensation, impairs obligation of contract; *Wilder v. Lumpkin*, 4 Ga. 218, 220, holding laws divesting antecedent vested rights are void; *McNamee v. Alexander*, 109 N. C. 246, 13 S. E. 778, refusing to construe as retroactive, a remedial statute operating so as to divest title of present owner; *Lowe v. Harris*, 112 N. C. 480, 17 S. E. 540, 22 L. R. A. 382, holding similarly as to repeal of part of statute of frauds; *Mellinger v. Houston*, 68 Tex. 44, 3 S. W. 252, reviewing authorities, and holding statute refusing right to plead statute of limitations in suits for delinquent taxes not retroactive under State Constitution forbidding retroactive laws; *Griffin v. Cunningham*, 20 Gratt. 110, holding unconstitutional an enabling act permitting rehearing of cases previously decided in military tribunal; *Peerce v. Kitzmiller*, 19 W. Va. 573, holding rule aliter since adoption of fourteenth amendment.

Circuit Court may decide whether State law is in conflict with State Constitution or not, p. 414.

Cited casually in *Clark v. Sohler*, 1 Wood. & M. 374, F. C. 2,835, and *Woodhull v. Wagner*, 1 Bald. 302, F. C. 17,975, remarking that Circuit Court must decide precisely as State courts ought to do.

Obligation of contracts.—Prohibition to pass laws impairing obligation of contracts is confined to the States, p. 416,

Cited and applied in *In re Smith*, 2 Woods, 460, F. C. 12,996, upholding Federal bankruptcy act.

Distinguished in *Rosa v. Buckland*, 17 Ill. 320, dissenting opinion, arguing law of congress void which impairs obligation of a contract.

Miscellaneous.—Cited without particular application, in *Salisbury etc., Assn. v. Wicomico Co.*, 86 Md. 622, 39 Atl. 427, *Borden v. State*, 11 Ark. 548, 54 Am. Dec. 238, *Ryder v. Innerrarity*, 4 Stew. & P. 30, *Baring v. Erdman*, 2 Fed. Cas. 790; *Atkinson v. Philadelphia, etc., R. R.*, 2 Fed. Cas. 110; in *Talcott v. Pine Grove*, 1 Flipp. 177, F. C. 13,735, on point that legislature may authorize issue of bonds to aid in constructing railroad; *Sabariego v. Maverick*, 124 U. S. 282, 31 L. 439, 8 S. Ct. 472, and *United States v. Land Co.*, 148 U. S. 44, 37 L. 360, 13 S. Ct. 463, remarking that decisions of legislative branch are not open to collateral attack; in *Leach v. Smith*, 25 Ark. 254, holding void a statute known as Confederate money act; *Wilder v. Lumpkin*, 4 Ga. 215, discussing ex post facto laws. Cited erroneously in *Bains v. James and Catherine*, Bald. 547, F. C. 756; *New Orleans, etc., R. R. Co. v. New Orleans*, 26 La. Ann. 521, discussing legislative authority over municipal corporations; *In re Mechanics' Society*, 31 La. Ann. 631, discussing essentials of constitutional stat-

ute; Campbell's Case, 2 Bland, 232, 237, 20 Am. Dec. 373, 378, discussing nature of State sovereignty; Doc Lonas v. State, 3 Helsk. 301, discussing right of judiciary to determine questions of constitutionality; Lewis v. Woodfolk, 2 Baxt. 47, discussing same proposition.

2 Pet. 417-441, 7 L. 470, REYNOLDS v. McARTHUR.

Statutory construction.—Laws should not be construed retrospectively unless their language renders such construction indispensable, p. 434.

Cited and rule applied in Ladiga v. Roland, 2 How. 589, 11 L. 390, refusing to construe as retroactive, provision in Indian treaty.

Western reserve.—A patent issued October 12, 1812, founded on a military warrant for lands within the reserve is valid against a claimant of the same land holding under sale made by United States, p. 435.

Cited casually in Wallace v. Saunders, 7 Ohio, 176, discussing titles within the reserve.

Words and phrases.—"Source" of a river is neither the point at which sufficient water flows to navigate small vessels laden, nor the point from which water flows at all seasons of the year, nor the point farthest from its mouth at which water flows at all seasons of the year, it is fixed by common consent and notoriety, pp. 438, 440.

Miscellaneous.—Cited erroneously in State v. Sterling, 20 Md. 505. Cited, to no particular point decided, in Gaston v. Mace, 33 W. Va. 21, 25 Am. St. Rep. 853, 10 S. E. 63, 5 L. R. A. 396, and note, discussing navigable rivers as highways.

2 Pet. 442-448, 7 L. 479, SOUTHWICK v. POSTMASTER-GENERAL.

District Court's jurisdiction extends to all suits at common law where the United States or any officer thereof under authority of act of congress shall sue, p. 44.

Cited obiter in United States v. New Bedford Bridge, 1 Wood. & M. 448, F. C. 15,867, and in In re Barry, 42 Fed. 127, F. C. 1,059, S. C., 136 U. S. 617, 34 L. 510n, discussing common law under United States.

District Court, performing its appropriate duty as such, is not sitting as a Circuit Court although it possesses the powers of that court also, p. 447.

Cited and approved in Swift v. Circuit Judges, 64 Mich. 486, 31 N. W. 437, holding Circuit Court may review judgment of Recorder's Court in case where they could have exercised concurrent jurisdiction.

District Court.—Where District Court sits as Circuit Court, writ of error will lie from original judgment to Supreme Court; aliter where it sits as District Court, p. 448.

2 Pet. 449-480, 7 L. 481, **WESTON v. CITY COUNCIL OF CHARLESTON.**

Words and phrases — Suit.—Where a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit, p. 464.

Cited with approval in *Kendall v. United States*, 12 Pet. 645, 9 L. 1229, dissenting opinion, arguendo, “suit” and “case,” synonymous; *Holmes v. Jennison*, 14 Pet. 566, 10 L. 592, dissenting opinion, arguendo, application for writ of habeas corpus is a suit; *State v. Jennings*, 56 Wis. 120, 14 N. W. 30, and *State v. Supervisors*, 67 Wis. 276, 30 N. W. 361, holding mandamus proceeding a civil action; *Ex parte Milligan*, 4 Wall. 112, 18 L. 293, holding application for habeas corpus, a “cause;” *In re Sloan*, 5 N. Mex. 611, 25 Pac. 937, and *Taylor v. New York*, 82 N. Y. 25, mandamus proceeding is a suit; *Rowan v. Shepard*, 2 Tex. Civ. App. 254, 255, and *Case of Sewing Machine Companies*, 18 Wall. 585, 21 L. 922, approving definition, *supra*; *Mineral Range Ry. Co. v. Detroit, etc., Copper Co.*, 25 Fed. 520; *United States v. Inlots*, 26 Fed. Cas. 487, and *Kohl v. United States*, 91 U. S. 375, 23 L. 452, condemnation proceeding is a suit; *Appleton v. Turnbull*, 84 Me. 76, 24 Atl. 593, also a bill in equity by a judgment creditor of a corporation; *State v. Oil Co.*, 42 W. Va. 95, 24 S. E. 693, a proceeding reviewing tax assessment, involving validity of tax law; *State v. Newell*, 13 Mont. 305 34 Pac. 29, habeas corpus proceeding is a “special proceeding in the nature of an action,” reviewing authorities; *United States v. Moore*, 11 Fed. 251, criminal proceeding is a suit; *McCullough v. Large*, 20 Fed. 310, as also a rule to show cause why one should not be punished for contempt; *Lackawanna Coal Co. v. Bates*, 56 Fed. 740, and execution proceeding against stockholder after return nulla bona against corporation; *In re Ditch*, 69 Fed. 166, also a statutory proceeding for establishing drains; *Mooney v. Manufacturing Co.*, 72 Fed. 36, 34 U. S. App. 581, garnishment proceeding against foreign corporation; *Stinson v. St. P. R. Co.*, 20 Minn. 494, querying whether condemnation proceeding is a suit. Cited casually in *Clark v. Sohler*, 1 Wood. & M. 372, F. C. 2,835, stating definition *ut supra*; and cited in note, 12 Am. Rep. 551.

Denied in *Holmes v. Jennison*, 14 Pet. 624, 10 L. 625, concurring opinion, arguendo, application for writ of habeas corpus is not a suit; *Decatur v. Paulding*, 14 Pet. 611, 612, 10 L. 617, 618, dissenting opinion, arguendo, application for writ of mandamus is not a suit; *In re Chicago*, 64 Fed. 898, assessment proceedings for municipal improvement are not a suit, even where conducted in court under judicial forms, collecting cases. Distinguished in *New Orleans, etc.*,

R. R. Co. v. Mississippi, 102 U. S. 144, 26 L. 99, dissenting opinion, arguendo, defense arising under laws of United States is not a "suit arising under laws of United States;" *Upshur Co. v. Rich*, 135 U. S. 474, 34 L. 199, 10 S. Ct. 653, holding appeal to a County Court acting as a board of commissioners without judicial powers is not a "suit."

"Suit"—Prohibition.—A proceeding to obtain a writ of prohibition is a suit, p. 464.

Cited in *In re Sloan*, 5 N. Mex. 611, 25 Pac. 937, ruling similarly as to proceeding for injunction against election officers. Cited without particular application, in *Smith v. Whitney*, 116 U. S. 174, 29 L. 603, 6 S. Ct. 573, discussing prohibition generally.

Final judgment.—A judgment refusing a writ of prohibition is a final judgment, and appealable, p. 464.

Supreme Court has jurisdiction upon error to Supreme Court of a State where it has sustained State law attacked as a violation of Constitution of United States, p. 464.

Cited and rule applied in *Home Ins. Co. v. Augusta*, 93 U. S. 121, 23 L. 826, entertaining error to State court sustaining validity of statute claimed to be in violation of constitutional provision forbidding impairing obligation of contracts; *Daniels v. Tearney*, 102 U. S. 418, 26 L. 188, ruling similarly on error to State court, where statute was upheld which was claimed to be void as in furtherance of the ordinance of secession. Cited casually in *Pratt v. Fitzhugh*, 1 Black, 273, 17 L. 207, discussing jurisdiction on error to Circuit courts; and in *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 533, *Citizens' Street Ry. Co. v. City Ry. Co.*, 56 Fed. 750, and *City Ry. Co. v. Citizens' Street R. R. Co.*, 196 U. S. 563, 41 L. 1116, 17 S. Ct. 655, discussing jurisdiction of Circuit Court where impairment of obligation of contract is involved; *Hammond v. People*, 32 Ill. 465, dissenting opinion, arguendo, writ of error lies to State Supreme Court in habeas corpus proceeding. Cited in 91 Am. Dec. 197, in very full note on writs of error to State courts.

Final judgment is one which determines the particular cause, pp. 464, 465.

Cited approvingly in *Holmes v. Jennison*, 14 Pet. 563, 10 L. 591, dissenting opinion, arguendo, judgment refusing discharge on habeas corpus is a final judgment; and in *Hammond v. People*, 32 Ill. 470, dissenting opinion, arguing similarly; *Antrim's Case*, 1 Fed. Cas. 1066, proceeding may be final and yet not conclusive elsewhere as to the right in question; *Belt v. Davis*, 1 Cal. 138, a judgment vacating another judgment in another court for fraud is final; *Bassick Mining Co. v. Schoolfield*, 15 Colo. 380, 24 Pac. 1051, and a decree settling amount of liens and ordering sale of property; *State v. Logan*, 1 Nev. 514, an order discharging defendant and exonerating his bail;

Swain v. Savage, 77 N. W. 363, as to judgment declaring writ of replevin to have been unauthorized; Lalande v. McDonald, 2 Idaho, 287, 13 Pac. 348, a judgment of nonsuit; Allen v. Savannah, 9 Ga. 293, collecting cases and approving definition *ut supra*; International Bank v. Jenkins, 104 Ill. 150, or a judgment of appellate court, which leaves nothing to be done but to carry that judgment into effect. Cited in 60 Am. Dec. 428, in exhaustive note on final judgments. Cited also in note, 83 Am. Dec. 292.

Distinguished in Brinkley v. Brinkley, 47 N. Y. 47, holding order punishing for contempt not final if conditional.

Power of congress to borrow money is free and unburdened, pp. 465, 466.

Cited, without particular application, in Griswold v. Hepburn, 2 Duv. 46; and in Van Husan v. Kanouse, 13 Mich. 309, Shollenberger v. Brinton, 52 Pa. St. 66, and Metropolitan Bank v. Van Dyck, 27 N. Y. 499, 538, discussing validity of legal tender act.

Taxation.—Where right to impose a tax exists, it is a right which, in its nature, acknowledges no limits, p. 466.

Cited in Fifield v. Close, 15 Mich. 508, and Jones v. Keep, 19 Wis. 376, holding unconstitutional a provision of stamp act taxing process in State courts; Davis v. Richardson, 45 Miss. 503, 7 Am. Rep. 733, holding similarly as to provision requiring documents used as evidence to be stamped.

*Distinguished in Hanson v. Vernon, 27 Iowa, 49, 1 Am. Rep. 230, holding purpose of tax must be public; Jones v. Keep, 19 Wis. 381, dissenting opinion, *arguendo*, statute of United States taxing process in State courts is constitutional.

Taxation.—A State may not use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, p. 467.

Cited and rule applied in Dobbins v. Erie Co., 16 Pet. 449, 10 L. 1027, holding unconstitutional a State law taxing "office" held under government of United States; Crandall v. Nevada, 6 Wall. 47, 18 L. 748, holding void a State law taxing passengers as interference with right of United States to transport troops throughout the Union; Union Pac. R. R. Co. v. Peniston, 18 Wall. 38, 21 L. 794, dissenting opinion, *arguendo*, railroad constructed as aid to government operations is not subject to State taxation; Central Pac. R. R. Co. v. California, 162 U. S. 148, 149, 40 L. 922, 923, 16 S. Ct. 787, 788, dissenting opinion, reviewing authorities and arguing similarly; Andrews v. Auditor, 28 Gratt. 121, 123, State may not tax government buildings; in the following: Barker v. Bank, 59 N. H. 311, National Exchange Bank v. Boylen, 26 W. Va. 557, 53 Am. Rep. 115, and Farmers', etc., Bank v. Dearing, 91 U. S. 34, 23 L. 199, holding national banks not affected by State usury laws; National Bank v.

Fisher, 45 Kan. 729, 26 Pac. 483, National, etc., Bank v. Mobile, 62 Ala. 292, 34 Am. Rep. 18, People v. Weaver, 100 U. S. 543, 25 L. 706, State v. Haight, 31 N. J. L. 402, Pittsburg v. Bank, 55 Pa. St. 49, Hubbard v. Supervisors, 23 Iowa, 144, and First National Bank of Albia v. Council, 86 Iowa, 37, 52 N. W. 336, all holding State may tax national bank only to extent actually permitted by congress; Talbott v. Silver Bow Co., 139 U. S. 440, 445, 35 L. 210, 212, 11 S. Ct. 595, 597, and Salt Lake, etc., Bank v. Golding, 2 Utah, 5, 7, holding similarly as to territories; City Bank v. City of Paducah, 2 Flipp, 66, F. C. 2,743, enjoining tax discriminating against national bank in taxing shares; Sapyllton v. Thaggard, 91 Fed. 95, State may not tax bank chartered by congress, except upon its real property; Van Brocklin v. Tennessee, 117 U. S. 156, 158, 29 L. 847, 6 S. Ct. 673, 674, State may not tax lands purchased by United States at delinquent tax sale and held under statute of United States; United States v. Weise, 2 Wall. Jr. 74, F. C. 16,659, State may not tax real estate owned by United States within its territory; In re Sheffield, 64 Fed. 835, nor patent rights; Grether v. Wright, 75 Fed. 753, 754, 43 U. S. App. 770, nor bonds of the District of Columbia; People v. Hoffman, 37 N. Y. 15, 16, nor bonds of United States; Wood v. Stockwell, 55 Me. 83, arguing by analogy State may not interfere with regulation of interstate commerce; Northern Pac. R. R. Co. v. Carland, 5 Mont. 188, 3 Pac. 156, holding State law taxing railway lands exempted from taxation by act of congress is void; Lin Sing v. Washburn, 20 Cal. 571, denying power of State to restrict immigration. Cited obiter in West River Bridge v. Dix, 6 How. 548, 12 L. 552, discussing impairment of obligation of contract by exercise of eminent domain; Day v. Buffinton, 3 Cliff. 388, F. C. 3,675, arguendo, congress may not tax salary of Federal judge as income; Railroad Tax Case, 8 Sawy. 250, 13 Fed. 732, discussing property rights under fourteenth amendment; Wood v. Drake, 70 Fed. 883, arguendo, Federal courts alone have jurisdiction of action against marshal for act done by him as such. Cited in thorough note on taxation of United States property, 33 Am. St. Rep. 402.

Distinguished in Passenger Cases, 7 How. 538, 12 L. 809, arguing State has power of taxation of all property within its limits not specially exempted; Thomson v. Union Pac. R. R. Co., 9 Wall. 589, 19 L. 798, holding State has power to tax railroad constructed by aid of congress under its postal and military powers; Union Pac. R. R. Co. v. Peniston, 18 Wall. 34, 21 L. 792, and People v. Railroad Co., 43 Cal. 427, holding similarly; dissenting opinion, Pollock v. Farmers' L. & T. Co., 157 U. S. 646 (39 L. 842, 15 S. Ct. 714, erroneously cite 8 Pet. 591), under facts.

Sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, p. 467.

Cited approvingly in Piqua Branch Bank v. Knoop, 16 How. 409, 14 L. 994, dissenting opinion, reviewing authorities and, arguendo,

State has power to increase tax on State bank over amount stipulated in charter; *State v. Fullerton*, 7 Rob. (La.) 216, State may tax passengers for benefit of charity hospital; *Harrison v. Willis*, 7 Heisk. 42, 19 Am. Rep. 608, holding State may tax litigation; *Wheeling, etc., Transportation Co. v. Wheeling*, 99 U. S. 279, 25 L. 414, sustaining right of State to tax vessel as personal property at place of principal office of owner; *State v. Charleston*, 5 Rich. L. 570, State may exempt bank from taxation; *Southern Express Co. v. Hood*, 15 Rich. L. 75, 94 Am. Dec. 141, may tax express company in proportion to gross receipts; *Battle v. Mobile*, 9 Ala. 237, 44 Am. Dec. 440, State may tax coasting vessel owned by resident; *Tonnage Tax Cases*, 62 Pa. St. 298, 1 Am. Rep. 410, sustaining validity of State tax based on tonnage; *Osborne v. Mobile*, 44 Ala. 499, or railway whose business extends without its limits; *Jones v. Page*, 44 Ala. 658, or occupations; *Burlington, etc., R. R. Co. v. Hayne*, 19 Iowa, 139, or railroad lands, title to which is in railroad; *Debolt v. Trust Co.*, 1 Ohio St. 584, 589, State legislature may not surrender power of State to tax; *Campaign Co. Bank v. Smith*, 7 Ohio St. 55, State may tax capital invested in its own bonds; *Collector v. Day*, 11 Wall. 123, 20 L. 125, congress may not tax salary of State judicial officer; *State v. Garton*, 32 Ind. 4, 2 Am. Rep. 317, nor official bond of State officer; *Webb v. Burlington*, 28 Vt. 192, holding State may tax stocks of other States owned by resident; *Eyre v. Jacob*, 14 Gratt. 427, 73 Am. Dec. 370, and *Schoolfield v. Lynchburg*, 78 Va. 370, holding State may tax collateral inheritances. Cited casually in *In re Strawbridge*, 39 Ala. 387, 388, discussing authority of State to subject its citizens to military service; *Norris v. Doniphan*, 4 Met. (Ky.) 431, discussing relations of State and Federal government; *Nashua Sav. Bank v. Nashua*, 46 N. H. 404, dissenting opinion, arguing State may tax shares of stock in savings bank; *Wills v. Allison*, 4 Heisk. 392, discussing contracts to pay in particular kind of money.

Distinguished in *State Tonnage Tax Cases*, 12 Wall. 224, 20 L. 377, holding State has no authority to levy tax on vessels in proportion to tonnage; *Manhattan Co. v. Blake*, 148 U. S. 426, 37 L. 509, 13 S. Ct. 645, sustaining Federal tax falling indirectly upon deposits of State government in private bank; *Sweatt v. Railroad Co.*, 3 Cliff. 352, F. C. 13,684, 5 Bank. Reg. 248, holding congress has power to enact that railroads created by a State shall be liable to the provisions of the bankruptcy act; *Kirtland v. Hotchkiss*, 42 Conn. 451, arguendo, State may not tax moneys of citizen loaned without its territory.

Taxation.—State law taxing stock of United States is unconstitutional, p. 469.

Affirmed in *Bank of Commerce v. New York City*, 2 Black, 629, 631, 633, 17 L. 454, 455, and *Banks v. The Mayor*, 7 Wall. 24, 19 L. 59. Approved in *Van Allen v. The Assessors*, 3 Wall. 591, 596, 18

L. 237, 239, and *German-American Sav. Bank v. Burlington*, 54 Iowa, 612, 7 N. W. 106, dissenting opinion, arguendo, State has no power to tax, indirectly, capital of national bank invested in United States bonds; *Whitney v. Madison*, 23 Ind. 337, and *Bank of Kentucky v. Commonwealth*, 9 Bush, 48, State has no power to tax United States bonds of national bank; *Davis v. Rogers*, 79 Mo. 289, 291, nor capital of State bank invested in United States bonds; *Bressler v. Wayne Co.*, 25 Neb. 472, 41 N. W. 357, and *Wasson v. National Bank*, 107 Ind. 213, 8 N. E. 100, nor to discriminate against national bank in taxation; Opinion of the Justices, 53 N. H. 636, holding unconstitutional income tax on income from United States bonds; *People v. Commissioners*, 90 N. Y. 66, and *Newark City Bank v. Assessor*, 30 N. J. L. 16, 26, stocks and bonds of United States are exempt from taxation by the States; *People v. Commissioners*, 23 N. Y. 209, dissenting opinion, arguendo, rule as above. Cited obiter in *Legal Tender Case*, 110 U. S. 444, 28 L. 213, discussing power of congress "to borrow money on credit of United States," and in *Pollock v. Farmers' Trust Co.*, 157 U. S. 581, 586, 591, 39 L. 819, 821, 823, 15 S. Ct. 689, 691, 693, and 158 U. S. 629, 39 L. 1123, 15 S. Ct. 917, discussing "direct taxation."

Distinguished in *Society v. Coite*, 6 Wall. 605, 18 L. 902, affirming *Coite v. Society*, 32 Conn. 184, 191, holding franchise tax estimated upon capital including that invested in United States bonds, is not unconstitutional; *Home Ins. Co. v. New York*, 134 U. S. 598, 33 L. 1029, 10 S. Ct. 594, holding similar, and approving principal case; *Pollock v. Farmers' Trust Co.*, 157 U. S. 646 (39 L. 842, and 15 S. Ct. 714, erroneously cite 8 Pet. 591), and 158 U. S. 665, 691, 39 L. 1135, 1144, 15 S. Ct. 931, 941, dissenting opinions, remarking question of what constitutes direct tax not involved in principal case; *People v. Bradley*, 39 Ill. 142, State may tax shares of stock in national bank; *Stetson v. Bangor*, 56 Me. 278, holding similarly; *People v. Commissioners*, 23 N. Y. 205, holding State may tax capital invested in the public debt; *State v. Tax Collector*, 2 Bail. L. 682, 683, 686, sustaining State tax on dividends from shares in Bank of United States.

Miscellaneous.—Cited erroneously in *Smith v. Pierce*, 1 La. 356, and *Pillsbury v. Dugan*, 9 Ohio, 120, 34 Am. Dec. 429, without particular application; in *Passenger Cases*, 7 How. 534, 12 L. 807, discussing power of taxation by States.

2 Pet. 481, 7 L. 492, **BANK OF UNITED STATES v. WEISIGER.**

Nunc pro tunc orders.—Where party dies after submission of cause, decree will be entered as of a day prior to his death, p. 481.

Cited in note, *Mitchell v. Overman*, 103 U. S. 66, 26 L. 371, the case holding that decree entered as of a term previous to death of party cannot be impeached on the ground that it was actually

rendered after his death; and in note to *Young v. Ridenbaugh*, 3 Dill. 245, F. C. 18,173, where discharge in bankruptcy was entered nunc pro tunc after death of bankrupt; *Vroom v. Ditmas*, 5 Paige, 529, allowing entry of decree on appeal nunc pro tunc; *Estate of Jarrett*, 42 Ohio St. 201, allowing entry of judgment nunc pro tunc upon death of party after trial.

Distinguished in *Hazard v. Durant*, 14 R. I. 35, holding judgment cannot be entered nunc pro tunc after death of party, unless the case has proceeded so far that it can be entered without further inquiry into matters of fact.

2 Pet. 482-491, 7 L. 493, **MANDEVILLE v. RIGGS.**

Equity practice.—Where a joint liability is asserted before a Court of Chancery, a decree will be made against all the parties before it who do not establish some personal discharge, p. 482.

Abatement.—Death of party who has been served with process, abates action until revived against his personal representatives, p. 487.

Cited in *Carey v. Hoxey*, 11 Ga. 651, holding, in general, no exception where parties are numerous; *Walsh v. Smyth*, 3 Bland, 22, holding representative of deceased party entitled to notice of motion to dissolve injunction; *Requa v. Holmes*, 16 N. Y. 199, holding void, proceedings in partition suit after death of party.

Parties.—Courts of equity will generally require all known parties within reach of its jurisdiction to be made parties, p. 487.

Cited in *Howth v. Owen*, 29 Fed. 725, holding all executors necessary parties in suit to settle trust.

Parties.—In suit in equity against stockholders of a voluntary association it is not necessary to bring them all before the court before a decree can be made, p. 487.

Cited in *Suydam v. Truesdale*, 6 McLean, 463, F. C. 13,656, refusing to permit amendment to answer in foreclosure suit bringing in parties of supposed adverse interest; *American, etc., Co. v. Wire, etc., Union*, 90 Fed. 606, quoting rule and collecting cases. Cited in *Bryan v. Stevens*, 4 Fed. Cas. 511, upon proposition that suits may be brought by some of the shareholders of voluntary association in behalf of all.

Parties.—Suits against stockholders, where they are numerous, need not be brought against all of them, p. 487.

Cited in *Pettibone v. McGraw*, 6 Mich. 445, applying rule.

Parties—Suits against stockholders.—When stockholders are sued on joint liability, it is error to dismiss as against those not served, if they could have been brought in by proper process, p. 489.

Service by publication may be made upon nonresidents in the District of Columbia under act of May 3, 1802, p. 489.

Cited in *Nations v. Johnson*, 24 How. 206, 16 L. 632, holding service by publication, according to the law of the jurisdiction, free from objection.

Appeal bond.—Objection to appeal for failure to execute proper bond should be taken by preliminary motion, p. 490.

Miscellaneous.—Referred to on subsequent appeal in same controversy in *Mandeville v. Burt*, 8 Pet. 258, 8 L. 937.

2 Pet. 492-526, 7 L. 496, *BANK OF HAMILTON v. DUDLEY'S LESSEE*.

Nunc pro tunc orders.—Quære whether a court of record can determine that an order was made at a previous term, no trace of which can be found on its records, and after repeal of the law authorizing the order, p. 522.

Cited in *Ex parte Buskirk*, 72 Fed. 21, 25 U. S. App. 613, on proposition that nunc pro tunc orders can only supply omissions in the record of what was actually done.

Estates of decedents.—Lands of intestate, though they descend to the heir, remain liable for the debts of the ancestor, and subject to be sold for those debts, p. 523.

Cited in *M'Farlane v. Golling*, 76 Fed. 25, 46 U. S. App. 141, stating rule *ut supra*, and holding personal estate must be exhausted before recourse to the realty; *Leavens v. Butler*, 8 Port. 390, stating rule and holding power of sale cannot be defeated by alienation; *Emerson v. Ross*, 17 Fla. 134, holding administrator's deed good as against prior unrecorded deed of intestate; *McNamee v. Waterbury*, 4 S. C. 166, applying rule. Cited, without particular application, in *Scott v. West*, 63 Wis. 552, 24 N. W. 164, arguing, estate of heirs becomes vested immediately on death of ancestor.

Repeal of statute authorizing sales of lands by administrator terminates proceedings commenced, but not concluded, p. 523.

Cited in *Campau v. Gillett*, 1 Mich. 420, 53 Am. Dec. 77, reviewing authorities and applying rule; *Perry v. Clarkson*, 16 Ohio, 573, applying rule. Cited on proposition that repeal of remedial statute terminates pending proceedings, in *Grey v. Thomas*, 11 Fed. Cas. 1; *Aspley v. Murphy*, 50 Fed. 377, 378; *Musgrove v. Railroad Co.*, 50 Miss. 682. Cited in *Jones v. Commonwealth*, 86 Va. 664, 10 S. E. 1006, discussing generally effect of amendment of remedial statute. Cited, without particular application, in *Scott v. Smart*, 1 Mich. 301, discussing discontinuance at common law.

Executors and administrators.—Vested rights of administrators in decedent's realty are not impaired by the repeal of a law authorizing sale of real estate by administrators, p. 523.

Cited in *State v. Dews*, Charl. (Ga.) 426, discussing obiter, nature of office of administrator; *McLure v. Melton*, 24 S. C. 571, 58 Am. Rep. 279, holding statute changing priority of payment of debts of deceased impairs no vested rights. Cited, by way of illustration, in *State v. Woody*, 20 Mont. 418, 51 Pac. 976, arguing public administrator acquires no vested right to administer on estate as against his successors; *Peters v. Caton*, 6 Tex. 559, power of sale of administrator must be exercised strictly according to statute.

Constitutional law.—A State court has jurisdiction to determine whether a local statute conflicts with the State Constitution, and its decision will be followed by the Federal courts, p. 524.

Cited in *State v. Weir*, 2 Iowa, 283; *Stewart v. Polk Co.*, 30 Iowa, 14, 1 Am. Rep. 242; *Bailey v. Railroad Co.*, 4 Harr. (Del.) 403, 44 Am. Dec. 605, all holding statute should, if possible, be given such a construction as to render it constitutional; *Beall v. Bealls*, 8 Ga. 218, applying rule and collecting cases; *Bank of St. Marys v. State*, 12 Ga. 498, collecting cases and applying principle; *State v. Kolsem*, 130 Ind. 454, 29 N. E. 601, dissenting opinion, stating rule and collecting cases. Cited in *Williamson v. Berry*, 8 How. 562, 12 L. 1198, dissenting opinion, arguendo, decision of State courts upon their own statutes are ordinarily conclusive; *Gelpcke v. Dubuque*, 1 Wall. 210, 17 L. 527, dissenting opinion, arguing similarly. Cited on proposition that rule of construction of State court construing its own statute is conclusive on Federal courts, in *Provident Institution v. Massachusetts*, 6 Wall. 630, 18 L. 913. Cited generally in *Hamilton Co. v. Massachusetts*, 6 Wall. 641, 18 L. 907, *Thompson v. Phillips*, Bald. 275, 284, F. C. 13,974, and *Griswold v. Bragg*, 18 Blatchf. 204, 208, 48 Fed. 520, 523.

Cited also in *Newmarket Bank v. Butler*, 45 N. H. 237, holding by analogy, that State courts must follow Federal interpretations of the Constitution. Cited, without particular application, in *State v. Auditor*, 47 La. Ann. 1694, 18 So. 751, discussing right of judiciary to mandamus State officer.

Constitutional law.—Statute providing that occupying claimant shall not be evicted until paid the value of all lasting improvements made by him, is constitutional, p. 525.

Cited and rule applied in *Griswold v. Bragg*, 18 Blatchf. 204, 208, 48 Fed. 520, 523, sustaining Connecticut betterment act; and S. C., 48 Conn. 579, 583; *Ross v. Irving*, 14 Ill. 177, 179, 182, sustaining Illinois occupying claimants act; *Armstrong v. Jackson*, 1 Blackf. 376, n., sustaining Indiana occupying claimants act; *Childs v.*

Shower, 18 Iowa, 269, sustaining Iowa act and collecting cases. Cited also, *Good v. Zarcher*, 12 Ohio, 376, dissenting opinion, arguing retrospective law may be valid. Cited, without application of rule, in *Tufts v. Tufts*, 3 Wood. & M. 483, F. C. 14,233, discussing obiter, validity of occupying claimant laws.

Distinguished in *McCoy v. Grandy*, 3 Ohio St. 466, holding invalid an amendatory act giving option to occupying claimant to pay value of land instead of to owner.

Suits at common law.—Where law provides for compensation for improvements to be paid occupying claimants of lands, if the determination of the value is to be had in a court of common law, it must be by jury, p. 525.

Cited in *Howe Co. v. Edwards*, 15 Blatchf. 404, F. C. 6,784, holding power of reference confined to equity side of court.

Distinguished in *Bonaparte v. Railroad Co.*, Bald. 222, F. C. 1,617, arguing condemnation proceeding is not a suit at common law; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 537, under facts.

Practice in Federal courts.—Federal courts will not adopt procedure adopted by State legislature, when it radically changes the ordinary procedure of United States courts, p. 526.

Cited and principle applied in *McNutt v. Bland*, 2 How. 17, 11 L. 162, holding statute of State regulating discharge of prisoners from State jails has no application to prisoners held on process from Federal courts.

Equity jurisdiction.—Where common-law side of Federal courts are unable to proceed in mode provided by State statute, resort may be had to equity side, p. 526.

Cited and rule applied in *Leighton v. Young*, 52 Fed. 443, 10 U. S. App. 298, 18 L. R. A. 271, enforcing occupying claimants law on equity side of court; *Klever v. Seawall*, 65 Fed. 396, 22 U. S. App. 715, enforcing partition law through chancery side of court. Cited in *Burns v. Scott*, 117 U. S. 588, 29 L. 993, 6 S. Ct. 868, holding equitable defense must be asserted in equity side of court. Cited, without particular application, in *Magill v. Brown*, 16 Fed. Cas. 410, discussing equitable jurisdiction over charities.

Statutes.—If any part of an act be unconstitutional, that part may be disregarded, and full effect given to the rest, p. 526.

The citations collect the following authorities on this proposition: *State v. Marsh*, 37 Ark. 361, applying rule and collecting cases, and *People v. Bull*, 46 N. Y. 69, *People v. Green*, 58 N. Y. 303, *Little Miami R. R. Co. v. Commissioners*, 31 Ohio St. 344, *Barry v. Iseman*, 14 Rich. L. 135, 91 Am. Dec. 264, *Marsh v. State*, 44 Tex. 80, and *State v. Kibling*, 63 Vt. 642, 22 Atl. 615, all applying rule; *East Hartford v. Bridge Co.*, 17 Conn. 94, holding statute constitutional as to one town and unconstitutional as to another; *Rison v. Farr*, 24

Ark. 171, 87 Am. Dec. 59, sustaining in part and holding invalid in part, test oath act; *The Barque Unadilla*, 8 Ben. 480, F. C. 14,332, holding law may be constitutional in particular cases and unconstitutional in others; *Mobile, etc., R. R. Co. v. State*, 29 Ala. 584, courts will treat unconstitutional part as if stricken out of the statute, collecting cases; *The Menominie*, 36 Fed. 201, enforcing maritime lien given by State statute while holding unconstitutional portion of statute conferring right to enforce lien on State courts; *Santo v. State*, 2 Iowa, 208, 63 Am. Dec. 506, holding court will favor construction rendering entire act constitutional; *Andrews v. Saucier*, 13 La. Ann. 306, holding statute constitutional in part and void in part; *Dale v. Governor*, 3 Stew. 416, 419, dissenting opinion, stating rule *ut supra*; *Campbell v. Bank*, 6 How. (Miss.) 677, applying rule. Cited in *Scott v. Donald*, 165 U. S. 105, 41 L. 647, 17 S. Ct. 274, dissenting opinion, arguing dispensary law not invalidated by unconstitutionality of provisions requiring purchase of liquors from brewers and distillers within the State; *Simpson v. Bank*, 56 N. H. 469, 22 Am. Rep. 493, holding courts will not declare laws unconstitutional unless clearly so. Cited also, but without particular application of the rule, in *Baker v. Biddle*, Bald. 405, F. C. 764, discussing jurisdiction at law and in equity; *Sadler v. Langham*, 34 Ala. 334, holding unconstitutional a statute taking private property for nonpublic use; also in *Lyman v. Martin*, 2 Utah, 146.

Enjoining execution.—Equity will enjoin the execution of a judgment in ejectment until its own decree, estimating and directing payment for improvements by occupant, be complied with, p. 526.

Cited in *Bonaparte v. Railroad Co.*, Bald. 227, F. C. 1,617, arguing, equity would enjoin enforcement of a law taking property for public use without due compensation.

Federal courts.—Inability of Federal courts to proceed in a mode provided by a State statute does not deprive a suitor of the benefit of rights of property conferred by the statute, p. 526.

Cited in *Thompson v. Phillips*, Bald. 275, F. C. 13,974, holding Federal court must determine rights of parties according to State statute, independently of whether it is able to carry statute into effect.

Miscellaneous.—Cited, without application, in *Irwin v. Dixon*, 9 How. 31, 13 L. 34. Cited erroneously in *Noble v. Cullom*, 44 Ala. 562.

2 Pet. 527-542, 7 L. 508, **BANK OF UNITED STATES v. OWENS.**

Usurious contracts.—A profit made or loss imposed upon the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, is a profit taken upon the loan and a violation of those laws which limit the lender to a specified rate of interest, p. 537.

Cited and principle followed in *Buttrick v. Harris*, 1 Biss. 443, F. C. 2,256, *Sherwood v. Roundtree*, 32 Fed. 120, 122, *Ely v. McClung*, 4 Port. 136; *Ferguson v. Sutphen*, 3 Gilm. 567, collecting cases, *Campion v. Kille*, 14 N. J. Eq. 233, collecting cases, *Dowdall v. Lenox*, 2 Edw. Ch. 273, 274, and *New York Life v. Beebe*, 7 N. Y. 368, all affirming and directly applying the rule; *Youngblood v. Savings Co.*, 95 Ala. 527, 36 Am. St. Rep. 250, 12 So. 581, 20 L. R. A. 61, and *Hunt v. Acre*, 28 Ala. 598, discounting note at illegal rate is usurious, collecting cases; *Austin v. Harrington*, 28 Vt. 133, holding contract usurious where borrower was required, as part consideration, to purchase a horse for more than his actual value; *Clague v. Creditors*, 2 La. 117, 20 Am. Dec. 303, holding contract usurious which required borrower to consign his crops to particular person, as well as pay full legal rate of interest; *New Orleans Canal & Banking Co. v. Hagan*, 1 La. Ann. 68, holding usurious a contract which exacted from borrower security for debt of third person in addition to the highest rate of interest allowed by law; *Valentine v. Conner*, 40 N. Y. 258, dissenting opinion, arguendo, compelling assumption by borrower of worthless debt renders loan usurious. Cited obiter in *Broach v. Kelly*, 71 Ga. 704, holding burden of proof on defendant to show contract usurious. Cited, without particular application, in *McGill v. Ware*, 4 Scam. 26, 29, discussing usurious contracts generally.

Distinguished in *Bank of United States v. Waggener*, 9 Pet. 403, 9 L. 173, holding *quo animo* is the gist of the transaction; *Omaha Hotel Co. v. Wade*, 97 U. S. 23, 24 L. 920, *Hitchcock v. Bank*, 7 Ala. 434, *Wiley v. Starbuck*, 44 Ind. 308, and *Planters' Bank v. Snodgrass*, 4 How. (Miss.) 623, 625, all holding similarly; *Sutton v. Fletcher*, 6 Blackf. 363, holding contract valid though, by mistake, usurious; *Bank of Louisiana v. Briscoe*, 3 La. Ann. 158, 159, holding courts will sustain contract if capable of construction which will free it from usury.

Usury.—A loan by a bank for a rate of interest in excess of that allowed by its charter is void, p. 538.

Cited and approved in *Bank of Chillicothe v. Swayne*, 8 Ohio, 289, 32 Am. Dec. 717, *Preble Co. Bank v. Russell*, 1 Ohio St. 320, *Russell v. Failor*, 1 Ohio St. 329, 59 Am. Dec. 632, and *Kilbreth v. Bates*, 38 Ohio St. 196, all following and applying rule; *Rock River Bank v. Sherwood*, 10 Wis. 237, 78 Am. Dec. 673, holding, where interest is charged in excess of that allowed by charter, general usury statute applies.

Words and phrases.—"Reserving interest" is the same as "taking interest," p. 538.

Cited approvingly in *Bank v. Waggener*, 9 Pet. 399, 400, 9 L. 171, construing same words similarly.

Usury.—A loan made in depreciated currency, to be repaid in coin, is usurious, pp. 538-539.

Cited in *Weatherhead v. Boyer*, 7 Yerg. 563, applying rule.

Usury.—A contract providing for a greater interest than that allowed by law, is usurious and void, pp. 538-540.

Cited approvingly in *Tiffany v. Boatman's Institution*, 18 Wall. 384, 21 L. 869, holding usurious contract void by general rules of law in absence of statute; *In re Pittock*, 2 Sawy. 421, F. C. 11,189, *Dill v. Ellicott*, Taney, 236, 237, F. C. 3,911, *Market Bank v. Smith*, 16 Fed. Cas. 758, *Fowler v. Throckmorton*, 6 Blackf. 328, *Chapman v. Oregon*, 5 Or. 435, and *Watson v. Aiken*, 55 Tex. 542, all directly following and applying rule; *Atkinson v. Allen*, 71 Fed. 59, 36 U. S. App. 255, and the defense may be set up at law without recourse to equity; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 195, dissenting opinion, and *Philadelphia Loan Co. v. Towner*, 13 Conn. 268, dissenting opinion, *arguendo*, rule *ut supra*. Cited *obiter* in *Tutts v. Tufts*, 3 Wood. & M. 492, F. C. 14,233, discussing void and voidable contracts; *Brower v. Insurance Co.*, 86 Fed. 751, holding usury regulated by place of performance; *English v. Smock*, 34 Ind. 132, discussing *ultra vires* contracts.

Distinguished in *Ewell v. Daggs*, 108 U. S. 149, 27 L. 684, 2 S. Ct. 412, holding usurious contract voidable; *Cooper v. Ferguson*, 113 U. S. 733, 28 L. 1138, 5 S. Ct. 741, holding single contract does not constitute "transacting business," within meaning of statute forbidding foreign corporations from transacting business; *McLean v. Lafayette Bank*, 3 McLean, 614, F. C. 8,888, and *Freeman v. Brittin*, 17 N. J. L. 205, holding purchase of a complete bill at any price is not usurious; *Orr v. Lacy*, 4 McLean, 248, F. C. 10,589, holding similarly; *Darby v. Savings Inst.*, 1 Dill. 149, F. C. 3,571, 4 Bank. Reg. 196, holding usurious contract void only as to excess; *Lewis v. Clarendon*, 5 Dill. 339, F. C. 8,320, holding municipal bonds bearing higher rate of interest than permitted by law, void only as to excess; *National Exchange Bank v. Moore*, 2 Bond, 177, F. C. 10,041, 1 Bank. Reg. 124, holding usurious contract void only as to excess; as also *Philadelphia Loan Co. v. Towner*, 13 Conn. 258; *Mechanics', etc., Association v. Wilcox*, 24 Conn. 157, *Maynard v. Marshall*, 91 Ga. 844, 18 S. E. 403, *Phelps v. Pierson*, 1 G. Greene, 127, *Pfeister v. Building Assn.*, 19 W. Va. 721, *Richards v. Marshman*, 2 G. Greene, 220, *Bandel v. Isaac*, 13 Md. 219, 220, and *Farmers', etc., Bank v. Harrison*, 57 Mo. 508, and *Perkins v. Watson*, 2 Baxt. 181, 182, 186, all holding similarly; *Evansville R. R. Co. v. Evansville*, 15 Ind. 414, holding usurious contracts valid for amount of principal; *Commercial Bank v. Nolan*, 7 How. (Miss.) 525, 527, and *Waite v. Bartlett*, 53 Mo. App. 382, holding similarly; *Bard v. Poole*, 12 N. Y. 501, and *Bank of Louisville v. Young*, 37 Mo. 407, holding usury controlled by law of place of performance.

Illegal contracts.— Courts of justice will not enforce a right or contract in violation of statute or public policy, though not expressly declared void by enactment, pp. 539-540.

The citations collect a number of cases involving and following this principle: *Burbank v. Conrad*, 96 U. S. 302, 24 L. 727, applying rule to contract forbidden by military proclamation in time of war; *Gibbs v. Gas Co.*, 130 U. S. 412, 32 L. 985, 9 S. Ct. 558, to contract for rendering illegal services in effecting contract in restraint of trade; *Miller v. Ammon*, 145 U. S. 426, 36 L. 762, 12 S. Ct. 886, to contract in violation of liquor law; *In re Comstock*, 3 Sawy. 224, F. C. 3,078, 11 Bank. Reg. 175, contract of foreign corporation which had neglected to file required certificate; *Buckner v. Street*, 1 Dill. 253, F. C. 2,098, 7 Bank. Reg. 260, to contract for purchase and sale of slaves; *Green v. Collins*, 3 Cliff. 500, F. C. 5,755, to contract in fraud of liquor laws of another State; *Thomas v. Railway Co.*, 1 McCrary, 397, 2 Fed. 881, to contract between railway company and construction company in violation of public policy; *Western Union v. Union Pacific*, 1 McCrary, 428, 3 Fed. 10, to contract between telegraph and railway company in violation of public policy; *Central Brauch v. Western Union*, 1 McCrary, 555, 3 Fed. 420, to ultra vires contract of railway company; *Cook v. Sherman*, 4 McCrary, 25, 20 Fed. 169, to contract of railway company to buy lands and locate railroad near them; *Kohn v. Melcher*, 43 Fed. 644, 10 L. R. A. 441, to contract aiding violation of liquor law; *Church v. Proctor*, 66 Fed. 244, 33 U. S. App. 1, to contract whose purpose is to defraud the public; *Chadwick v. Improvement Co.*, 74 Fed. 618, 41 U. S. App. 39, to acknowledgment by notary public in violation of statute; *In re Comstock*, 3 Sawy. 224, F. C. 3,078, refusing to enforce contract executed by corporation before compliance with State laws; *Hyer v. Richmond Traction Co.*, 80 Fed. 845, holding void, as against public policy, an agreement between corporations to combine to prevent competition; *Jackson v. Shawl*, 29 Cal. 271, to pawnbroker's contract in violation of penal statute; *El Dorado Co. v. Davison*, 30 Cal. 524, applying rule to illegal grant by board of supervisors of right to collect tolls on public highway; *Penn v. Bornmanu*, 102 Ill. 530, 535, to loan by bank to director, reviewing cases; *Dolson v. Hope*, 7 Kan. 165, to liquor sale in violation of statute; *Sandidge v. Sandersou*, 21 La. Ann. 766, dissenting opinion, to sale of slaves in violation of State law; *Williams v. Bank*, 71 Miss. 866, 867, 42 Am. St. Rep. 506, 507, 16 So. 240, to corporate contract, void for noncompliance with statute; *Brooks v. Hill*, 1 Mich. 127, and *State v. How*, 1 Mich. 515, to contract of banking company illegally organized; *Sprague v. Rooney*, 104 Mo. 358, 16 S. W. 508, to contract shown to be in fact lease of premises for purposes of bawdy-house; *Hill v. Spear*, 50 N. H. 287, dissenting opinion, to contract made in one State in contemplation of violation of statute of another; *Pennington v. Townsend*, 7 Wend. 281, and

De Groot v. Van Duzer, 20 Wend. 400, to contract of foreign bank transacting business in violation of State law; *Fowler v. Scully*, 72 Pa. St. 466, 13 Am. Rep. 708, to ultra vires contract of national bank; *McConnell v. Kitchens*, 20 S. C. 439, 47 Am. Rep. 851, applying rule to sale of fertilizer where regulating statute had not been complied with; *Ohio Life Co. v. Merchants' Co.*, 11 Humph. 11, 53 Am. Dec. 750, to contracts of company transacting exchange business in violation of statute; *Clarke v. Lumber Co.*, 59 Wis. 658, 18 N. W. 494, to contract to issue corporate stock at less than par, collecting cases collected with other cases in notes on actions on illegal contracts, 8 Am. Dec. 692, and 25 Am. Rep. 676, and on illegal contracts generally, in 59 Am. St. Rep. 639.

Distinguished in *Stewart v. Bank*, 2 Abb. (U. S.) 431, 432, F. C. 13,435, holding equity will not interfere when illegal contract has been executed; *Pullman Co. v. Central Transportation Co.*, 65 Fed. 161, holding equity will compel restitution of property by one repudiating illegal contract; *The Charles E. Wiswall*, 86 Fed. 673, 57 U. S. App. 183, 42 L. R. A. 86, where contract for services is void for violation of law against combinations to raise prices, recovery may be had on quantum meruit; *Hough v. Land Co.*, 73 Ill. 27, 24 Am. Rep. 233, holding grantor of land to corporation estopped to claim that it has no power to take except for particular purpose; *Kerwin v. Doran*, 29 Mo. App. 406, holding contract not void by comity where made for purpose of violation of laws of sister State, collecting cases; *Hill v. Spear*, 50 N. H. 278, 9 Am. Rep. 229, enforcing contract of sale valid in State where executed, although made in contemplation of violation of statute of State where enforced.

Miscellaneous.—Cited erroneously in *Lyman v. Martin*, 2 Utah, 146 (should be *Bank v. Dudley*, ante). Cited generally in *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, discussing certification of questions for decision of Supreme Court.

2 Pet. 543-553, 7 L. 513, **BANK OF UNITED STATES v. CARNEAL.**

Puis darrein continuance is pleaded by way of substitution for former plea on which no proceeding is afterwards had, p. 548.

Cited in *Wisdom v. Williams*, Hemp. 460, F. C. 17,904, applying rule.

Bills and notes.—Possession of funds of maker of note by bank to whom note is payable on date when due, is matter of defense in suit on the note, p. 449.

Cited and followed in *Central Bank v. Allen*, 16 Me. 44, applying rule.

Bills and notes.—Notice of dishonor may be given by notary public, p. 549.

Cited on this point in *Crocker v. Getchell*, 23 Me. 397.

Bills and notes.—Where a bank is the holder of a note payable at the bank on a certain day, failure of the maker to pay within usual banking hours is equivalent to demand and refusal of payment, p. 549.

Cited and followed in *Allen v. Smith*, 4 Harr. (Del.) 237, *Thomas v. Marsh*, 2 La. Ann. 354, *Goodloe v. Godley*, 13 Smedes & M. 240, 51 Am. Dec. 162, *Gillett v. Averill*, 5 Den. 88, *Apperson v. Bank*, 4 Cold. 456, all affirming and applying rule; *Bank of Syracuse v. Hollister*, 17 N. Y. 50, 72 Am. Dec. 419, holding demand sufficient when bank afterwards delivered note to cashier, who was also a notary, and who, as notary, made demand on himself as cashier; *Hoffman v. Hollingsworth*, 10 Ind. App. 358, 37 N. E. 962, holding where note is payable at bank it is sufficient demand if note be at bank on day when payable and someone there authorized to receive payment; *Hallowell v. Curry*, 41 Pa. St. 326, reviewing authorities, and *State Bank v. Napier*, 6 Humph. 273, 274, 44 Am. Dec. 311, 312, both holding similarly; *Exchange Bank v. Bank of North America*, 132 Mass. 148, holding note is not dishonored until expiration of banking hours.

Distinguished in *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 649, 19 L. 425, holding no presentment when note was sent to bank but letter mislaid and not opened; *Barkalow v. Johnson*, 16 N. J. L. 402, holding where note is at bank demand must nevertheless be made at the counter; *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 503, holding no recovery can be had against indorser if maker of note had funds in bank sufficient to meet it when due.

Trial.—Instruction to jury, as in case of nonsuit, should only be given when there is no contrariety in the evidence, p. 551.

Cited in *Perry v. Clarke*, 5 How. (Miss.) 500, holding where plaintiff has failed to make out his case and there is no conflicting testimony, the court may instruct jury to find for defendant.

Bills and notes.—Due diligence in giving notice of dishonor depends in general upon the particular facts of each case, p. 551.

Cited in *Dickins v. Beal*, 10 Pet. 582, 9 L. 542, holding that where due diligence has been used to give notice it becomes immaterial whether notice was actually received, collecting authorities; *Reier v. Strauss*, 54 Md. 290, 39 Am. Rep. 392, holding where indorser formerly resided at place of dishonor, and continued to keep his name in city directory and sign at his place of business, notary was justified in treating him as still a resident of that place at time of dishonor.

Bills and notes.—Notice of dishonor may sometimes be addressed to the county in which the indorser resides, p. 552.

Cited in *Harris v. Robinson*, 4 How. 348, 11 L. 1006, applying rule.

Bills and notes.—Notice of dishonor is sufficient if in spite of the address being too general it is in fact to the proper post-office, p. 552.

Bills and notes.—Notice of dishonor is sufficient if sent to the only address within reach of the person sending, after due inquiry, p. 552.

Cited in *Cabot Bank v. Russell*, 4 Gray, 169, holding notice good where sent to "Hadley" after inquiry by the notary, although in fact indorser lived at "North Hadley;" *Manchester Bank v. White*, 30 N. H. 463, where indorser lived at "South Deerfield" and notice was sent to "Deerfield;" *Central Nat. Bank v. Adams*, 11 S. C. 456, 32 Am. Rep. 499, where notice was mailed to "Adams Cut," there being no such post-office; *Bank of Manchester v. Slason*, 13 Vt. 340, notice may be sent to any post-office in town where party resides notwithstanding there is another in the same town nearer his residence.

Bills and notes.—Notice of dishonor may be sent to any post-office near the residence of the person to be notified, at which he is in the habit of receiving letters, p. 552.

Cited in the following: *Hazelton Coal Co. v. Ryerson*, 20 N. J. L. 132, 40 Am. Dec. 218, *McGrew v. Toulmin*, 2 Stew. & P. 434, *Timms v. Delisle*, 5 Blackf. 448, *Sharpe v. Drew*, 9 Ind. 283, collecting cases, *New Orleans, etc., R. R. Co. v. Robert*, 9 Rob. (La.) 132, *Follain v. Dupré*, 11 Rob. (La.) 473, *Hepburn v. Ratcliffe*, 2 La. Ann. 332, *Bank of Louisiana v. Tournillun*, 9 La. Ann. 134, *Graham v. Sangston*, 1 Md. 70, *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 181, 3 Am. Rep. 449, and *Wachusett Nat. Bank v. Fairbrother*, 148 Mass. 185, 12 Am. St. Rep. 533, 19 N. E. 347, all applying rule; in *Bondurant v. Everett*, 1 Met. (Ky.) 660, 661, applying rule where party lived near the place of dishonor and the post-office of that place was where he usually received his letters; *New Orleans Canal and Banking Co. v. Barrow*, 2 La. Ann. 326, *Bird v. McCalop*, 2 La. Ann. 352, *Hogatt v. Bingaman*, 7 How. (Miss.) 578, dissenting opinion, and *Foster v. Sineath*, 2 Rich. L. 343, all holding similarly; *Chouteau v. Webster*, 6 Met. 7, 39 Am. Dec. 707, notice may be sent to United States senator at Washington; *Walker v. Stetson*, 14 Ohio St. 97, 84 Am. Dec. 365, holding notice may be sent to place where party usually receives his mail, though it be not the place of his residence; *Payne v. Patrick*, 21 Tex. 687, and *Westfall v. Farwell*, 13 Wis. 506, holding similarly.

Bills and notes.—Notice of dishonor need not state that holder looks to indorser for payment, p. 553.

Cited in *Nelson v. National Bank*, 69 Fed. 801, 32 U. S. App. 554, *Corbit v. Bank*, 2 Harr. (Del.) 263, 30 Am. Dec. 648, *Spann v. Baltzell*, 1 Fla. 324, 46 Am. Dec. 363, *May v. Bank*, 9 Ind. 234, *Barstow*

v. Hiriart, 6 La. Ann. 99, Warren v. Gilman, 17 Me. 365, Graham v. Sangston, 1 Md. 68, Fitchburg Ins. Co. v. Davis, 121 Mass. 123, Burgess v. Vreeland, 24 N. J. L. 76, 59 Am. Dec. 411, Ransom v. Mack, 2 Hill, 593, 38 Am. Dec. 605, Townsend v. Bank, 2 Ohio St. 355, all affirming and applying rule, and cited as to contracts of notice of dishonor in note, 2 Am. Dec. 619.

Distinguished in Gilbert v. Dennis, 3 Met. 498, 505, 38 Am. Dec. 330, 337, holding notice of nonpayment insufficient where no dishonor implied.

Miscellaneous.—Cited, without particular application, in Saltmarsh v. Tuthill, 13 Ala. 401, holding construction of written notice is question for the court, collecting cases; Rowell v. Bruce, 5 N. H. 385, to point that where promise is to pay money on demand at a particular place, demand is necessary before assumpsit. Cited erroneously in Stow v. Parks, 2 Pinn. 129.

2 Pet. 554-555, 7 L. 517, CANTER v. AMERICAN, ETC., INSURANCE CO.

Motion to dismiss for want of jurisdiction applies solely to cases where the Supreme Court has not jurisdiction of the cause, and not to cases where the Circuit Court has exceeded its proper powers in the particular case, p. 555.

Cited in Nashua Co. v. Boston Co., 51 Fed. 930, 5 U. S. App. 97, holding same rule in Circuit Court of Appeals.

2 Pet. 556-565, 7 L. 518, CONNOLLY v. TAYLOR.

Federal courts — Diverse citizenship.— In a suit brought by aliens and a citizen against citizens, the Federal court can acquire jurisdiction by striking out the citizen as party plaintiff, and making him a party defendant, p. 565.

Followed on precise point in Insurance Co. of North America v. Svendsen, 74 Fed. 348, 349. Cited and rule applied in Betzoldt v. American Ins. Co., 47 Fed. 707, holding plaintiff may amend declaration to correct false allegation of citizenship; Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 325, and Stuart v. Easton, 156 U. S. 47, 39 L. 341, 15 S. Ct. 268, where judgment is reversed for defective statement of citizenship, defect may be corrected by amendment in court below, collecting cases; Vattier v. Hinde, 7 Pet. 261, 8 L. 679, where court acquired jurisdiction by dismissing the bill as to a citizen defendant, thereby leaving the action between citizens of different States; Hall v. Mobley, 13 Ga. 319, In re McKibben, 16 Fed. Cas. 212, 12 Bank. Reg. 102, Woolridge v. McKenna, 8 Fed. 679, and Glover v. Shepperd, 11 Biss. 579, 15 Fed. 838, all holding record may in general be amended to show jurisdictional facts.

Federal court jurisdiction on the ground of diverse citizenship depends upon the state of the parties at the commencement of the suit, p. 565.

Affirmed upon this point in *Anderson v. Watt*, 138 U. S. 703, 34 L. 1081, 11 S. Ct. 451, *Brigel v. Salt Co.*, 73 Fed. 14, 15, and *Tug River Salt Co. v. Brigel*, 86 Fed. 820; also in *Laskey v. Mining Co.*, 56 Fed. 629, holding amended declaration must allege citizenship as of date of commencement of action; *Stout v. Railroad Co.*, 3 McCrary, 4, 8 Fed. 796, it is the state of facts when suit commenced, not when process served; *Gilmer v. Grand Rapids*, 16 Fed. 710, nor when cause of action accrued; *Trigg v. Conway*, Hemp. 712, F. C. 14,173, and *United States v. Myers*, 2 Brock. 522, F. C. 15,844, where jurisdiction once attaches no subsequent change in the residence of the parties can divest it; *Moore v. Edgefield*, 32 Fed. 500, holding jurisdictional amount determined by law at day of commencing suit; *Ex parte Kyle*, 67 Fed. 309, applying rule to criminal prosecution; *Florence Sewing Machine Co. v. Grover & Baker Co.*, 110 Mass. 81, affirmed in *Case of Sewing Machine Companies*, 18 Wall. 574, 21 L. 918, upon proposition that where interest of parties is joint it is necessary to give the Federal court jurisdiction that each distinct interest should be represented by persons, all of whom are entitled to sue or be sued in the Federal courts; *Calderwood v. Braly*, 28 Cal. 99, holding similarly; and cited in note, 12 Am. Rep. 545.

Distinguished in *Anderson v. Watt*, 138 U. S. 707, 34 L. 1083, 11 S. Ct. 452, holding that where citizenship of necessary party at time of commencement of action was such as to prevent Federal court from acquiring jurisdiction, subsequent change of parties cannot give jurisdiction; *Pond v. Railroad Co.*, 12 Blatchf. 290, F. C. 11,265, holding Federal court has jurisdiction of suit by stockholders, citizens of one State against board of directors, some of whom are citizens of same State with plaintiffs; *Wood v. Mann*, 1 Sumn. 584, F. C. 17,952, holding exception to jurisdiction by denial of citizenship must be taken by plea in abatement.

Miscellaneous.—Cited, without particular application, in *Fisher v. Rutherford*, 1 Bald. 193, F. C. 4,823, discussing amendment of bill in equity by addition of parties. Cited erroneously in *Thompson v. Phillips*, 1 Bald. 284, F. C. 13,974.

2 Pet. 566-585, 7 L. 521, BEATTY v. KURTZ.

Dedication — Charitable uses.—Where lands have been set apart in original plat of town for a public or pious purpose and afterwards used and acted upon according to that purpose, it is a valid dedication to the public, pp. 583-584.

Cited and principle followed in *Wyandotte Co. v. Presbyterian Church*, 30 Kan. 638, 641, 1 Pac. 113, 115, holding reservation of lands in plat "for church purposes" a valid dedication to the use of any church establishing its right to be regarded as the beneficiary intended; *Cemetery Assn. v. Bandy*, 93 Ind. 248; *Lay v. State*, 12 Ind. App. 370, 39 N. E. 770, and *Williams v. Wiley*, 16 Ind. 363, dedication may be implied from acts of grantor; *Hayes v. Houke*, 45

Kan. 469, 25 Pac. 861, holding similarly; *State v. Trask*, 6 Vt. 364, 27 Am. Dec. 556, sustaining dedication for purpose of courthouse; *Parisa v. Dallas*, 83 Tex. 258, 18 S. W. 570, and *Baton Rouge v. Bird*, 21 La. Ann. 246, to support a dedication to public purposes no particular form of grant is necessary; *Lamar Co. v. Clements*, 49 Tex. 355; *Carter v. Portland*, 4 Or. 347, and *Board of Supervisors, etc. v. Seal*, 66 Miss. 134, 14 Am. St. Rep. 547, 5 So. 623, 3 L. R. A. 660, public street dedicated by filing map and public user; *Trustees v. Council*, 33 N. J. L. 17, 97 Am. Dec. 699, holding public square dedicated by filing plat and acquiescence by the owners; *Brown v. Manning*, 6 Ohio, 303, 305, 27 Am. Dec. 256, 257, holding similarly; *Colbert v. Shepherd*, 89 Va. 404, 16 S. E. 247, holding use of lot with consent of owner for burial purposes amounts to dedication; *Bond v. Texas, etc., Ry. Co.*, 15 Tex. Civ. App. 286, 39 S. W. 980, holding sale of lot in tract showing street, conveys easement in street.

Distinguished in *Attorney-General v. Manufacturing Co.*, 14 Gray, 605, holding intention to dedicate to religious purposes must be clear; *Price v. Methodist Church*, 4 Ohio, 544, holding words of grant must control.

Dedication — Charitable uses.—To support a grant to religious or public uses it is not necessary that there should be a particular grantee, p. 584.

Cited and principle followed in *Williams v. Presbyterian Soc.*, 1 Ohio St. 500, and *Hadden v. Chorn*, 8 B. Mon. 78, applying rule to dedication for purposes of church; *Cincinnati v. White*, 6 Pet. 436, 8 L. 455, collecting cases and sustaining dedication for purposes of a public common; *Carter v. Balfour*, 19 Ala. 828, reviewing authorities and holding bequest for charitable purposes valid where devisee was unincorporated; *Chatham v. Brainerd*, 11 Conn. 88, holding valid a grant for cemetery purposes, notwithstanding grantee was unincorporated association; *Antones v. Eslava*, 9 Port. 539, 544, stating rule *ut supra*; *Trustees v. Adams*, 4 Or. 87, 89, grant to unincorporated religious association takes effect on incorporation; *Bartlett v. Nye*, 4 Met. 380; *Burr v. Smith*, 7 Vt. 285, 303, 29 Am. Dec. 166, 184, and *Bible Society v. Wetmore*, 17 Conn. 188, devise to charitable use is valid though devisee is unincorporated at time of devise; *Ould v. Washington Hospital*, 95 U. S. 313, 24 L. 452, devise for charitable purposes to corporation to be afterwards created, is valid; *Miller v. Chittenden*, 2 Iowa, 373, or conveyance to church to be afterwards organized; *Newmarket v. Smart*, 45 N. H. 99, applying rule *ut supra*; *Potter v. Chapin*, 6 Paige, 650, schoolhouse a public use within rule; *Sewall v. Cargill*, 15 Me. 420, sustaining dedication for parsonage purposes; *Russell v. Allen*, 107 U. S. 168, 27 L. 399, 2 S. Ct. 331, collecting cases, and holding grant to trustee for charitable uses valid although the institution for whose benefit grant is made be not established in lifetime of either donor or trustee; *Baptist Church v.*

Witherell, 3 Paige, 300, 24 Am. Dec. 225, holding title to lands granted to unincorporated religious society vests upon incorporation in the corporation; Green v. Allen, 5 Humph. 217, 218, 229, dissenting opinion, arguendo, devise to unincorporated religious society creates trust for which equity will appoint trustee if necessary; Nance v. Busby, 91 Tenn. 314, 315, 18 S. W. 876, 877, 15 L. R. A. 804, and n., deed to unincorporated religious society is valid; Atkinson v. Bell, 18 Tex. 480, dedication to unincorporated religious association is valid; San Antonio v. Odln, 15 Tex. 545, discussing certainty in legislative grant for religious purposes. Cited obiter in Irwin v. Dixon, 9 How. 31, 13 L. , remarking dedication may be by parol; Kittle v. Pfeiffer, 22 Cal. 489, discussing dedication of public streets; Wardens, etc. v. Savannah, 82 Ga. 665, 9 S. E. 540, discussing succession of cemetery lands in subsequent religious corporation; Jersey City v. Banking Co., 12 N. J. Eq. 562, holding dedication may be made to take effect in futuro; Church v. Leiber, 2 Paige, 44, and African Church v. Conover, 27 N. J. Eq. 160, sustaining contract with organizers of church made before its incorporation; Pearsall v. Post, 20 Wend. 118, discussing validity of grants for charitable purposes where there is no grantee in esse, collecting cases; Post v. Pearsall, 22 Wend. 438, 446, 454, 455, holding public cannot acquire easement by user in absence of dedication. Cited in series of notes on dedication to public uses, 27 Am. Dec. 562, 567.

Distinguished in Vick v. Vicksburg, 1 How. (Miss.) 430, 31 Am. Dec. 171, holding there can be no valid dedication unless the public be a party thereto.

Charitable uses.—Grants to pious uses may at all times be enforced through the government as *parens patriæ*, by its attorney-general or other law officer, p. 584.

Cited in Mormon Church v. United States, 136 U. S. 52, 34 L. 494, 10 S. Ct. 806, holding that where church has been dissolved its property devolves to the government as *parens patriæ*, subject to disposal according to rules as to property devoted to pious uses; Loring v. Marsh, 2 Cliff. 492, F. C. 8,515, holding prerogative power as *parens patriæ* resides in the States and not in the Federal government. Cited obiter in Tappan v. Deblois, 45 Me. 130, discussing enforcement of charitable bequests in equity.

Distinguished in Fountain v. Ravanel, 17 How. 384, 15 L. 86, holding United States courts have no power to give effect to charitable devises where manner of execution directed by testator cannot be complied with.

Public uses.—A grant to a religious society of lands afterwards used for burial purposes, is a grant to pious uses, p. 584.

Cited in Hopkins v. Grimshaw, 165 U. S. 352, 41 L. 742, 17 S. Ct. 405, on this point; Forney v. Calhoun Co., 84 Ala. 221, 4 So. 154, holding dedication for courthouse purposes a public use; Macon v.

Franklin, 12 Ga. 244, a dedication for purposes of common; *Hunter v. Trustees*, 6 Hill, 411, and *Mowry v. Providence*, 10 R. I. 55, a public burying ground; *Magill v. Brown*, 16 Fed. Cas. 414, 433, 446, holding gift to religious society for relief of poor members a valid, charitable use; *Gass v. Wilhite*, 2 Dana, 182, 26 Am. Dec. 457, holding pious purposes are charitable purposes under law of United States. Cited, without particular application, in *Benn v. Hatcher*, 81 Va. 30, 59 Am. Rep. 647, holding dedication of lands for cemetery purposes may not be revoked; and cited in note collecting cases on what are charitable uses, 63 Am. St. Rep. 265.

Parties.—A regularly appointed committee of a voluntary religious society may sue for injunction to prevent disturbance of society's possession of lands in its actual possession for religious purposes, p. 584.

Cited, approved and followed in *Dwenger v. Geary*, 113 Ind. 121, 14 N. E. 911, bishop and priest may sue to prevent violation of burial rules in cemetery; *Cahill v. Bigger*, 8 B. Mon. 213, holding officers of church may sue in equity to be quieted in enjoyment of grant for religious purposes; *Guilfoil v. Arthur*, 158 Ill. 605, 606, 41 N. E. 1010, 1011, committee of unincorporated society may sue in equity to enforce a trust; *Congregation, etc., Church v. Texas, etc., Ry. Co.*, 41 Fed. 567, holding reincorporated religious society may sue for breach of condition committed previous to reincorporation; *Reformed Church v. Trustees*, 4 N. J. Eq. 100, where church organization consists of several incorporated bodies, any one of the corporations may sue to enforce a common trust.

Parties.—Some of the members of a voluntary religious society, having a common interest, may sue on behalf of all for purposes common to themselves and beneficial to all, p. 585.

Cited and followed in *Callsen v. Hope*, 75 Fed. 760, in suit by members of religious society to enjoin exercise of possessory rights over property claimed by association; *Mears v. Moulton*, 30 Md. 146, stating rule generally that members of voluntary associations are entitled to sue to protect their common interests; *Mannix v. Purcell*, 46 Ohio St. 141, 15 Am. St. Rep. 574, 19 N. E. 587, they may defend in actions against the association.

Distinguished in *Antones v. Eslava*, 9 Port. 544, 546, holding there must be proof that plaintiffs are trustees or members of the association before their right to sue will be presumed; *Whitney v. Mayo*, 15 Ill. 255, other members must be made parties, unless it is alleged that the suit is brought on their behalf.

Nuisance.—Interference with public burying ground is a public nuisance which a court of equity may enjoin, p. 585.

The citations collect the following cases, affirming and following this rule: *Trustees v. Walsh*, 57 Ill. 366, 11 Am. Rep. 23, and *Boyce v. Kalbaugh*, 47 Md. 336, 28 Am. Rep. 465, following rule on precise

point; *Davidson v. Reed*, 111 Ill. 171, 53 Am. Rep. 616, such relief may be sought in action by residents in neighborhood of cemetery, having friends buried there, brought on behalf of all others interested; *Burke v. Wall*, 29 La. Ann. 45, 49, 29 Am. Rep. 321, 326, owner of cemetery lot may enjoin interference with his enjoyment thereof; *Pierce v. Cemetery*, 10 R. I. 242, 14 Am. Rep. 680, equity will regulate trust of cemetery authorities created by burial of body in cemetery; *Trustees v. Hoessli*, 13 Wis. 355, and *Gilbert v. Arnold*, 30 Md. 38, equity will enjoin interference with religious meeting-house; *Mannix v. Purcell*, 46 Ohio St. 144, 15 Am. St. Rep. 576, 19 N. E. 588, 2 L. R. A. 762, may prevent interference with religious trusts. Cited obiter in *Jones v. Brandon*, 60 Miss. 561, holding injunction will lie to prevent execution of writ of ejectment from city lot until true boundaries are ascertained; *Mitchell v. Thorne*, 134 N. Y. 539, 30 Am. St. Rep. 702, 32 N. E. 11, holding injunction to enjoin interference with private burial ground must be brought by heir of person buried therein; and cited in note on injunction to permit trespasses destructive of the estate, 11 Am. Dec. 504, and in note on injunction to prevent interference with cemeteries, 21 Am. Rep. 647.

Distinguished in *Page v. Symonds*, 63 N. H. 20, 56 Am. Rep. 484, holding removal of bodies from one cemetery to another by lawfully acting town authorities is not such interference with property rights as to authorize injunction.

2 Pet. 586-594, 7 L. 528, *BUCKNER v. FINLEY*.

Bill of exchange drawn in one State on person living within another, is a foreign bill, p. 590.

Cited, principle affirmed and rule applied in the following, all holding, therefore, that protest is per se evidence to prove dishonor of instrument: *Dickins v. Beal*, 10 Pet. 579, 9 L. 541; *Jones v. Heaton*, 1 McLean, 318, F. C. 7,468; *Doughty v. Hildt*, 1 McLean, 336, F. C. 4,027; *Nelson v. Bank*, 69 Fed. 800, 32 U. S. App. 554; *Joseph v. Salomon*, 19 Fla. 632; *State Bank v. Hayes*, 3 Ind. 400; *Bernard v. Barry*, 1 G. Greene, 390; *Chenowith v. Chamberlin*, 6 B. Mon. 61, 43 Am. Dec. 146; *Greene v. Jackson*, 15 Me. 138; *Clark v. Bigelow*, 16 Me. 247; *Freeman's Bank v. Perkins*, 18 Me. 294; *Phoenix Bank v. Hussey*, 12 Pick. 484; *Ocean Nat. Bank v. Williams*, 102 Mass. 143; *Linville v. Welch*, 29 Mo. 205; *Carter v. Burley*, 9 N. H. 566; *Grafton Bank v. Moore*, 14 N. H. 148, as to Boston bill; *Simpson v. White*, 40 N. H. 543; *Wells v. Whitehead*, 15 Wend. 530; *Halliday v. McDougall*, 20 Wend. 84, 22 Wend. 272; *Commercial Bank v. Varnum*, 49 N. Y. 275; *Case v. Heffner*, 10 Ohio, 186; *Gardner v. Bank of Tennessee*, 1 Swan, 422, and *Terbell v. Downer*, 27 Vt. 511, 65 Am. Dec. 213. Cited also in *Bank of United States v. Daniel*, 12 Pet. 54, 55, 9 L. 998, holding consequently holder entitled to re-exchange when protest for nonpayment made. Cited in notes to *Townsley v. Sumrall*, 2 Pet. 179, 7 L. 389, and *Lonsdale v. Brown*,

4 Wash. 158, F. C. 8,494, question was discussed but not decided; *Allen v. Merchants' Bank*, 22 Wend. 226, 34 Am. Dec. 292, and *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 706, 28 L. 869, 5 S. Ct. 318, holding protest necessary in case of such a bill; *Williams v. Putnam*, 14 N. H. 541, 40 Am. Dec. 205, and *Howard v. Bank*, 3 Ga. 381, holding note drawn in one State and payable in another, equivalent to a foreign bill; *Mason v. Dousay*, 35 Ill. 431, 85 Am. Dec. 368, holding foreign bill governed by law of State of acceptance. Cited in note on foreign bills within rule, 4 Am. Dec. 374, and in exhaustive note on bills drawn in one State on resident of another, 43 Am. Dec. 218.

Constitutional law.—With respect to their municipal relations, the States are to each other foreign, p. 591.

Jackson v. Bulloch, 12 Conn. 41, holding State not bound by comity to permit holding as slave of person held as such under laws of sister State; *Hatch v. Spofford*, 22 Conn. 497, 498, 58 Am. Dec. 436, *Seevers v. Clement*, 28 Md. 434, *Smith v. Lathrop*, 44 Pa. St. 330, 84 Am. Dec. 450, and *Insurance Co. v. Brune*, 96 U. S. 592, 24 L. 740, all holding plea of suit pending in another State bad, the suit being in a foreign jurisdiction; *Simmons v. Saul*, 138 U. S. 459, 34 L. 1063, 11 S. Ct. 376, and *Hanley v. Donoghue*, 116 U. S. 4, 29 L. 537, 6 S. Ct. 244, holding judgments in one State foreign judgments when proved in the courts of another; *Pugh v. Bussel*, 2 Blackf. 400, and *Woodhull v. Wagner*, Bald. 299, F. C. 17,975, holding insolvency laws of one State have no effect in another. Cited in *Cherokee Nation v. Georgia*, 5 Pet. 47, 56, 67, 8 L. 41, 45, dissenting opinions, *arguendo*, Indian nations are foreign; *Bank of Augusta v. Earle*, 13 Pet. 605, 10 L. 316, dissenting opinion, *arguendo*, State not bound by comity to permit foreign corporation to contract within it; *Rhode Island v. Massachusetts*, 12 Pet. 720, 9 L. 1259, holding United States Supreme Court has jurisdiction of suit between States to determine disputed boundary; *Scheible v. Bacho*, 41 Ala. 448, dissenting opinion, arguing States within their boundaries sovereign. Cited *obiter* in *Phillips v. Payne*, 92 U. S. 132, 23 L. 649, discussing validity of retrocession of part of District of Columbia to Virginia; *State v. Tutty*, 41 Fed. 762, 7 L. R. A. 54, validity of foreign marriage; *Fisher v. Fielding*, 67 Conn. 105, 52 Am. St. Rep. 273, 34 Atl. 715, 32 L. R. A. 239 & n., foreign judgments; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 525, holding corporation organized under one State only recognized in another as matter of comity. Cited in note on effect of *lis pendens* in sister State, 25 Am. Dec. 195; *Allshouse v. Ramsay*, 6 Whart. 334, 37 Am. Dec. 418, holding debtor is not obliged to go out of State in which contract is made to make tender to his creditor. Cited generally, *The Parkhill*, 18 Fed. Cas. 1188.

Distinguished in *Bradshaw v. The Sylph*, 3 Fed. Cas. 1178, holding vessels not foreign in any American port independent of State of owner's domicile.

2 Pet. 595-612, 7 L. 531, *ENGLISH v. FOXALL*.

Marriage settlement providing that funds are to be called in and reinvested with approval of the wife, gives her a controlling agency, p. 607.

Cited in note on marriage settlements, in 50 Am. Dec. 371, collecting cases.

Marriage settlement.—Where settlement provided for investment of funds in certain securities only, trustees are bound to invest in those securities alone, p. 608.

Cited in *Swift v. Castle*, 23 Ill. 144, on proposition that provisions of marriage settlement must be strictly followed.

Equity.—Where will provided that trustees thereunder should transfer to themselves, as trustees under marriage settlement, such sums as might be necessary to keep income from settlement funds at a fixed sum, and the deficiency is caused by the wife's direction to invest proceeds of settlement in one of three classes of securities allowed by the terms of the settlement, she is, nevertheless, entitled to have the deficiency made up from the estate, and equity will so decree, p. 611.

Equity practice.—Under prayer for general relief, other relief may be granted than that particularly prayed for, but it must conform to the case made by the bill, p. 612.

The following citing cases have awarded various forms of relief under general prayer: *Stevens v. Gladding*, 17 How. 455, 15 L. 158, accounting in suit for injunction in patent right case; *Texas v. Hardenberg*, 10 Wall. 86, 19 L. 842, substituted security followed, in suit containing original security; *Dodd v. Benthall*, 4 Heisk. 609, decree declaring rights in futuro and removing cloud granted under bill asking immediate relief; *Jones v. Van Doren*, 130 U. S. 692, 32 L. 1080, 9 S. Ct. 687, in suit to set aside conveyance of dower obtained by fraud, dower decreed and damages awarded; *Hunter v. Marlboro*, 2 Wood. & M. 198, F. C. 6,908, specific performance allowed under bill to enforce a trust; *Graham v. Cook*, 48 Ala. 105, damages given on bill to decree interest in vessel wrongfully sold. Cited obiter in *Clarke v. Railroad Co.*, 5 Neb. 331; *Byers v. Fowler*, 12 Ark. 288, 54 Am. Dec. 289, and *Boone v. Chiles*, 10 Pet. 209, 9 L. 399, remarking allegata and probata must agree; *Pennock v. Ela*, 41 N. H. 192, and *Colton v. Ross*, 2 Paige, 398, 22 Am. Dec. 650, stating rule ut supra.

Distinguished in *Laird v. Boyle*, 2 Wis. 435, and *Driver v. Fortner*, 5 Port. 26, general relief cannot be given unless specially prayed; *Hayward v. Elliot Nat. Bank*, 96 U. S. 615, 24 L. 857, in bill to recover stock decree for its value will not be made; *Wiltshire v. Marfleet*, 1 Edw. Ch. 657, nor an injunction forbidding disposal of property or proceeds when bill recognized the contract by which

they were obtained; *Rainey v. Herbert*, 55 Fed. 444, 3 U. S. App. 592, nor in bill to restrain operation of coke ovens in one place, a decree restraining them in another; *Skinner v. Bailey*, 7 Conn. 500, nor any relief where bill falls on the main fact to bring the case within scope of court of equity; *Smith v. Trenton Co.*, 4 N. J. Eq. 510, nor will equity decree an act unconstitutional under prayer for general relief in bill alleging act to be void; *Pensacola, etc., R. R. Co. v. Spratt*, 12 Fla. 101, 91 Am. Dec. 751, nor grant a decree impounding revenues in a suit to enjoin conduct of railroad; *Casady v. Woodbury*, 13 Iowa, 120, nor a decree reforming a contract in a suit to enforce it; *Thayer v. Lane*, Walk. Ch. 205, nor a partition based on equitable rights not appearing in the pleading; *Sanford v. Cloud*, 17 Fla. 575, nor a decree enforcing rights under a contract upon a bill to cancel.

Miscellaneous.—Cited erroneously in *The Parkhill*, 18 Fed. Cas. 1188, and *Thompson v. People*, 23 Wend. 580.

2 Pet. 613-626, 7 L. 538, *CHIRAC v. REINECKER*.

Evidence.—Where a single map only, in a book of city plats, has been properly authenticated, no other map in the volume is evidence until the proper authentication is supplied, p. 619.

Cited in *Story v. Maclay*, 3 Mont. 484, holding map not proper evidence until duly authenticated.

Evidence of pedigree, obtained under commission, and afterwards embodied in a bill of exceptions, may be proven against third persons by the bill of exceptions when the original commission and testimony have been lost, p. 620.

Evidence.—Record in ejectment is evidence in action against third persons to show possession, but not to establish title, p. 622.

Ejectment.—Judgment in ejectment binds parties and privies, p. 622.

Cited in *Carlisle v. Kilbrew*, 89 Ala. 334, 6 So. 757, 6 L. R. A. 619, and n., holding record conclusive in collateral action for mesne profits, collecting cases.

Evidence.—When ejectment is brought against tenant, record in that action is prima facie evidence of title against landlord who participates in the defense, though not nominally a party, p. 623.

Cited, approved and followed in *Jones v. Miller*, 1 McCrary, 537, 3 Fed. 385, holding grantee bound in action against his grantor; *Belden v. Seymour*, 8 Conn. 309, 21 Am. Dec. 663, following principal case on precise point; *McNamee v. Moreland*, 26 Iowa, 113, holding that landlord, when bound by action against tenant, may also claim benefit of decree in favor of tenant, collecting cases; *Read v. Allen*, 56 Tex. 180, holding judgment in action against tenant not conclusive.

Distingulshed in *Wilson v. Brookshire*, 126 Ind. 505, 25 N. E. 134, 9 L. R. A. 797, & n., landlord not bound by ejectment suit brought by his tenant, unless it appears that landlord instigated them; *Masten v. Olcott*, 101 N. Y. 161, 4 N. E. 277, or by judgment against tenant, unless he is in some way made a prlvy; and in *Lamar v. Raysor*, 7 Rich. L. 513, and *Samuel v. Dinkins*, 12 Rich. L. 175, 75 Am. Dec. 730, both holding similarly.

Instructions.— Court should not give instruction upon question as to which there is no evidence, p. 625.

Cited and approved in *White v. Burnley*, 20 How. 249, 15 L. 889, *Dibble v. Truluck*, 11 Fla. 141, 143, and *Lewis v. State*, 4 Ohio, 397; in *Hunt v. Toulmin*, 1 Stew. & P. 180, 181, 187, holding mere speculative instruction may be ground for reversal; and cited in 72 Am. Dec. 540, in note on Instructions to juries.

Descent.— In Maryland, a person claiming as heir must prove himself heir of person last seized of the estate, and if intestate leaves a brother of the whole blood who survived him and died without issue, and without having been ever actually seized of the estate, the estate will descend to the half blood of the person so seized, p. 625.

Miscellaneous.— Cited erroneously in *Slicer v. Bank*, 16 How. 579, 14 L. 1066. Cited, without particular application, in *Tyler v. Magwire*, 17 Wall. 292, 21 L. 586, referring to previous decision of principal case in 11 Wheat. 280, 6 L. 474; *State v. Van Winkle*, 6 Nev. 352, without application.

2 Pet. 627-663, 7 L. 542, WILKINSON v. LELAND.

Federal courts.— United States courts are bound to decide questions of title precisely as State court ought to, p. 656.

Cited and rule applied in *Hinde v. Vattier*, 5 Pet. 401, 8 L. 170, holding Federal courts bound to receive same evidence as State court on matter of title; *Livingston v. Story*, 11 Pet. 393, 9 L. 763, dissenting opinion, arguendo, questions arising under Louisiana law should be determined according to rules of civil law, not of English law of equity; *Bennett v. Boggs*, 1 Bald. 72, F. C. 1,319, enforcing State law imposing penalties for unlawful fishing; *Comstock v. Tracey*, 46 Fed. 169, holding Federal court must follow rule laid down by State Supreme Court; *Smith v. Power*, 23 Tex. 33, citing rule as illustrating doctrine that reason and justice require uniformity of decision.

Constitutional law.— The extent of power granted to legislature is to be determined by usage as well as by construction of the terms in which it is given, p. 657.

Cited obiter in *Magill v. Brown*, 16 Fed. Cas. 420, stating rule *ut supra*.

Constitutional law.—Quære, whether under a charter requiring a legislature to legislate in subordination to the general laws of England, the great principles of magna charta can be disregarded, p. 657.

Cited in *Luther v. Borden*, 7 How. 69, 12 L. 610, dissenting opinion, holding legislature of Rhode Island can exercise no power not granted to the king from whom it derived its charter. Cited, without particular application, in *Bonaparte v. Railroad Co.*, Bald. 220, F. C. 1,617, remarking State legislatures have succeeded to legislative powers of parliament.

Constitutional law.—Laws violating rights of personal liberty or private property, are in conflict with the fundamental principles of our government, and power to pass them ought never to be taken as granted in the absence of the clearest authorization in the organic law, p. 657.

Cited in *Schroeder v. Ehlers*, 31 N. J. L. 50, questioning whether legislature has power to make one a judge in his own case; *Witham v. Osburn*, 4 Or. 322, 18 Am. Rep. 289, *Coster v. Tidewater Co.*, 18 N. J. Eq. 64, 65, *Varner v. Martin*, 21 W. Va. 549, collecting cases and holding State may not take private property for private use, nor for public use without compensation; *Wilder v. Lumpkin*, 4 Ga. 219, 220, *Spence v. Railroad Co.*, 79 Ala. 590, *Billings v. Hall*, 7 Cal. 14, and *Inglis v. Sailors Snug Harbor*, 3 Pet. 154, 7 L. 636, dissenting opinion, all holding legislature has no right to divest vested legal rights; *Clark v. White*, 2 Swan, 549, and *Taylor v. Ford*, 4 Hill, 144. 40 Am. Dec. 277, legislature may not authorize private road to be laid out on lands of another; *The Legal Tender Cases*, 12 Wall. 671. 20 L. 351, dissenting opinion, arguing legal tender act not applicable to previously incurred obligations; *Twombly v. Humphrey*, 23 Mich. 483, 9 Am. Rep. 102, holding State may not exercise eminent domain for purpose of aiding Federal government in execution of Federal power; *Osborn v. Nicholson*, 13 Wall. 662, 20 L. 696, permitting suit on contract for purchase of slave, made prior to passage of the thirteenth amendment; *Atchison, etc., R. R. Co. v. Baty*, 6 Neb. 45, 29 Am. Rep. 360, holding void a statute giving owner of live stock double the value of his property when injured on a railroad; *Lowe v. Harris*, 112 N. C. 480, 17 S. E. 540, 22 L. R. A. 382, & n., legislature cannot make repeal of statute of frauds retroactive so as to destroy vested rights; *Talbot v. Talbot*, 14 R. I. 59, nor change right of dower so as to alter existing rights; *S. A. & A. P. Ry. Co. v. Wilson*, 4 Tex. Civ. App. 571, nor pass act discriminating against certain individuals in matters applicable to general law of contract; *Lyman v. Martin*, 2 Utah, 157, dissenting opinion, arguing, a law against common right and reason is void; *School Board v. Stuart*, 80 Va. 76, dissenting opinion, arguing statute void, authorizing payment of debt in depreciated currency; *Durkee v. Janesville*, 28 Wis. 468, 9 Am. Rep. 504, holding void an act exempting city from pay-

ment of costs in certain suits. Cited obiter in *Peerce v. Carskadon*, 4 W. Va. 248, 6 Am. Rep. 292, discussing power of legislature to permit use of courts by enemy in time of war; *University v. Railroad Co.*, 76 N. C. 107, 22 Am. Rep. 673, holding unconstitutional a statute requiring unclaimed dividends of corporations to be paid to State university; *Munn v. Illinois*, 94 U. S. 148, 24 L. 92, dissenting opinion, arguing legislature has no power to interfere with conduct of business where not necessary to proper exercise of police power; *Burch v. Newbury*, 10 N. Y. 393, dissenting opinion, arguendo, statute granting right to new trial when previously lost is void; *Cotton v. County Commissioners*, 6 Fla. 647, dissenting opinion, arguendo, State cannot levy tax for purpose of purchasing stock of private corporation to be distributed among taxpayers in proportion to their assessment; *Board v. Van Hoesen*, 87 Mich. 537, 49 N. W. 895, 14 L. R. A. 115; *Sadler v. Langham*, 34 Ala. 330; *Robinson v. Swope*, 12 Bush, 27; *New C. C. Co. v. George's, etc., Co.*, 37 Md. 560; *Van Witsen v. Gutman*, 79 Md. 409, 29 Atl. 609, 24 L. R. A. 405; *Gough v. Bell*, 22 N. J. L. 474, dissenting opinion, and *Missouri, etc., Ry. v. Nebraska*, 164 U. S. 417, 41 L. 495, 17 S. Ct. 135, all holding State has no right to take private property for a private purpose; *Griffin v. Mixon*, 38 Miss. 435, holding unconstitutional a statute forfeiting lands for nonpayment of taxes; *Reed v. Wright*, 2 G. Greene, 26, holding unconstitutional a statute requiring owners of certain lands to present their claims to commissioners; *In re Klein*, 14 Fed. Cas. 725, and *Sackett v. Andross*, 5 Hill, 364, dissenting opinion, holding bankruptcy act unconstitutional so far as retroactive; *State v. Mayor*, 24 La. Ann. 71, dissenting opinion, arguendo, legislature may not pass act requiring municipality to pay fraudulent claim; *Orr v. Quimby*, 54 N. H. 647, dissenting opinion, *New Orleans R. R. Co. v. New Orleans*, 26 La. Ann. 521, dissenting opinion, *Charles River Bridge Co. v. Warren Bridge Co.*, 7 Pick. 452, *Parham v. Decatur County*, 9 Ga. 354, and *Hooker v. New Haven Co.*, 14 Conn. 152, 36 Am. Dec. 479, all holding eminent domain may only be exercised upon making proper compensation.

Cited also, but without particular application, in *United States v. Arredondo*, 6 Pet. 715, 8 L. 556, discussing source of legislative power; *Lavin v. Bank*, 18 Blatchf. 28, 1 Fed. 667, discussing due process of law; *Blanding v. Burr*, 13 Cal. 355, discussing power of taxation; *In re Flournoy*, 1 Ga. 608, discussing effect of remission of fine; *Quimby v. Hazen*, 54 Vt. 140, and *Speer v. Mayor*, 85 Ga. 68, 11 S. E. 808, 9 L. R. A. 408, due process of law; *Beebe v. State*, 6 Ind. 524, dissenting opinion, discussing validity of statute prohibiting sale of intoxicants; *Noel v. Ewing*, 9 Ind. 60, dissenting opinion, discussing statute abolishing dower and substituting a third in fee therefor; *Wynehamer v. People*, 13 N. Y. 417; *People v. Collins*, 3 Mich. 392, and *People v. Gallagher*, 4 Mich. 275, dissenting opinion, discussing act prohibiting manufacture of intoxicants; *Stockton v. Montgomery, Dall. (Tex.)* 480, discussing limitation of legislative

authority implied from nature of government; *Hatch v. Railroad Co.*, 25 Vt. 66, discussing exercise of eminent domain, and cited in note, 7 Am. St. Rep. 720.

Disapproved in *Dorman v. State*, 34 Ala. 232, holding there is no limitation upon legislative authority implied from the nature of government. Distinguished in *Ingram v. Colgan*, 106 Cal. 123, 46 Am. St. Rep. 229, 38 Pac. 316, 28 L. R. A. 189, sustaining bounty act for destruction of coyotes; *Campbell v. State*, 11 Ga. 370, right to be confronted with witnesses is not defeated by admission of evidence of dying declarations. Criticised in *People v. Gallagher*, 4 Mich. 252, holding no act can be declared void which does not conflict with some right secured by written Constitution. Doubted in *Westervelt v. Gregg*, 12 N. Y. 212, 62 Am. Dec. 166, courts cannot limit legislature, except as by limitations found in the Constitution; *Sharpless v. Mayor*, 21 Pa. St. 160, 59 Am. Dec. 764, holding similarly.

Estates of decedents.—Title of heir vests immediately upon death of ancestor, incumbered by the liens created by the latter in his lifetime and by the law at his decease, p. 658.

Cited and rule applied in *Vansyckle v. Richardson*, 13 Ill. 173, holding title of heir may be defeated by administrator's sale; *Ticknor v. Harris*, 14 N. H. 281, 40 Am. Dec. 188, holding estate of decedent is charged with payment of his debts, and heir not a proper party when he stakes nothing by descent; *Campbell's Case*, 2 Bland Ch. 232, 237, 20 Am. Dec. 373, 378, holding lien of creditor upon estate cannot be defeated by private statute authorizing devisees to mortgage it; *Johnson v. Branch*, 9 S. Dak. 122, 62 Am. St. Rep. 860, 68 N. W. 175, holding unconstitutional a private act authorizing sale of estate by administrator, when not necessary to pay debts; *Culbertson v. Coleman*, 47 Wis. 200, 2 N. W. 129, holding act authorizing sale of decedent's land by executor void. Cited obiter in *Maxwell v. Maxwell*, Charlt. (Ga.) 466, holding legatees, to whom estate has been distributed, not necessary parties in suit by creditor against executor; *Good v. Norley*, 28 Iowa, 193, 208, 212, discussing nature of administrators' sales; *Coombs v. Jordan*, 3 Bland, 306, 22 Am. Dec. 254, discussing lien of judgments.

Constitutional law.—An act of a State legislature, confirming a void executrix's sale, is not an exercise of judicial power, p. 660.

Cited, approved and followed in *Holman v. Bank*, 12 Ala. 417, 419, holding legislative act authorizing sale of property by foreign administratrix not an exercise of judicial power; *Smith v. Judge of Twelfth District*, 17 Cal. 562, nor an act permitting change of venue in a particular case; *Taylor v. Place*, 4 R. I. 344, nor an act opening a judgment and permitting an answer in a particular case; in *Clusky v. Burns*, 120 Mo. 574, 25 S. W. 586, *Williamson v. Williamson*, 3 Smedes & M. 745, 41 Am. Dec. 638, *Chandler v. Douglass*, 8

Blackf. 12, 44 Am. Dec. 734, and *Todd v. Flournoy*, 56 Ala. 111, 28 Am. Rep. 764, all sustaining private statutes authorizing sale of property of estate; *Louisville, etc., Ry. Co. v. Blythe*, 69 Miss. 947, 30 Am. St. Rep. 603, 11 So. 113, 16 L. R. A. 255, & n., so act authorizing guardian to compromise with railway company, to avoid condemnation proceedings; *Langdon v. Strong*, 2 Vt. 263, sustaining act authorizing administrator to deed lands to creditors in satisfaction of their claims. Cited obiter in *Norwalk Co.'s Appeal*, 69 Conn. 593, 37 Atl. 1085, 39 L. R. A. 799, arguing legislature cannot confer legislative powers upon the judiciary.

Distinguished in *Trustees v. Bailey*, 10 Fla. 249, holding act of legislature, directing a rehearing of a particular case, a judicial act and void; *Maxwell v. Goetschius*, 40 N. J. L. 388, 29 Am. Rep. 246, holding unconstitutional an act attempting to confirm partition proceedings void for want of jurisdiction; *Powers v. Bergen*, 6 N. Y. 367, holding void a private statute authorizing sale of lands by executors; *Jones v. Perry*, 10 Yerg. 70, 76, 30 Am. Dec. 432, 438, holding private act authorizing sale of minor's estate by guardian void as an attempt to exercise judicial power; *Griffin v. Cunningham*, 20 Gratt. 110, legislature cannot give effect to judgment void for want of jurisdiction.

Confirmatory act confirming title under void executrix's sale may be passed by a State legislature, p. 660.

Cited and rule applied in *Weed v. Donovan*, 114 Mass. 183. Cited in *Leland v. Wilkinson*, 10 Pet. 296, 9 L. 431, as having decided above point; *Blagge v. Miles*, 1 Story, 444, F. C. 1,479, sustaining resolve of legislature authorizing a sale of trust property; *Payne v. Treadwell*, 16 Cal. 238, sustaining act of legislature confirming void alcalde sales; *Hoyt v. Sprague*, 12 Fed. Cas. 769, legislature may authorize change of investments by trustees; *Mohr v. Porter*, 51 Wis. 504, 8 N. W. 372, *Stewart v. Griffith*, 33 Mo. 23, 82 Am. Dec. 153, and *Davison v. Johonnot*, 7 Metc. 394, 41 Am. Dec. 452, or sale of estate of ward by guardian; *Wildes v. Van Voorhis*, 15 Gray, 148, may confirm voidable sale of husband's interest in homestead; *Tameling v. Land Co.*, 2 Colo. 422, congress may pass act confirming void land claim.

Distinguished in *Smith v. Morse*, 2 Cal. 542, 547, reviewing principal case and holding legislature cannot ratify fraudulent, void grant to prejudice of third persons; *Brenham v. Story*, 39 Cal. 186, holding unconstitutional an act authorizing sale of property by administrator thereby operating to divest the heir of his property; *Forster v. Forster*, 129 Mass. 565, collecting and reviewing authorities, and holding statute confirming void tax sale unconstitutional.

Retrospective laws may be passed by State legislature, where not operating to divest settled rights of property, p. 661.

Cited and principle followed in *Drehman v. Stifle*, 8 Wall. 603, 19

L. 510, sustaining statute exempting persons from civil prosecution from acts previously committed under military authority; *Ex parte Hull*, 12 Fed. Cas. 854, holding 'bankruptcy act retrospective in operation; *Randall v. Kreiger*, 23 Wall. 149, 23 L. 126, legislature may pass retrospective act curing defective acknowledgment; *Mitchell v. Campbell*, 19 Or. 205, 206, 207, 24 Pac. 457, 458, or retrospective act curing defective administrators' sales; *McMillan v. Lee Co.*, 6 Iowa, 394, or retrospective act cured defective subscription for stock by county; *Albee v. May*, 2 Paine, 80, F. C. 134, or retrospective act allowing ejected occupants to recover for improvements; *Elliott v. Mayfield*, 4 Ala. 424, or retrospective act directing execution against sureties on executors' bonds; *Tilton v. Swift*, 40 Iowa, 80, or retrospective statute enlarging time for receiving verdicts; *Scott v. Smart*, 1 Mich. 302, or statute transferring cases from territorial to State court; *Danville v. Pace*, 25 Gratt. 12, 18 Am. Rep. 670, and *Andrews v. Russell*, 7 Blackf. 476, holding repeal of statute avoiding contracts for usury, validates previously existing contracts; *State v. Newark*, 27 N. J. L. 196, sustaining statute curing defective street assessment proceedings; *State v. Squires*, 26 Iowa, 348, holding valid a retrospective statute curing defective organization of school district; *Ross v. Worthington*, 11 Minn. 327, 88 Am. Dec. 98, holding valid a statute curing defectively-executed mortgage; *Gibson v. Hibbard*, 13 Mich. 219, holding valid an act curing instruments defective for want of stamp; in *Gelpcke v. Dubuque*, 1 Wall. 204, 17 L. 525; *Bridgeport v. Railroad Co.*, 15 Conn. 496, *Beloit v. Morgan*, 7 Wall. 624, 19 L. 207, and *Bissell v. Jeffersonville*, 24 How. 296, 16 L. 670, all holding legislature may pass act enabling municipal corporation to cure defective bond proceedings; *Bass v. Columbus*, 30 Ga. 852, and tax proceedings levied in pursuance thereof. Cited, arguendo, in dissenting opinion, *Treadway v. Schrauber*, 1 Dak. 271, 46 N. W. 476, and in dissenting opinion, *Hooker v. New Haven, etc., Co.*, 14 Conn. 166.

Distinguished in *Dockery v. McDowell*, 40 Ala. 481, dissenting opinion, collecting cases and arguing retroactive acts are unconstitutional; *Forsyth v. Marbury*, Charl. (Ga.) 333, holding law limiting enforcement of dormant judgments cannot be construed to be retrospective, when it will thereby impair vested rights; *Hardemann v. Downer*, 39 Ga. 453, dissenting opinion, arguing exemption law not retrospective; *Adams v. Palmer*, 51 Me. 495, legislature cannot render valid a release of dower, voidable when executed and avoided before the passage of the act; *Rich v. Flanders*, 39 N. H. 387, dissenting opinion, arguendo, statute removing disqualification of witnesses cannot apply to pending suits; *Palairret's Appeal*, 67 Pa. St. 487, 5 Am. Rep. 454, holding unconstitutional a retrospective statute abolishing ground rents; *Hasbrouck v. Milwaukee*, 13 Wis. 51, 80 Am. Dec. 725, holding act curing void bond issue unconstitutional; *Blodgett v. Hitt*, 29 Wis. 178, holding curative act inapplicable to void probate sale.

Statutory construction.—A legislative act is to be determined according to the intention of the legislature apparent upon its face, and is not to be defeated by technical rules, p. 662.

Cited and principle followed in *United States v. Freeman*, 3 How. 565, 11 L. 728, construing statutes relating to brevet officers; *Oates v. First Nat. Bank*, 100 U. S. 244, 25 L. 582, construing statute relating to bills of exchange; *United States v. Fisher*, 109 U. S. 145, 27 L. 886, 3 S. Ct. 155, construing statute fixing salary of certain officers; *Davis v. Leslie*, Abb. Adm. 139, F. C. 3,639, construing statute regulating recovery of seamen's wages; *Goodall v. Tuttle*, 3 Blss. 235, F. C. 5,533, construing bankruptcy act; *Ludington v. The Nucleus*, 15 Fed. Cas. 1095, construing act conferring jurisdiction on District Courts; *United States v. One Hundred and Twenty-nine Packages*, 27 Fed. Cas. 285, construing revenue law; *United States v. The Reindeer*, 27 Fed. Cas. 760, construing statute regulating fishing vessels; *Beekman v. Railway Co.*, 35 Fed. 9, construing statute defining Federal district; *United States v. Huggett*, 40 Fed. 642, construing statute relating to obscene letters; *Wilson v. Biscoe*, 11 Ark. 48, construing statute incorporating bank; *State v. Smith*, 40 Ark. 433, construing statute relating to chattel mortgages; *San Francisco v. Mooney*, 106 Cal. 588, 39 Pac. 853, construing statute ratifying municipal ordinance; *Seabury v. Arthur*, 28 Cal. 150, construing acts confirming titles; *Linsley v. Brown*, 13 Conn. 195, construing statute relating to acknowledgments; *Brown Co. v. Aberdeen*, 4 Dak. 408, 31 N. W. 738, construing incorporation act; *State v. Commissioners*, 20 Fla. 432, construing statute regulating sale of intoxicating liquors; *Erwin v. Moore*, 15 Ga. 365, construing statute regulating executions; *Gadsden v. Jones*, 1 Fla. 342, construing statute regulating duties of executors; *Gray v. Commissioners*, 83 Me. 435, 22 Atl. 377, construing statutes regulating location of highways; *Sisters v. Detroit*, 9 Mich. 99, construing statute exempting certain property from taxation; *People v. Blodgett*, 13 Mich. 168, construing election law; *Sanborn v. Sanborn*, 62 N. H. 639, construing will; *Braithwaite v. Cameron*, 3 Okl. 635, 38 Pac. 1086, construing statute providing for payment of salaries of territorial officers; *State v. Delesdenier*, 7 Tex. 107, construing act regulating general land office; *Ferguson v. Mason*, 60 Wis. 391, 19 N. W. 425, construing statute relating to mortgages of homestead.

Miscellaneous.—Cited, without particular application, in *Miller v. Sullivan*, 4 Dill, 344, F. C. 9,592, discussing effect of statute of limitations on void guardian's sales; *Northern Pac. R. R. Co. v. Majors*, 5 Mont. 126, 2 Pac. 325, discussing congressional grants. Cited also in *Talcott v. Pine Grove*, 1 Flipp, 177, F. C. 13,735, on point that legislature may levy tax for purpose of aiding construction of railroad. Cited obiter in *West River Co. v. Dix*, 6 How. 543, 12 L. 550, dissenting opinion, discussing right of eminent domain. Cited erroneously in *United States v. Kochersperger*, 26 Fed. Cas.

806. Cited, Texas, etc., Ry. Co. v. Gay, 86 Tex. 592, 26 S. W. 606, 25 L. R. A. 59, to point that real property is governed by law of situs.

2 Pet. 664-670, 7 L. 555, *LE GRAND v. DARNALL*.

Slave.—A devise of property to a slave entitles him to freedom by necessary implication, p. 670.

Cited in *Durham v. Durham*, 26 Mo. 510, holding manumission may be presumed; *Dred Scott v. Sandford*, 19 How. 600, 15 L. 781, stating rule *ut supra*; *Monohon v. Caroline*, 2 Bush, 413, testator may manumit slaves by will. Cited obiter in *Sibley v. Maria*, 2 Fla. 563, discussing manumission generally; Opinion of Judge Appleton, 44 Me. 567, 570, 584, arguing, Africans have the right to vote; *Dred Scott v. Sandford*, 19 How. 423, 589, 15 L. 708, 777, discussing right of slave to sue.

Distinguished in *Jones v. Lipscomb*, 14 B. Mon. 297, rule aliter in Kentucky; *Dred Scott v. Sandford*, 19 How. 425, 15 L. 709, under facts.

Manumission.—When statute provided that slave must be under forty-five and able to gain a livelihood at time of manumission, one who is eleven years of age and able to gain a livelihood, is within the statute, p. 670.

2 Pet. 671-674, 7 L. 557, *BANK OF COLUMBIA v. SWEENEY*.

Execution.—Law authorizing execution to issue without judgment, will be so construed as to permit the debtor, on return of the execution, to set up any defense he might have had had the suit proceeded in the ordinary way, p. 674.

Not cited.

2 Pet. 675-679, 7 L. 559, *BEACH v. VILES*.

Statutory construction.—Federal courts will adopt construction of local statutes given by State court, p. 678.

Cited obiter in *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 525, holding foreign corporations only recognized by interstate comity.

Bankruptcy.—Assignees, under fraudulent assignment, are not chargeable as trustees in garnishment proceedings, p. 679.

Cited in *Firebaugh v. Stone*, 36 Mo. 115, holding rights of garnishee are not affected by garnishment, and in note on effect of fraud in assignments for benefit of creditors, 58 Am. St. Rep. 96. Cited obiter, *Ware v. Wanless*, 2 Wyo. 164, discussing impeachment of assignment for fraud.

Miscellaneous.—Cited obiter in *The Watchman*, 1 Ware, 243, F. C. 17,251, discussing assignments generally. Cited erroneously in *Bender v. Crawford*, 33 Tex. 751, 7 Am. Rep. 272.

REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1830.

BY RICHARD PETERS,

Counselor at Law, and Reporter of the Decisions of the Supreme
Court of the United States.

VOLUME III.

IT has been found impracticable to include in one volume all the cases decided by the Supreme Court at January Term, 1830. The reporter was desirous to escape from the labor of preparing two volumes for the press, and still more desirous to avoid imposing upon the profession the double expense of the purchase of the cases in this form.

In his vindication, and in explanation of the course which has been adopted, he has been indulged with the permission of the court to publish the following correspondence;

WASHINGTON, March 20, 1830. }
Supreme Court Room. }

My Dear Sir:

I am exceedingly embarrassed on the subject of the publication of the Reports of the Cases decided at this term, and submit myself to the court for direction.

It is manifest that it will be impossible to comprehend the whole of the decisions, with the arguments of counsel, in one volume, of a size which will be convenient, and executed on a type such as is proper for the work. Should it be desired by the court, I am willing to publish two volumes, introducing in most of the cases the arguments of counsel; indeed, more than half the cases are now ready for the press, the arguments included; having intended to pursue the plan heretofore adopted. But the [*] objection to this is, *that the profession may consider the expense of two volumes a burthen and may complain. With the approval of the court, and their expression of a wish that the arguments shall be reported, I shall be entirely protected. If the court shall recommend or sanction the omission of the ar-

guments, I shall be also safe from the censure of those gentlemen whose ability in the discussion of the cases which have been disposed of during the term entitles them to every illustration, and whose arguments it would, under other circumstances, give me great pleasure to insert in the work.

I have no desire to present the case in any form which can be construed as intending a claim on the government for additional compensation for delivering to the Department of State two volumes instead of one; and I wish to be understood as relinquishing any such claim or purpose. My whole object is to act in the matter as the court shall wish, and I shall have full compensation for any addition to my labors in their approbation. I am, sir, with great respect and esteem,

Your obedient servant, faithfully,

RICHARD PETERS.

MR. CHIEF JUSTICE MARSHALL.

WASHINGTON, March 22.

My Dear Sir:

I laid your letter before the court and found a general disposition among the judges to approve of the course which you should yourself think most eligible. I believe we all think that the arguments at the bar ought, at least in substance, to appear in the reports. They certainly contribute very much to explain the points really decided by the court. If this cannot be done in one volume, I should think it advisable to give us two. With great respect and esteem, I am, dear sir,

Your obedient,

J. MARSHALL.

RICHARD PETERS, Esq.

OBITUARY.

THE obligation to record the decease of *Mr. Justice* Washington is felt with the deepest sensibility. Associations of years, during which it was the good fortune of the writer to possess his friendship and esteem, were thus terminated: his judicial career of thirty-one years, distinguished by all the lustre and usefulness that talent, learning and virtue could give, was closed by that event. He died at Philadelphia on the 26th day of November, 1829, in the sixty-eighth year of his age; and his remains were conveyed to Mount Vernon and deposited in the same tomb with those of his uncle; THE FATHER OF HIS COUNTRY.

It may be said with truth that *Mr. Justice* Washington belonged to two States—Virginia and Pennsylvania. He was born and educated in Virginia, and there, for some time, practiced his profession; he acquired his knowledge of the law in Pennsylvania; in that State the great portion of his eminent judicial labors were performed, and in that State he died. He was equally beloved, honored, and lamented in both States.

Mr. Justice Washington was the son of John A. Washington, Esquire, of Westmoreland County, Virginia, who was the next eldest brother of General Washington. His father was a gentleman of strong mind, and possessed the consideration and confidence of all who knew him. He was, with honor to himself, a delegate in the State Legislature of Virginia, **viii**]* and a magistrate of the county in which he resided. Bushrod Washington, his son, received a part of his classical education in the house of the inflexible patriot Richard Henry Lee, under a private tutor; his studies were continued under his paternal roof, and afterwards at William and Mary College. At that respectable institution commenced his intimacy and friendship with *Mr. Chief Justice* Marshall, with whom he became afterwards associated in the Supreme Court of the United States; and whose esteem, confidence and respect, he continued to possess in the fullest extent to the close of his life.

The invasion of Virginia by Lord Cornwallis called from their studies for its defense the gallant youth of the State, and among them Bushrod Washington, who joined a volunteer troop of cavalry under Colonel John F. Mercer, in the army commanded by the Marquis La Fayette. During the whole of the summer he remained in the field, and until Cornwallis had crossed James River. It was then supposed that the invaders intended to move on South

Carolina; the troop was disbanded, and its members returned to their homes. In the following winter he came to Philadelphia, and, under the auspices and affectionate care of General Washington, he was placed as a student at law in the office of Mr. Wilson, a gentleman of great legal learning and high character, and who was afterwards appointed a Justice of the Supreme Court of the United States. After completing his studies, he returned to Virginia and practiced his profession in his native county with reputation and success. In 1787 he was chosen a member of the House of Delegates of Virginia; and the following year, as one of that body, he assisted in the adoption and ratification of the Constitution of the United States by the State of Virginia.

From Westmoreland he removed to Alexandria, a wider sphere for the exercise of his talents as an advocate and a jurist; and he went afterwards from thence to Richmond, and there *assumed and maintained an equal station with the gentlemen of that bar; whom to equal, has always been and continues to be conclusive evidence of the highest professional attainments and character.

During his arduous, industrious and extensive practice at the bar in Richmond and throughout the State, Judge Washington undertook to report the decisions of the Supreme Court of Virginia; a work in two volumes, of high authority in the courts of that State and in those of the Union.

He was married in 1785 to Miss Blackburn; he had no children. He was a devoted husband to an affectionate wife; and such was the strength of her conjugal attachment to her deceased husband that she survived him but three days.

His high and just reputation as a lawyer, the purity and integrity of his character, and the confidence and respect of the whole community with whom he lived, induced President Adams, in 1798, to appoint him an Associate Justice of the Supreme Court of the United States, to fill the vacancy which had occurred by the decease of Mr. Justice Wilson. He continued to hold that honored and honorable station until his death; and presided in the Circuit Court of New Jersey and in that of Pennsylvania from April, 1803, having been during that year assigned to the circuit courts composing the third circuit.

Judge Washington was the favorite nephew of President Washington, and the devisee of

Mount Vernon, the much-loved residence of that pure, distinguished and venerated patriot. To Judge Washington he also gave his library, and he also bequeathed to him his public and private papers; at the same time appointing him one of his executors. These high and affectionate testimonials of confidence and esteem must have ever been held in proud possession by him on whom they were bestowed, and by whom they were deserved.

x*] *It is with peculiar satisfaction that the writer has been permitted by Mr. Justice Story to introduce here his evidence of the talents, the usefulness, the qualifications and the virtues of *Mr. Justice Washington*. This was given in a notice written by him immediately after that occurrence. *Laudari a viro laudato*.

"For thirty-one years Judge Washington held the station of Justice of the Supreme Court with a constantly increasing reputation and usefulness. Few men, indeed, have possessed higher qualifications for the office, either natural or acquired. Few men have left deeper traces in their judicial career of everything which a conscientious judge ought to propose for his ambition or his virtue or his glory. His mind was solid, rather than brilliant; sagacious and searching, rather than quick or eager; slow, but not torpid; steady, but not unyielding; comprehensive, and at the same time cautious; patient in inquiry, forcible in conception, clear in reasoning. He was, by original temperament, mild, conciliating, and candid; and yet was remarkable for an uncompromising firmness. Of him it may be truly said that the fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions. In him the love of justice was the ruling passion—it was the master spring of all his conduct. He made it a matter of conscience to discharge every duty with scrupulous fidelity and scrupulous zeal. It mattered not whether the duty were small or great, witnessed by the world or performed in private; everywhere the same diligence, watchfulness and pervading sense of justice were seen. There was about him a tenderness of giving offense, and yet a fearlessness of consequences in his official character, which it is difficult to portray. It was a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy. *It gained confidence when it seemed least to seek it. It repressed arrogance by overawing or confounding it.

"To say that as a judge he was wise, impartial, and honest, is but to attribute to him those qualifications without which the honors of the bench are but the means of public disgrace or contempt. His honesty was a deep vital principle, not measured out by wordly rules. His impartiality was a virtue of his nature, disciplined and instructed by constant reflection upon the infirmity and accountability of man. His wisdom was the wisdom of the law, chastened and refined and invigorated by study, guided by experience, dwelling little on theory, but constantly enlarging itself by a close survey of principles.

"He was a learned judge. Not in that everyday learning which may be gathered up by a hasty reading of books and cases. But that which is the result of long-continued laborious

services and comprehensive studies. He read to learn and not to quote; to digest and master, and not merely to display. He was not easily satisfied. If he was not as profound as some, he was more exact than most men. But the value of his learning was that it was the key-stone of all his judgments. He indulged not the rash desire to fashion the law to his own views; but to follow out its precepts with a sincere good faith and simplicity. Hence he possessed the happy faculty of yielding just the proper weight to authority; neither on the one hand surrendering himself to the dictates of other judges, nor on the other hand overruling settled doctrines upon his own private notions of policy or justice.

"But it is as a man that those who knew him best will most love to contemplate him. There was a daily beauty in his life which won every heart. He was benevolent, charitable, affectionate and liberal in the best sense of the terms. He was a Christian, full of religious sensibility and religious humility. Attached to the Episcopal *Church by education and [*xii choice, he was one of its most sincere, but unostentatious friends. He was as free from bigotry as any man; and at the same time that he claimed the right to think for himself, he admitted without reserve the same right in others. He was, therefore, indulgent even to what he deemed errors in doctrine, and abhorred all persecution for conscience sake. But what made religion most attractive in him, and gave it occasionally even a sublime expression, was its tranquil, cheerful, unobtrusive, meek and gentle character. There was a mingling of Christian graces in him which showed that the habit of his thoughts was fashioned for another and a better world."

At the session of the Supreme Court at January Term, 1830, Mr. Berrien, the Attorney-General of the United States, moved the court to have the proceedings of the bar and officers of the court, expressive of their high sense of the merits and talents of *Mr. Justice Washington*, entered on the record of the court. *Mr. Chief Justice Marshall* said:

"The sentiments of respect and affection which the gentlemen of the bar and the officers of the court have expressed for the loss of our deceased brother are most grateful to me, and I can say, with confidence, to all my brethren, no man knew his worth better or deplores his death more than myself; and this sentiment, I am certain, is common to his former associates. I am very sure, I may say for my brethren as well as for myself, that the application is most gratifying to us all; and that in ordering the resolutions to be entered on the minutes of our proceedings, we indulge our own feelings not less than the feelings of those who make the application."

Immediately on the decease of *Mr. Justice Washington*, the bar of Philadelphia assembled to testify their sense of the loss sustained in his decease by the court and by the nation. Resolutions expressive of their sentiments and feelings were unanimously adopted, and a gentleman of high *attainments and station [*xiii was requested to pronounce an eulogium on the deceased.

The bar of the Circuit Court of the United States for the Eastern District of Pennsylvania

have caused to be placed a mural tablet of marble, in a recess immediately behind and above the seat of the judges, in the room lately arranged for the Circuit Court in the "Hall of Independence," in the city of Philadelphia, on which is inscribed:

THIS TABLET

Records

The affection and respect of

The Members of the Philadelphia Bar

for

BUSHROD WASHINGTON,

An Associate Justice of the Supreme Court of
the United States:

Alike distinguished for

Simplicity of Manners

and

Purity of Heart:

Fearless, dignified, and enlightened, as a Judge,

No influence or interest

could touch his integrity

or

Bias his Judgment:

A zealous patriot, and a pious Christian.

He died

At Philadelphia,

On the 26th of November, A. D. 1829,

Leaving

To his professional brethren

A spotless fame,

And to his country

The learning, labor and wisdom

of a

Long judicial Life.

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES
DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, *Chief Justice.*
The Hon. WILLIAM JOHNSON, *Associate Justice.*
The Hon. GABRIEL DUVALL, *Associate Justice.*
The Hon. JOSEPH STORY, *Associate Justice.*
The Hon. SMITH THOMPSON, *Associate Justice.*
The Hon. JOHN M'LEAN, *Associate Justice.*
The Hon. HENRY BALDWIN, *Associate Justice.*
JOHN M'PHERSON BERRIEN, Esq., *Attorney-General.*
TENCH RINGGOLD, Esq., *Marshal.*
WILLIAM THOMAS CARROLL, Esq., *Clerk.*

RULES AND ORDERS

OF THE SUPREME COURT OF THE UNITED STATES.

February 11, 1830.—There having been two associate justices of the Supreme Court appointed since its last session, it is ordered that the following allotment be made of the Chief Justice and the associate justices of the said Supreme Court among the circuits, agreeably to the Act of Congress in such case made and provided, and that such allotment be entered on record, viz.:

For the First Circuit, the Hon. Joseph Story.

For the Second Circuit, the Hon. Smith Thompson.

For the Third Circuit, the Hon. Henry Baldwin.

For the Fourth Circuit, the Hon. Gabriel Duvall.

For the Fifth Circuit, the Hon. John Marshall, *Chief Justice*.

For the Sixth Circuit, the Hon. William Johnson.

For the Seventh Circuit, the Hon. John McLean.

March, 1830.—The court, on the second day in each term, hereafter, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order; and if the parties or either of them shall be ready when the case is called, the same will be heard;

and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court. That ten causes only shall be considered as *liable to be called on each [*xvii] day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of its order on the docket, or be set down for any particular day; except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been twice called in its order and passed and put at the foot of the docket, shall, if not again reached during the term it was last called, be dismissed, and no longer continued on the docket.

August 12, 1796.—Ordered, that when process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and Attorney-General of such State.¹

Montalet v. Murray, February Term, 1806.—Marshall, *Ch. J.*, stated the practice of the court to be that when there is no appearance for the plaintiff in error, the defendant may have the plaintiff called and dismiss the writ of error; or may open the record and pray for an affirmation. In such a case costs go of course.¹

1.—These rules of court have been omitted in 1 Wheaton, 1 Peters, and 1 Condensed Reports. This omission arose from the fact that they were not reg-

ularly entered with the other rules of the court by the then clerk of the court at the time of their adoption.

THE DECISIONS

OF THE

Supreme Court of the United States.

AT

JANUARY TERM, 1830.

1*] *RICHARD R. KEENE, Plaintiff in
Error,

MARGARET MEADE, Executrix of RICHARD
W. MEADE, deceased, Defendant in Error.

*Clerical error—middle letter of name—parol and
written evidence—practice.*

A commission was issued in the name of Richard M. Meade, the name of the defendant being Richard W. Meade. This is a clerical error in making out the commission, and does not effect the execution of the commission. [6]

It may well be questioned whether the middle letter of a name forms any part of the Christian name of a party. It is said the law knows only of one Christian name, and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance. [7]

A witness, the clerk of the plaintiff, examined under a commission, stated the payment of a sum of money to have been made by him to the defendant, and that the defendant at his request made an entry in the plaintiff's rough cash book, writing his name at full length, and stating the sum paid to him, not so much for the sake of the receipt, as in order for him, the witness, to become acquainted with his signature, and the way of spelling his name. It is not necessary to produce the book in which the entry was made, and parol evidence of the payment of the money is legal. It cannot be laid down as a universal rule that where written evidence of a fact exists, all parol evidence of the same fact is excluded. [7]

It is not known that there is any practice in the execution or return of a commission requiring a certificate, in whose handwriting the depositions

returned with the commission were taken down. All that the commission requires is *that the [*2 commissioners, having reduced the depositions taken by them to writing, should send them with the commission under their hands and seals to the judges of the court out of which the commission issued. But it is immaterial in whose handwriting the depositions are; and it cannot be required that they should certify any immaterial fact. [8]

A certificate by the commissioners that A. B., whom they were going to employ as a clerk had been sworn, admits of no other reasonable interpretation than that A. B. was the person appointed by them as clerk. [9]

It is not necessary to return with the commission the form of the oath administered by the commissioners to the witnesses. When the commissioners certify the witnesses were sworn and the interrogatories annexed to the commission were all put to them, it is presumed that they were sworn and examined as to all their knowledge of the facts. [10]

ERROR to the Circuit Court for the County of Washington in the District of Columbia.

In the Circuit Court the testator of the defendant in error, Richard W. Meade, instituted an action against Richard R. Keene, the plaintiff in error, for money lent and advanced to him in Spain, where Mr. Meade, at the time of the loan, resided and carried on business as a merchant. In order to establish the claims of the plaintiff below, a commission was issued to Cadiz; and under the same, certain depositions were taken, which were returned with the commission. The commission was directed to the

NOTE.—Name, omission of, or error in, middle name, not material, nor a misnomer.—*Idem sonans.*—Initials. The addition of Senior or Junior forms no part of the name.

The law knows but one christian name, and the omission or insertion of the middle name, or of the initial letter of that name, in a conveyance, is immaterial. It is competent for the party to show that he is known as well without as with the middle name. *Games v. Dunn*, 14 Pet., 322; affirming 1 McLean, 321; *Meade v. Keene*, 3 Cranch, C. C., 51.

A bond with sureties and the oath of office of a receiver of public moneys, subscribed "B. F. E.," where the commission has issued to "B. E.," are valid. 2 Op. Att.-Gen., 332.

"Jr." is not an essential addition to, or a part of a name. *Clark v. Gilbert*, Burr., 207.

An assignment by P. P. Pitchlynn of a reservation in a treaty in favor of Peter Pitchlynn, where there is no doubt of the identity of the person, is good, as the law knows of but one christian name. 4 Op. Att.-Gen., 467.

The plaintiff declared by the name of William T. Robinson, and gave in evidence a deed to Will-
Peters 3.

iam Robinson, the omission of the middle letter was held to be an immaterial variance. *Franklin v. Talmadge*, 5 John., 84; 4 Watts, 329; 14 Pet., 322; *Willes*, 654; 1 Youngs, 602.

A middle name, or initial, is no part of a name, and may be disregarded. The law knows only one christian name. *Milk v. Christie*, 1 Hill., 102; *Roosevelt v. Gardener*, 2 Cow., 463; *Franklin v. Talmadge*, 5 John., 84; *Rex v. Newmau*, 1 Ld. Raym., 562.

The addition of "Senior" or "Junior" is mere matter of description, and forms no part of the name. It is a casual and temporary designation. *People v. Collins*, 7 John., 549; *Fleet v. Youngs*, 11 Wend., 522; *Lepiot v. Browne*, 1 Salk., 7; 10 Mass., 203.

Where a man is known with the addition of Junior, the omission of that addition in an indictment is not, in a collateral proceeding, conclusive that he was not intended. *Jackson v. Prevost*, 2 Chines, 164.

The word "junior" is no part of a name, but is merely descriptive of the person. Its omission from the name of a grantee is merely presumptive

commissioners in a case stated to be depending in the court in which Richard M. Meade was plaintiff, and Richard R. Keene defendant; and it was returned to the court under the hands and seals of the commissioners, who certified that the "execution of the commission appears in a certain schedule annexed."

In the schedule annexed to the commission was also the following certificate under the hands of the commissioners:

"We, the undersigned, appointed commissioners to examine evidences in a cause depending in the Circuit Court of the County of Washington in the District of Columbia, between Richard W. Meade, plaintiff, and Richard R. Keene, defendant, do hereby certify that we have severally taken the oath into the hands of each other prescribed in the herein annexed commission, and we further certify that we have likewise administered the oath prescribed by the same herein annexed commission to Mr. James M'Cann, the clerk we are going to employ for the execution of the same."

3*] *The commission "required the commissioners, or a majority of them, to cause to come before them all such evidences as shall be named or produced to them by either the plaintiff or defendant; and to examine them on oath touching their knowledge or remembrance of anything relating to the cause." The record does not show that any interrogatories were annexed to the commission.

The commissioners also certify as to the execution of the commission in the following words: "We, the undersigned, do certify that, in compliance with our duty, we shall examine the witnesses upon the following interrogatories, which we deem necessary first to establish."

Interrogatories returned with the commission were then administered to the witnesses, and the separate answers to each written and returned.

Frederick Rudolph, who was the clerk and book-keeper of Mr. Meade, testified as to one of the items of the account, "that on the defendant's receiving two hundred and fifty dollars, the defendant himself made the entry thereof in the rough cash book, writing his name at full length, probably at my own request, not so much for the sake of the receipt as in order for me to become acquainted with his signature and the way of spelling his name."

On the trial of the cause, the counsel for the

defendant objected to the reading of the commission on the ground of a variance in the name of the plaintiff in the commission, the plaintiff being called Richard M. Meade, instead of Richard W. Meade. This objection was overruled by the court; the defendant's counsel also objected to the deposition of F. Rudolph, so far as the same went to prove the item of \$250 in the plaintiff's account; alleging as the ground of the objection, that as there was a written acknowledgment made by the defendant, the writing should be produced, and the same could not be proved by parol. The plaintiff by his counsel offered to withdraw, and stated that he withdrew and waived that part of the deposition which went to prove the existence of a written acknowledgment or receipt, and he relied only on the proof of the actual payment of the amount *paid by [*4 the witness. The court overruled the objection and permitted the evidence to be read.

The defendant, by his counsel, also objected to the reading of the depositions returned with the commission, because the commissioners had not certified in whose handwriting the depositions were taken down, nor that they had appointed a clerk, nor administered the oath to their clerk, as required by the said commission; nor that the said witnesses were required to testify all their knowledge or remembrance of anything that may relate to the said cause, nor that they were sworn so to do, but were examined on particular interrogatories propounded by the commissioners themselves. But the court overruled the objections, and permitted the depositions to be read in evidence to the jury, &c.

The defendant's counsel excepted to the opinion of the court on the objections made to the evidence, and the court sealed a bill of exceptions; upon which the defendant prosecuted this writ of error.

Mr. Key, for the plaintiff in error, contended, that as there was written evidence of the payment of the sum of \$250, it should have been produced; and that in its absence, no allegation of its loss having been made, parol proof of its contents could not be given. The entry in the book was the original and superior evidence.

The offer of the plaintiff's counsel to strike out that part of the deposition of Rudolph which referred to the written entry, did not prevent the influence of the fact that such evidence ex-

evidence that the grantee was the father, and not the son, where both have the same name, and the presumption may be rebutted by showing that the grantor intended to convey to the son by the name and description contained in the deed. *Padgett v. Lawrence*, 10 Paige, 170; *Lepiot v. Browne*, 6 Mod., 198.

The law recognizes but one christian name. An error in the middle name may be disregarded as a surplusage. *VanVoorhis v. Budd*, 39 Barb., 479; *Newton v. Maxwell*, 2 Comp. & J., 215; 1 Dowl. Pr. C., 315.

The rule above stated, that the omission of a descriptive word, as *junior* or *senior*, or the middle letter between the christian and surname, is no misnomer, and needs no remedy, applies to ballots and votes. *The People v. Cook*, 14 Barb., 259, 261; S. C., affirmed, 8 N. Y. (4 Seld.), 67.

Initials and middle names are not recognized in law. *Petition of John Snook*, 2 Hilt., N. Y., 566.

Idem sonans.

If the name used were *idem sonans* with the true one, no variance would be held to exist; as if *Se-grave* were put for *Seagrave*. *Williams v. Ogle*, 2

Str., 889; and *Benedetto* for *Beneditto* has been considered no variance. *Abitbol v. Benedetto*, 2 Taunt., 401; 2 Camp., 487. Nor *Josier* for *Josiah*. *Schooler v. Ashurst*, 1 Little., 216. Nor *Petris* for *Petrie*, the name being a foreign one, and having the same sound in *French*. *Petrie v. Woodworth*, 3 Cal., N. Y., 219. Nor *Laurence* for *Lawrence*. *Webb v. Lawrence*, 2 Dowl. P. C., 81; 1 C. & M., 806. Nor *Tinmarsh* for *Tidmarsh*. *Homan v. Tidmarsh*, 11 Moore, 231. Nor *Stafford* for *Stratford*, 2 Chit., 355.

A variation in the spelling of plaintiff's name in a single letter between the writ and subsequent proceedings is immaterial. *Leatherbarrow v. Ward*, 5 Jur., 388; 1 Chit., 659, n.; *Anon.*, 1 Chit., 660, n.

But on a bail-piece the name of *Tarbart* for *Ta-bart* is a fatal variance. *Bingham v. Dickie*, 5 Taunt., 814.

So, *Frances* for *Francis*, in recognizance and notice of bail, is fatal. *Anon.*, 1 Moore, 126.

Initials.

A single letter, either a vowel or a consonant, may be a christian name, and not merely an initial letter of one. *Regina v. Dale*, 5 Eng. Law & Eq. R., 360; 15 Jur., 657.

isted, nor deprive the defendant of his right to its production.

As to the misnomer of the plaintiff, he argued that the commission was an *ex-parte* proceeding, and a strict scrutiny of it is warranted and demandable. The misnomer shows a different plaintiff from the real plaintiff in the cause.

He objected to the execution of the commission, as it did not appear that the interrogatories were those of the parties to the cause, but had been framed and put by the commissioners without notice of the same. Nor did it appear 5*] that *the clerk, who was sworn, wrote down the examinations of the witnesses; the certificate stating only that the clerk was sworn whom the commissioners "were about to employ." The clerk does not attest the depositions.

He also contended that the other matters stated in the court below were legal objections to the commission. (Cited, 5 Har. and John., 438.)

Mr. Lee and Mr. Jones, for the defendant in error, maintained that the objections made by the plaintiff in error were merely technical, and such as were exclusively in the power of the Circuit Court. This court has decided against such objections as ground of error. (7 Cranch, 208.)

As to the variance, it was said it was immaterial; or if material, should have been the subject of a plea; and if it had been pleaded, the plaintiff could have cured the defect by an averment that the person named in the commission and the plaintiff were the same. (Cited, 5 Bac. Ab., 215; 1 Wash. Rep., 257; 1 T. R., 235.)

The evidence of Rudolph was not to prove the contents of the memorandum, but the advance of the money by the witness as the plaintiff's agent. The entry in the book was but secondary evidence of the payment; and to claim that the whole of the account book should have been annexed to the commission was unreasonable; and yet it must have been so annexed, if the position of the plaintiff in error is correct.

It was also contended, that upon a fair construction of the certificate of the commissioners, the execution of the commission was legal and proper.

Mr. Justice THOMPSON delivered the opinion of the court:

This case comes up on a writ of error to the Circuit Court of the District of Columbia, and the questions for decision grow out of bills of exception taken at the trial, and relate to the admission of evidence offered on the part of the plaintiff and objected to by the defendant.

The first objection was to the admission of the depositions taken under a commission issued under a rule or order of the court below, on the ground of a variance in the name of 6*] *the testator, Meade, as set out in the commission, from that stated in the title of the cause. The commission purports to be in a cause between Richard M. Meade, plaintiff, and Richard R. Keene, defendant, whereas, the name of the plaintiff is Richard W. Meade. The whole variance, therefore, consists in the use of M instead of W, the middle letter in the plaintiff's name. This objection, we think, Peters 3.

was properly overruled. It was a mere clerical mistake in making out the commission. The rule or order of the court for the commission was in the right name, Richard W. Meade; and the oath taken by the commissioners and administered to the clerk, and the witnesses who were examined, and all the proceedings under the commission were in the cause according to its right title. It was a mistake of the officer of the court, which the court on motion might have corrected on the return of the commission. It may be regarded as mere matter of form, and which has not in any manner misled the parties. And, indeed, it may well be questioned whether the defendant was at liberty to raise this objection. It has been urged at the bar that this was an *ex-parte* commission taken out by the plaintiff, and that the defendant has therefore waived nothing. But the record now before this court warrants no such conclusion. The mode and manner of taking out the commission is governed and regulated by the practice of the court below, and of which this court cannot judge. From the commission itself, and the interrogatories upon which the witnesses were examined, it would appear to have been a joint commission. The commissioners are required to examine all witnesses named or produced to them, either by the plaintiff or the defendant. And one of the interrogatories put to the witnesses was, "Do you know of any sum or sums of money paid by the defendant to the plaintiff in money, bills, or merchandises, which are not credited in the amount now before you?" It can hardly be presumed that such an interrogatory would have been put by the plaintiff. It was to elicit matter of defense, and which concerned the defendant only. The motion for the commission having been made by the plaintiff would not preclude the defendant from afterwards *joining in [*7 it with the consent of the plaintiff. And if it is to be viewed as a joint commission, the alleged mistake may be considered as made by both parties, and not to be taken advantage of by either; and, besides, it may well be questioned whether the middle letter formed any part of the Christian name of Meade. It is said the law knows only of one Christian name. And there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance (Lit., 3, a; 1 Lord Ray., 563; 5 Johns., 84; 4 Johns., 119, note a); and if so, the middle letter is immaterial, and a wrong letter may be stricken out or disregarded.

The general objection to the testimony taken under the commission on account of the alleged variance having been overruled, the plaintiff's counsel read the deposition of F. Rudolph, which, in that part which went to prove the first item of \$250 in the plaintiff's account, states that the defendant made the entry on the plaintiff's rough cash book himself; writing his name at full length at his request, not so much for the sake of the receipt as in order for him to become acquainted with his signature and the way of spelling his name. The witness fully proved the actual payment of the money. But the defendant objected to such parol proof, as written evidence of the payment existed and should be produced. This objection we think not well founded. The entry of

the advance made by the defendant himself, under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that subject, than proof of the actual payment. The entry in the cash book did not change the nature of the contract arising from the loan, or operate as an extinguishment of it, as a bond or other sealed instrument would have done. If the original entry had been produced, the handwriting of the defendant must have been proved, a much more uncertain inquiry than the fact of actual payment. It cannot be laid down as an universal rule that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the 8*] receipt of the *money, it certainly could not be pretended that the production of this letter would be indispensable and exclude all parol evidence of the advance. And yet it would be written evidence. The entry made by the defendant in the cash book was not intended or understood to be a receipt for the money, but made for a different purpose; and even if a promissory note had been given as written evidence of the loan, the action might have been brought for money lent, and this proved by parol. The note must have been produced on the trial; not, however, as the only competent evidence of the loan, but to be cancelled, so as to prevent its being put into circulation; a reason which does not in any manner apply to the present case. This objection has been argued at the bar, as if the court permitted the plaintiff to withdraw or expunge that part of the deposition which related to the written acknowledgment, in order to let in the parol evidence. But this view of it is not warranted by the bill of exceptions. This was offered to be done by the plaintiff's counsel, but no such permission was given by the court. The parol evidence was deemed admissible, notwithstanding the written entry of the advance. The parol evidence did not in any manner vary or contradict the written entry, and no objection could be made to it on that ground. Nor does the nonproduction of the written entry afford any inference that, if produced, it would have operated to the prejudice of the plaintiff. Nor can it in any manner injure the defendant. The production of the written entry in evidence would not protect the defendant from another action for the same cause, as seemed to be supposed on the argument. The charge would not be cancelled on the book, but remains the same as before trial; and the defendant's protection against another action depends on entirely different grounds.

By the second bill of exceptions, several objections appear to have been taken to the reading of the depositions. These relate principally to the proceedings before the commissioners.

1. It is objected that the commissioners have not certified in whose handwriting the depositions were taken down.

9*] *We are not aware of any practice in the execution and return of a commission requiring such a certificate. And all that the commission requires is that the commissioners, having reduced the depositions taken by them to writing, should send the same with the commission, under their hands and seals, to the

judges of the Circuit Court. But it is immaterial in whose handwriting the depositions are; and it cannot be required that they should certify any immaterial fact.

2. The second exception is that the commissioners have not certified that they had appointed a clerk, and administered to him the oath required by the commission.

This exception does not appear to be sustained in point of fact.

The commission directs the commissioners to administer the annexed oath to the person whom they shall appoint as clerk. And they certify that they had administered the oath annexed to the commission to James M'Cann, the clerk they were going to employ for the execution of the same. This certificate admits of no other reasonable interpretation than that the person named was the one appointed by them as clerk, and it states in terms that the prescribed oath was administered to him. The inference from the certificate is irresistible that the person employed as the clerk was the one to whom the oath was administered. And this is all the commission required. If employed as clerk, it follows, of course, that he must have been appointed as such. If objections like this are to set aside, testimony taken under a commission, but very few returns will stand the test.

3. The third exception is that the witnesses were not required to testify all their knowledge and remembrance of anything that related to the said cause.

The commission does not prescribe the form of oath, but directs generally that the witnesses produced should be examined upon their corporal oaths, to be administered by the commissioners, touching their knowledge or remembrance of anything that may relate to the cause aforesaid.

The commissioners do not certify what oath was administered *to the witnesses, [*10 but by way of caption to the interrogatories, state that "in compliance with our duty we shall examine the witnesses upon the following interrogatories, which we deem necessary first to establish." This form of expression may not be very accurate or intelligible. It may probably arise from what is required of the commissioners by their own oath, which is to examine the witnesses upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to and left with the commissioners by either of the said parties. The interrogatories which followed this caption were probably those which the commissioners had before them when the examination commenced; and, if so, it was proper for them first to examine the witnesses upon those interrogatories, leaving the examination open to such other interrogatories as might be submitted to them before the commission closed. But whatever might be the reason for this particular form of expression, it is not perceived that it warrants any conclusion that a proper oath was not administered to the witnesses. It cannot be presumed that these interrogatories were framed by the commissioners. It would be against the usual course of taking testimony on a commission, and, in the absence of any evidence to the contrary, we must assume that these interrogatories were

framed by the parties in the ordinary course of such proceedings. And if this was a joint commission, as there is reasonable grounds to conclude it was, the interrogatories put to the witnesses did require them to testify as to all their knowledge of anything that related to the cause, or at all events to whatever the parties supposed related to it. And the commissioners expressly certify in their return that the witnesses produced and examined were sworn. The form of the oath administered to the witnesses is not set out in the return, nor is it necessary that it should be; and there is nothing from which the court can infer that the proper oath was not administered.

There is, therefore, no well-founded objection taken to the execution of this commission, [11*] and the depositions were properly admitted in evidence. The judgment of the court below is accordingly affirmed.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is considered, ordered, and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

Aff'g 3 Cranch, C. C., 51.
Cited—Hemp., 591.

12*] *THE UNITED STATES, Plaintiff's
in Error,
v.

THOMAS BUFORD, Defendant in Error.

Money received for the use of the United States—treasury statement—assignment to the government—statute of limitations—pleading—practice.

When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action against the receiver for the same. [28]

B., a Deputy Commissary-General of the United States, received from M., a Deputy Quartermaster-General of the United States, the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar. [29]

An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the Act of Congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated. [29]

But when moneys come into the hands of an individual, not through the officers of the treasury or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by

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the evidence on which that statement was made.

[29]

In England any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name. No valid objection is perceived against giving the same effect to an assignment to the government of this country. [30]

Where, before the transfer to the United States of an instrument which was the evidence of debt, the term of five years had elapsed, the period after which the statute of limitations was a bar, it can require no argument to show that the transfer of such claim to the United States cannot give it any greater validity than it possessed before the transfer. [30]

In the correct order of pleading it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. [31]

This court has repeatedly decided that the exercise of the discretion of the court below in refusing or granting amendments of pleadings or motions for new trials, affords no grounds for a writ of error. In overruling a motion for leave to withdraw a replication and file a new one, the court exercised its discretion; and the reason assigned, as influencing that discretion, cannot affect the decision. [31]

*** ERROR to the Circuit Court of [*13**
Kentucky.

The United States instituted an action of *assumpsit* in the Circuit Court of Kentucky to recover the sum of \$10,000 from the defendant, which they alleged to have been received by him to their use. The claim of the United States arose under the following circumstances:

On the 21st December, 1812, at Lexington, Kentucky, James Morrison, a Deputy Quartermaster-General of the Army of the United States, paid to the defendant in error, Thomas Buford, then a Deputy Commissary of the United States, the sum of ten thousand dollars, and took from Mr. Buford a receipt for the same in the following words:

LEXINGTON, 21st December, 1822.

Received of James Morrison, Deputy Quartermaster-General, ten thousand dollars, for which sum I promise to account when called upon.

THOS. BUFORD,

Deputy Commissary, U. S. A.

Upon the settlement of his account with the United States, Mr. Morrison claimed a credit for the sum thus paid to Mr. Buford, which credit was refused to him; and afterwards, on the 3d March, 1823, Congress passed "an Act for the relief of James Morrison," by which the accounting officers of the treasury were authorized to allow to him in the settlement of his accounts the sum so advanced to Mr. Buford, "provided that the said James Morrison shall first assign and transfer to the United States all his right and claim to the moneys mentioned in a certain receipt given by the said Thomas Buford to the said James Morrison, bearing date the 21st day of December, 1812," with a proviso that if James Morrison should not be found indebted to the United States the whole of the amount so to be assigned, the balance should be repaid to him.

On the 7th of March, 1823, James Morrison made the following assignment to the United States, in compliance with the Act of Congress:

"*Now I, James Morrison, in pursu- [*14
ance of the provisions of the said law, do hereby assign and transfer to the said United States all my right and claim to the moneys mentioned

in the said receipt. Witness my hand and seal, this 7th day of March, 1823.

"JAMES MORRISON."

Test. H. CLAY,
A. D. HARDIN.

Upon the execution of this assignment and the surrender of the receipt, the following account was made out and certified at the Treasury of the United States.

Dr. Thomas Buford, late Deputy Commissary, in account with the U. S. Cr.

GENERAL ACCOUNT OF ARREARAGES.

| | |
|---|-------------------------------------|
| To James Morrison, for amount received from him per receipt 21st December, 1812, for which he is accountable, | By bal. due U. States, - - \$10,000 |
| \$10,000 | |
| To bal. per contra, \$10,000 | |

TREASURY DEPARTMENT, 3d Auditor's Office, March 7th, 1823.

Stated by RD. BURGESS.

Pursuant to the provisions of the Act of Congress passed 3d March, 1817, entitled, "An Act to provide for the prompt settlement of public accounts," a transcript of the account so stated and settled was certified for the purpose of maintaining a claim on Thomas Buford for the balance which thus appeared to be due to the United States.

In August, 1823, the attorney of the United States filed a declaration in the suit, in the District Court of Kentucky, for money had and received, which declaration set forth "that the defendant, on the 10th day of March, 1823, was indebted to the United States in the sum of ten thousand dollars, for so much money before that time had and received as an officer of the United States to their use, as by the account of the said defendant with the said United States, duly settled, examined and adjusted **15**"] at the Treasury *Department on the said 10th day of March, 1823, and to the court shown, duly certified according to the Act of Congress of the United States in such case made and provided, fully appears."

To this declaration the defendant pleaded:

1. After oyer of the account; that the plaintiffs *actio non*, because "the declaration and the matters and things therein contained are not good and sufficient in law to have and maintain the said action," &c.

2. Because he does not owe the debt in the declaration mentioned and demanded, &c.

3. Because James Morrison, the assignor of the receipt and demand to the said plaintiffs, was, at the time of and before said assignment, and remained until the time of his death, indebted to him in a much larger sum of money than the said sum demanded, for money had and received by said Morrison to the use and benefit of said defendant; for money before that time lent and advanced at his special instance and request; for money paid, laid out and expended, at his like special instance and request; and being so indebted, said Morrison assumed upon himself and promised to pay said defendant the aforesaid sum of money whenever he should be thereunto afterwards requested; yet the said Morrison has not paid said defendant the aforesaid sum of money, or any part thereof; nor have the executors or administrators of said Morrison, since his death,

or anyone for him or them, paid said defendant said sum of money, or any part thereof, but the same remains wholly unpaid; which said sum of money, or so much thereof as is equal to the demand of said plaintiffs, the said defendant offers to set off, and pleads as a set-off against said plaintiffs' demand, &c.

4. Because the cause of action and demand set forth by the plaintiffs did not accrue within five years next before the impetration of the original writ in the cause.

To these several pleas the plaintiffs demurred, for insufficiency; and the demurrer being overruled, the United States replied: "The matters and things contained in the third plea of the defendant are not good and sufficient in law to bar and *preclude the United [***16** States from having and maintaining their action; and they further say that the matters and things contained in the fifth plea of the defendant of the statute of limitations are not good and sufficient in law to bar and preclude the plaintiffs from having their action," &c.

The court sustained the demurrer, and ordered that the third and fifth plea be overruled, and gave time to the defendant to put in other pleas.

And afterwards, at October Term, 1824, of the court, the defendant pleaded *actio non*, because the account upon which the plaintiffs' suit is founded was for money alleged to have been advanced by James Morrison to the defendant on the 21st day of December, 1812, in the district aforesaid, amounting to the sum of \$10,000, for which, by the terms of the transaction and the express agreement of said parties thereto, said Buford was to account to said Morrison for the same, and that said account and claim of said Morrison was, on the 7th day of March, 1823, under and by virtue of an Act of Congress, assigned and transferred by said Morrison to said plaintiffs; and the said defendant in fact says, that said demand and cause of action aforesaid did not accrue to said Morrison within five years next before said assignment aforesaid, &c.

7. That on the 21st day of December, 1812, this defendant received from a certain James Morrison, the sum of ten thousand dollars, and executed to him a receipt therefor, that is to say, in the Commonwealth and District of Kentucky; and on the 7th day of March, 1823, the said Morrison assigned by his certain writing, to which is subscribed his proper hand, all his right and claim to the money in the said receipt specified as aforesaid, and upon that receipt and assignment aforesaid, and without any other consideration, and without the consent and privity of the defendant, the account in the declaration mentioned was settled, examined and adjusted at the Treasury Department of the United States, to which settlement and adjustment this defendant has at no time assented. And the defendant says that he did not undertake and assume to pay the said debt in the declaration *mentioned within five [***17** years next before the assignment by the said Morrison, nor then, nor at any time subsequent.

8. Because he says that the *assumpsit* and demand of said plaintiff arose upon and by virtue of a claim which was held by virtue of one James Morrison for money by him advanced

and loaned to said defendant on the 21st day of December, 1812, and which claim and demand of said Morrison was, by virtue of an Act of Congress on the 7th day of March, 1828, assigned and transferred to said plaintiffs. And the defendant in fact says that the said cause of action did not accrue or arise within five years next before the suing out of the original writ in this cause, &c.

9. And because the claim and demand of said plaintiffs was derived by assignment and transfer from James Morrison of a certain writing executed by the defendant to said Morrison acknowledging the receipt of ten thousand dollars by the defendant from Morrison, stipulating to account therefor to said Morrison under and by virtue of an Act of Congress, which assignment as aforesaid was made on the 7th day of March, 1823, and for no other consideration whatever. And the defendant in fact says that said Morrison, before and at the date of said assignment in the district aforesaid, was indebted to said defendant in a sum equal to the sum demanded by said plaintiff, to wit, the sum of eleven thousand dollars, for money by said defendant before that time loaned and advanced to the said Morrison for money had and received by said Morrison to the use of said defendant, and for money by said defendant paid, laid out and expended for said Morrison, and all at the special instance and request of said Morrison; and being so indebted, he, said Morrison, in consideration thereof, then and there assumed upon himself and promised said defendant to pay said sums of money whenever he should be thereto afterwards requested, and although often requested has not paid the same, which said sum of money said defendant is here willing and offers to set off against the plaintiffs' demand.

To the ninth plea the attorney of the United States filed a replication stating that the United States ought not to be barred by anything therein contained, because he says that **[18*]** the said James Morrison was not, at the date of said assignment in said plea mentioned, indebted to the said defendant, as in pleading the defendant hath alleged. Upon this replication issue was joined.

To the sixth, seventh, and eighth pleas the plaintiffs replied that the United States ought not to be barred by anything contained in the said pleas, because the demand in the declaration accrued for and in consideration of \$10,000 of and belonging to the United States and by the said James Morrison as an officer of the United States, advanced to the said Thomas Buford as an officer of the United States, to wit, as Deputy Commissary of the United States, then and there, and to the use of the said United States, and by the said Thomas Buford in his official character as Deputy Commissary as aforesaid, receipted for to James Morrison in his official character as Deputy Quartermaster General. And the said attorney for the United States brings here into court the said receipt signed with the proper name of said Thomas, and in his official character as aforesaid, and assignment, and the Act of the Congress of the United States in the sixth, seventh, and eighth pleas of the defendants mentioned, duly certified according to the Acts Peters 3.

of the Congress of the United States in such case made and provided, which said sum of money of and belonging to the United States so as aforesaid advanced by the said Deputy Quartermaster-General to the said Deputy Commissary of the United States, and so as aforesaid receipted for, by said Thomas Buford as Deputy Commissary as aforesaid, is the same money and receipt and assignment in the said sixth, seventh, and eighth pleas of the defendant mentioned, and this the said attorney of the United States is ready to verify, wherefore, &c.

The defendant after craving oyer of the writing in the replication to the sixth, seventh, and eight pleas, rejoined that by reason of anything by the plaintiffs alleged in replying to the sixth, seventh, and eighth pleas of the defendant, the plaintiffs ought not to have and maintain their action against the defendant, because he says that the money received by him from the said Morrison was received upon an *individual transaction between the **[*19]** said Morrison and the defendant, and the express understanding and agreement that the defendant was to account therefor with the said Morrison, and not upon any contract for this defendant to account with the plaintiffs, and of this he puts himself upon the country.

The plaintiffs surrejoined and stated that the money demanded by the declaration and expressed in the receipt and assignment in the sixth, seventh, and eighth pleas of the defendants, was the proper money of the United States, lent and advanced by said Quartermaster-General to the said Thomas Buford, as Deputy Commissary, and to the use of the said United States, as in the replication to the said pleas, six, seven, and eight, is alleged.

The defendant demurred, and the United States having joined in the demurrer, the court gave judgment "that the law was with the defendant."

Afterwards, at a subsequent day of this same term, "the attorney for the United States moved to withdraw the replication to the pleas of the statute of limitation for the purpose of replying thereto a written agreement produced in court by the attorney, under the hand and seal of James Morrison and the said Buford, respecting the statute of limitations."

The writing referred to was as follows:

"Whereas, there is an item of ten thousand dollars in the account of James Morrison, late Deputy Quartermaster-General, charged by him as paid to Thomas Buford, Deputy Commissary-General, United States Army, or of purchases in December, 1812, suspended on the allegation by the proper officer of the War Department for the United States that Morrison should look to Buford for this money, and Morrison having been advised that it would be proper that he should institute a suit against Buford so as to preclude any question about the statute of limitations; but being willing to await a reasonable time to let Buford show, if he can, that said sum was paid, or properly accounted for by him; now Morrison agrees that he will not bring suit before 1st day of June, 1819, and Buford agrees that if suit is brought thereafter the statute of limitation should be no bar to Morrison's *recovery, if he is **[*20]** otherwise entitled to recover. In testimony

whereof we have hereunto set our hands and seals, this 20th day of December, 1819."

This motion was overruled by the court.

The record contained the following memorandum: "After the demurrer decided in this cause, the attorney for the United States produced the writing between James Morrison and said Buford respecting the statute of limitations, in the words and figures following (inserted), and moved for leave to withdraw the demurrer to the pleas of the statute of limitations for the purpose of replying to the said writing, and for cause shown, that he had come to the possession and knowledge of said writing since the decision of the court upon the demurrer. The court overruled the motion upon the ground that the writing would not be an avoidance of the statute, but only a substantive cause of action for breach of said covenant, expressing, however, that leave should be given if the writing would be a sufficient reply and evidence of the statute of limitations, to which opinion of the court in refusing to withdraw the demurrer and to reply the attorney for the United States excepted, and brought this writ of error."

The case was argued by *Mr. Berrien*, Attorney-General of the United States, for the plaintiffs in error, and by *Mr. Wickliffe* and *Mr. Ogden* for the defendant.

The *Attorney-General* contended that the court in pronouncing its judgment was bound to look at the whole record, and give judgment accordingly. (1 *Stephens on Pleading*, 163.) The original error was in allowing the plea of the statute of limitations, which could only be sustained on the ground that the United States had no original cause of action against Thomas Buford, and that the limitation had attached before this action was brought.

1. The United States had an original and good cause of action.

2. That if the assignment is to be referred to, still the right of action is in the United States. **21*** 3. The treasury settlement was conclusive against the defendant, and whether the right of action existed originally or derivatively, the statute was no bar to the suit by the United States.

As to the first point: the declaration alleges, and the replication and surrejoinder reiterate the allegation, that "this was the proper money of the United States, received by the defendant to the use of the United States," and the demurrer on the part of the defendant admitted the same. If the money of the United States is advanced by one agent of the government to another, this is *prima facie*, by necessary implication, an advance to the use of the government. In the case before the court, by the terms of the receipt given by the defendant, this is shown; as the receipt acknowledges the money to have been paid by James Morrison, "Deputy Quartermaster-General of the United States," to Thomas Buford, "Deputy-Commissary General;" and promises to account for the same. To whom was he to account but to "the Deputy Quartermaster-General," the agent of the United States. The money was received by the defendant as an officer of the United States from Morrison as an officer, and was therefore received to the use of the United States.

Under the provisions of the Act of Congress of 20th March, 1812, it was the duty of the Commissary-General to account to the Quartermaster-General, and thus the obligations of duty and those assumed by the receipt were the same. The transaction was official in its character, and was, therefore, one in which the rights of the United States were in full operation. Had Buford, in his accounts as an officer, in the settlement of those accounts with the United States given, credit for this sum, he would have been discharged from all liability to Morrison for the amount.

If the claim of the United States is to rest on the receipt given to Morrison and the assignment made of it under the Act of Congress, it was contended that the law which authorized the transfer gave to the receipt an assignable character, and authorized the United States to sue upon it in this form.

*The treasury settlement was evidence **[*22]** against the defendant, as he was within the objects of the provisions of the act. (*Walton v. The United States*, 9 Wheaton, 651.) In every case of "delinquency" in an officer, or anyone accountable to the United States, the settlement is evidence; and the privity or consent of the debtor is not required to give it validity.

The statute of limitations of Kentucky is not a bar to the suit of the United States. (*The United States v. Hour*, 2 Mass. Rep., 311.)

If the claim of the United States was under the assignment only, as the receipt is a promise "to account when called upon;" until called upon there was no cause of action, and the promise was not broken until the defendant was called on.

The court should have admitted the replication to be withdrawn, and the agreement between Buford and Morrison was a good answer to the plea of the statute of limitations.

Although the rule is admitted that error does not lie for matters in the discretion of a court, yet exceptions to this rule exist, and this is a case for an exception. (*Manderville v. Wilson*, 5 Cranch, 15.) The plaintiffs had no knowledge of the agreement which they desired to give in evidence until after the demurrer to the defendant's pleas; and he desired to make this a distinct matter in reply to allegation that the claim was barred by the statute of limitations. (Cited, *Young v. The Commonwealth*, 6 Binney's Reports, 88; *Marine Insurance Company v. Hodgson*, 6 Cranch's Rep., 206.)

The court having stated the reasons for the refusal of the motion of the plaintiff, they may therefore be examined; and when examined they will be found to be erroneous, and may be assigned as error. It was error to refuse the motion, because the plaintiffs were thus excluded from the benefit and legal operation of the evidence; and having the construction of the evidence presented for the decision of this court, if it should have been necessary. Upon a fair examination of the state of the **[*23]** pleadings, the plaintiffs' claim should have been allowed.

The agreement was a good bar to the statute. Its object was to prevent the operation of the statute. By it Morrison agreed not to bring suit before a day named, and Buford agreed that if suit should be brought thereafter, the statute should not be a bar.

In England the courts proceed on the principle that the bar created by the statute rests "on the presumption of payment," and whatever repels the presumption takes the case out of its operation. (2 Stark on Ev., 892.) The agreement between Morrison and Buford does this effectually. It admits the debt to have existed; it provides that time shall be allowed to show payment, and it implies a promise of payment on the condition of forbearance.

Mr. Wickliffe and *Mr. Ogden*, for the defendant, argued, that the liability of the defendant upon the receipt, was a private, and not a public responsibility; although the official description of the parties was used, it did not therefore become an act of an official character. The Deputy Quartermaster-General had no right to advance or pay the money of the United States to the Deputy Commissary. The officers were in different spheres, each accountable to their government, and not to each other. This is declared by the provisions of the fifth section of the Act of Congress of 1812.

Such were the views of the accounting officers of the treasury upon this subject, and therefore they considered the advance made by Morrison to Buford illegal. A special act of Congress was necessary to authorize the credit and to make the charge against Buford legal in the Treasury Department. It was legal from the date of that act, and not before. This was therefore a transaction between two officers of the government, unconnected in their official duties, and the United States did not necessarily derive from the same a right of action against the receiver of the money.

The provisions of the Acts of Congress authorizing treasury settlements and making them evidence, did not apply to such a case. These laws comprehended cases of disbursing officers liable to account to the United States; and the **24*** certificate of the Treasury Department could be controverted by the defendant, and he had a right to do so by the usual practice and forms of pleading.

The sixth, seventh, and eighth pleas are good, if the defendant was not indebted to the United States. It is admitted that the statute of limitations does not run against the United States, but as between Morrison and Buford it did run; and when the assignment of the claim on the receipt was made the statute had attached, and the United States were in no better situation than was that of Morrison before and at the time of the assignment. The suit should have been instituted by the plaintiffs, as assignees, and it would have been in that form subject to the rights of the defendant growing out of the statute of limitations, and to all the offsets to which the defendant was entitled in his particular and private relations with Morrison.

The United States, if they claimed on the receipt and assignment, and desired to show that the statute did not run, should have stated the same in their replication, by alleging a demand within five years.

The case comes up without any opinion of the court upon the point of law. There is a question of law which arises in the pleadings, they having ended in a demurrer; and the pleadings, it is submitted, present the only question in the cause. The receipt is not in question. It may show a responsibility to Peters 3.

the United States by the defendant; but as it is not in the pleadings, it cannot aid the plaintiffs' case.

The question for the decision of this court is not whether the declaration is good, but whether the pleas are good. If they are, the defendant must go without day.

The declaration whether it must be considered as general or special, is a statement of a debt due to Morrison and assigned to the United States, and the pleas allege that if the debt existed it is barred by the statute of limitations, and there is no claim. This is not met by the United States. They do not traverse this, and thus put it in issue; nor do they traverse the defendant's allegation which is made, that the transaction with Morrison was private. The replication is therefore defective.

*It is not seen how this court can look [***25** any further into the pleadings on a demurrer, and it must be conceded that the error is in the replication. The matters asserted in the pleas stand uncontradicted, and must be taken as true against the plaintiff. This is decisive of the cause. If Buford was, by the terms of the receipt, liable on demand, a demand should have been alleged.

The refusal of the court, after judgment in favor of the defendant, to allow the plaintiffs to withdraw the replication in order to set up the agreement, was in the exercise of their discretion, and not examinable in this court. To admit as ground of error the refusal of motions of this kind would be productive of frequent injustice. The record never shows why acts of the character of that complained of are done, and thus a superior court would often be found proceeding upon very different circumstances from those which existed in the case.

It is doubtful whether it is within the province of a court to interfere with such a decision as that now objected to. It is not a final judgment; and the final judgment upon the pleadings in the case is yet subsisting and must remain until reversed. The motion was to set aside the judgment, and this is not a ground of error. The rule is invariable that there should be something in the record upon which the court can exercise their judgment.

The principle recognized in this court in *Bell v. Morrison* (1 Peters, 351), in reference to the statute of limitations, establish the rule to be that an acknowledgment of the debt will not take the case out of the statute. There must be a promise to pay the debt. The courts of Kentucky have held these principles to be correct, and they support the decision of the Circuit Court upon the agreement between the defendant and Morrison.

Mr. Justice M'LEAN delivered the opinion of the court:

This suit was brought by writ of error from the Circuit Court of Kentucky to reverse a judgment obtained in that court against a claim prosecuted by the United States. The following errors are assigned by the Attorney-General:

*1. That the judgment of the Circuit [***26** Court on the defendant's demurrer to the surrejoinder of the plaintiffs growing out of the sixth, seventh, and eighth pleas of the defendant, ought to have been for the plaintiffs, and not for the defendant.

2. That the court erred in not permitting the plaintiffs to withdraw their replication to the defendant's several pleas of limitation, and to plead the special agreement on that subject between Morrison and Buford.

The declaration contains but one count, in which it is alleged that the defendant was indebted to the United States in the sum of ten thousand dollars, for so much money by him before that time had and received as an officer of the United States to their use, as by account of the said defendant with the said United States, settled, examined and adjusted, at the Treasury Department, duly certified, fully appears, &c.

The treasury statement is as follows:

Dr. Thomas Buford, late Deputy Commissary, in account with the United States,

To James Morrison, for amount received from him per receipt, 21st December, 1812, for which he is accountable, - - - - - \$10,000

The receipt referred to is in the following words:

Received of James Morrison, Deputy Quartermaster-General, ten thousand dollars, for which sum I promise to account to him when called on. Signed, Thomas Buford, Deputy Commissary of U. S. A.

Under the following Act of Congress this receipt was assigned to the United States:

"Be it enacted by the Senate and House of Representatives in Congress assembled, that the accounting officers of the Treasury Department be, and they are hereby authorized to allow James Morrison, late Deputy Quartermaster-General, in the settlement of his accounts, the sum of ten thousand dollars, which was advanced by James H. Pendell, an assistant Deputy Quartermaster-General, providing that the said James Morrison shall first assign and transfer to the United States all his right **27***] and claim to the moneys mentioned *in a certain receipt by said Thomas Buford to said James Morrison, bearing date the 21st day of December, in the year 1812, &c." The words of the assignment are: "Now, I, James Morrison, in pursuance of the provisions of said law, do hereby assign and transfer to the United States all my right and claim to the moneys mentioned in said receipt. Witness my hand and seal this 7th day of March, 1823. Signed, James Morrison."

In the sixth plea the defendant says the plaintiffs *actio non*, because he says that the account upon which the plaintiffs' suit is founded was for money alleged to have been advanced by James Morrison to the defendant on the 21st day of December, 1812, in the district aforesaid, amounting to the sum of ten thousand dollars, for which, by the terms of the transaction and agreement of said parties thereto, said Buford was to account to said Morrison for the same, and that said account and claim of said Morrison was, on the 7th day of March, 1823, under and by virtue of an Act of Congress, assigned and transferred by said Morrison to said plaintiffs, and the said defendant in fact says that said demand and cause of action aforesaid did not accrue to said Morrison within five years next before said assignment, and this he is ready to verify," &c.

The seventh plea states the receipt of the money by the defendant from Morrison, the

assignment of the receipt; and that without any other consideration, and without the consent and privity of the defendant, the account in the declaration mentioned was settled at the treasury, to which he has at no time assented; and the defendant says that he did not undertake and assume to pay the said debt in the declaration mentioned within five years next before the assignment by the said Morrison, nor then, nor at any time subsequent.

In the eighth plea the defendant says that the *assumpsit* and demand of said plaintiffs arose from and by virtue of a claim which was held by one James Morrison, for money by him advanced and loaned to said defendant, which was assigned, &c.

The attorney for the United States, in his replication, says that by anything contained in the sixth, seventh, and eighth *pleas of [**28** the defendant, they ought not to be barred, because they say that the said demand in the declaration accrued for and in consideration of ten thousand dollars of and belonging to the United States, and by the said James Morrison as an officer of the United States, advanced to the said Thomas Buford as an officer of the United States, to wit, as Deputy Commissary, then and there to the use of the United States, and by the said Thomas Buford, in his official character as aforesaid, receipted to said James Morrison in his official character as Deputy Quartermaster-General, and the said attorney brings here into court the said receipt, signed with the proper name of the said Thomas in his official character as aforesaid, the assignment, and the Act of Congress, in the sixth, seventh, and eighth pleas of the defendant mentioned, duly certified, &c., which sum of money is the same as referred to in the above pleas, &c.

To this replication there is a rejoinder by the defendant asserting that the above sum of money was received upon an individual transaction, &c. The attorney for the United States, in his surrejoinder, says that the said money demanded by the declaration and expressed in said receipt and assignment in the sixth, seventh, and eighth pleas of the defendant, was the proper money of the United States, lent and advanced by the said Quartermaster-General to the said Thomas Buford as Deputy Commissary, and to the use of the said United States, &c.

To this the defendant demurs, which presents for consideration the sufficiency of the sixth, seventh, and eighth pleas of the defendant.

In behalf of the government it is contended, 1. That a good cause of action by the United States against Buford existed prior to the assignment.

2. That the treasury settlement gave a right of action, and also the assignment.

3. If the sum received by Buford from Morrison was public money, whether it was received in an official or private capacity, there can be no doubt that Buford received it to the use of the United States, and that they may maintain an action against him.

*The United States had a right to treat [**29** Morrison as their agent in this transaction by making Buford their debtor, and to an action brought against him for money had and received the statute of limitations would be no

bar. It is therefore important to consider on what ground the plaintiffs seek to recover in this case.

Is the declaration general or special? It contains only one count, and that sets out the cause of action arising from a settled account at the Treasury Department. The declaration must therefore be considered as special, and if the plaintiffs recover, they must recover upon the ground stated.

The treasury statement, the receipt and the assignment of it, are made a part of the declaration.

An account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated.

But where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made.

The account against Buford is founded on the receipt, and was made out on the day it was assigned by Morrison, under the special Act of Congress. Until this time Morrison was charged on the books of the treasury with this sum of ten thousand dollars, and there can be no doubt that he and his sureties were liable for it.

As the advance of this sum to Buford was not made in pursuance of any authority, the treasury officers had no right to release Morrison from liability by crediting his account with so much money paid to Buford.

The declaration being special upon the treasury account, *and the account being raised upon the assignment of the receipt, the claim of the United States to the sum in controversy as presented cannot be considered as existing prior to the assignment.

It is objected that, under this assignment, the United States may claim as assignees in equity, but not at law. This objection seems not to be well founded. In England any instrument or claim, though not negotiable, may be assigned to the king, who can sue on it in his own name. No valid objection is perceived against giving the same effect to an assignment to the government in this country. But the special Act under which this assignment was made puts this question at rest. This Act authorizes the assignment; consequently, when made, the legal right is vested in the government, and authorizes a charge against Buford on the books of the treasury.

As more than five years had elapsed from the date of the receipt to the assignment, the statute of limitations will bar a recovery of this claim unless the transfer of it to the United States has changed its character, or the terms of the receipt prevent the statute from operating, or, by some promise or agreement between

Morrison and Buford, the statute has been waived.

It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed as to exempt it from the operation of the statute of limitations after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run.

But it is contended that as the receipt promises to account for the sum of ten thousand dollars when called on, it was necessary for the defendant to show that no demand had been made, or that five years had elapsed subsequent thereto, and before the assignment.

In his plea the defendant states that the demand and cause of action did not accrue within five years next before said assignment, &c. If a demand had been made so as to prevent the effect of the statute, it was incumbent on the plaintiffs to plead over and allege [*31] the fact. They have not done it, and this allegation of the plea stands uncontradicted, and is consequently admitted to be true.

The defendant in his plea sets out that the loan of the money was obtained from Morrison, to whom the payment was to be made, and represents the transaction as a private one. In the replication the plaintiffs do not traverse this fact, but allege that the money belonged to the United States, and was advanced by Morrison as an officer of the United States to the defendant as an officer.

On the sufficiency of the plea, and the insufficiency of the replication, one of the counsel in the defense rests the cause.

In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.

In the case under consideration, it was material in the defense to show that the loan of this money was a private transaction, and such is the statement of the plea substantially. This fact should have been traversed in the replication. It was not done, and consequently the replication is bad on demurrer.

The writing set out in the bill of exceptions, it is insisted, shows a waiver of the statute by Buford. This writing was produced after the decision of the court was given on the demurrer, and leave was then asked to withdraw the replication to the plea of the statute of limitations for the purpose of pleading this covenant, of which, it was alleged that the attorney of the United States had no knowledge until after the decision on the demurrer. The court overruled the motion upon the ground that the writing would not be an avoidance of the statute, but afford only a substantive cause of action for a breach of its conditions.

The court, it is contended, in refusing leave to amend, decided the effect of this covenant, and that they erred in their construction of it.

*This court has repeatedly decided that [*32] the exercise of the discretion of the court below, in refusing or granting amendments of pleadings

or motions for new trials, affords no ground for a writ of error. In overruling the motion for leave to withdraw the replication and file a new one, the court exercised its discretion, and the reason assigned as influencing that discretion cannot affect the decision.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, and was argued by counsel; on consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed.

Criticised—13 How., 483, 485.

Cited—8 Pet., 381; 10 How., 132; 13 How., 483, 485; 17 How., 440, 441; 1 Wall., 598; 11 Wall., 676; 8 Otto, 488; 12 Otto, 554; McAl., 248.

33*] *ALEXANDER GORDON ET AL.,

v.

FRANCIS B. OGDEN.

Jurisdiction—amount in dispute—writ of error.

The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum.

The jurisdiction of this court depends on the sum or value in dispute between the parties, as the case stands upon the writ of error in this court; not on that which was in dispute in the Circuit Court. [34]

If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered should the judgment for a smaller sum be reversed; and, consequently, the whole sum claimed is still in dispute. [34]

But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court, and, consequently, the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. [34]

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount.*

Under sec. 22 of the Judiciary Act of 1789, the matter in dispute must be money, or some right, the value of which can be calculated in money, to bring it within the appellate jurisdiction of the Supreme Court. *DeKraft v. Barney*, 2 Black., 704; *Lee v. Lee*, 8 Pet., 44; *Carter v. Cutting*, 8 Cranch, 251.

Controversy as to guardianship or custody of children is not within the section. *Ritchie v. Manro*, 2 Pet., 243; *Barry v. Mercein*, 5 How., 103.

The amount of the judgment is not material under the 25th sec. of the Judiciary Act, which authorizes a review of decisions in the State courts, against rights claimed under laws or treaties of the United States. *Buel v. Van Ness*, 8 Wheat., 312.

Nor on a question of personal freedom, the judgment of the court below being against such claims. *Lee v. Lee*, 8 Pet., 44.

Whatever may have been the amount claimed by the plaintiff in the court below, if the judgment in his favor be less than two thousand dollars, and the writ of error is sued out by the defendant below, the court has no jurisdiction; but if the writ of error in such case is brought by the plaintiff below, provided the amount claimed in his declaration exceeds two thousand dollars, the court has jurisdiction; because, should the judgment be reversed, he may still recover what he claims. *Gordon v. Ogden*, *supra*; *Smith v. Honey*, 3 Pet., 469; *Knapp v. Banks*, 2 How., 73; *Grant v. McKee*, 1 Pet., 248; *Scott v. Lunt*, 6 Pet., 349.

In action on money demand where the general issue is pleaded, the matter in dispute is the debt claimed in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion. *Lee v. Watson*, 1 Wall., 337; *Shacker v. Hartford Fire Ins. Co.*, 3 Otto, 241.

Where the declaration claimed one thousand dol-

WRIT of error to the Circuit Court for the District of Louisiana.

Mr. Ogden moved to dismiss the writ of error in this case, on the ground that the court had not jurisdiction of the cause, the sum in controversy not amounting to two thousand dollars, the amount for which a writ of error is allowed. He stated that the action was instituted for the violation of a patent, and the amount of the recovery in damages was four hundred dollars, by the verdict of the jury. If, under the provision of the patent law, the damages are to be trebled, it will not amount to a sum authorizing the writ of error.

Although the damages laid in the declaration are two thousand six hundred dollars, yet, after verdict, as the writ of error is taken by the defendant below, the only matter in dispute here is the amount of the verdict, or at most, treble that sum, being twelve hundred dollars. If the sum stated in the declaration shall be allowed to ascertain the amount in dispute in every case of tort or of claims of uncertain damages, the plaintiff, who might insert any sum in his declaration, could secure the right to a writ of error to this court.

Mr. Cox, for the plaintiff in error, the defendant below, *on the authority of *Wilson v. Daniel* (3 Dall. Rep., 401; 1 Condensed Reports, 185), contended that the matter in dispute originally determined the jurisdiction; and in this case the sum stated in the declaration ascertains the amount. He also cited *Peyton v. Robertson* (9 Wheaton, 527); *Cooke v. Woodrow* (5 Cranch, 14).

Mr. Chief Justice MARSHALL delivered the opinion of the court:

A motion had been made to dismiss this writ of error because the court has no jurisdiction over it. The plaintiff below claimed more than

lars, and the plea alleged a set-off of four thousand, and judgment might be for the excess: Held, that the sum of three thousand and not one thousand was the amount in controversy, and consequently that the Supreme court had appellate jurisdiction. *Ryan v. Bendly*, 1 Wall., 66.

Exceptions as to part only will not prevent jurisdiction. *United States v. McDaniel*, 6 Pet., 634; *The Same v. The Same*, 7 Pet., 1. Nor apportionment of recovery. *Shields v. Thomas*, 17 How., 3; *Rich v. Lambert*, 12 How., 352; *Stratton v. Jarvis*, 8 Pet., 8; *Spear v. Place*, 11 How., 525; unless the rights of each party united in the action are separate and distinct. *Clifton v. Sheldon*, 23 How., 481; *Rogers v. the St. Charles*, 19 How., 108; *Stratton v. Jarvis*, 8 Pet., 4; *The Rio Grande*, 19 Wall., 178; *Terry v. Hatch*, 3 Otto, 44.

Interest cannot be added to give jurisdiction unless claimed as damages. *Udall v. The Ohio*, 17 How., 17.

Where the demand is not for money and the nature of the action does not require the value of the thing demanded to be stated in the complaint, the value is allowed to be given in evidence in either court. *Ex-parte Bradstreet*, 7 Pet., 634; *Grant v. McKee*, 1 Pet., 248.

The value may be shown by an appraisement by order of the court. *United States v. The Union*, 4 Cranch, 216; or by an admission, by the parties, of the value. *Olwin v. Alexander*, 6 Pet., 143.

The value as stated in the proceedings below, cannot be enhanced in the court above by affidavits, in order to give jurisdiction. *Richmond v. City of Milwaukee*, 21 How., 391.

The penalty in an injunction bond, in the court below cannot be referred to, to give jurisdiction. *Brown v. Shannon*, 20 How., 55.

Time will be given by the court to procure affidavits as to value of matter in dispute. *Rush v. Parker*, 5 Cranch, 287.

two thousand dollars in his declaration, but obtained a judgment for a less sum. The defendant below has sued out a writ of error, and contends now that the matter in dispute is not determined by the judgment, but by the sum claimed in the declaration.

This court has jurisdiction over final judgments and decrees of the Circuit Court where the matter in dispute exceeds the sum or value of two thousand dollars. The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the Circuit Court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. The counsel for the plaintiff in error relies on the case of *Wilson v. Daniel* (3 Dall. 401). That case, it is admitted, is in point. It turns on the principle that the jurisdiction of this court depends on the sum which was in dispute before the judgment was rendered in the Circuit Court. Although that case was decided by a divided court, and although we think, upon the true construction of the twenty-second section of the Judicial Act, the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error, we should be much inclined to adhere to the decision in *Wilson v. Daniel*, had not a contrary practice since prevailed. In *Cooke v.*

Woodrow *(5 Cranch, 13), this court said, [*35 "if the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute." This, however, was said in a case in which the defendant below was plaintiff in error, and in which the judgment was a sufficient sum to give jurisdiction.

The case of *Wise and Lynn v. The Columbian Turnpike Company* (7 Cranch, 276) was dismissed because the sum for which judgment was rendered in the Circuit Court was not sufficient to give jurisdiction, although the claim before the commissioners of the road, which was the cause of action and the matter in dispute in the Circuit Court, was sufficient. The reporter adds that all the judges were present.

Since this decision we do not recollect that the question has been ever made. The silent practice of the court has conformed to it. The reason of the limitation is that the expense of litigation in this court ought not to be incurred unless the matter in dispute exceeds two thousand dollars. This reason applies only to the matter in dispute between the parties in this court.

We are all of opinion that the writ of error be dismissed, the court having no jurisdiction of the cause.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of East Louisiana, and was argued by counsel; on consideration whereof, and of the motion made by *Mr. Ogden* in this cause on a prior day of this term, to wit, on Thursday, the 28th of January of the present term of this court, to dismiss this writ of error for want of jurisdiction, the amount in controversy not exceeding the sum of two thousand dollars; it is ordered and adjudged by this court that the writ of

But not after a decision of the court as to value. *United States v. The Union*, 4 Cranch, 216.

A suit for account involving over \$2,000: Held, within the appellate jurisdiction. *McCormack v. Gray*, 13 How., 26.

The sum due on a bond, and not the penalty, determines the jurisdiction. *United States v. McDowell*, 4 Cranch, 316.

But where the action is for the penalty, the amount of that is the criterion. *Postmaster-General v. Cross*, 4 Wash. C. C., 326.

In foreclosure, the amount claimed as due determines the question of jurisdiction. *Bank of Alexandria v. Hooff*, 7 Pet., 168; *Sewall v. Chamberlain*, 5 How., 6.

On injunction against execution, the amount claimed in the execution, and not the value of the property levied on, is the criterion of jurisdiction. *Ross v. Prentice*, 3 How., 771.

In bill for specific performance, see as to amount, *Brown v. Shannon*, 20 How., 55. In replevin, see *Peyton v. Robertson*, 9 Wheat., 527; as to goods seized for violation of revenue laws, see *United States v. Eighty-four boxes of Sugar*, 7 Pet., 453. In trover, see *Cooke v. Woodrow*, 5 Cranch, 13.

Where the libellant recovered in the District Court five hundred dollars, and upon appeal the decree was reversed by the Circuit Court, upon appeal to the Supreme Court the appeal was dismissed, the amount in controversy being but five hundred dollars. *The D. R. Martin*, 1 Otto, 365.

The amount of the matter in dispute requisite to give the Supreme Court of the United States jurisdiction was increased by the Act of Feb. 16, 1875, ch. 77, s. 318, Stat. at L., 317, from a sum exceeding two thousand, to a sum or value exceeding five thousand dollars.

The Act of 1875 increasing the jurisdictional amount required to warrant an appeal to the Supreme Court, is in

premise Court, to a sum exceeding five thousand dollars, makes no difference in the rule that neither interest nor costs upon the judgment below can enter into the computation. When the judgment was for five thousand dollars and costs of suit, it was held that a writ of error would not lie; for the amount did not exceed five thousand dollars. *Western Union Tel. Co. v. Rogers*, 3 Otto, 565.

In actions for money, the amount of the judgment below is, presumably, the criterion for determining the jurisdiction of the Supreme Court, and unless it exceeds \$5,000, an appeal does not lie. *Troy v. Evans*, 97 U. S.; 7 Otto, 1.

"Whenever, by the laws now in force, it is required that the matter in dispute shall exceed the sum or value of two thousand dollars, exclusive of costs, in order that the judgments and decrees of the circuit courts of the United States may be re-examined in the Supreme Court, such judgments and decrees hereafter rendered shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." Act of Feb. 16, 1875; 18 Stat. at L., 315; Supplement to the Rev. Stat. of U. S., Vol. I., p. 13, sec. 3.

All cases arising under the provisions of the "Act to protect all citizens in their civil and legal rights," passed March 1, 1875, in the courts of the United States, are reviewable by the Supreme Court of the U. S. without regard to the sum in controversy. 1 Supp. to Rev. Stat. of U. S., 149, sec. 5; 18 Stat. at L., 335.

The judgments and decree of the Supreme Court of the District of Columbia, may be reviewed by the Supreme Court of the U. S. where the matter in dispute, exclusive of costs, exceeds \$2,500. Act of Feb. 25, 1879; 20 Stat. L., 320; 1 Supp. to Rev. S. of U. S., 419, sec. 4.

error in this cause be, and the same is hereby dismissed for want of jurisdiction, on the ground that the sum in controversy does not exceed the sum of two thousand dollars, and the same is dismissed accordingly.

36*] *ANNA MARIA THORNTON, Executrix of WILLIAM THORNTON, Plaintiff in Error,

THE BANK OF WASHINGTON.

Demurrer to evidence—its effect—usury.

The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is therefore bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favor of the other party. And if upon any view of the facts the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him. [40]

The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has been long settled and is not now open for controversy. [40]

The taking of interest for sixty-four days on a note is not usury, if the note given for sixty days according to the custom and usage in the banks at Washington was not due and payable until the sixty-fourth day. In the case of *Renner v. The Bank of Columbia* (9 Wheat., 581), it was expressly held that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default. [40]

Where it was the practice of the party who had a sixty-day note discounted at The Bank of Washington to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the District of Columbia, such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the meantime.

ERROR to the Circuit Court of the County at Washington in the District of Columbia. This cause was brought before the court to reverse the judgment of the Circuit Court on a demurrer to the evidence offered by the defendants in error, the plaintiffs below, to sustain a claim on Mr. Thornton as indorser on a promissory note discounted at The Bank of Washington for the benefit of one Bailey, the maker of the note.

The facts of the case are stated in the opinion of the court, delivered by Mr. Justice STORY.

37*] *Mr. C. C. Lee and Mr. Jones, for the plaintiff in error, contended that the evidence offered by the plaintiffs below proved that usury had been taken on the note, and by the statute of usury in Maryland the note was declared void. If usury had been taken, the judgment of the Circuit Court must therefore be reversed.

The loan was made on a note payable in sixty days, which, with the days of grace, made

it a loan for sixty-three days, and the bank had received the interest in advance by way of discount for sixty-four days.

The legislation of all mankind has been against usury; and the legislation of Maryland has been desirous and vigilant to suppress it. The principle in all courts acting under these laws has been, that if usury was found to have been taken, the wit of man would not evade the statute.

The transactions between the bank and the drawer of the note are admitted. It was a loan of money, and six renewals of the note took place in the year, and therefore the interest for six days was illegally taken. The series of loans are to be considered as one transaction. The notes were given for the accommodation of the drawer; and their renewals were expected, and were considered by the borrower and the bank as a part of the contract. The succeeding note was only substituted for that which had preceded it in order to enable the bank to charge and receive the interest, by way of discount, every sixty-three days. Every security was therefore tainted with the usury of the whole dealing. This position is fully maintained by the case of *Cuthbert v. Hayley* (8 T. R., 390). The law of Maryland relative to usury and that of England is the same, as was seen by this court in the case of *Gaither v. The Bank of Georgetown* (1 Peters, 37. Cited, also, Marshall, 349; 5 Taunt., 780; 7 Com. Dig., Usury, 627; 3 T. R., 530.)

The taking of interest by way of discount was a device which was originally, and long continued to be, considered a violation of the statute. (*Barnes v. Worledge*, Cro. James, 25; Comyn on Usury, 82; Noy, 171; 1 Bulstrode, 20.) These cases are confirmed in *Marsh v. Martindale* (3 Bos. & Pull., 154), and [*38] fully establish the principle that receiving interest beforehand is usury. (Comyn on Usury, 90.)

It is admitted that the practice of bankers to take "discount" is now allowed; but this is upon principles which do not authorize the practice which prevails with the defendants in error. As late as 14 George II., 7 Mod., 353, it was held by Mr. Chief Justice Wills that "otherwise the force of the statute would be taken away." The practice is since, however, considered legal for bankers to take interest in advance as discount. The allowance of this practice, upon the principles by which it is protected, is not evidence that the general principle of the law are altered. The expenses of postage, remittance and commission, are considered as paid by this advance. (*Auriol v. Thomas*, 2 T. R., 52; 1 Bos. & Pull., 144; Comyn on Usury, 128.)

That the principles of the law as originally established are not altered, cited *Peake's Nisi Prius Cases*, 200; Comyn, 125; 4 Taunt., 810; *Brooke qui tam v. Middleton*, 1 Camp., 445; Comyn, 132.

Banks are allowed to deduct interest, and, *ex vi termini*, discount. (*Fleekner v. The Bank of the United States*, 8 Wheat., 354.) But this does not allow the deduction of a greater amount than the interest for the actual advance. The bill of exceptions presents the custom of the bank as a justification of the proceeding. Custom is no protection. (*Floyer v. Edwards*,

Peters 3

1 Cowp., 112; *Dunham v. Gould*, 16 Johns., 367.)

It was argued that the practice of the bank to give notice of the dishonor of the bill on the fourth day after the sixty days does not relieve the case from difficulty; as this could only be done by proof that there was a forbearance until the fourth day, the very reverse of which is established by the evidence; nor will the practice of the bank to protest on the fourth day, and not before, assist the claim. The universal commercial rule is, that on the third day of grace the note is due; and on non-payment before or upon that day, the money may be demanded and suit brought.

The question in this case has been decided in New York. (*Bank of Utica v. Wagner*, 2 Cow. 39*] en's Rep., 712.) If more than *legal interest is reserved or taken, it is usury, whether by agreement or not. (3 Bigelow's Dig., 796; 4 Mass., 156; 15 Mass., 96.)

Mr. Lear and *Mr. Webster*, for the defendant in error, contended that the Maryland law of usury, passed in 1704, similar to the statute of Ann, had no application to the case. It was passed before the establishment of banks. The language is prohibitory as to any "person," and this may include "corporations sole," but not corporations aggregate. It is a criminal law, and a strict construction may be insisted upon. The insertion of a prohibition against taking more than six per centum in the charters of banks, is a proof that the general terms of the usury laws are not considered as extending to such corporations. It would not be necessary if this were the sound construction of the usury law.

In this case the whole question is whether there was an agreement for forbearance for the loan of money on which more than legal interest has been taken. It is agreed that, in England, discount or interest in advance is not usurious. The facts of the case do not show that the borrower had the money for less than sixty-four days. On the sixty-fourth day, according to the custom of the bank, the note would be protested. It is admitted that a custom of trade will not take a case out of this statute, but it will go a great way to explain a transaction. (2 T. R., 52; Cowp. Rep., 114; 2 W. Black., 792; 1 Bos. & Pull., 144; 3 Bos. & Pull., 154.)

Every new note was a separate transaction. At the end of each loan the loan was returned; and whether by a new negotiation of another note or by the repayment of the money from other means, does not connect the transactions or make them the same.

This is a demurrer to evidence, and everything is to be taken in favor of the defendant in error, the plaintiff in error having demurred in the Circuit Court. It is enough for this court if a jury could have presumed from the facts that the loan was for sixty-four days. The bank maintains that the borrower has had or might have had the money for that time, and interest may be deducted for that time. 40*] The evidence *authorizes this conclusion. The jury might have drawn the conclusion that no unlawful dealing was intended. The transaction was not considered as a permanent loan. The bank make no such engagement; and if the borrower of money thinks proper, Peters 3.

for the purposes of convenience or certainty, to obtain a loan on another note before the note already discounted is due, the bank have nothing to do with the purposes or object for which the second loan is asked. There is no necessary connection between the transactions. Both notes may run at the same time.

Mr. Justice Story, after stating the facts, delivered the opinion of the court:

This case comes before us on a demurrer to the evidence in the court below, taken by the original defendant, now plaintiff in error; and this, in our judgment, is very important to be considered in the determination of the case. The party who demurs to evidence seeks thereby to withdraw the consideration of the facts from the jury, and is therefore bound to admit not only the truth of the evidence as given but every fact which that evidence may legally conduce to prove in favor of the other party. And if upon any view of the facts the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

The defense set up against this action by the defendant is that the transaction is usurious within the meaning of the statute of Maryland against usury, which (it is admitted) is substantially like the English statute on the same subject. To sustain the defense, it has been urged that the receipts of the interest in advance for sixty-four days upon the discount of the note is usury. But we are all of opinion that the taking of interest in advance upon the discount of notes in the usual course of business by a bank, is not usury. The doctrine has been long settled, and is not now open for controversy. The taking of the interest for sixty-four days is not usury, if the note, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. That custom was *complete- [*41 ly established, not only by the evidence in the present case, but by that in *Renner v. The Bank of Columbia* (9 Wheat. Rep., 581), which is referred to in this record. In the latter case it was expressly held by the court that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default.

Then, again, it is argued that here there have been successive renewals of the note, or rather successive notes given by way of renewal of the original note, and that these renewals have been on the sixty-third day, and the money credited on that day on account of the existing note; and thus in effect sixty-four days' interest has been taken upon loans for sixty-three days only. If there had been proved any contract between the bank and the party for whose benefit the original discount was made, that the original note should be so renewed from time to time, and the extra day's interest thereupon be taken by the bank; so that the bank would have been bound to make the renewal, and the party would have been bound to renew and not to pay the note at maturity; there would have been strong grounds on which to rest the argument. But the difficulty is that no such contract is to be found in the evidence; and the party demurring to the evidence asks the court to infer it from facts which do not necessarily

import it, and may well admit of an explanation favorable to the other party. It is quite consistent with every fact in the case that the original discount may have been made without any such contract; and that the application for the renewals may have been made from time to time by the party interested for his own accommodation, and without any previous understanding or co-operation on the part of the bank. For aught that appears, he was at liberty to have paid the original note, or any one of those afterwards given, at the time when it became due. If of choice he had paid it on the sixty-third day instead of the sixty-fourth, there is no pretense to say that it would have been a case of usury. If, instead of payment, he offers a new note for discount for the purpose of applying the proceeds to the payment or withdrawal of the former note under the 42*] like circumstances, the case is not substantially varied. Each note is considered as a distinct substantive transaction. If no more than the legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it becomes due does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount that the party shall not have the use or benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the meantime. Such a contract being illegal is not to be presumed; it must be established in evidence. The argument requires the court to infer such illegality from circumstances in their own nature, equivocal, and susceptible of different interpretations; and this in favor of the party demurring to the evidence. Even if the jury might have made such an inference from the evidence, we think it ought not to be made by the court; for the rule of law requires the court in such a case to make every inference and presumption in favor of the other party which the jury might legally deduce from the evidence; nor is this any hardship upon the party demurring to the evidence, for it is his own choice to withdraw from the jury, to whom it properly belongs, the consideration of the facts which he relies on as presumptive of usury.

Upon the other point suggested in the cause, whether banks are within the statute of usury, we entertain no doubt that they are. But, for the reasons already stated, we are of opinion that the judgment below ought to be affirmed.

Cited—3 Pet., 569; 7 Pet., 459; 15 How., 208; 17 How., 22; 4 Wall., 164; 16 Wall., 344; 5 Otto, 695; Abb. Adm., 571.

43*] *THOMAS WILLISON,
Plaintiff in Error,

v.

ANDERSON WATKINS, Defendant in Error.

Landlord and tenant—estoppel—disclaimer of landlord's title—adverse claim by tenant in right of third party—tortious possession—landlord's right of entry—successor of tenant—ejectment—tenants in common—statute of limitations—case of Bell v. Morrison.

It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time or demand of possession. [47]

The same principle applies to mortgagee and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. [48]

In no instance has the principle of law which protects the relations between landlord and tenant been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. [48]

When a tenant disclaims to hold under his lease he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. [49]

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession. [49]

A mortgagee, or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord with all its legal consequences, and is as much estopped from denying the tenancy. [50]

If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we would give our sanction to such a doctrine; and this is not the case upon authorities. [51]

*The relation between tenants in common is in [*44 principle very similar to that between lessor and lessee. The possession of one is the possession of the other, while ever the tenure is acknowledged. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run: so of a trustee, so of a mortgagee. [51]

In relation to the limitations of actions for the recovery of real property, the court think it proper to apply the remarks of the learned judge who delivered the opinion of the court in the case of *Bell v. Morrison* 1 (Peters, 360), and to say the statute ought to receive such a construction as will effectuate the beneficial objects which it intended

NOTE.—Tenant, or one holding under him, cannot dispute the title of his landlord. Disclaimer.

The possession of the tenant may become adverse, by the forfeiture of his term, so that the statute of limitations will begin to run in his favor, yet the landlord may maintain ejectment against him any time before the period prescribed by the statute has expired, without any other evidence of title than the proof of the tenancy. The tenant cannot, without surrendering possession, contest the landlord's right or title, until the lapse of the

to accomplish—the security of titles and the quieting of possessions. That which has been given to it in the present case is, we think, conformable to its true spirit and intention, without impairing any principle heretofore established. [54]

ERROR to the Circuit Court of the District of South Carolina.

An action of trespass to try titles was brought in the Circuit Court of South Carolina on the 20th of April, 1822, by the defendant in error, against the plaintiff in this court, for the recovery of six hundred acres of land situated on the Savannah River. The title claimed by the plaintiff below and the evidence are fully stated in the opinion of the court.

On the trial in the Circuit Court the defendant proved that Samuel Willison, his father, had possession of the land in 1789, and cultivated it till the period of his death in 1802, from which time his widow and family possessed it until the death of his widow in 1815; and that from 1815 until this action was brought, the children retained possession by their tenants. That in the lifetime of Samuel Willison, Bordeaux, through whom the plaintiff claimed, was apprised that he claimed to hold the land by an adverse title. That the widow, in 1802, on demand made, refused to give possession to Ralph S. Phillips, who claimed the land and set up a title in herself, and was sued as a trespasser. That in 1793, Bordeaux and Willison were in treaty for the sale of this land; Bordeaux wishing to sell and Willison to purchase. The plaintiff then offered in evidence a power of attorney from Bordeaux to Willison, dated February, 1792, authorizing him to take possession of the land and sue trespassers; and that Willison was then a tenant of Bordeaux. The defendant having pleaded the statute of limitations (five years' ^{45*}adverse *possession giving a title under it) relied upon the foregoing facts. But the presiding judge overruled the plea, and instructed the jury that, when a tenancy had been proved to have once existed, the tenancy

must not only be abandoned, but possession given up, before an adverse possession can be alleged. To this decision the defendant excepted.

The defendant brought this writ of error.

In the argument of the cause, the counsel for the plaintiff in error presented for the consideration of the court other exceptions besides that upon which the judgment of the Circuit Court was reversed. The decision of the court is exclusively upon the law arising on that which is stated.

The case was argued by *Mr. Blanding* and *Mr. McDuffie* for the plaintiff in error, and by *Mr. Berrien*, Attorney-General, for the defendant.

Mr. Justice BALDWIN delivered the opinion of the court:

This was an action of trespass to try titles, brought in 1822 in the Circuit Court of the United States for the District of South Carolina, by Watkins against Willison, for a tract of land containing six hundred acres, on the Savannah River. This land was originally granted to James Parsons, who conveyed to Ralph Phillips, whose estate was confiscated by an Act of Assembly of South Carolina, and vested in five commissioners appointed by the Legislature of that State. The five commissioners acted in execution of the law, but before any conveyance was made of the land in question, one of them had died, and two of the others had ceased to act, or resigned in 1783. The two remaining commissioners in 1788, conveyed this land to Daniel Bordeaux and R. Newman, who, in the same year, executed to the treasurer of the State a bond and mortgage to secure the payment of the purchase money, which, pursuant to an Act of Assembly passed for that purpose in 1801, was transferred and delivered to Ralph S. Phillips, the son of Ralph Phillips, to be disposed of as he should think proper; and by the same law the Confiscation Act, so far as it respected

same period has legalized his own possession. *Peyton v. Stith*, 5 Pet., 485; *Woodward v. Brown*, 13 Pet., 1.

A tenant who disclaims to hold under his lease becomes a trespasser, and his possession is adverse. He cannot revoke his disclaimer and adverse claim, so as to protect himself under his lease. His act is conclusive on himself. The relation of landlord and tenant is dissolved, and each party stands upon his right. *Walden v. Bodley*, 14 Pet., 156; *Brown v. Coreoran*, 5 Cranch, C. C., 610.

A tenant who has disclaimed his landlord's title, and attorned to a third person, is not entitled to notice to quit. *Jackson v. Wheeler*, 6 John., 272; *Sharpe v. Kelly*, 5 Den., 431; *Jackson v. Vincent*, 4 Wend., 633; *Woodward v. Brown*, 13 Pet., 1.

But such tenant so disclaiming is still liable to his landlord for rent, or use and occupation. *Scott v. Hawsman*, 2 McLean, 180.

A person in possession of land, taking a lease from another who has bought and claims it, is estopped from denying the title of such other person, or showing that such person was but the trustee of the land for him. *Fleming v. Gooding*, 4 M. & Scott, 455; 10 Bing., 549; *Johnson v. Baytup*, 4 Nev. & M., 387; 3 Ad. & E., 188; *Lucas v. Brooks*, 18 Wall., 436; *Clark v. Crego*, 47 Barb., 599.

A tenant cannot controvert or dispute the title of his landlord. *Ingraham v. Baldwin*, 9 N. Y., 5 Seld., 45; *Jackson v. Whedon*, 1 E. D. Smith, N. Y., 141; 10 John., 292; 1 Cow., 575; 7 Cow., 717; 7 Wend., 401; *Sands v. Hughes*, 53 N. Y., 286; *Tompkins v. Snow*, 63 Barb., 525; *Storer v. Stiner*, 30 How. Pr., N. Y., 129; *Agan v. Young*, 1 Car. & M., 78; *Doe v. Pegge*, 1 Term R., 760; *Hall v. Butler*, 2 Per. & D., 374; 10 Ad.

& E., 204; *Jew v. Wood*, 1 Craig & P., 185; *Perry v. House*, Holt., 489.

But the tenant may show that the title of the landlord has been acquired by the tenant, or has expired or been terminated or extinguished, or been conveyed to a third person since the commencement of the tenancy. *Agar v. Young*, 1 Car. & M., 78; *Nellis v. Lathrop*, 22 Wend., 121; *Evertson v. Sawyer*, 2 Wend., 507; *Downs v. Cooper*, 1 Gale & D., 573; 2 Ad. & E. N. S., 256; *Lawrence v. Miller*, 1 Sandf. N. Y., 516; reversed, 2 N. Y., 2 Const., 245; *Doe v. Marriott*, 3 Nev. & M., 193; 5 B. & Adol., 1065; *Jackson v. Rowland*, 6 Wend., 666; *Despard v. Walbridge*, 15 N. Y., 374; *Neave v. Moss*, 1 Bing., 360; 8 Moore, 389; *Jackson v. Welden*, 3 John., 283; *Jackson v. Davis*, 5 Cow., 123; *Syburn v. Slade*, 4 Term R., 682; *Jackson v. Vincent*, 4 Wend., 633; *Jackson v. Delaney*, 13 John., 537; *Landon v. Watson*, 2 Starkie, 230; *Jones v. Clark*, 20 Johns., 51; *Bigler v. Furman*, 58 Barb., 545; *Marriott v. Edwards*, 6 Car. & P., 208; *Hilton v. Bender*, 2 Hun, N. Y., 1; *Hoag v. Hoag*, 35 N. Y., 469; *Doe v. Seaton*, 2 Crompt., M. & R., 728; *Moore v. Beaseley*, 3 Ham. Ohio., 294; *Marley v. Rogers*, 5 Yerg., 217; *Wells v. Mason*, 4 Scam. Ill., 85; or that tenant has been ousted by title paramount. *Moffat v. Strong*, 9 Bosw., N. Y., 57.

A tenant, or one coming in under him, is estopped from controverting the title of his landlord. *Doe v. Mills*, 1 Nev. & M., 25; 2 Ad. & E., 17; *Doe v. Lewis*, 6 Nev. & M., 764; 5 Ad. & E., 277; 2 Har. & W., 152; *Brooks v. Bridges*, 2 Bing. N. C., 572; 2 Scott, 803; *Doe v. Austin*, 2 M. & Scott, 107; *Marriott v. Edwards*, 6 Car. & P., 208; *Wood v. Day*, 1 Moore, 389; 7 Taunt., 646.

Ralph Phillips, was repealed. A suit was brought on this bond in the name of the treasurer **46***] of the State *in 1803, against Daniel Bordeaux, and prosecuted to final judgment against his administrators in 1817, when an execution issued, on which the land was sold and conveyed by deed from the sheriff to Anderson Watkins, the plaintiff in the Circuit Court, who claims by virtue of the sheriff's deed, and as standing in the relation of landlord to the defendant.

Samuel Willison, the father of the defendant, entered into the possession of the premises in question in 1789, and cultivated them till his death in 1802; from which time his widow and children possessed them till her death in 1815; since which time the children have retained possession by their tenants till the commencement of this suit.

In 1802 Ralph S. Phillips, who was then the assignee of the bond and mortgage, made a demand of the possession from the widow, who refused to give it up and set up a title in herself. He brought an action of trespass against her to try titles in January, 1803, in which he was nonsuited in November, 1805; and in March, 1808, he brought another action of the same nature against her, in which no proceedings were had after 1812, which, by the law and practice of South Carolina, operates as a discontinuance of the action.

In 1792 Bordeaux, the mortgageor, executed to Willison a power of attorney authorizing him to take possession of the land and sue trespassers. Willison was then a tenant of Bordeaux.

In 1793 they were in treaty for the sale of the land, Bordeaux wanting to sell and Willison to purchase. But during the lifetime of Willison, Bordeaux was apprised that he claimed to hold the land by an adverse title. The defendant exhibited no title other than what is derived from the possession of his father and the family.

The first question which arose on the trial was on the admission in evidence of the deed from the two commissioners to Bordeaux and Newman; the defendant alleging that no title passed by it because it was not signed by the other two commissioners. The Circuit Court overruled the objection; the deed was read, and this becomes the subject of the first error assigned in this court.

As the court have been unable to procure the **47***] Confiscation *Act of South Carolina, we are unwilling to express any opinion on this exception without examining its provisions, which are very imperfectly set out in the record; and as the merits of the case can be decided on another exception we do not think it necessary to postpone our judgment.

The remaining exception is that the Circuit Court erred in charging the jury that the claim of the plaintiff was not barred by the act of limitations of South Carolina, which protects a possession of five years from an adverse title.

It appears from the record that the defendant and his family have been in possession of this land for thirty-three years next before this suit was brought; but whether that possession has been adverse to the title of the plaintiff during the whole of that time, or such part of

it as will bring him within the protection of this law, becomes a very important inquiry.

The plaintiff contended at the trial that, by becoming the tenant of Bordeaux, Willison the elder and his heirs, so long as they remain in possession, are prevented from setting up any title in themselves, or denying that of Bordeaux, without first surrendering to him the possession and then bringing their suit. That the possession of the tenant being the possession of the landlord, he could do no act by which it could become adverse, so that the statute of limitations would begin to run in his favor or operate to bar his claim by any lapse of time however long.

The defendant, on the other hand, contended that from the time of the disclaimer to the tenancy by Willison, and the setting up of a title adverse to Bordeaux and with his knowledge, his possession became adverse, and that he could avail himself of the act of limitations if no suit was brought within five years thereafter.

It is an undoubted principle of law fully recognized by this court that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtained and holds possession. (7 Wheat., 535.) *He cannot change the [**48** character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time or demand of possession. The same principle applies to mortgageor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning, or to admit of a doubt. But we do not think that in any of these relations it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. Few stronger cases than this can occur, and if the plaintiff can recover without any other evidence of title than a tenancy existing thirty years before suit brought, it must be conceded that no length of time, no disclaimer of tenancy by the tenant, and no implied acquiescence of the landlord, can protect a possession originally acquired under such a tenure.

If there is any case which could clearly illustrate the sound policy of acts of repose and quieting titles and possessions by the limitation of actions, it is in this. Here was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux and was notice to him that Willison meant to hold from that time by his own title and on adverse possession. This terminated the tenancy as to him, and from that time Bordeaux had a right to eject him as a

trespasser. (Adams on Eject., 118; Bull. N. P., 96; 6 Johns. Rep., 272.)

Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.

49*] *Having thus a right to consider the lessee as a wrong-doer holding adversely, we think that under the circumstances of this case the lessor was bound so to do. It would be an anomalous possession, which as to the rights of one party was adverse and as to the other fiduciary, if after a disclaimer with the knowledge of the landlord and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease he ought to be entitled to, such as result from his known adverse possession. No injury can be done the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time.

As to the assertion of his claim, the possession is as adverse and as open to his action as one acquired originally by wrong; and we cannot assent to the proposition that the possession shall assume such character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim so as to protect himself during the unexpired term of the lease; he is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

It is on this principle alone that the plaintiff could claim to recover in this action. If there was between him and the defendant an existing tenancy at the time it was brought, he had no right of entry. The lessee cannot be a trespasser during the existence of the lease, and cannot be turned out till its termination. At the end of a definite term the lessor has his election to consider the lessee a trespasser and to enter on him by ejectment; but if he suffers him to remain in possession, he becomes a tenant at will, or from year to year, and in either case is entitled to a notice to quit before the lessor can eject him. The notice terminates the term, and thenceforth the lessee is a wrong-doer and holds at his peril. (Woodfall's Land. and Ten., 218, 220; 2 Serg. & Rawle, 49.)

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or his 50*] own, or attorns to another, his *possession then becomes a tortious one by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he also affirms the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and defendant which can protect his possession from his adversary suit, and at the same time recover on the ground of there

being a tenure so strong that he cannot set up his own adversary possession.

The plaintiff claims without showing any title in himself or any right of possession except what exists from the consequences of a tenancy, the existence of which he denies in the most solemn manner, by asserting its termination before suit brought.

The principle here asserted is not new in this court. In the case of *Blight's Lessee v. Rochester* (7 Wheat., 535, 549), the plaintiff's lessors claimed as heirs of John Dunlap; the defendant claimed by purchase from one Hunter, who professed to have purchased from Dunlap. The defendant acknowledged the title of Dunlap as the one under which he held. Dunlap had in fact no title; but the plaintiffs insisted that the defendant could not deny his title. The Chief Justice, in giving the opinion of the court, observes: If he holds under an adversary title to Dunlap, his right to contest his title is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence.

We are not aware that in applying this doctrine to the case now before the court we shall violate any settled principle of the common law.

If a different rule was established, the consequences would be very serious. A mortgagee, a direct purchaser from a *tenant, [*51 or one who buys his right at a sheriff's sale, assumes his relations to the landlord with all their legal consequences, and they are as much estopped from denying the tenancy. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we could give our sanction to such a doctrine.

An examination of the authorities on this point relieves our minds from all such apprehensions by finding our opinion supported to its full extent by judicial decisions entitled to the highest respect, and which we may safely adopt as evidence of the common law.

The case of *Horenden v. Lord Annesley* was that of a tenant who had attorned to one claiming adversely to his lessor with his knowledge. In delivering his opinion Lord Redesdale entered into a detailed view of the decisions on the application of the Act of Limitations to trusts of real and personal estate in courts of law and chancery, and to fiduciary possessions generally. On the point directly before us he observes: "That the attornment will not affect the title of the lessor so long as he has a right to consider the person holding possession as his tenant. But as he has a right to punish the acts of his tenant in disavowing the tenure by proceeding to eject him, notwithstanding his lease; if he will not proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was destroyed, and there must be a limitation to this as well as every other demand. The intention of the

Act of Limitations being to quiet the possession of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of the original lessor for the term of ninety-nine years. That would, I think, be too strong to hold on the ground of the possession being in the lessor after the tenure had been disavowed to the knowledge of the lessor."

The relation between tenants in common is, in principle, very similar to that between lessor **52*** and lessee: the possession of one is the possession of the other, while ever the tenure is acknowledged. (Cowp., 217.) But if one ousts the other or denies the tenure and receives the rents and profits to his exclusive use, his possession becomes adverse, and the Act of Limitations begins to run. (2 Scho. & Lef., 628, &c., and cases cited; 4 Serg. & Rawle, 570.) The possession of a trustee is the possession of the *cestui que trust* so long as the trust is acknowledged; but from the time of known disavowal it becomes adverse. So of a mortgagee, while he admits himself to be in as mortgagee, and therefore liable to redemption. (7 Johns. Ch., 114, &c., and cases cited.) But if the right of redemption is not foreclosed within twenty years, the statute may be pleaded; and so in every case of an equitable title, not being the case of a trustee, whose possession is consistent with the title of the claimant. (7 Johns. Ch., 122.)

After elaborately reviewing the English decisions on these and other analogous subjects, Chancellor Kent remarks: "It is easy to perceive that the doctrines here laid down are the same that govern courts of law in analogous cases, and the statute of limitations receives the same construction and application at law and in equity." (*Kane v. Bloodgood*, 7 Johns. Ch., 90, 122.) It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute does not run until the discovery of the fraud; for the title to avoid it does not arise until then; and pending the concealment of it, the statute ought not to run. But after the discovery of the fact imputed as fraud, the statute runs as in other cases; and he cites in support of this position, 1 Browne's Parliament. Cases, 455; 3 P. Wms., 143; 2 Scho. & Lef., 607, 628, 636, and the cases cited.

In the case of *Hughes v. Edwards* (9 Wheat., 490, 497), it was settled that the right of a mortgagee to redeem is barred after twenty years' possession by the mortgagee after forfeiture, no interest having been paid in the meantime, and no circumstance appearing to account for the neglect. (7 Johns. Ch., 122; 2 Sch. & Lef., 636.) The court in that case say, that in respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is that where the mortgagee **53*** has been permitted to remain in *possession the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as payment of interest, a promise to pay, an acknowledgment by the

mortgagee that the mortgage is still existing, or the like.

All these principles bear directly on the ease now before us; they are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorning to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why, then, should not the statute protect him as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagee or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action.

In doing this we do not intend to dispute the principle of any case adjudged by the Supreme Court of South Carolina. Of those which have been cited in the argument there are none which in our opinion controvert any of the principles here laid down, or profess to be founded on any local usage, common law, or construction of the statute of limitation of that State. One has been much pressed upon us, as establishing a doctrine which would support the position of the plaintiff, which deserves some notice. In the case in 1 Nott & M'Cord, 374, the court decide that where a defendant enters under a plaintiff, he shall not dispute his title while he remains in possession, and that he must first give up his possession and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South *Carolina, [**54** but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing in terms tenants in common, trustees, mortgagees and lessees, but disallowing none of the exceptions or limitations which qualify it and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay; leaving the rule in full force wherever the suit is brought within the time prescribed by law. To this extent, and this only, the decision would reach. To carry it further would be giving a more universal application than the courts of South Carolina would seem to have intended, and further than we should be warranted by the rules of law. To extend it to cases of vendor and vendee would be in direct contradiction to the solemn decision in 7 Wheat., 525.

In relation to the limitation of actions for the recovery of real property, we think it proper to apply the remarks of the learned judge who delivered the opinion of this court in the case of *Bell v. Morrison* (1 Peters, 351), and to say

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that the statute ought to receive such a construction as will effectuate the beneficent objects which it intended to accomplish—the security of titles, and the quieting of possessions. That which has been given to it in the present case, is, we think, favorable to its true spirit and intention, without impairing any legal principle heretofore established.

It is therefore the opinion of the court that the plaintiff in error has sustained his fourth exception, and that the judgment of the Circuit Court must be reversed. The cause is remanded to the Circuit Court with directions to award a *venire de novo*.

Mr. Justice JOHNSON. Had I felt myself at liberty in the court below to act upon my own impressions as to the general doctrine respecting the defense which a tenant might legally set up in ejectment brought against him by his landlord, I certainly should have left it to the jury to inquire whether the possession of Willison ever was hostile to that of Bordeaux; a **55** fact the evidence *to prove which was very trifling, as appears even in this bill of exceptions. But there were produced to me official reports of adjudged cases in that State by the courts of the last resort, which appeared fully to establish that when once a tenancy was proved, the tenant could make no defense, but must restore possession, and then alone could he avail himself of a title derived from any source whatever inconsistent with the relation of tenant. Now, it ought not to be controverted that, as to what are the laws of real estate in the respective States, the decisions of every other State in the Union, or in the universe, are worth nothing against the decisions of the State where the land lies. On such a subject we have just as much right to repeal their statutes as to overrule their decisions.

I will repeat a few extracts from one of their decisions to show that they will at least afford an apology for the opinion expressed in the bill of exceptions upon the law of South Carolina, for I placed it expressly on their decisions, not my own ideas of the general doctrine.

The case of *Wilson v. Weatherby* (1 Nott & McCord's Rep., 373), was an action to try title, just such as the present, and heard before Cheves, *Justice*, in July, 1815. The defendant offered to go into evidence to show a title in himself, to which it was objected that as he had gone into possession under the plaintiff he could not dispute his title. The objection was sustained, and a verdict given for the plaintiff. The cause was then carried up to the Appellate Court, and the judgment below sustained, that court unanimously agreeing the law to be as laid down by the judge who delivered the opinion, in these terms: "The evidence offered by the defendant was of a title acquired by him after he went into possession under the plaintiff, and before he gave up possession. If he was at any time the tenant of the plaintiff, he continues so all the time unless he had given up the possession. The attempt to evade the rule of law by going out of possession a moment and then returning into possession did not change his situation at all, and especially as he left another person in possession, so that his possession was altogether unbroken. A distinct and *bona fide* abandonment of the posses-

sion *at least was necessary to have put [***56** him in a situation to dispute the plaintiff's title. On the last ground, that the defendant was not at any time the tenant of the plaintiff, the defendant was not indeed a tenant under a lease rendering rent, but he nevertheless held under the plaintiff. This ground is founded on a misconception of the principle, which is not confined to the cases of tenants in the common acceptance of the term. These cases have only furnished examples of the application of the principle, which is, that wherever a defendant has entered into possession under the plaintiff, he shall not be permitted, while he remains in possession, to dispute the plaintiff's title. He has a right to purchase any title he pleases, but he is bound, *bona fide*, to give up possession, and to bring his action on his title and recover by the strength of his own title."

This is the leading case upon this doctrine in that State, and it is fully settled there that the wife, the executor, the heir, or the purchaser at sheriff's sale, is identified in interest with the previous possessor; as also that a statutory title is acquired by possession, under which one subsequently going out of possession may recover.

Understanding such to be the law of that State, I certainly did not hold myself bound or at liberty to inquire whether it accorded with the rules of decision in any other State. In principle, I am under the impression there is not much difference, or at least not more than that court was at large to disregard if they thought proper.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Cited—5 Pet., 440, 442, 491; 9 Pet., 417; 10 Pet., 221, 223; 12 Pet., 262, 295; 13 Pet., 4; 14 Pet., 162; 16 Pet., 54; 4 How., 296; 18 How., 488; 5 Wall., 287; 9 Wall., 601; 1 McLean, 166; 2 McLean, 396, 399; Bald., 419; 2 Curt., 210.

*THE UNITED STATES, *Appellants*, [***57** v.

ISAAC T. PRESTON, Attorney-General of Louisiana, *Appellee*.

Construction of Acts of Congress concerning importation of slaves.

The offense against the law of the United States, under the seventh section of the Act of Congress passed the 2d of March, 1807, entitled, "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st of January, 1808," is not that of importing or bringing into the United States persons of color with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor

of the State or persons appointed by the respective States to receive the same. [65]

The *Josefa Segunda*, having persons of color on board of her, was, on the 11th of February, 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libeled in the District Court of the United States of Louisiana, under the Act of Congress of the 2d of March, 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of color as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law.

By the tenth section of the Act of 30th of April 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of color found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the Act of 1807, no power having been given to dispose of them otherwise than to appoint some one to receive them. The seventh section of the Act of 1818 confirms no other sales previously or subsequently made under the State laws but those for illegal importation, and does not comprise the case of a condemnation under the seventh section.

The final condemnation of the persons on board the *Josefa Segunda* took place in this court on the 13th of March, 1820, after Congress had passed the Act of the 3d of March, 1819, entitled, "An Act in addition to an Act prohibiting the slave trade," by the provisions of which persons of color brought in under any of the acts prohibiting traffic in slaves, were to be delivered to the President of the United States to be sent to Africa. It could not affect them.

In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. If, therefore, the persons of color who were on board the *Josefa Segunda* when captured had been specifically before the court on the 13th of March, 1820, they must have been delivered up to the President of the United States to be sent to Africa, under the provisions of the Act of the 3d of March, 1819, and therefore there is no *claim to the proceeds of their sale under the law of Louisiana which appropriated the same. The court do not mean to intimate that the United States are entitled to the money, for they had no power to sell the persons of color. [65]

A PPEAL from the District Court for the Eastern District of Louisiana.

The brig *Josefa Segunda*, a Spanish vessel, proceeding with a cargo of negroes from the coast of Africa to the Island of Cuba, was captured on the 11th day of February, 1818, off St. Domingo, by a regularly commissioned Venezuelan privateer, and on the 24th of the following April she was seized in the River Mississippi by custom-house officers of the United States, carried to New Orleans, and there the vessel and negroes were libeled at the suit of the United States in the District Court of the United States for the Louisiana District.

The libel alleged that the negroes were unlawfully brought into the United States with an intent to dispose of them as slaves, contrary to the provisions of the Act of Congress passed March 2d, 1807, entitled, "An Act to prohibit the importation of slaves," &c. (2 Story's Laws U. S., 1050.) The libel was filed on the 29th of April, 1818, and a claim was put in by the Spanish owners, alleging an unlawful capture of the brig; that the brig put into the Balize in distress, and without any intention to infringe or violate a law of the United States. The District Court condemned the brig and effects found on board to the United States, and the claimants appealed to this court.

At February Term, 1820, of this court, the sentence of the District Court of Louisiana was affirmed; the court having been of opinion that "the alleged unlawful importation could not be excused on the plea of distress;" and that "where a capture is made by a regularly commissioned captor, he acquires a title to the captured property which can only be divested by recapture, or by the sentence of a competent tribunal; and the captured property is subject to capture for a violation by the captors, of the revenue or other municipal laws of the neutral country into which the prize may be carried." (5 Wheat., 338.)

*After the decree of the District Court [*59] of Louisiana had been pronounced, and before the appeal to this court, the negroes found on board of the captured brig were, under the provisions of the fourth section of the Act of Congress, and under the Act of the State of Louisiana passed the 13th of March, 1818, delivered by the collector of the port of New Orleans, to the sheriff of the Parish of New Orleans; and they were by him sold for \$68,000, and the proceeds lodged in The Bank of the United States, subject to the order of the District Court.

Upon the return of the cause to the district of Louisiana from this court, Mr. Roberts, an inspector of the revenue, and others, who alleged that they had made "military seizures" subsequent to that of the officers of the customs, filed claims to the moneys which were the proceeds of the sales of the brig and "effects," and of the negroes. Mr. Chew, the collector, conjointly with the naval officers, filed a like claim, and the court having dismissed the claims of Roberts and the asserted "military captors" and allowed those of the collector and other officers of the customs, the cause was again brought before this court. (10 Wheat., 312.)

This court, at February Term, 1825, decided that "the District Court, under the Slave Trade Acts, have jurisdiction to determine who are the actual captors under a State law made in pursuance of the fourth section of the Slave Trade Act."

The court also decided that "under the seventh section of this Act of the 2d of March, 1807, ch. 77, the entire proceeds of the vessel are forfeited to the use of the United States, unless the seizure be made by armed vessels of the navy or by revenue officers; in which case distribution is to be made in the same manner as prizes taken from the enemy."

The court also decided "that under the Act of the State of Louisiana of the 13th of March, 1828, passed to carry into effect the fourth section of the Act of 1807, and directing the negroes imported contrary to the act to be sold and the proceeds to be paid, 'one moiety for the use of the commanding officer of the capturing vessel and the other moiety to the treasurer of the Charity Hospital of New Orleans for the use and benefit of the said hospital; no other *person is entitled to the first [*60] moiety than the commanding officer of the navy or revenue cutter who may have made the seizure, under the seventh section of the Act of Congress.'"

The case having returned again to the District Court of Louisiana, Mr. Preston, as At-
Peters 3.

torney-General of that State, filed a claim on behalf of that State, setting forth the illegal importation of the negroes; that the greater part of them had been delivered over to the sheriff of New Orleans; that the sheriff had disposed of them under the law of the Legislature of Louisiana; that the proceeds of the sale—\$68,000—were brought into the District Court by the order of the court, and that part of the same remains deposited in court. He insisted that the money belongs to the State, and has been brought into court contrary to law and the rights of the State, and prays for an account, and that the said money may be paid over to him so far as the same had not been disposed of conformably to the laws of Louisiana.

In the District Court this claim was opposed on behalf of the United States.

The decree of the court was in favor of the claim, and an appeal was taken by the District Attorney of the United States to this court.

The case was argued by *Mr. Berrien*, Attorney-General, and *Mr. Livingston* for the United States, and by *Mr. Jones* for the appellee.

For the appellants it was contended:

1. That the proceedings in the District Court of Louisiana upon the claim of the appellee were irregular, the matter being of admiralty jurisdiction, and they should therefore have been by libel and monition.

2. That all proceedings relative to the matter in dispute had been regularly terminated by a final judgment of the Supreme Court of the United States.

3. That by the judgment of the Supreme Court the whole beneficial interest in the proceeds in question has been adjudged to the United States.

4. That with regard to that moiety of the **61*** proceeds, which *by the law of Louisiana was directed to be paid over to the treasurer of the Charity Hospital of New Orleans, the proper claimant was the treasurer.

5. That any claim of the Attorney-General of Louisiana to the money in the District Court is unfounded; the sale of the negroes having been made without authority, and therefore void, and the whole amount of the sales having been paid without consideration; and as no title to the negroes was acquired by the purchase, the money belongs to those who paid the same to the sheriff of New Orleans. Upon this last point, and on no other, the opinion of the court was given.

For the United States it was argued, upon this point, that as the decision of this court in the case of the *The Josefa Segunda*, reported in 5 and 10 Wheaton, had established the principle which ruled the case, that in reference to negroes brought into the United States under the circumstances attending their capture and introduction they were not placed under the power of the Legislature of Louisiana, but for the purpose of being received by the sheriff of New Orleans for safe keeping, the sale made by the sheriff was invalid and without authority.

The provisions of the seventh section of the Act of 1807 are repealed by the Act of Congress of 1819, "An act in addition to acts *Peters 3.*

prohibiting the slave trade." (3 Story's Laws U. S., 1752.)

By this act a change in the regulations before adopted by the United States in relation to persons of color illegally introduced into the United States was established.

The power given by the Act of 1807 to the States to pass laws for the disposition of those persons was repealed by the Act of 1819. The United States had before that time been unwilling to direct the mode in which those persons should be treated, and it was considered most proper to refer the same to the legislation of the particular States into which they might be brought. By the Act of 1819, all such persons so found in the United States were directed to be transported to Africa. That act authorizes the President so to remove all negroes brought into the United States contrary to the Act of 1807, and repeals all prior acts repugnant to its provisions. Before *the passage of [**62** the Act of 1819, the negroes who were on board the *Josefa Segunda* had not been finally condemned; as there was an appeal from the decree of condemnation in the District Court, depending and undecided, until February, 1820.

Until the final condemnation by this court in 1820, the negroes remained in the hands of the sheriff of New Orleans, under the protection of the United States, not as the property of the United States or of Louisiana, but under their care. No rights were vested or could vest by the decree of the District Court, as the appeal suspended the operation of that decree until affirmed by this court in 1820.

The sale of the negroes did not and could not become valid by any consent of the parties before the District Court. Until condemnation, undisturbed by an appeal, no rights existed in the court to order, or in the parties to consent to or authorize the sale.

When the case was disposed of in this court in 1820, the whole of the authority of the District Court of Louisiana, which had been exercised in 1818, was at an end, and that court could not legally proceed in the case. The Act of 1819 authorized the appointment of an agent, and provided funds for the purpose of removing all such persons, under the direction of the President of the United States, to Africa. It was a necessary consequence of this change in the policy of the government that all the provisions of the law of 1807 repugnant to its purposes should be repealed, and they were repealed. The powers given to the courts to condemn, and the powers given to the States to legislate in reference to those persons, ceased at the passage of the law of 1819; and that law, notwithstanding the sale made by the sheriff, found those negroes among its objects, and it operated upon them fully and effectually. This court has decided that no effective disposition of them had been or could be made by the Legislature of Louisiana, and they were consequently in the condition stated, and were the objects of the bountiful and liberal provisions of that law.

It cannot be maintained that the sale was authorized either by the Act of 1807 or by the law of Louisiana. The Act of *1807 [**63** gave no power to the court to consent to or order the sale, and Louisiana could not interfere

until after a sentence of condemnation, which should be final. The claimant, the Spanish owner of the brig, could not give the right to sell. Such is the nature and such are the effects of admiralty proceedings. It follows, therefore, that the money now in controversy was paid without consideration; it belongs to the purchaser of the negroes; and it cannot, therefore, under any circumstances, belong to the State of Louisiana.

The sale has been made in the execution of a special power delegated by Congress to the Legislature of Louisiana.

It is fully established by the decisions of this court that special powers must be strictly pursued and cannot be exceeded. The act gave no other powers, and did not give this power.

If the negroes, instead of being sold, had been distributed among the parties to await the final decree, and after the Act of 1819 had passed, the District Court of Louisiana had ordered them to be delivered to the sheriff of New Orleans for sale; looking to the provisions of the Act of 1819; to the repeal of the act of 1807, giving the legislatures of the States power to order a sale of those persons; to the provisions of the Act of 1819 securing to them the privileges of freemen to be returned to their native country; to the terms of that Act which embrace negroes delivered to the officers of the United States before or after the date of this law; could those persons be delivered to slavery? Would they not rather be subject to the order of the President to be returned to Africa? Can an illegal sale change the rights of the negroes?

Mr. Jones, for the appellee, contended that on the admissions of the counsel for the United States, if the Act of 1819 did not operate on the case, one moiety of the money in dispute belonged to the Charity Hospital of New Orleans. The provisions of the Act of 1807, taken together, forfeited the negroes, and gave the property in them or the proceeds of their sale to the State of Louisiana by placing them at the disposition of the State. By that law the negroes were to remain subject to such regulations as the State may make for the disposal of them. This gave the property in them to the State. Placing property at the disposal of a State necessarily gives the State the property. This flows essentially from the sovereign character of a State.

The provisions of the seventh section of the Act of 1807 provide for the corporal delivery of the negroes to the State officers. In the custody of those officers they remained until condemnation, which, as soon as it occurs, reverts to the time of seizure. It gives no right, but ascertains it. The judicial proceedings confirm and improve it, but do not create it. The Act of Congress having declared to whose benefit the forfeiture incurred by the violation of its provisions shall accrue, and that being the State, the condemnation does but confirm it.

As to the invalidity of the sale, it was contended that if the Admiralty Court had power to order a sale *pendente lite*, the agreement that the sale should be made was operative and equally effectual. The right of an admiralty court to do so exists under special circumstances; but consent supplied the necessity of such circumstances. It is to be presumed that there

was an order of court to confirm the sale, as the money arising from it was deposited in the court under its order.

The property in the negroes having thus become that of the State of Louisiana under the law of 1807; that State having appointed an officer to take charge of them and legislated as to the disposal of them under the authority of that act; the District Court having condemned the negroes before the law of 1819, and that condemnation having established judicially the right of the State at the time of seizure, the provisions of the law of 1819 could not affect rights thus given, vested and executed.

Mr. Justice JOHNSON delivered the opinion of the court:

The case of *The Josefa Segunda* has been twice already before this court: the first time upon the question of condemnation, the second upon the application of several claimants to be preferred in the distribution of the proceeds.

It now comes up upon a claim to the proceeds of the sale of the persons of color found on board at the time of the seizure interposed by the law officer of the State of Louisiana.

The vessel was condemned under the seventh section of the Act of 1807 passed to abolish the slave trade. By the fourth section of the act, the State of Louisiana was empowered to pass laws for disposing of such persons of color as should be imported or brought into that State in violation of that law. The offense under the seventh section, on which this condemnation was founded, is not that of importing or bringing into the United States, but that of hovering on the coast with intent to bring in persons of color to be disposed of as slaves, contrary to law; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any farther than to impose a duty upon officers of armed vessels who may capture them to keep them safely, to be delivered to the overseers of the poor, or the governor of the State, or persons appointed by the respective States to receive the same.

The State of Louisiana passed an Act on the 13th of March, 1818, which recites the provisions of the fourth and seventh sections of the Acts of Congress, and authorizes and requires the sheriff of New Orleans to receive any colored persons designated under either of those sections, and the same to keep until the District or Circuit Court of the United States shall pronounce a decree upon the charge of illegal importation.

The second section makes provision for selling them upon receiving a certificate of such decision, and enjoins a distribution of the proceeds; one-half to the commanding officer of the capturing vessel, the other to the treasurer of the Charity Hospital of New Orleans.

In pursuance of this law of the State, it appears that after the decree of condemnation below, but pending the appeal in this court, the sheriff went on to sell, with the consent, it is said, of all parties; and \$65,000, the sum now in controversy, was deposited in the registry of the court below to await the final disposal of the law.

The 20th of April, 1818, Congress passed an-
66* other Act on *this subject, by the tenth section of which the six first sections of the Act of 1807 are repealed; but their provisions are re-enacted with a little more amplitude; and the fifth section of this act, which professes to reserve to the States the powers given in the former act as well as the language of the repealing clause, in the saving which it contains as to offenses, still confines all their provisions to the case of illegal importation, thus leaving the seventh section in force, but without any express power to dispose of the colored persons, otherwise than to appoint some one to receive them.

And so, likewise, the seventh section of the Act of 1818, which professes to confirm sales previously or subsequently made under the State laws, confines its provisions to sales made under condemnation for illegal importation; thus not comprising the cases of condemnation under the seventh section of the Act of 1807, at least so far as relates to this offense.

The final condemnation in this court took place March 13th, 1820; but previous to that time was passed the Act of March 3d, 1819, entitled, "An act in addition to an act prohibiting the slave trade," by which a new arrangement is made as to the disposal of persons of color seized and brought in under any of the acts prohibiting the traffic in slaves. By the latter act they are deliverable to the orders of the President; not of the States. And the repealing clause repeals all acts and parts of acts which may be repugnant to this act. So that if in the disposal of persons of color brought into the United States the provisions of this act embrace the case of such persons when brought in under the seventh section of the Act of 1807, the power to deliver them to the order of the States was taken away before the final decree in this court.

Such, in the opinion of the court, is the effect of the Act of 1819. And then the question is, how does it affect the present controversy?

Ever since the case of *Yeaton v. The United States* (5 Cranch, 286), the court has uniformly acted under the rule established in that case; to wit, that in admiralty causes a decree was not final while it was depending here, and any **67*** *statute which governs the case must be an existing, valid statute, at the time of affirming the decree below.

Whatever was the extent of the legal power of the State over the Africans, it is clear that such power could not be exercised finally over them at any time previous to the final decree of this court; we must, therefore, consider whether, if they had been specifically before the court at the date of that decree, they must have been delivered up to the State or the United States: clearly to the United States. And, then, this claim of the State cannot be sustained. We would not be understood to intimate that the United States are entitled to this money, for they had no power to sell. Nor do we feel ourselves bound to remove the difficulties which grow out of this state of things.

With regard to the ground of irregularity; if not abandoned by the Attorney-General it was but slightly touched upon, and we know Peters 3.

of no other mode in the existing state of things, in which the rights of the parties could be reached, according to the course of the admiralty, but that here pursued.

On the question whether the decision in the second cause in which the subject of this seizure was before us was not final as to the rights of the United States, we are clearly of opinion that it was not, as against this party. Although this question might then have been raised by the State, and could as well then have been settled, yet it was not raised, nor was it the interest of any of the parties then before the court, that it should be raised.

The decree below must be reversed.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel; on consideration whereof, it is ordered, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby reversed, and that the said cause be, and the same is hereby remanded for further proceedings to be had therein according to law and justice, and in conformity to the opinion of this court.

Cited—2 Wood. & M., 540.

*THE BANK OF THE UNITED **[*68**
 STATES AND SAMUEL W. VENABLE'S EXECUTORS

v.

JOHN T. SWAN.

Practice.

Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term and move to have the appeal re-instated. To allow such a certificate would be to prejudice such a motion.

ON consideration of the motion made by *Mr. Wirt*, of counsel for the appellee, for leave to take from the office of the clerk of this court, before the adjournment of the present term of this court, an official certificate of the dismissal of this appeal, dismissed last Saturday, being the 30th of January of the present term of this court:

It is ordered that the said motion be overruled, and that the leave prayed for be refused; as under the practice of this court the appellants would have a right during the present term to lodge a transcript of the record of said appeal with the clerk of this court, and move to have the appeal re-instated; whereas, to grant the present prayer or motion would be to prejudice such a motion. Per *Mr. Chief Justice MARSHALL*.

69*] *BELL ET AL., *Plaintiffs in Error*,

v.

CUNNINGHAM ET AL., *Defendants in Error*.

Principal and agent—disobedience of orders by agent—measure of damages—what constitutes ratification by principal.

C. & Co., merchants of Boston, owners of a ship proceeding on freight from Havana to the consignment of B. & Co. at Leghorn, and to return to Havana, instructed B. & Co. to invest the freight, estimated at four thousand six hundred pesos; the two thousand two hundred in marble tiles, and the residue, after paying disbursements, in wrapping paper. B. & Co. undertook to execute these orders. Instead, however, of investing two thousand two hundred pesos in marble, they invested all the funds which came into their hands in wrapping paper, which was received by the captain of the ship and was carried to Havana and there sold on account of C. & Co., and produced a loss, instead of the profit which would have resulted had the investment been made in marble tiles. As soon as information of the breach of orders was received, C. & Co. addressed a letter to B. & Co., expressing in strong terms their disapprobation of the departure from their orders, but did not signify their determination to disavow the transaction entirely and consider the paper as sold on account of B. & Co. Held, that C. & Co. were entitled to recover damages for the breach of their orders; that their not having given notice to B. & Co. that the paper would be considered as sold on their account, did not injure their claim; and that the amount of the damages may be determined by the positive and direct loss arising plainly and immediately from the breach of the orders.

If the principal, after a knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury. But if the merchandise was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable. [81]

The faithful execution of orders which an agent or correspondent has contracted to execute is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. Speculative damages, dependent on possible successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the

breach of orders, may be taken into the estimate. [85]

The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased may be properly allowed as damages. [86]

THIS was a writ of error from the Circuit Court of Massachusetts, prosecuted by the defendant in the Circuit Court.

The bill of exceptions to the opinion of the court below *sets forth the pleadings and [*70 evidence, and exhibited the following case:

Cunningham & Loring, merchants of Boston, owners of the brig Halcyon, Skinner, master, chartered by them to proceed from Havana to Leghorn with a cargo of sugars, directed Bell, De Yough & Co., merchants at that place, and consignees of the brig, to purchase for them to be shipped to Havana by the Halcyon on her return to that port a quantity of marble tiles and wrapping paper. The letter containing these instructions was dated 15th September, 1824, and stated: "The whole amount of freight received at Leghorn will be about four thousand six hundred pesos; please invest two thousand two hundred in marble tiles; the balance, after paying disbursements, please invest in wrapping paper. We have further engaged whatever may be necessary to fill the brig on half profits, on account of which seven hundred pesos are to be paid in Leghorn, after purchasing tiles and paying disbursements, you will invest the balance in paper."

A duplicate of this letter was forwarded, to which the following postscript was added:

"P. S.—We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which seven hundred pesos are to be paid in Leghorn. After purchasing the tiles and paying disbursements, you will invest the balance in paper, as before mentioned. In previous orders the reams have been deficient in the proper number of sheets. We will thank you to pay particular attention to this, as well as having all the sheets entire."

This letter was received by the plaintiffs in error on the 13th of November, 1824, and on

NOTE—Agent, liability of to principal, for disregard of orders or for negligence. Exceptions to the rule.

An attorney is liable to his client for negligence in conducting the business of the client. What is negligence? *Williams v. Reed*, 3 Mas., 405; *Wilcox v. Plummer*, 4 Pet., 174; *Wynn v. Wilson*, Hempst., 698.

An attorney liable to the party for an unauthorized appearance. *Field v. Gibbs*, Pet. C. C., 155.

An agent is answerable for any injury consequent upon his departing from his orders, however fair his motives may be. *Manella v. Barry*, 3 Cranch, 415; *Short v. Skipwith*, 1 Broek. Marsh., 103.

If a loss is incurred by agent's failure to comply with instructions, he will be liable, though his services were gratuitous. *Walker v. Smith*, 1 Wash., C. C., 152; 4 Dall., 389.

Where agent mixed his principal's money with his own and invested it in real estate, the agent not being able to distinguish his own from the effects of his principal, the real estate will be considered the property of the principal to be specifically conveyed to him, or sold for his benefit. *Yates v. Arden*, 5 Cranch, C. C., 526.

Where one has undertaken to procure insurance for another and neglects to do so, or insures insufficiently or different from his orders, he becomes li-

able as insurer. *De Tastet v. Cronsillat*, 1 Wash. C. C., 504; *Morris v. Summer*, 2 Wash. C. C., 203.

So, when agent omits to insure when instructed, and a loss occurs. *Manny v. Dunlap*, 1 Woolw., 372.

The relinquishment of commissions on an agency does not release the agent from responsibility to his principal. *Walker v. Smith*, 1 Wash. C. C., 152; 4 Dall., 389.

Ratification of agent's acts relieves him from liability for violation of his instructions. *Cairnes v. Bleecker*, 12 John., 300; *Vianna v. Barclay*, 3 Cow., 281; *Corning v. Hill*, 3 Hill, 552; *Ætna Ins. Co. v. Sabine*, 6 McLean, 393; *McKinley v. Tucker*, 6 Lans, 214.

The amount of damages against the agent is measured by the real or positive loss incurred through his unauthorized act or default. *Hamilton v. Cunningham*, 2 Broek. Marsh., 350; *Bell v. Cunningham*, 3 Pet., 69; *Pope v. Barrett*, 1 Mas., 117; *Seul v. Briddle*, 2 Wash. C. C., 150; *Brewer v. Caldwell*, 7 Rep., 389; *Webster v. De Tastet*, 7 Term R., 157; *Hale v. Wall*, 2 Gratt. Va., 424.

A commission merchant is liable to his principal if he sells contrary to his instructions or is guilty of negligence in the sale. But the receiving without objection the accounts of sales made on credit, is a waiver of previous instructions to sell for cash. *Marshall v. Williams*, 2 Biss., 255; 18 Int. Rev. Rec., 168.

An action for fraud, however, cannot be maintained. *Peters* 3.

the 9th of the December following they addressed a letter to Cunningham & Loring, in which they stated:

"The order you are pleased to give us for paper and marble tiles, to be paid for out of the freight of the Halcyon from Havana to our consignment, has our particular attention.

"You have done very right to send on this order, as the wrapping paper cannot be got in 71*] readiness before the end *of January, and, therefore, had it been delayed longer, could not have been in time for your brig Halcyon.

"We have contracted for five thousand reams at as near your limits as possible, the article being just now in great demand. The tiles shall be collected also."

On the 14th of January, 1825, they wrote to Cunningham & Loring:

"The wrapping paper ordered by yours of the 15th of September will be in readiness by the end of this month, and we shall have by that time, ready to ship, ten thousand marble tiles of twelve ounces, seven thousand six hundred of fourteen ounces, and six thousand two hundred of sixteen ounces, which will be about the investment you desire of the freight from the Halcyon."

On the 21st of January, 1825, the plaintiffs in error informed the defendants of the arrival of the Halcyon, and on the 21st of February they addressed them another letter, stating: "The sample of wrapping paper sent us by Messrs. Murdoch, Storey & Co. we found much inferior to any made in this State, and have executed your order with a much better article, although the difference in price bears no proportion. As your account current after purchasing the paper, which Captain Skinner told us was the better article for investment, gave only a small balance, we increased a little one quantity of paper and sent no tiles.

"We now hand you bill of lading and invoice, amounting to P2,801 18 for 473 packages of wrapping paper, shipped for your account and risk, on board your brig Halcyon, John Skinner, master, which, if found right, please to pass accordingly.

"Captain Skinner has been made aware of the superior quality of this parcel of paper, and that each ream is composed correctly of twenty quires of twenty-four and not sixteen sheets, as had been occasionally shipped; so that he will no doubt make an adequate price for it, because in reality the prices at which it is invoiced are reduced by this difference below those mentioned in your order."

The account current stated the investment of pesos 2,801 18 in wrapping paper, and showed that the balance *of the freight [*72 and other assets in the hands of the plaintiffs in error belonging to Cunningham & Loring had been absorbed in the disbursements of the brig, &c.

The Halcyon proceeded to Havana, and there the paper shipped by the plaintiffs in error was sold and the proceeds accounted for to Cunningham & Loring by their agents at that port. Had the marble tiles been shipped as ordered, there would have been a considerable profit in the transactions instead of the heavy loss sustained on the sales of the paper.

Cunningham & Loring, on being advised of the non-compliance by the plaintiffs in error with their instructions of the 15th of September, 1824, addressed the following letter to them:

"BOSTON, April 18th, 1825.

"MESSRS. BELL, DE YOUGH, & Co.

"Gentlemen: We have received your favor of February 21st. The following are extracts of our letter to you of 13th September, directing the investment of the freight per Halcyon. "The whole amount of freight received at Leghorn will be about 4,600 pesos; please invest 2,200 in marble tiles; the balance, after paying disbursements, please invest in wrapping paper. We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which 700 pesos are to be paid in Leghorn; after purchasing the tiles and paying disbursements, you will invest the balance in paper."

"We are exceedingly disappointed that such positive directions were not complied with; they were given for sufficient reasons, and

ained against agent, from the facts only that he exceeded his authority, and that a loss resulted therefrom. Price v. Keyes, 62 N. Y., 378; reversing S. C., 1 Hun, 177; 3 Thomp. & C., 720.

If a forwarding agent ship goods otherwise than as instructed by the owner, he is liable for damages done in the transportation. Wilts v. Mowall, 66 Barb., 511.

Agent for investment who loans his principal's money on second mortgages without the latter's knowledge or consent, is liable for loss thereby sustained irrespective of any question of actual fraud. Whitney v. Martins, 6 Abb. N. C., N. Y., 72.

The agent is responsible to his principal for the proper discharge of the authority entrusted to him, whether he receives compensation or not. Wilkinson v. Coverdale, 1 Esp., 75; Smith v. Lascelles, 2 Term R., 187.

He is thus liable for effecting insurance with irresponsible parties. Hurrell v. Bullard, 3 Fost. & F., 445.

The measure of damages would be the amount which the insured could have recovered if the agent had performed his duty faithfully. Smith v. Price, 2 Fost. & F., 748.

Where the authority of an agent is limited by instructions, it is his duty to adhere faithfully to them in all cases in which they ought properly to be applied; and if he necessarily exceeds his commission or powers, or risks the property of his principal, he is liable. Peters 3.

Principal without authority, he renders himself responsible to his principal for all loss or damage which naturally results from his acts. Dwight v. N. Y. Central R. R. Co., 33 N. Y., 610; Scott v. Rogers, 31 N. Y., 676; 4 Abb. Ct. App., 157; Wilson v. Wilson, 26 Penn. St., 393; Concier v. Ritter, 4 Wash. C. C., 551; Hall v. Storrs, 7 Wis., 253; Whitney v. Merchants' Union Express Co., 104 Mass., 152; 6 Am. Rep., 207.

Where instructions are clear, precise, and imperative, they should be followed strictly and exactly. Williams v. Higgins, 30 Md., 404; Wilson v. Wilson, 26 Penn. St., 393; Rechtscheld v. Accommodation Bank of St. Louis, 47 Mo., 181; Brown v. Gran, 14 Pct., 479; Blot v. Bureau, 3 N. Y., 3 Comst., 78.

That the agent intended to benefit his principal is no legal excuse for disregarding his explicit instructions. Rechtscheld v. Acc. Bank of St. Louis, 47 Mo., 181; Evans v. Root, 7 N. Y., 3 Seld., 186; Scott v. Rogers, 4 Abb. Ct. App. (N. Y.), 157; 31 N. Y., 676.

Principal's instructions should not be construed as intended to be obligatory, unless they are distinct, positive, and express. Agent should not be held liable for a departure from the will of his principal, where his orders are ambiguous, doubtful, or not explicit. Vianna v. Barclay, 3 Cow., 281; Jervis v. Hoyt, 2 Hun. N. Y., 637; 5 Thomp. & C., 199; De Tastet v. Cronsillat, 2 Wash. C. C., 132, 137; Bessent v. Harris, 63 N. C., 542; Foster v. Rock-

without authority to alter them. You omitted to invest the 700 pesos on account of the freight of 150 boxes marked T, which we regret, as we wished the funds at Havana; with this you would have had 4,240 pesos, which would have furnished the tiles, paid disbursements, and left 1,393 pesos to be invested in paper.

Very respectfully,

"CUNNINGHAM & LORING."

73*] *One of the partners of the firm being in Boston in 1827, an action was instituted against the plaintiffs in error in the Court of Common Pleas of the County of Suffolk for damages for the loss sustained by the plaintiffs by the conduct of the defendants; and on their petition, the defendants in the suit being aliens, was removed to the Circuit Court of the United States for the District of Massachusetts.

On the trial of this cause in the Circuit Court, it was in evidence that the tiles ordered by the plaintiffs in the suit could have been procured by the defendants, and at prices which would have produced a profit to the plaintiffs.

During the trial exceptions were taken to the opinion of the court by the defendants in the Circuit Court, which exceptions are stated in the opinion of this court, and a verdict and judgment having been rendered for the plaintiffs, the defendants prosecuted this writ of error.

The case was argued by *Mr. Ogden* for the plaintiffs in error, and by *Mr. Webster* for the defendants.

For the plaintiffs, it was contended that the Circuit Court had erred in leaving to the jury the construction of the correspondence between the plaintiffs in the court below and the defendants, of the 15th September, 1824. The evidence being written, the construction of it was exclusively with the court. The course adopted by the defendants was in full accordance with the objects of the latter, as the paper could not be procured without previous orders, and they having been given and the defendants bound to take the paper so ordered, they were necessarily without the funds required to purchase the tiles.

The plaintiffs below were bound to give the defendants notice of their intention to claim damages from them for non-compliance with instructions, and their neglect to do this, as

well as their having received the proceeds of the paper, was a waiver of all their claims. The letter of the 18th April, 1825, was not such a notice.

The rule adopted in the assessment of the damages was incorrect. The plaintiffs below were entitled to no more than the difference between the cost of the paper which had been shipped at Leghorn, and the price [*74 of tiles at that place. (Cited, 1 Vez., Jun., 509.

Mr. Webster, for the defendants in error, said that there were no questions of law in the case which presented any difficulty, and the facts clearly established a claim by the defendants on the plaintiffs in error for a manifest breach of instructions, and upon these facts the jury had given their verdict. As to the rule adopted by the jury for the assessment of the damages, they had exercised their sound discretion without any instructions from the court which interfered with this their peculiar province.

As to the notice of claim by the defendants in error of the 18th of April, 1825, it was sufficient. They might have rejected the articles altogether, or have received the proceeds arising from their sale in the regular course of trade, and claimed, as they have in this case, damages for the loss.

Notice of claim is not necessary. If the party does not intend to refuse the article altogether, it is not required; and the neglect to do so is no bar to a claim for damages.

In this case the letter of the defendants is an express disavowal of the acts of their agents. (Cited, *Lorain v. Cartwright*, 3 Wash. C. C. R., 151.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered in the Court of the United States for the First Circuit and District of Massachusetts, in a suit brought by *Cunningham & Co.* against *Bell, De Yough & Co.*, on a special contract.

Cunningham & Co., merchants of Boston, had let their vessel, the *Halcyon*, to *Messrs Atkinson and Rollins*, of the same place, to carry a cargo of sugars from the Havana to Leghorn. The cargo was consigned to *Messrs. Bell, De Yough & Co.*, merchants of Leghorn; and

well, 104 Mass., 167; *Long v. Pool*, 68 N. C., 479; *Marsh v. Whitmore*, 21 Wall., 178.

An exception to the rule that an agent is bound to observe or obey his instructions, is, if by some sudden emergency or supervening overwhelming necessity or other unexpected event, clearly shown, it becomes impossible for the agent to comply with his instructions, or a literal compliance with them would frustrate the objects of the principal and amount to a sacrifice of his interests, it is the agent's duty, under the circumstances, to do the best he can in the exercise of a sound discretion, to prevent a loss to his principal, and if he acts in good faith and exercises a reasonable discretion, his acts will bind his principal. *Greenleaf v. Moody*, 13 Allen, 363; *Forrestier v. Boardman*, 1 Story, 43, 51; *Williams v. Shackelford*, 16 Ala., 318; *Liottard v. Graves*, 3 Caines, 226; *Dusar v. Perit*, 4 Binn., 361; *Day v. Noble*, 2 Pick., 615.

Agent not bound to follow instructions which require him to do an illegal or immoral act. *Story on Agency*, sec. 195; *Wharton on Agency*, sec. 542.

An agent is liable for disregarding express and positive instructions as to investing money, if the securities he takes are not good. *Williams v. Higgins*, 30 Md., 404.

Agent receiving illegal or depreciated currency

in discharge of legacies or debts is liable, in good faith, for the full amount of the legacies or debts. *Turner v. Turner*, 36 Tex., 41.

A cashier of a bank who neglects to make demand of payment of a note, and thus discharges the indorser, who is the only responsible party, is liable to the bank for resulting damages. *Bidwell v. Madison*, 10 Minn., 13.

A bank or express company receiving a note or bill of exchange for collection is liable for any neglect of duty whereby any of the parties to the note or bill are discharged. *Ayrault v. Pacific Bank*, 47 N. Y., 570; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y., 3 Seld., 459; *Commercial Bank v. Union Bank*, 11 N. Y., 1 Kern., 203; *Reeves v. State Bank of Ohio*, 8 Ohio St., 465; *Nannemaker v. Lanier*, 48 Barb., 234; *Palmer v. Holland*, 51 N. Y., 416; S. C., 10 Am. Rep., 616; *Walker v. Bank of State of N. Y.*, 9 N. Y., 5 Seld., 582.

The agent may show that no loss or damage has resulted to the principal from the disobedience of the agent to the principal's instructions, or the agent's neglect to follow them. *Fulsam v. Mussey*, 10 Me., 297; *Fornin v. Oswell*, 3 Camp., 357; *Suydam v. Allen*, 20 Wend., 324; *Frothingham v. Everton*, 12 N. H., 239.

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Cunningham & Co. addressed a letter to the same house, instructing them to invest the freight, which was estimated at four thousand six hundred petso, two thousand two hundred in marble tiles, and the residue, after paying **75*** disbursements, in wrapping *paper. Messrs. Bell, De Yough & Co. undertook to execute these orders. Instead, however, of investing the sum of two thousand two hundred petso in marble tiles, they invested the whole amount of freight which came to their hands, amounting to three thousand four hundred and forty-nine petso, and seven-thirds instead of four thousand six hundred, in wrapping paper, which was received by the captain of the Halcyon, shipped to the Havana, and sold on account of Messrs. Cunningham & Co. One of the partners of Messrs. Bell, De Yough & Co., having visited Boston on business, this suit was instituted against the company. At the trial, all the correspondence between the parties was exhibited, from which it appeared that Cunningham & Co., as soon as information was received that their orders had been broken, addressed a letter to Messrs. Bell, De Yough & Co., expressing in strong terms their disapprobation of this departure from orders, but did not signify their determination to disavow the transaction entirely, and consider the wrapping paper as sold on account of the house in Leghorn.

In addition to the correspondence, several depositions were read to the jury which proved that the orders respecting the marble tiles might have been executed without difficulty, but that the house in Leghorn, expecting to receive more money on account of freight than actually came to their hands, had contracted for so much wrapping paper as to leave so inconsiderable a sum for the tiles that they determined to invest that small sum also in wrapping paper.

At the trial, the counsel for the defendants in the court below prayed the court to instruct the jury on several points which arose in the cause. Exceptions were taken to the rejection of these prayers, and also to instructions which were actually given by the court, and the cause is now heard on these exceptions.

The defendants' counsel prayed the court to instruct the jury that the letter of the 9th of December, 1824, from the defendants to the plaintiffs, was notice to them of the exercise of the aforesaid authority in contracting for five thousand reams of paper to be paid for out of the freight money of the Halcyon, and was admitted by the plaintiffs in their *letter of the 7th of March, 1825, to be a rightful exercise of such authority; and that the freight money of the Halcyon was pledged for payment of the said quantity of paper.

But the court so refused to instruct the jury, because it did not appear on the face of the said letter at what price the said wrapping paper was purchased so as to put the plaintiffs in possession of the whole facts that there had been a purchase of paper to an extent and at a price which would amount to a deviation from the orders of the plaintiffs, or that defendants had deviated from such orders, without which there could arise no presumption of notice of any deviation from such orders, or of any ratification of any such deviation from such orders. But

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the court did instruct the jury that if, from the whole evidence in the case, the jury were satisfied that the letter of the 9th of December, connected with the letter of the 14th of January, did sufficiently put the plaintiffs in possession of all the facts relative to such purchase and the price thereof and of such deviation, and that the letter of the 7th of March in answer thereto was written with a full knowledge and notice of all the facts, and that the plaintiffs did thereupon express their approbation of all the proceedings and acts of the defendants relative to such purchase, then, in point of law, it amounted to a ratification thereof, even though there had been a deviation from the orders in this behalf.

This first exception is very clearly not supported by the fact, and was very properly overruled for the reasons assigned by the judge. The plaintiffs in that court, when the letter of the 7th of March, 1825, was written, had no reason to presume that their orders had been violated, and consequently could not be intended to mean by that letter to sanction such violation.

The said defendants' counsel further prayed the court to instruct the jury that, if they believed from the evidence submitted to them that the required quantity of tiles could be had in season for the return cargo of the Halcyon without any previous contract therefor, and that the five thousand reams of paper could not be had in season for said vessel without a previous contract therefor, that, inasmuch as the *plaintiffs admit, in their declaration, [***77** that they did not furnish the defendants with freight money enough to purchase twenty-two hundred petso worth of tiles and pay the disbursements and pay for the said five thousand reams of wrapping paper, but only with three thousand four hundred and forty-nine petso, 7.3 (as in their declaration is expressed), and which latter sum was only sufficient for the payment of said disbursements and for the performance of the defendants' own contract in paying for said wrapping paper, the defendants were not holden to purchase any tiles, but were holden to ship the said five thousand reams of paper on board the Halcyon as the property of the plaintiffs.

But the court refused so to instruct the jury; and the court did instruct the jury that if the defendants undertook to comply with the original written orders of the plaintiffs, and no deviation therefrom was authorized by the plaintiffs, the defendants were bound, if funds to the amount came into their hands, in the first instance to apply two thousand two hundred petso of the funds which should come into their hands and be applied to this purpose to the purchase of tiles, and in the next place to deduct and apply as much as was necessary to pay the disbursements, and then to apply the residue to the purchase of paper; that if it were necessary or proper under the circumstances to make a purchase of the paper before the arrival of the vessel, the defendants were authorized to act upon the presumption that four thousand six hundred petso would come into their hands, and therefore the plaintiffs would have been bound by any purchase of paper made by the defendants, to the amount of the balance remaining of the said four thousand six hun-

dred pesos, after deducting the two thousand two hundred pesos for tiles, and the probable amount of such disbursements. But that it was the duty of the defendants, if they had funds, to deduct in the first instance, from the whole amount, two thousand two hundred pesos for tiles; and if they did not, but chose to purchase paper without any reference thereto, it was a deviation from the plaintiffs' orders, and unless ratified by the plaintiffs the defendants *were answerable therefor: that if the defendants had purchased paper before the arrival of the vessel to the amount only of such residue or balance as aforesaid, and the funds had afterwards fallen short of the expected amount of four thousand six hundred pesos, the defendants were not bound to apply any more than the sum remaining in their hands, after deducting the amount of such purchase of paper, and such disbursements, to the purchase of tiles; and that after the receipt of the letters of the 20th of September and the duplicate of the 15th of September, if the defendants undertook to perform the orders therein contained, there was an implied obligation on them to apply the seven hundred pesos mentioned therein for the plaintiffs' benefit, to the purposes therein stated; that, to illustrate the case, if the jury were satisfied that the whole funds which came into the hands of the defendants for the plaintiffs (independent of the seven hundred pesos) were three thousand four hundred and fifty pesos, then the said seven hundred pesos should be added thereto as funds in the defendants' hands, making in the whole four thousand one hundred and fifty pesos.

In the view of the facts thus assumed by the court, and to illustrate its opinion, the practical result under such circumstances would be thus: the defendants were authorized to act on the presumption of funds to the amount of four thousand six hundred pesos. Deduct two thousand two hundred pesos for tiles and six hundred and fifty for probable disbursements, the balance left to be invested in paper would be one thousand seven hundred and fifty. The defendants would then be authorized, if the circumstances of the case required it, to contract for, or purchase to the amount of one thousand seven hundred and fifty pesos in paper, before the arrival of the vessel; and if the funds should afterwards fall short of the expected amount of four thousand six hundred pesos, the sum of one thousand seven hundred and fifty pesos, and the disbursements, say six hundred and fifty pesos, were to be first deducted out of the funds received, and the balance only invested in tiles. That if the funds *which actually came to the defendants' hands (without the seven hundred pesos) and the sum of seven hundred pesos were also received, the whole amount would be four thousand one hundred and fifty pesos, then the defendants would be justified in deducting therefrom for the purchase of paper one thousand seven hundred and fifty pesos, and disbursements six hundred and fifty pesos; leaving the sum of one thousand seven hundred and fifty pesos to be invested in tiles; and to this extent, if there was ratification, the defendants would be bound to invest for the plaintiffs in tiles, and were guilty of a breach of orders if they did not so invest, and the plaintiffs entitled to dam-

ages accordingly. But the court left the whole facts for the consideration of the jury, and stated the preceding sums only as illustrations of the principles of decisions if they were found conformable to the facts.

This prayer was properly overruled for the reasons assigned by the court. The orders were peremptory to apply two thousand two hundred pesos in the first instance to the purchase of tiles. The residue only of the funds which came to the hands of Bell, De Yough & Co. was applied to the purchase of wrapping paper; and the instruction that Bell, De Yough & Co. were justifiable in acting on the presumption that the whole sum mentioned in the letter of Cunningham & Co. would be received, and in contracting by anticipation for wrapping paper on that presumption, was as favorable to Bell, De Yough & Co. as the law and evidence would warrant. The only questionable part of the instruction is that which relates to the seven hundred pesos, mentioned in the postscript of that copy of the letter of the 15th of September, 1824, which went by the *Halcyon*. That postscript is in these words: "P. S.—We have further engaged whatever may be necessary to fill the brig, on half profits, on account of which seven hundred pesos are to be paid in Leghorn. After purchasing the tiles and paying the disbursements, you will invest the balance in paper as before mentioned. In previous orders the reams have been deficient in the proper number of sheets. We will thank you to *pay particular attention to this, as well [*80 as having all the sheets entire."

The court instructed the jury that if the defendants undertook to perform the orders, there was an implied obligation on them to apply the seven hundred pesos mentioned therein to the purposes therein mentioned.

No doubt can be entertained of the existence of this implied obligation if the seven hundred pesos were in fact received. This fact, however, could not be decided by the court, and was proper for the consideration of the jury. If the court took it from them, the instruction would be erroneous. Some doubt was at first entertained on this part of the case; but on a more attentive consideration of the charge that doubt is removed. The declaration that there was an implied obligation to apply the seven hundred pesos as directed in the letter and postscript, is not made in answer to any prayer for an instruction respecting the reception of this money, but respecting its application. The answer, therefore, which relates solely to the application, ought not to be construed as deciding that it was received. The judge afterwards, by way of illustration, shows the sum which might have been invested in wrapping paper consistently with the orders given by Cunningham & Co. on the hypothesis that the freight money would amount to four thousand six hundred pesos, and also on the hypothesis that the additional seven hundred pesos were received; and adds: "But the court left the whole facts for the consideration of the jury, and stated the preceding sums only as illustrations of the principles of decisions, if they were found conformable to the facts." We think, then, that the question whether the seven hundred pesos were actually received by Bell, De Yough & Co. was submitted to the jury on the

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evidence, and that there is no error in this instruction.

The defendants' counsel did further pray the court to instruct the jury that inasmuch as the plaintiffs admit, in their declaration, that the freight money received by the defendants was three thousand four hundred and forty-nine pesos 7.3; and it appearing that the whole of **81***] that sum had been absorbed *in the purchase of five thousand reams of wrapping paper, disbursements, and reasonable and customary charges; and that as the said plaintiffs did accept and sell the said five thousand reams of paper on their own account at the Havana, that such receipt and sale of the paper on their account, is, in law, a ratification of the acts of the defendants at Leghorn in the application of the whole of said freight money.

But the court refused so to direct the jury, because the instruction prayed for assumed the decision of matters of facts, and because the plaintiffs did not admit that the sum of three thousand four hundred and forty-nine pesos 7.3 was the whole sum or funds received as freight money by the defendants, but contended that the additional sum of seven hundred pesos was so received, and ought to be added thereto; and, because, whether the receipt and sale of the paper at Havana was a ratification of the acts of the defendants at Leghorn or not, was matter of fact for the consideration of the jury under all the circumstances of the case, and not matter of law to be decided by the court in the manner prayed for.

We think this instruction was properly refused by the court for the reasons assigned by the judge. It may be added in support of the statement made by the court, that though the first and second new count in the declaration claim only the sum mentioned by counsel in their prayer, the third claims a larger sum, and consequently left the plaintiffs in the court below at liberty to ask from the jury such sum within the amount demanded by the third count as the evidence would in their opinion prove to have come to the hands of the defendants. The question whether the receipt and sale of the sugars at the Havana amounted to a ratification of the acts of Bell, De Yough & Co. at Leghorn, certainly depended on the circumstances attending that transaction. If Cunningham & Co., with full knowledge of all the facts, acted as owners of the wrapping paper without signifying any intention of disavowing the acts of their agents, an inference in favor of ratification might be fairly *drawn by the jury. If the cargo from Leghorn was received and sold in the Havana under directions given at a time when Cunningham & Co. felt a just confidence that their orders would be faithfully executed by Bell, De Yough & Co., such an inference would be in a high degree unreasonable. This subject was, therefore, very properly left to the jury.

And the defendants' counsel furthermore prayed the court to instruct the jury as the plaintiffs' first new count, filed at this term by leave of court, that, inasmuch as the plaintiffs have set forth the letter of the plaintiffs to the defendants, of the 15th of September, 1824, as containing the special contract between the plaintiffs and defendants; and as the postscript to that letter contains a material part of the

contract; and as the said postscript is not set forth in said count as part of said letter, but as wholly omitted; that the evidence offered by the plaintiffs in this behalf does not support and prove the contract as in that count is alleged.

But the court refused so to instruct the jury, being of opinion that the said postscript did not necessarily as a matter of law establish any variance between the first new count and the evidence in the case; and the court left it to the jury to consider upon the whole evidence in the case, whether that count was established in proof, and if in their opinion there was a variance, then to find their verdict for the defendants on that count.

On the 15th of September, 1824, Cunningham & Co. addressed a letter to Bell, De Yough & Co. containing the orders which have given rise to this controversy. This letter was sent by the Halcyon, and contained the postscript mentioned in this prayer for instructions to the jury. It was received on the 20th of January, 1825.

As the Halcyon was to make a circuitous voyage by the Havana, and Cunningham & Co. were desirous of communicating the contents of their letter by that vessel previous to her arrival, a duplicate was sent by the Envoy, which sailed a few days afterwards direct for Leghorn.

In this letter the postscript was omitted. It was received *on the 30th of November, [**83** 1824, and was answered soon afterwards with an assurance that the orders respecting the titles and wrapping paper would be executed.

The first new count in the declaration is on the special contract, and sets out at large the letter sent by the Envoy, which was first received, and to which the answer applied, in which Bell, De Yough & Co. undertook to execute the orders that were contained in that letter. It is undoubtedly true that a declaration which proposes to state a special contract in its words must set it out truly; but this contract was completed by the answer to the letter first received, and the obligation to apply the funds when received was then created. The plaintiffs below might certainly count upon this letter as their contract. Other counts in the declaration are general, and both letters may be given in evidence on them. The defendants might have objected to the reading of the letter by the Halcyon on the first new count; but the whole testimony was laid before the jury without exception, and the counsel prayed the court to instruct the jury that as the postscript was omitted in the letter stated in the first count, the evidence did not support the contract as in that count alleged.

This prayer might perhaps have been correctly made had no other letter been given in evidence than that received by the Halcyon. But as the very letter on which the count is framed and which was the foundation of the contract was given in evidence, the court could not have said with propriety that this count was not sustained. It was left to the jury to say whether there was a variance between the evidence and this count, and if in their opinion such variance did exist, they were at liberty to find for the defendants on that count. If there was any error in this instruction it was not to the prejudice of the plaintiffs in error.

The fifth, sixth, and seventh exceptions ap-

pear to have been abandoned by the counsel in argument, and were certainly very properly abandoned. These several prayers are founded on the assumption of contested facts, which were submitted and ought to have been submitted to the jury.

The eighth and last prayer is in these words: **84*** "The defendants' *counsel prayed the court to instruct the jury that if they should find that any contract or promise was made by the defendants as to the purchase and shipment of twenty-two hundred petsos worth of tiles, and not performed (but broken), that the measure of damages was the value of the said sum of twenty-two hundred petsos at Leghorn and not at Havana; and that as the plaintiffs have taken and accepted another article of merchandise at Leghorn, viz., five thousand reams of wrapping paper of greater value than two thousand two hundred petsos, and which was purchased with the same moneys which plaintiffs aver should have been invested in marble tiles as aforesaid, the plaintiffs are not entitled to recover any damages in this action.

But the court refused so to instruct the jury because the instruction prayed for called upon the court to decide on matters of fact in controversy before the jury. And the court did instruct the jury that, if upon the whole evidence they were satisfied that the orders of the plaintiffs had been broken by the defendants in not purchasing the tiles in the manner stated in the declaration, and that there had been no subsequent ratification by the plaintiffs of the acts and proceedings of the defendants, then that the plaintiffs were entitled to recover their damages for the breach thereof; that what the proper damages were, must be decided by them upon the whole circumstances of the case; that in their assessment of damages they were not bound to confine themselves to the state of things at Leghorn, and they were not precluded from taking into consideration the voyage to the Havana and the fact of the arrival of the vessel there, the state of the markets, and the profits which might have been made by the plaintiffs if their orders as to the tiles had been complied with; that the court would not lay down any rule for their government, except that they were at liberty to compensate the plaintiffs for their actual losses sustained as a consequence from the default of the defendants, but they were not at liberty to give vindictive damages.

This prayer consists of two parts. 1st. The measure of damages if the jury should be of opinion that the contract was broken. 2d. The **85*** ratification of the acts of Bell, De *Yough & Co. by accepting at Havana another article in lieu of the tiles.

1. The measure of damages. The plaintiffs in error contend that the value of the money at Leghorn which ought to have been invested in tiles, and not its value at the Havana, ought to be the standard by which damages should be measured. That is, if his views are well understood, that the value of two thousand two hundred petsos at Leghorn, with interest thereon, and not the value of the tiles in which they ought to have been invested at the Havana, ought to be given by the jury.

This instruction ought not to have been given unless it be true that special damages for the

breach of a contract can be awarded under no circumstances whatever; that an action for the breach of contract was equivalent, and only equivalent, to an action for money had and received for the plaintiffs' use. That the breach of contract consisted in the nonpayment of two thousand two hundred petsos; not in the failure to invest that sum in tiles. In fact, that under all circumstances, if no money came to the hands of the defendants, the damages in such an action must be nominal. This can never be admitted.

The faithful execution of orders which an agent or correspondent has contracted to execute is of vital importance in commercial transactions, and may often effect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. We do not mean that speculative damages; dependent on possible successive schemes, ought ever to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate. Thus in this case, an estimate of possible profit to be derived from investments at the Havana of the money arising from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at the Havana, affords a reasonable standard for the estimate of damages. The instructions of the judge seem to contemplate this course, and his restraining *power would have corrected, by grant- [**86** ing a new trial, any great excess in this particular. The rule that the jury was to compensate the plaintiffs for actual loss, and not to give vindictive damages, is thought by this court to have been correct. The declaration expressly claims the loss of the profits which would have accrued from the sale of the tiles.

That part of this prayer which relates to the ratification of the acts of Bell, De Yough & Co. by the receipt of the wrapping paper at the Havana has been fully noticed in the observations on the third exception.

This court is of opinion that there is no error in several instructions given by the Circuit Court to the jury, and that the judgment ought to be affirmed with costs and six per cent. damages.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

Cited—3 Wood. & M., 86.

*GEORGE B. MAGRUDER, *Plaintiff* [**87**
in Error,

v.

THE UNION BANK OF GEORGETOWN,
Defendants in Error.

*Promissory note—indorser as administrator of
maker—demand and notice—due diligence.*

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An action was brought by The Union Bank of Georgetown against George B. Magruder as indorser of a promissory note drawn by George Magruder. The maker of the note died before it became payable, and letters of administration to his estate were taken out by the indorser. No notice of the nonpayment of the note was given to the indorser, or any demand of payment made until the institution of this suit. Held, that the indorser was discharged, and his having become the administrator of the drawer does not relieve the holder from the obligation to demand payment of the note and to give notice thereof to the indorser.

The general rule that payment must be demanded from the maker of a note, and notice of nonpayment forwarded to the indorser within due time in order to render him liable, is so firmly settled that no authority need be cited to support it. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. [90]

IN the Circuit Court of the District of Columbia for the County of Washington, the defendants in error instituted a suit against George B. Magruder, the plaintiff in error, upon a promissory note drawn by George Magruder in favor of and indorsed by the plaintiff in error, dated Washington, November 8th, 1817, for six hundred and forty-three dollars, twenty-one cents, payable seven years after date. After the making of the note, the drawer, George Magruder, died, and on the 18th of November, 1822, administration of his effects was granted to George B. Magruder, the plaintiff in error. The note having been due on the 11th of November, 1824, was not paid.

Upon the trial of the cause, the plaintiff, in support of the issue joined, offered in evidence to the jury the promissory note issued the 18th of November, 1823, the handwriting of the maker and the indorsement by the defendant having been admitted; and further proved that the defendant had, previous to the note falling due, taken out letters of administration in the County of Montgomery, in the State of Maryland, upon the personal estate of George Magruder, the maker of the said note, on the 18th 88*] of November, 1823; the *said George Magruder having previously departed this life. It was admitted that the note in question had never been protested, nor had any notice been given to this defendant that the note was not paid. Upon these circumstances the counsel for the defendant moved the court to instruct the jury, that before the plaintiff can recover in this action, it is essential for him to prove demand and notice to the indorser of the nonpayment; which not being done, the verdict should be for the defendant. But the court refused to give the instruction prayed for as aforesaid, and charged the jury that no demand of notice of nonpayment was necessary. To this refusal and instruction the counsel for the defendant excepted, and the court sealed a bill of exceptions and this writ of error was prosecuted.

The case was argued by *Mr. Cove* for the plaintiff in error, and by *Mr. Dunlop* and *Mr. Key* for the defendant.

Mr. Cove contended that the fact that the indorser of the note had become the administrator of the drawer did not release the holders of the note from any of the duties and legal obligations they were under to give notice to the indorser of the nonpayment of the note, and that payment was expected from him. The letters of administration were granted out of the District of Columbia; but if they had been issued

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within the District the law would have been the same.

As a general rule notice was necessary, and notice must come from the holder of the note to apprise the party that he is looked to for payment. (Chitty, 293.)

The mere fact that the indorser had been the representative of the drawer did not imply a knowledge of the nonpayment of the note; and if it did, notice of its nonpayment was not thereby dispensed with. (Chitty, 293; 1 T. Rep., 167; 2 Con. Rep., 654.) The legal obligations of an indorser become complete on notice, and are not such until notice.

The obligation to give notice has been declared to exist in a case in which, if it ever could be excused, it would have been waived under its circumstances. Where one person *was a member of two partnerships, one [*89 of which signed and the other of which indorsed, it was held that presentment for payment was necessary to charge the indorser. (Bayley on Bills, 159.)

Mr. Dunlop and *Mr. Key*, for the defendant, admitted the general rule to be as stated by the counsel for the plaintiff in error; but exceptions had been allowed to the rule, and on the same principles the present was entitled to exemption from its stricter application.

In *The Bank of Columbia v. French* (4 Cranch, 161), when this note was drawn for the use of the indorser notice was not required. His knowledge that the obligation to pay was upon him made the notice unnecessary.

The plaintiff in error, as administrator of the drawer, became the payer of the note, and as such was bound to do so without demand; no demand on him being required, it was useless to give him notice that he had not done what he well knew he had omitted.

The purpose of the rule as to notice did not exist here; if notice was required to enable the indorser to secure himself by calling on the drawer, this could not be done; and as he had the estate of the drawer in his hands for his indemnity no demand of the indorser was necessary. (*Bank of the United States v. Carneal*, 2 Peters, 552.)

The law never requires that to be done which is useless; and therefore the defendant in error, who could not by the notice or by its omission have affected the rights of the indorser or his means of protecting himself from loss, was not required to give it.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This action was brought by The Union Bank of Georgetown against George B. Magruder, as indorser of a promissory note made by George Magruder. The maker of the note died before it became payable, and letters of administration on his estate were taken out by the indorser. When the note became payable suit was commenced against the indorser *without [*90 any demand of payment other than the suit itself, without any protest for nonpayment, and without any notice that the note was not paid and that the holder looked to him as indorser for payment. Upon these circumstances the counsel for the defendant moved the court to instruct the jury, that before the plaintiff can recover in this action, it is essential for him to

prove demand and notice to the indorser of the nonpayment, which not being done, the verdict should be for the defendant. But the court refused to give this instruction, and charged the jury that no demand or notice of nonpayment was necessary. To this opinion the counsel for the defendant in the Circuit Court excepted, and has brought the cause to this court by writ of error.

The general rule that payment must be demanded from the maker of a note, and notice of its nonpayment forwarded to the indorser within due time in order to render him liable, is so firmly settled that no authority need be cited in support of it. The defendant in error does not controvert this rule, but insists that this case does not come within it, because demand of payment and notice of nonpayment are totally useless, since the indorser has become the personal representative of the maker. He has not, however, cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle before it sanctions so essential a departure from established commercial usage.

This suit is not brought against George B. Magruder as administrator of George Magruder, the maker of the note, but against him as indorser. These two characters are as entirely distinct as if the persons had been different. A recovery against George B. Magruder, as indorser, will not affect the assets in his hands as administrator. It is not a judgment against the maker, but against the indorser of the note. The fact that the indorser is the representative of the maker does not oppose any obstacle to proceeding in the regular course. The regular demand of payment may be made and the note protested for nonpayment, of which notice may be given to him as indorser with as *91*] much facility as if the indorser had *not been the administrator. It is not alleged that any difficulty existed in proceeding regularly; the allegation is that it was totally useless.

The note became payable on the 8th day of November, 1824. The writ was taken out against the indorser on the 26th day of April, 1825. If this unusual mode of proceeding can be sustained, it must be on the principle that, as the indorser must have known that he had not paid the note as the representative of the maker, notice to him was useless. Could this be admitted, does it dispense with the necessity of demanding payment? It is possible that assets which might have been applied in satisfaction of this debt, had payment been demanded, may have received a different direction. It is possible that the note may have been paid by the maker before it fell due. Be this as it may, no principle is better settled in commercial transactions than that the undertaking of the indorser is conditional. If due diligence be used to obtain payment from the maker without success, and notice of nonpayment be given to him in time, his undertaking becomes absolute; not otherwise. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. As no attempt to obtain payment from the maker was made in this case, and no notice of nonpayment was given to the

indorser, we think the Circuit Court ought to have given the instruction prayed for by the defendant in that court.

The judgment is reversed and the cause remanded, with instructions to award a *venire facias de novo*.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that the said cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo* in said cause.

See S. C., 7 Pet., 291.

Cited—4 Pet., 384; 7 Pet., 287, 291; 10 Otto, 712.

*ROBERT CHINOWETH, JAMES [*92
TRACY, AND THOMAS WILMOUTH,
Plaintiffs in Error,
v.

THE LESSEE OF BENJAMIN HASKELL
ET AL., *Defendants.*

*Demurrer to evidence—its effect—description of
land in a grant.*

The defendant in the court below having withdrawn his cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiff subject to the demurrer, cannot hope for a judgment in his favor if by any fair construction of the evidence the verdict can be sustained. [96]

It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. The description of the land consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. [96]

If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given, and must be used. [96]

The line which forms the western boundary of the land intended to be granted was never run or marked. In his office the surveyor assumed a course and distance, and terminates the line at two small chestnut oaks. But where are we to look for those two small chestnut oaks in a wilderness in which one man takes up fifty thousand acres and another one hundred thousand? or how are we to distinguish them from other chestnut oaks. The guide, and the only guide given us by the surveyor or by the grant, is the course and distance. [96]

It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description which show that the survey actually covered other ground than the lines of the grant would comprehend. [98]

WRIT of error to the District Court of the Western District of Virginia.

This case was argued by *Mr. Doddridge* for the plaintiff in error, no counsel appearing for the defendant. He contended:

1. That Wilson does not prove the making of any actual survey of the three last lines, and all that he does prove is that he protracted them.

2. That in protracting the line D E he
Peters 3.

93*] guessed at a course *and distance which he supposed would reach Young's corner, which he missed about five miles.

3. That he only proves it to have been his intention to go to Young's corner. He did not in this certificate of survey call for a corner to Young, but only for two chestnut oaks in a country where there is scarcely any other timber.

4. That course and distance, as called for, may be corrected by other matters of description in the certificate and grant by any natural call or description which may identify a corner, or render it certain as "two chestnut oaks, corner to Robert Young's survey of one hundred thousand acres, &c., the first, second, or third corner, &c." Such correction of course and distance cannot be made by a secret, undisclosed intention that the two chestnuts he called for should be those at one of Young's corners.

5. The course and distances called for in the grant will locate the grant on the waters and water-courses precisely as stated in the grant. This appears by the surveyor's diagram, which, with the grant, is record evidence of this fact. Let the courses and distances called for be varied according to Wilson's secret intention, the case will be very different.

The grant calls to be on part of Clover Run, on Cheat River, and to include the waters of Pheasant Run. These descriptions suit either mode of locating the grant, but the grant calls to be on the waters of Tygart Valley, and to include part of the waters of Hornback's Run and the Cherry Tree Fork of Leading Creek. Whereas, as he would locate his grant, it will include not only part of the waters of Hornback's Run and the Cherry Tree Fork of Leading Creek, but all these two streams and their waters, and even all Leading Creek itself, of which they are small branches; and his survey will be, not on the waters of Tygart Valley River, but on the river itself, crossing it four times.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The judgment in this cause was rendered by the Court of the United States for the Western District of Virginia, in an ejectment brought by **94***] the defendants in error to recover *fifty thousand acres of land, a part of which was in the occupation of the defendants in the court below. The defendants in that court disclaimed as to the part of the land for which judgment was entered against the casual ejector, and went to trial as to the residue. The original plaintiffs having the eldest title, the case depended entirely on the question whether their grant covered the land in dispute. If it be surveyed according to the courses and distances called for, it will entirely exclude that land. The plaintiffs, however, claim to survey it in such manner as to comprehend the tenements in possession of the defendants.

A survey was made, and the diagram of the surveyor, with his report, exhibits the respective claims of the parties. The diagram A B C D E F A represents the land claimed by the plaintiffs. A B C D G H A represents the land, which, as the defendants contend, the grant to the plaintiffs ought to cover. A B C and D form the northern side of the

tract, and are admitted by both parties to be correctly laid down. The question is: whether the next line should run from D to E, as contended by the plaintiffs, or from D to G, as contended by the defendants. The line from D to G corresponds in course and distance with the call of the patent; it is S. nine W. four thousand six hundred poles. The line from D to E is S. twenty-eight degrees nine minutes west, four thousand eight hundred and fifty-four poles, varying nineteen degrees nine minutes from the course, and two hundred and fifty-four poles from the distance. This variance places the corner at E about five miles west from that of G, and produces a correspondent change in the two remaining lines which form the southern and western sides of the land.

At the trial the defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the opinion of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs.

The demurrer states that at the trial the plaintiff gave in evidence the plat and report made by the surveyor, which show that the lines from A to D which bind the land on the north, conform to the patent. That the other three lines—D *E, E F and F A—which [***95**] inclose the land on the west, south, and east, are not marked, nor is any corner found at F. At E. two chestnut oaks were found where two chestnut oaks were called for in the patent. They are marked as a corner previously made for Robert Young. The lines D. G., G. H. and H. A., laid down by the directions of the defendants conformably to the patent, are not marked.

The plaintiffs also gave in evidence the patent under which they claimed, dated the 9th of July, 1796, the conveyance of the patentees to them, and an official copy of the plat and certificate of survey on which the grant was founded. The land is described as lying on the waters of Tygart Valley River, Cheat River, to include the waters of Pheasant Run and a part of Clover Run, part of the waters of Benjamin Hornback's and Cherry Tree Fork of Leading Creek. They also gave in evidence the grants under which the defendants claimed, with the entries and surveys on which they were founded, which were younger than that under which the plaintiffs claimed. They also read the deposition of William Wilson. He deposes that he made the survey of fifty thousand acres in 1795. He proves that he began at A and ran the line on the north side of the tract to D. He then protracted a line intended to strike two chestnut oaks near the head of James's Run by the side of a path leading from Tygart Valley to the mouth of Seneca, which was a corner he had previously marked to a survey of one hundred thousand acres he had made for Robert Young. From those two chestnut oaks he ran to Tygart Valley River. Not having a sufficient distance, and finding that the line would cross the river several times, he extended the course and called for a white oak, because he knew there were white oaks thereabout. He does not know whither the course and distance would have carried him to the east or west side of the river. He then protracted a line to the

beginning. On being cross examined he said he made the line from D to E in his office, and laid it down, intending to hit the two chestnut oaks near James's Run. He went to the two chestnut oaks and ran to the river (not quite half the line E F) where he stopped, and continued the line E F the proper distance, and also protracted the closing line F A. He had **96*** no axeman *with him, consequently marked no trees. He was accompanied by only one individual, and does not allege that a chain was stretched.

The defendants in the District Court having withdrawn their cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiffs subject to that demurrer, cannot hope for a judgment in their favor if, by any fair construction of the evidence, the verdict can be sustained. If this cannot be done, the judgment rendered for the defendants in error must be reversed.

It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. For the purpose of furnishing this description and of separating the land from that which is not appropriated, the law directs a survey to be made by sworn officers, who, "at the time of making such survey, shall see the same bounded plainly by marked trees, except where a water-course or ancient marked line shall be the boundary." The persons employed to carry the chain are to be sworn by the surveyor to measure justly and exactly to the best of their abilities. The description of the land thus made by a survey is transferred into the grant. It consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed. The courses and distances are less certain and less permanent guides to the land actually surveyed and granted than natural and fixed objects on the ground; but they are guides to some extent, and, in the absence of all others, must govern us. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us, and must be used.

In the case at bar the line from D to E or from D to G, which forms the western boundary of the land intended to be granted, was never run or marked. In his office the surveyor assumed a course and distance, and terminates the line of two small chestnut oaks. But where **97*** are we to look *for these two small chestnut oaks in a wilderness in which one man takes up fifty thousand acres of land, and another one hundred thousand? Or how are we to distinguish them from other chestnut oaks? The guide and the only guide given us by the survey or by the grant is the course and distance. We are to find them at the end of a line of four thousand six hundred poles, to be run south nine degrees west from the established corner at D. We are furnished with no other guide which may conduct us to them. That the surveyor had in his mind the two small chestnut oaks which he had marked as a corner to Robert Young can be of no avail, since he has

not indicated this intention on his survey. He had impliedly indicated the contrary. When the established line or corner of a prior survey is made part of a boundary, it is usual to designate such marked line or corner by naming the person whose line or corner it is. The call for two small chestnut oaks without farther description would rather exclude the idea that they were already marked as the corner of a previous survey.

The fact that the surveyor on a subsequent day went to Young's corner, and without marking it as a corner for the survey he was then employed to make, walked along the line he intended for the southern boundary of the land nearly half the distance without marking a single tree, cannot in any manner affect the case.

In estimating this evidence we may inquire what weight would be allowed to it if the grantee claimed to hold the land actually within his patent lines, and this testimony was opposed to him by a junior patentee within those lines? We believe that no person would hesitate an instant to say that his title to the land actually within the lines of his patent was unquestionable. He cannot be permitted after the grant has issued to elect what ground it shall cover.

This opinion derives some additional weight from the general description of the country as made in the grant, and as shown on the plat and report of the survey made by order of court in the cause.

The grant calls to be on the waters of Tygart Valley, and to include part of the waters of Hornback's Run, and the *Cherry Tree [***98** Fork of Leading Creek. This description accords with the survey as required by the plaintiffs in error. The grant, if placed as the defendants in error claim to place it, will include, as is shown by the survey made in the cause, not only part of the waters of Hornback's Run and the Cherry Tree Fork of Leading Creek, but all these two streams, and even all Leading Creek itself, of which they are small branches. It will also, instead of being on the waters of Tygart's Valley River, lie on the river itself, which it crosses several times. The general description, then, contained in the grant, fits the land comprehended within the lines of the patent much better than it does that which is claimed by the defendants in error.

It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description, which show that the survey actually covered other ground than the line of the grant would comprehend. If the grant in this case had called for two small chestnut oaks marked as a corner to Robert Young's survey of one hundred thousand acres, the mistake in the course and distance would not have prevented the line from being run from the corner at D to the chestnut oak. So if a plain marked line, originally run from the one corner to the other, had shown that the land claimed was the land actually surveyed. But neither the grant nor the face of the plat furnishes any information by which the corner called for in the grant can be controlled. We are therefore of opinion that the defendant in error is not entitled to the land shown by the survey made in the cause to be

in possession of the plaintiffs in error, and that the demurrer ought to have been sustained.

The judgment is reversed and the cause remanded, with directions to enter judgment in favor of the defendants in the District Court.

See—3 Wheat., 444; 6 Pet., 328.

99*] *JOHN INGLIS, Demandant,

v.

THE TRUSTEES OF THE SAILOR'S SNUG HARBOR IN THE CITY OF NEW YORK.

Charitable devise—uses and trusts—intention of testator—citizenship—English and American rule as to American antenati—allegiance—devise of estate “wheresoever and whatsoever in law or equity, in possession, reversion, remainder or expectancy”—local law of real property—writ of right—cases discussed.

The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the Chancellor of the State of New York, and recorder of the city of New York, &c. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office to the uses and trusts, subject to the conditions and appointments declared in the will; which were; out of the rents, issue and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called “The Sailor’s Snug Harbor,” for the purpose of maintaining and supporting aged, decrepit and worn-out sailors, &c. And after giving direction, as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should forever continue the governors thereof, &c., he adds, “it is my will and desire that if it cannot legally be done according to my above intention by them without an Act of the Legislature, it is my will and desire that they will as soon as possible apply for an Act of the Legislature to incorporate them for the purpose above specified; and I do further declare it to be my will and intention that the said rest, residue,

&c., of my estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said last will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner and for the uses herein above specified.”

Within five years after the death of the testator the Legislature of the State of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons holding the offices designated in the will and their successors a body corporate, by the name of “The Trustees of the Sailor’s Snug Harbor,” and enabling them to execute the trusts declared in the will.

This is a valid devise to divest the heir of his legal estate, or, at all events to affect the lands in his hands with the trust declared in the will.

If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose; it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. If this intention cannot be carried into effect precisely in the mode at first contemplated by him consistently with the rules of law, he has provided an alternative, which, with the aid of the Act of the Legislature, must remove every difficulty. [113]

*In the case of *The Baptist Association v. [*100 Hart’s Executors* (4 Wheat., 27), the court considered the bequest void for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provisions of the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund? [114]

Whenever a person by will gives property and points out the object, the property, and the way in which it shall go, a trust is created unless he shows clearly that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it. [119]

What are the rights of the individuals composing a society and living under the protection of the government when a revolution occurs, a dismemberment takes place, and when new governments are formed and new relations between the government and the people are established? A person

NOTE.—Wills, devise to trustees for charitable uses. As to devises and bequests to unincorporated associations, &c., see note to *Baptist Association v. Hart*, 4 Wheat., 1.

Unincorporated associations not capable of taking devise to charitable uses. *Baptist Association v. Hart*, 4 Wheat., 1; *Goesele v. Bineler*, 5 McLean, 223; *Affirmed*, 14 How., 539.

Subsequent incorporation confers on the association the capacity of taking and managing the fund. *Inglis v. Trustees of Sailor’s Snug Harbor*, *supra*.

Where a corporation has the legal capacity to take real and personal estate, it may take and hold it in trust, in the same manner and to the same extent as a private person. *Vidal v. Girard*, 2 How., 127; *Miller v. Lerch*, 1 Wall., Jr., C. C., 210.

Validity of particular bequests and devises to charitable uses, determined. *Baptist Association v. Hart*, 4 Wheat., 1; *Beatty v. Kurtz*, 2 Pet., 566; *Inglis v. Sailor’s Snug Harbor*, *supra*; *Henderson v. Griffin*, 5 Pet., 151; *Perin v. Carey*, 24 How., 465; *Cresson v. Cresson*, 6 Am. Law Reg., 42; 5 Pa. Law J. Rep., 431; *Ould v. Washington Hospital*, 5 Otto, (95 U. S.) 303.

Uncertain legacies which are not given with sufficient definiteness to vest an interest in the beneficiaries intended, or to enable them to claim, cannot be carried into effect by the United States, on the ground that they are for charitable uses. *Wheeler v. Smith*, 9 How., 55; *Barnes v. Barnes*, 3 Crauch C. C., 269; See *Fontain v. Ravenel*, 17 How., 369.

By the laws of Maryland a bequest to an unincorporated association is void for want of power in the legatees to take. *Meade v. Meade*, Taney, 339, 359.

incorporated association is void for want of power in the legatees to take. *Meade v. Meade*, Taney, 339, 359.

If the grant or devise is too vague and indefinite to enable the court to detect to what charity the instrument refers, then the estate will follow the prescribed course of descent; otherwise the charity will be enforced. *Russell v. Allen* 7 Reporter, 614; *Power v. Cassidy*, 16 Hun. N. Y., 294; S. C., 54 How. Pr. R., 4; *Ex-parte Goodrich*, 2 Redf. N. Y., 45.

The support of foundlings is a charitable use and greater certainty in designating the beneficiaries intended, is not necessary. *Ould v. Washington Hospital*, 5 Otto, (95 U. S.) 303.

A devise to trustees, to grant and convey the trust estate to a corporation yet to be created in fee, for the purposes of the trust, may be sustained as an executory devise. *Ould v. Washington Hospital*, 5 Otto, (95 U. S.) 303.

The opinion prevailed extensively in this country for a considerable period that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon the statute 4 Eliz., ch. 4. By more recent discussions this idea has been exploded (*Bright, Pa.*, 346; 7 Vt., 241; 2 How., 128); and one cannot but feel surprised that it ever prevailed. The statute is purely remedial and ancillary. *Ould v. Washington Hospital*, 5 Otto, (95 U. S.) 303.

By a statute of New York, a devise of lands in that State can only be made to natural persons, and to such corporations as are created under the

born in New York before the 4th of July, 1776, and who remained an infant with his father in the city of New York during the period it was occupied by the British troops; his father being a royalist and having adhered to the British government and left New York with the British troops, taking his son with him, who never returned to the United States, but afterwards became a bishop of the Episcopal Church in Nova Scotia; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the State of New York. [126]

If such a person had been born after the 4th of July, 1776, and before the 15th of September, 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remained a British subject and disabled from inheriting land in the State of New York. [126]

The rule as to the point of time at which the American *antenati* ceased to be British subjects differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the Declaration of Independence. [121]

The settled doctrine in this country is, that a person born here, but who left the country before the Declaration of Independence, and never returned here, became an alien and incapable of taking land subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent east. [121]

The doctrine of perpetual allegiance is not applied by the British courts to the American *antenati*; and this court, in the case of Blight's Lessee v. Rochester (7 Wheat., 544), adopted the same rule with respect to the rights of British subjects here—that although born before the revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. [121]

The British doctrine, therefore, is that the American *antenati*, by remaining in America after the peace, lost their character of British subjects; and our doctrine is that by withdrawing from this country, and adhering to the British [101*] government, they lost, or perhaps more properly speaking, never acquired the character of American citizens. [122]

The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases. [122]

This court in the case of M'Ilvaine's Lessee v. Cox (4 Cranch, 211), fully recognized the right of election; but they considered that Mr. Cox had lost that right by remaining in the State of New

Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she declared him to be a member of and in allegiance to the new government. [124]

Allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine. [125]

C. B., by her last will and testament, devised "all her estate, real and personal, wheresoever and whatsoever in law or equity, in possession, reversion, remainder or expectauey, unto her executors and to the survivor of them, his heirs and assigns forever," upon certain designated trusts; under the statute of wills of the State of New York (1 N. Y. Revised Laws, 364), all the rights of the testator to real estate, held adversely at the time of the decease of the testator, passed to the devisees by this will. [127]

It is the uniform rule of this court with respect to the title to real property, to apply the same rule which is applied to State tribunals in like cases. [127]

The right of an absent and absconding debtor to real estate held adversely, passed to and became vested in the trustees by the Act of the Legislature of New York, passed April 4, 1786, entitled, "An act for relief against absconding and absent debtors." [131]

In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If anything which fell from this court in the case of *Greene v. Lister* (8 Cranch, 229), can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene v. Watkins* (7 Wheaton, 31). It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the demandant's seisin: that a writ of right does bring into controversy the mere right of the parties to the suit; and, if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises, or that his mere right is inferior to that set up against him. [133]

In a writ of right on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety. [135.]

THIS case came before the court at January Term, 1829, from the Circuit Court of the United States for the Southern District of New York, on points of disagreement certified by the judges of that court. After argument by counsel, it was held under advisement until the present term.

laws of the State and are authorized to take by devise. A devise, therefore, of lands in that State to the government of the United States, is void. *United States v. Fox*, 4 Otto 94 (U. S.), 315.

A devise in trust, "for the purpose of founding an institution for the education of youth in St. Louis County, Mo." Sustained. *Russell v. Allen*, 8 Cont. L. J., 314.

A devise of real estate to an unincorporated society, for charitable uses, is valid. *Bartlett v. Nye*, 4 Met., 378; *Washburn v. Sewall*, 9 Met., 280.

The system of charitable uses as recognized in England, has no existence in New York; and no trust in realty can be devised except such as are permitted by the statutes of that State. *Holmes v. Mead*, 52 N. Y., 332.

A devise of lands in trust to be used and occupied for religious purposes, where there is no corporation in existence capable of taking, and none named in the will as the beneficiary of the trust, is invalid. *Ibid.*

In New York, a bequest which attempts to create a trust not valid by the revised statutes of that State, cannot be sustained merely because it is to charitable uses. *Wetmore v. Parker*, 7 Laus., 121; *S. C.* affirmed, 52 N. Y., 450.

What is a sufficient compliance with a general law, as to organization of a charitable institution, to enable it to take a legacy in New York. *Betts v. Betts*, 4 Abb., N. C., 317.

A misnomer or misdescription of the beneficiary will not invalidate a charitable devise or bequest;

if a corporation be intended, its identity may be established by parol. *Lefevre v. Lefevre*, 59 N. Y., 434.

What is a "charity," or a charitable corporation. *Moriee v. Bishop of Durham*, 9 Ves., 399, 405; *Coggleshall v. Pelton*, 7 Johns. Ch., 294; *Perin v. Carey*, 24 How., 506; *Franklin v. Arnfield*, 2 Sneed. Tenn., 305; *Price v. Maxwell*, 28 Penn. St., 35; *Jackson v. Phillips*, 14 Allen, Mass., 539, 556; 2 Story, Eq. Jur., sec. 1194, §; *Gooch v. Association for Relief, etc.*, 109 Mass., 558; *Thomson v. Norris*, 20 N. J. Eq., 489.

Mr. Binney in his argument in the famous *Girard Will Case* defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the Catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." *Girard Will Case*, 41; approved, 28 Penn. St., 35.

Lord Camden defines it to be "a gift to a general public use, which extends to the poor as well as the rich." *Ambl.*, 652. This definition has been approved by high authority. See *Coggleshall v. Pelton*, 7 Johns. Ch., 294; *Perin v. Carey*, 24 How., 506; 2 Sneed. Tenn., 305.

That the title to real property by will, or devise, or deed, is governed by the law of the State in which it is situated, in all actions in the federal courts, see notes to *Clark v. Graham*, 6 Wheat., 577; *Elmendorf v. Taylor*, 10 Wheat., 132; *Darby v. Mayer*, 10 Wheat., 465; *Jackson v. Chew*, 12 Wheat., 153.

It was a writ of right brought in the Circuit Court for the recovery of certain real estate situate in the city of New York, whereof Robert Richard Randall died seized and possessed.

102*] *The count was upon the seisin of Robert Richard Randall, and went for the whole premises.

Paul R. Randall and Catherine Brewerton, a brother and sister of Robert Richard Randall, both survived him, but had since died without issue.

The demandant claimed his relationship to Robert Richard Randall through Margaret Inglis, his mother, who was a descendant of John Crooke, the common ancestor of Robert Richard Randall, Catherine Brewerton, and Paul R. Randall.

The tenants put themselves upon the grand assize, and the mise was joined upon the mere right.

The cause was tried at October Term, 1827.

The counsel for the tenants began with the evidence, and showed that they had been in possession for a number of years, claiming and holding the land as owners.

The seisin of Robert Richard Randall was then proved, and that he purchased from one Baron Poelnitz. The genealogy of the demandant as next collateral heir of Robert R. Randall, on the part of his mother, and that the blood of Thomas Randall, the father of Robert Richard Randall, was extinct, was proved.

It was in evidence that the British troops entered into New York on the 15th of September, 1776, and took and had full possession thereof, and of the adjacent bays and islands, and established a civil government there under the authority of the British commander-in-chief.

Evidence was given to prove that the demandant was not more than one year old when the British troops entered the city of New York, where he was born; that the father of the demandant was a native of Ireland, and had resided for some time in New York, and continued to reside there until he left there for England on the day of or the day before the evacuation of New York, the 25th of November, 1783. He took the demandant with him to England, remained there two years, was appointed a bishop, and went to Nova Scotia in 1785 or 1786, and there resided until his death. The mother of the demandant died in New York on the 21st of September, 1783, a little while before the evacuation thereof by the British troops. It was always considered by a witness

103*] *who testified in the cause, that Charles Inglis, the father of the demandant, was a royalist. The demandant was certainly born before the year 1779; in 1783 he could not speak plainly, and was considered not more than five years old, between four and five. He took his degree of master of arts in England, was there ordained a clergyman; his place of residence from the time he first arrived at Nova Scotia was with his father, and he has continued to reside there ever since. He went to England to be consecrated a bishop; which character he now holds, being Bishop of Nova Scotia. Charles Inglis, the father of the demandant, had four children, the eldest of which, a son, died an infant, 20th of January, 1782, two daughters

and the demandant, who was the youngest child.

The following proceedings of a convention of the State of New York before the British entered the city were in evidence:

Tuesday Afternoon, July 16th, 1776.

Present, General Woodhull, president, and the members of the Convention.

Whereas, the present dangerous situation of this State demands the unremitted attention of every member of the Convention: *Resolved*, unanimously, that the consideration of the necessity and propriety of establishing an independent civil government be postponed until the first day of August next, and that in the meantime,

"*Resolved*, unanimously, that all magistrates and other officers of justice in this State who are well affected to the liberties of America be requested, until further orders, to exercise their respective offices, provided that all processes and other their proceedings be under the authority and in the name of the State of New York.

"*Resolved*, unanimously, that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws and are members of the State: and that all persons passing through, visiting, or making a temporary stay in said State, being entitled to the protection of the laws during the time of such passage, *visitation, or temporary stay, owe [***104** during the same allegiance thereto.

"That all persons members of or owing allegiance to this State as before described, who shall levy war against the said State, within the same, or be adherent to the King of Great Britain, or others, the enemies of the said State, within the same, giving to him or them aid or comfort, are guilty of treason against the State, and being thereof convicted, shall suffer the pains and penalties of death."

The tenants gave in evidence the Acts of the Legislature of New York: "For the forfeiture of the estates of persons who adhered to the enemies of the State," &c., passed the 22d of October, 1779; the "act supplementary to the act to provide for the temporary government of the southern part of this State," &c., passed the 23d of October, 1779; and the supplement thereto passed the 27th of March, 1783.

Robert Richard Randall died in the city of New York between the 1st of June and the 1st of July, 1801, having on the 1st of June of that year made his last will and testament; probate of which was regularly made in the city of New York.

The provisions of the will of Robert Richard Randall under which the tenants claimed their title are the following:

"6. As to and concerning all the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath the same unto the Chancellor of the State of New York, the mayor and recorder of the city of New York, the president of the Chamber of Commerce in the city of New York, the president and vice-president of the Marine Society of the city of New York, the senior minister of the Episcopal Church in the said city, and the senior minister of the Presbyterian Church in

the said city, to have and to hold all and singular the said rest, residue, and remainder of my said real and personal estate, unto them the said Chancellor of the State, of New York, mayor of the city of New York, the recorder of the city of New York, the president of the Chamber of Commerce, president and vice-president of the Marine Society, senior minister **105*** of the Episcopal Church, and *senior minister of the Presbyterian Church in the said city, for the time being, and their respective successors in the said offices forever, to, for, and upon the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say: out of the rents, issues and profits of the said rest, residue, and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called "The Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepit, and worn-out sailors, as soon as they, my said charity trustees, or a majority of them, shall judge the proceeds of the said estate will support fifty of the said sailors and upwards; and I do hereby direct that the income of the said real and personal estate, given as aforesaid to my said charity trustees, shall forever hereafter be used and applied for supporting the asylum, or marine hospital, hereby directed to be built, and for maintaining sailors of the above description therein, in such manner as the said trustees, or a majority of them, may from time, or their successors in office, may from time to time direct. And it is my intention that the institution hereby directed and created should be perpetual, and that the above-mentioned officers for the time being, and their successors, should forever continue and be the governors thereof, and have the superintendence of the same. And it is my will and desire that if it cannot legally be done according to my above intention by them without an Act of the Legislature, it is my will and desire that they will as soon as possible apply for an Act of the Legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention that the said rest, residue and remainder of my real and personal estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations or any other persons should **106*** *heir, possess, or enjoy my property, except in the manner and for the uses herein above specified.

"And, lastly, I do nominate and appoint the Chancellor of the State of New York, for the time being at the time of my decease; the mayor of the city of New York, for the time being; the recorder of the city of New York, for the time being; the president of the Chamber of Commerce, for the time being; the president and vice-president of the Marine Society in the city of New York, for the time being; the senior minister of the Episcopal Church in the city of New York, and the senior minister of

the Presbyterian Church in the said city for the time being; and their successors in office after them, to be the executors of this my last will and testament, hereby revoking all former and other wills, and declaring this to be my last will and testament."

It was admitted that at the time of the decease of Robert Richard Randall, and of the probate of the will, the offices named in the will were respectively filled by different persons, and that they, or some of them, immediately upon the death of the testator entered upon the premises under the will, claiming to be the owners in fee, until the Legislature of New York, on their application, on the 6th of February, 1806, passed "An Act to incorporate the trustees of the marine hospital called 'The Sailor's Snug Harbor, in the city of New York.'"

Those offices continued to be filled respectively by different persons from the time of the death of the testator until the time of the trial.

The act incorporating "the trustees of the marine hospital," &c., provides:

"Whereas, it is represented to the Legislature that Robert Richard Randall, late of the city of New York, deceased, in and by his last will and testament duly made and executed, bearing date the 1st day of June, in the year of our Lord 1801, did, after bequeathing certain specific legacies therein mentioned, among other things give and devise and bequeath all the residue of his estate, both real and personal, unto the Chancellor of this State, the mayor and recorder of the city of New York, the president of the Chamber of Commerce in *the city of New York, the president [***107** and vice-president of the Marine Society of the city of New York, the senior minister of the Episcopal Church in the said city, and the senior minister of the Presbyterian Church in the said city, for the time being, and to their successors in office respectively, in trust, to receive the rents, issues and profits thereof, and to apply the same to the erecting or building on some eligible part of the land whereon the testator then resided, an asylum, or marine hospital to be called "The Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepit and worn-out sailors, as soon as the said trustees, or a majority of them, should judge the proceeds of the said estate would support fifty of such sailors and upwards; and that the said testator in his said will declared his intention to be that the said estate should at all events be applied to the purposes aforesaid, and no other; and if his said intent could not be carried into effect without an act of incorporation, he therein expressed his desire that the said trustees would apply to the Legislature for such incorporation; and, whereas, the said trustees have represented that the said estate is of considerable value, and if prudently managed will in time enable them to erect such hospital and carry into effect the intent of the testator; but that as such trustees, and being also appointed executors of the said will, in virtue of their offices, and only during their continuance in the said offices, they have found that considerable inconveniences have arisen in the management of the said estate from the changes which have taken place in the ordinary course of the elections and ap-

pointments to those offices, and have prayed to be incorporated for the purposes expressed in the said will, and such prayer appears to be reasonable: therefore,

"1. Be it enacted by the people of the State of New York represented in Senate and Assembly that John Lansing, Jun., the Chancellor of this State; De Witt Clinton, the mayor, and Maturin Livingston, the recorder of the city of New York; John Murry, the president of the Chamber of Commerce of the city of New York; James Farquhar, the president, and Thomas Farmer, the first vice-president of **108**]* the Marine Society *of the city of New York; Benjamin Moore, senior minister of the Episcopal Church in the said city, and John Rogers, senior minister of the Presbyterian Church in the said city, and their successors in office respectively, in virtue of their said offices, shall be, and hereby are constituted and declared to be a body corporate, in fact and in name, by the name and style of The Trustees of The Sailor's Snug Harbor in the city of New York; and by that name they and their successors shall have continual succession, and shall be capable in law of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and in all manner of actions, suits, complaints, matters and causes whatsoever; and that they and their successors, may have a common seal, and may change and alter the same at their pleasure; and, also, that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate devised and bequeathed as aforesaid according to the intention of the said will; and the same is hereby declared to be vested in them and their successors in office for the purpose therein expressed; and shall also be capable of purchasing, holding and conveying any other real and personal estate for the use and benefit of the said corporation, in such manner as to them or a majority of them shall appear to be most conducive to the interest of the said institution."

The second section gives to the trustees the power to make rules and regulations, and to appoint officers for the government and business of the corporation, and provides for the mode of transacting the same.

The third section declares that "This act shall be deemed and taken to be a public act, and be construed in all courts and places benignly and favorably for the purposes therein intended."

On the 25th of March, 1814, an Act supplementary to the Act of Incorporation was passed, declaring that persons holding certain offices should act as trustees, and declaring it to be the duty of the corporation to make an annual re-**109**]* port of *their funds to the common council of the city of the state of their funds.

The counsel for the tenants gave in evidence the Act of the Legislature of New York "for relief against absconding and absent debtors," passed the 4th of April, 1786; and a report made to the Superior Court of Judicature of the State of New York of proceedings under the act against Paul Richard Randall, by which he was declared an absent debtor.

Under this act all the estate, real as well as Peters 3.

personal, of Paul Richard Randall, as an absent debtor, of what kind or nature soever, the same might be, were, on the 13th of November, 1800, attached, seized, and taken, and were, by the recorder of New York, under and in pursuance of the provisions of the law, upon the 22d of December, 1801, by an instrument of writing under his hand and seal, conveyed to Charles Ludlow, James Brewerton and Roger Strong, all of the city of New York, to be trustees for all the creditors of the said Paul Richard Randall, who afterwards duly qualified as trustees.

Subsequently, on the 14th of April, 1808, upon a further application to the recorder of New York, Paul Richard Randall being still absent, other trustees are appointed according to law, who were on the same day qualified to act as trustees.

The demandant gave in evidence the following rules of the Supreme Court of Judicature of the people of the State of New York:

"February 17th, 1804.

"In the matter of Paul Richard Randall, an absent debtor.

"On reading and filing the petition of Alexander Stewart, White Matlack, and Catherine Brewerton, agents and attorneys of the said Paul Richard Randall, and also reading and filing the answer of Charles Ludlow, James Brewerton, and Roger Strong, trustees for all the creditors of the said Paul Richard Randall, to the said petition, and on motion of Mr. Hamilton, attorney of the said Alexander Stewart, White Matlack, and Catherine Brewerton, it is ordered by the court that the said trustees pay to the said Paul Richard Randall, *or to his said agents and attorneys for [**110** his use, the sum of five thousand five hundred dollars out of the moneys now remaining in the hands of the said trustees.

"August 9th, 1804.

"In the matter of Paul R. Randall, an absent debtor, and his assignees, &c.

"On reading and filing the petition of Alexander Phoenix, the attorney and agent for Paul Richard Randall, together with a certified copy of the power of attorney and the acknowledgments of the trustees and former attorneys of the said Paul thereunto annexed, and on motion of *Mr. Van Wick*, of counsel for the said Alexander, ordered that the rule heretofore in February Term last made in the said matter be vacated, and that the said sum of five thousand five hundred dollars, acknowledged to be still remaining in the hands of the said Charles Ludlow, James Brewerton, and Roger Strong, trustees as aforesaid, be paid over by them to the said Alexander Phoenix, as the attorney and agent of the said Paul Richard Randall."

It appeared in evidence that Catherine Brewerton died some time in or about the year of our Lord 1815, and that Paul R. Randall died some time in the year of our Lord 1820, Catherine Brewerton having first, while a widow, made her last will and testament, dated the 5th of June, A. D. 1815, duly executed and attested to pass real estate, and devised among other things as follows, that is to say:

"Secondly, I give, devise, and bequeath, all my estate, real and personal, whatsoever and wheresoever, in law or equity, in possession,

reversion, remainder or expectancy (excepting such as is herein otherwise specially mentioned), unto my executors hereinafter named and to the survivor of them, his heirs and assigns forever, upon trust nevertheless for the uses and purposes hereinafter mentioned and intended, that is to say, that my executors shall," &c.

Upon the trial of the cause in the Circuit Court the judges were opposed in opinion upon the following points, which were certified to the court:

111*] *I. Whether, inasmuch as the count in the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

II. Whether John Inglis, the demandant, was or was not capable of taking lands in the State of New York by descent, which general question presents itself under the following aspects:

1. Whether, in case he was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

2. Whether, in case he was born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, he would be under the like disability.

3. Whether, if he was born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he would be under the like disability.

4. What would be the effect upon the right of John Ingles to inherit real estate in New York if the grand assize should find that Charles Ingles, the father, and John Ingles, the demandant, did, in point of fact, elect to become and continue British subjects and not American citizens?

III. Whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question so as to defeat the demandant in any respect; the premises being, at the date of the will and ever since, held adversely by the tenants in this suit.

IV. Whether the proceedings against Paul R. Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, or either of them, so as to defeat the demandant in any aspect.

V. Whether the devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir-at-law of his legal estate, or to affect the lands in his hands with a trust.

The cause was argued by *Mr. Ogden* and *Mr. Webster* for the demandant, and by *Mr. Talcott* **112*]** and *Mr. Wirt* for the *tenants. The argument was commenced and concluded by the counsel for the tenants.

Mr. Justice Thompson delivered the opinion of the court:

This case comes up from the Circuit Court for the Southern District of New York upon several points, on a division of opinion certified by that court. In the examination of these points I shall pursue the order in which they have been discussed at the bar.

I. "Whether the devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir-at-law of

his legal estate, or to affect the lands in his hands with a trust."

This question arises upon the residuary clause in the will, in which the testator declares, "that as to and concerning all the rest, residue, and remainder of my estate, both real and personal, I give, devise and bequeath the same unto the Chancellor of the State of New York, the mayor and recorder of the city of New York, &c., (naming several other persons by their official description only) to have and to hold all and singular the said rest, residue and remainder of my said real and personal estate, unto them, and their respective successors in office, forever, to, for and upon, the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say: out of the rents, issues and profits of the said rest, residue and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum, or marine hospital, to be called 'The Sailor's Snug Harbor,' for the purpose of supporting aged, decrepit, and worn-out sailors," &c. And after giving directions as to the management of the fund by his trustees, and declaring that it is his intention that the institution erected by his will should be perpetual, and that the above-mentioned officers for the time being and their successors should forever continue to be the governors thereof and have the superintendence of the same, he then adds, "and it is my will and desire that if it cannot legally be done according to my above intention by them *with- [*113 out an Act of the Legislature, it is my will and desire that they will as soon as possible apply for an Act of the Legislature to incorporate them for the purposes above specified. And I do hereby declare it to be my will and intention that the said rest, residue and remainder of my said real and personal estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations or other persons should heir, possess or enjoy my property, except in the manner and for the uses herein above specified."

The Legislature of the State of New York, within a few years after the death of the testator, on the application of the trustees, who are also named as executors in the will, passed a law constituting the persons holding the offices designated in the will and their successors in office a body corporate, by the name and style of "The Trustees of the Sailor's Snug Harbor in the city of New York," and declaring that they and their successors, by the name and style aforesaid, shall be capable in law of holding and disposing of the said real and personal estate devised and bequeathed as aforesaid according to the intentions of the aforesaid will. And that the same is hereby declared to be vested in them and their successors in office for the purposes therein expressed.

If, after such a plain and unequivocal declaration of the testator with respect to the dis-

position of his property, so cautiously guarding against, and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills that the intention of the testator is to be sought after and carried into effect. But no such difficulty in my judgment is here presented. If the intention of the testator cannot be carried into effect precisely in the mode at first contemplated **114***] by *him consistently with the rules of law, he has provided an alternative, which, with the aid of the Act of the Legislature, must remove all difficulty.

The case of the *Baptist Association v. Hart's Executors* (4 Wheat., 27), is supposed to have a strong bearing upon the present. This is, however, distinguishable in many important particulars from that. The bequest there was, "to the Baptist Association that for ordinary meets at Philadelphia." This association, not being incorporated, was considered incapable of taking the trust of a society. It was a devise in *presenti*, to take effect immediately on the death of the testator, and the individuals composing it were numerous and uncertain, and there was no executory bequest over to the association if it should become incorporated. The court therefore considered the bequest gone for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provision in the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund.

In the case now before the court there is no uncertainty with respect to the individuals who were to execute the trust. The designation of the trustees by their official character is equivalent to naming them by their proper names. Each office referred to was filled by a single individual, and the naming of them by their official distinction was a mere *designatio personæ*. They are appointed executors by the same description, and no objection could lie to their qualifying and acting as such. The trust was not to be executed by them in their official characters, but in their private and individual capacities. But, admitting that if the devise in the present case had been to the officers named in the will and their successors to execute the trust, and no other contingent provision made, it would fall within the case of the *Baptist Association v. Hart's Executors*.

The subsequent provisions in the will must remove all difficulty on this ground. If the first mode pointed out by the testator for carrying into execution his will and intention with **115***] *respect to this fund cannot legally take effect, it must be rejected, and the will stand as if it had never been inserted; and the devise would then be to a corporation to be created by the Legislature, composed of the several officers designated in the will as trustees, to take the estate and execute the trust.

And what objection can there be to this as a valid executory devise, which is such a dis-
Peters 3.

position of lands that thereby no estate vests at the death of the deviser, but only on some future contingency? By an executory devise a freehold may be made to commence *in futuro*, and needs no particular estates to support it. The future estate is to arise upon some specified contingency, and the fee-simple is left to descend to the heir-at-law until such contingency happens. A common case put in the books to illustrate the rule is: if one devises land to a *feme sole* and her heirs upon her marriage. This would be a freehold commencing *in futuro* without any particular estate to support it, and would be void in a deed though good by executory devise. (2 Black. Com., 175.) This contingency must happen within a reasonable time, and the utmost length of time the law allows for this is that of a life or lives in being and twenty-one years afterwards. The devise in this case does not purport to be a present devise to a corporation not in being, but a devise to take effect *in futuro* upon the corporation being created. The contingency was not too remote. The incorporation was to be procured according to the directions in the will as soon as possible on its being ascertained that the trust could not legally be carried into effect in the mode first designated by the testator. It is a devise to take effect upon condition that the Legislature should pass a law incorporating the trustees named in the will. Every executory devise is upon some condition or contingency, and takes effect only upon the happening of such contingency or the performance of such condition; as in the case put of a devise to a *feme sole* upon her marriage; the devise depends on the condition of her afterwards marrying.

The doctrine sanctioned by the court in *Porter's case* (1 Coke's Rep., 24), admits the validity of a devise to a future incorporation. *In answer to the argument that the [***116** devise of a charitable use was void under the statute 23 Hen. VIII., it was said that admitting this, yet the condition was not void in that case. For the testator devised that his wife shall have his lands and tenements upon condition that she, by the advice of learned counsel, in convenient time after his death, shall assure all his lands and tenements for the maintenance and continuance of the said free school and alms-men and alms-women forever. So that, although the said uses were prohibited by the statute, yet the testator hath devised that counsel learned should advise how the said lands and tenements should be assured for the uses aforesaid, and that may be advised lawfully, viz.: to make a corporation of them by the king's letters patent, and afterwards by license to assure the lands and tenements to them. So if a man devise that his executors shall, by the advice of learned counsel, convey his lands to any corporation, spiritual or temporal, this is not against any Act of Parliament, because it may lawfully be done by license, &c., and so doubtless was the intent of the testator; for he would have the lands assured for the maintenance of the free school and poor forever, which cannot be done without incorporation and license as aforesaid; so the condition is not against law; *quod fuit concessum per curiam*.

The devise in that case could not take effect

without the incorporation. This was the condition upon which its validity depended, and the incorporation was to be procured after the death of the testator. The devise, then, as also in the case now before the court, does not purport to be a present devise, but to take effect upon some future event. And this distinguishes the present case from that of the *Baptist Association v. Hart's Executors* in another important circumstance. There it was a present devise, here it is a future devise. A devise to the first son of A, he having no son at that time, is void; because it is by way of a present devise, and the devisee is not *in esse*. But a devise to the first son of A, when he shall have one, is good; for that is only a future devise, and valid as an executory devise. (1 Salk., 226, 229.)

The cases in the books are very strong to show that for the purpose of carrying into **117*** effect the intention of the testator, *any mode pointed out by him will be sanctioned if consistent with the rules of law, although some may fail. In *Thellusson v. Woodford* (4 Ves., Jun., 325), Buller, Justice, sitting with the Lord Chancellor, refers to and adopts with approbation the rule laid down by Lord Talbot in *Hopkins v. Hopkins*: that in such cases (on wills) the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired, but to let it work as far as it can. Most executory devises, he says, are without any freehold to support them; the number of contingencies is not material if they are to happen within the limits allowed by law. That it was never held that executory devises are to be governed by the rules of law, as to common law conveyances. The only question is whether the contingencies are to happen within a reasonable time or not. The Master of the Rolls in that case says (p. 329) he knows of only one general rule of construction equally for courts of equity and courts of law applicable to wills. The intention of the testator is to be sought for and the will carried into effect, provided it can be done consistent with the rules of law. And he adds another rule, which has become an established rule of construction; that if the court can see a general intention consistent with the rules of law, but the testator has attempted to carry it into effect in a way that is not permitted, the court is to give effect to the general intention, though the particular mode shall fail. (1 Peerc Wms., 332; 2 Brown's Ch., 51.)

The language of Lord Mansfield in the case of *Chapman v. Brown* (3 Burr., 1634), is very strong to show how far courts will go to carry into effect the intention of the testator. To attain the intent, he says, words of limitation shall operate as words of purchase; implication shall supply verbal omissions. The letter shall give way, every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest.

In *Bartlet v. King* (12 Mass. Rep., 543), the Supreme Judicial Court of Massachusetts adopt the rule laid down in *Thellusson v. Woodford*, that the court is bound to carry the will into effect if they can see a general intention con-

sistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. And the court refer with approbation to what is laid down by Powell in his Treatise on Devises, 421, that a devise is never construed absolutely void for uncertainty, but from necessity: if it be possible to reduce it to certainty it is good. So, also, in *Finlay v. Riddle* (3 Binn. Rep., 162), in the Supreme Court of Pennsylvania, the rule is recognized that the general intent must be carried into effect, even if it is at the expense of the particular intent.

A rule so reasonable and just in itself, and in such perfect harmony with the whole doctrine of the law in relation to the construction of wills, cannot but receive the approbation and sanction of all courts of justice; and a stronger case calling for the application of that rule can scarcely be imagined than the one now before the court. The general intent of the testator, that this fund should be applied to the maintenance and support of aged, decrepit and worn-out sailors, cannot be mistaken. And he seems to have anticipated that some difficulty might arise about its being legally done in the particular mode pointed out by him. And to guard against a failure of his purpose on that account, he directs application to be made to the Legislature for an incorporation to take and execute the trust according to his will; declaring his will and intention to be that his estate should, at all events, be applied to the uses and purposes aforesaid; and desiring all courts of law and equity so to construe his will as to have his estate applied to such uses. And to make it still more secure, if possible, he finally directs that his will should in no case, for want of legal form or otherwise, be so construed as that his relations or any other persons should heir, possess or enjoy his property, except in the manner and for the uses specified in his will.

The will looks therefore to three alternatives:

1. That the officers named in the will as trustees should take the estate and execute the trust.

2. If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust.

*3. If both these should fail, his [*119 heirs, or whosoever should possess and enjoy the property, are charged with the trust.

That this trust is fastened upon the land cannot admit of a doubt. Wherever a person by will gives property and points out the object, the property, and the way in which it shall go, a trust is created; unless he shows clearly that his desire expressed it to be controlled by the trustee, and that he shall have an option to defeat it. (2 Ves., Jun., 335.)

It has been urged by the demandant's counsel that these lands cannot be charged with the trust in the hands of the heir, because the will directs that they shall not be possessed or enjoyed except in the manner and for the uses specified. That the manner and the use must concur in order to charge the trust on the land. But I apprehend this is a mistaken application of the term *manner* as here used. It does not refer to the persons who were to execute the trust, but to the mode or manner in which it was to be carried into effect, viz., by erecting upon some eligible part of the land an asylum,

or marine hospital, to be called The Sailor's Snug Harbor. And the uses were, "for the purpose of maintaining and supporting aged, decrepit and worn-out sailors." Whoever, therefore, takes the land, takes it charged with these uses or trusts, which are to be executed in the manner above mentioned. And if so, there can be no objection to the Act of Incorporation and the vesting the title therein declared. It does not interfere with any vested rights in the heir; he has no beneficial interest in the land, and the law only transfers the execution of the trust from him to the corporation, and thereby carrying into effect the clear and manifest intention of the testator. But being of opinion that the legal estate passed under the will, I have not deemed it necessary to pursue the question of trust, and have simply referred to it as being embraced in the point submitted to this court.

If this is to be considered a devise to a corporation, it will not come within the prohibitions in the statute of wills (1 Revised Laws, 364). For this Act of Incorporation is, *pro tanto*, a repeal of that statute.

Taking this devise, therefore, in either of the 120*] points of view *in which it has been considered, the answer to the question put must be, that it is valid, so as to divest the heir of his legal estate, or, at all events, to affect the lands in his hands with the trust declared in the will.

If this view of the devise in the will of Robert Richard Randall be correct, it puts an end to the right and claim of the demandant, and might render it unnecessary to examine the other points which have been certified to this court had the questions come up on a special verdict or bill of exceptions. But coming up on a certificate of a division of opinion, it has been the usual course of this court to express an opinion upon all the points.

It is not, however, deemed necessary to go into a very extended examination of the other questions, as the opinion of the court upon the one already considered is conclusive against the right of recovery in this action.

II. The second general question is, whether John Inglis, the demandant, was or was not capable of taking lands in the State of New York by descent.

This question is presented under several aspects for the purpose of meeting what at present, from the evidence, appears a little uncertain as to the time of the birth of John Inglis. This question as here presented does not call upon the court for an opinion upon the broad doctrine of allegiance and the right of expatriation under a settled and unchanged state of society and government. But to decide what are the rights of the individuals composing that society and living under the protection of that government when a revolution occurs, a dismemberment takes place; new governments are formed; and new relations between the government and the people are established.

If John Inglis, according to the first supposition under this point, was born before the 4th of July, 1776. he is an alien, unless his remaining in New York during the war changed his character and made him an American citizen. It is universally admitted both in the English courts and in those of our own country, that

all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects, and it *must necessarily follow that that [*121 character was changed by the separation of the colonies from the parent State, and the acknowledgment of their independence.

The rule as to the point of time at which the American *antenati* ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the Declaration of Independence. And in the application of the rule to different cases, some difference in opinion may arise. The settled doctrine of this country is, that a person born here, who left the country before the Declaration of Independence and never returned here became thereby an alien, and incapable of taking lands subsequently by descent in this country. The right to inherit depends upon the existing state of allegiance at the time of descent east. The descent east in this case being long after the Treaty of Peace, the difficulty which has arisen in some cases where the title was acquired between the Declaration of Independence and the Treaty of Peace does not arise here. *Prima facie*, and as a general rule, the character in which the American *antenati* are to be considered will depend upon, and be determined by, the situation of the party and the election made at the date of the Declaration of Independence, according to our rule; or the Treaty of Peace according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined in most cases by what took place during the struggle, and between the Declaration of Independence and the Treaty of Peace. To say that the election must have been made before, or immediately at the Declaration of Independence, would render the right nugatory.

The doctrine of perpetual allegiance is not applied by the British courts to the American *antenati*. This is fully shown by the late case of *Doe v. Acklam* (2 Barn. & Cresw., 779). *Chief Justice Abbott* says: "James Ludlow, the father of Frances May, the lessor of the plaintiff, was undoubtedly born a subject of Great Britain. He was born in a part of *Amer-[*122 iea which was at the time of his birth a British colony, and parcel of the dominions of the crown of Great Britain; but upon the fact found, we are of opinion that he was not a subject of the crown of Great Britain at the time of the birth of his daughter. She was born after the independence of the colonies was recognized by the crown of Great Britain; after the colonies had become United States, and their inhabitants generally citizens of those States, and her father, by his continued residence in those States, manifestly became a citizen of them." He considered the Treaty of Peace as a release from their allegiance of all British subjects who remained there. A declaration, says he, that a State shall be free, sovereign and independent, is a declaration that the people composing the State shall no longer be considered as subjects of the sovereign by

whom such a declaration is made. And this court, in the case of *Blight's Lessee v. Rochester* (7 Wheat., 544), adopted the same rule with respect to the right of British subjects here—that, although born before the Revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country. The British doctrine therefore is, that the American *antenati*, by remaining in America after the Treaty of Peace, lost their character of British subjects. And our doctrine is, that by withdrawing from this country and adhering to the British government they lost, or, perhaps, more properly speaking, never acquired the character of American citizens.

This right of election must necessarily exist in all revolutions like ours, and is so well established by adjudged cases that it is entirely unnecessary to enter into an examination of the authorities. The only difficulty that can arise is to determine the time when the election should have been made. (Vattel B. 1, ch. 3, sec. 33; 1 Dall., 58; 2 Dall., 234; 20 Johns., 332; 2 Mass., 179, 236, 244, note; 2 Pickering, 394; 2 Kent's Com., 49.)

I am not aware of any case in the American courts where this right of election has been denied, except that of *Ainsley v. Martin* (9 Mass., 454.) Chief Justice Parsons does there seem to recognize and apply the doctrine of **123*** perpetual allegiance *in its fullest extent. He then declares that a person born in Massachusetts, and who, before the 4th of July, 1776, withdrew into the British dominions and never since returned into the United States, was not an alien; that his allegiance to the King of Great Britain was founded on his birth within his dominions, and that that allegiance accrued to the Commonwealth of Massachusetts as his lawful successor. But he adds what may take the present case even out of his rule: "It not being alleged," says he, "that the demandant has been expatriated by virtue of any statute or any judgment of law." But the doctrine laid down in this case is certainly not that which prevailed in the Supreme Judicial Court of Massachusetts both before and since that decision, as will appear by the cases above referred to of *Gardner v. Ward*, and *Kilham v. Ward* (2 Mass.), and of *George Phipps* (2 Pickering, 394, note).

John Inglis, if born before the Declaration of Independence, must have been very young at that time, and incapable of making an election for himself; but he must, after such a lapse of time, be taken to have adopted and ratified the choice made for him by his father, and still to retain the character of a British subject and never to have become an American citizen if his father was so to be considered. He was taken from this country by his father before the Treaty of Peace, and has continued ever since to reside within the British dominions without signifying any dissent to the election made for him; and this ratification as to all his rights must relate back, and have the same effect and operation as if the election had been made by himself at that time.

How, then, is his father, Charles Inglis, to be considered? Was he an American citizen? He was here at the time of the Declaration of Independence, and, *prima facie*, may be deemed

to have become thereby an American citizen. But this *prima facie* presumption may be rebutted; otherwise there is no force or meaning in the right of election. It surely cannot be said that nothing short of actually removing from the country before the Declaration of Independence will be received as evidence of the election; and every act that could be done to signify the choice that had been made, *except actually withdrawing from the [*124 country, was done by Charles Inglis. He resided in the city of New York at the Declaration of Independence, and remained there until he removed to England, a short time before the evacuation of the city by the British in November, 1783; New York, during the whole of that time, except from July to September, 1776, being in possession, and under the government and control of the British, he taking a part and acting with the British; and was, according to the strong language of the witness, as much a royalist as he himself was, and that no man could be more so. Was Charles Inglis under these circumstances to be considered an American citizen? If being here at the Declaration of Independence necessarily made him such, under all possible circumstances he was an American citizen. But I apprehend this would be carrying the rule to an extent that never can be sanctioned in a court of justice, and would certainly be going beyond any case as yet decided.

The facts disclosed in this case, then, lead irresistibly to the conclusion that it was the fixed determination of Charles Inglis, the father, at the Declaration of Independence, to adhere to his native allegiance. And John Inglis, the son, must be deemed to have followed the condition of his father, and the character of a British subject attached to and fastened on him also, which he has never attempted to throw off by any act disaffirming the choice made for him by his father.

The case of *M'Ilvaine v. Cox's Lessee* (4 Cranch, 211), which has been relied upon, will not reach this case. The court in that case recognized fully the right of election, but considered that Mr. Cox had lost that right by remaining in the State of New Jersey not only after she had declared herself a sovereign State, but after she had passed laws by which she pronounced him to be a member of and in allegiance to the new government; that by the Act of the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government. He continued to reside in New Jersey after the passage of this law, and until some time in the year 1777, thereby making his election to become a member of the new government; and the doctrine of allegiance became applicable to his case, which rests on the *ground of a mutual compact between [*125 the government and the citizen or subject, which it is said cannot be dissolved by either party without the concurrence of the other. It is the tie which binds the governed to their government in return for the protection which the government affords them. New Jersey, in October, 1776, was in a condition to extend that protection, which Cox tacitly accepted by remaining there. But that was not the situation of the city of New York; it was in the possession of the British. The government of the

State of New York did not extend to it in point of fact.

The resolutions of the Convention of New York of the 16th of July, 1776, have been relied upon as asserting a claim to the allegiance of all persons residing within the State. But it may well be doubted whether these resolutions reached the case of Charles Inglis. The language is, "that all persons abiding within the State of New York and deriving protection from the laws of the same, owe allegiance to the said laws and are members of the State." Charles Inglis was not, within the reasonable interpretation of this resolution, abiding in the State and owing protection to the laws of the same. He was within the British lines and under the protection of the British army, manifesting a full determination to continue a British subject. But if it should be admitted that the State of New York had a right to claim the allegiance of Charles Inglis, and did assert that right by the resolution referred to, still the case of *M'Ilvaine v. Cox* does not apply.

It cannot, I presume, be denied, but that allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine in the case of *Doe v. Acklam*, before referred to. The Act of Attainder passed by the Legislature of the State of New York by which Charles Inglis is declared to be forever banished from the State and adjudged guilty of treason if ever afterwards he should be found there, must be considered a release of his allegiance, if ever he owed any to the State. (1 Greenleaf's Ed. L. N. Y., 26.)

126*] *From the view of the general question referred to in this court, the answer to the specific inquiries will, in my judgment, be as follows:

1. If the demandant was born before the 4th of July, 1776, he was born a British subject; and no subsequent act on his part or on the part of the State of New York has occurred to change that character; he, of course, continued an alien, and disabled from taking the land in question by inheritance.

2. If born after the 4th of July, 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remains a British subject, and disabled from inheriting the land in question.

3. If born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he was, under the circumstances stated in the case, born a British subject; under the protection of the British government, and not under that of the State of New York, and, of course, owing no allegiance to the State of New York. And even if the resolution of the Convention of the 16th of July, 1776, should be considered as asserting a rightful claim to the allegiance of the demandant and his father, this claim was revoked by the Act of 1779, and would be deemed a release and discharge of such allegiance on Peters 3.

the part of the State, and which having been impliedly assented to by the demandant by withdrawing with his father from the State of New York to the British dominions and remaining there ever since, worked a voluntary dissolution by the assent of the government and the demandant of whatever allegiance antecedently existed, and the demandant at the time of the descent cast was an alien, and incapable of taking lands in New York by inheritance.

4. When Charles Inglis, the father, and John Inglis, his son, withdrew from New York to the British dominions, they had the right of electing to become and remain British subjects. And if the grand assize shall find that in point of *fact they had made [*127 such election, then the demandant at the time of the descent cast was an alien, and could not inherit real estate in New York.

III. The next question is, whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question so as to defeat the demandant in any respect; the premises being at the date of the will and ever since held adversely by the tenants in the suit. Mrs. Brewerton was the sister of Robert Richard Randall, and if the devise in his will is void and cannot take effect, she, as one of his heirs-at-law, would be entitled to a moiety of the lands in question. She died in the year 1815, having shortly before made her last will and testament, duly executed and attested to pass real estate. By this will she devised and bequeathed all her real and personal estate, whatsoever and wheresoever, in law and equity, in possession, reversion, remainder, or expectancy (except some specific legacies), unto her executors, upon certain trusts therein mentioned. If this will was therefore operative, so as to pass her right to her brother's estate, it will defeat the demandant's right to recover, as to one moiety of the premises in question.

The objection taken to the operation of this will is, that the premises were at the date thereof and ever since have been held adversely by the tenants in the suit.

The validity of this objection must depend upon the construction of the statute of wills in the State of New York. By that statute (1 N. Y. Rev. Laws, 364, sec. 1), it is declared that any person having any estate of inheritance, either in severalty, in coparcenary, or in common, in any lands, tenements, or hereditaments, may at his own free will and pleasure give or devise the same or any of them or any rent or profit out of the same or out of any part thereof to any person or persons (except bodies public and corporate) by his last will and testament, or any other act by him lawfully executed.

This being a question depending upon the construction of a State statute with respect to the title to real property, it has been the uniform course of this court to apply the *same rule that we find applied by the [*128 State tribunals in like cases. (1 Peters, 371.) This statute, upon the point now under consideration, has received a construction by the Supreme Court of the State of New York in the case of *Jackson v. Furick* (7 Cowen, 238). The question arose upon the validity of a devise in the will of Medceff Eden, the younger.

The objection was that at the time of the devise and of the death of the testator the premises in question were, and had been for several years before, in the adverse possession of the defendant, and that he and those under whom he claimed entered originally without the consent of the deviser or anyone from whom he claimed. The courts say the facts present the question whether the owner in fee can devise land which, at the time of the devise and his death, is in the adverse possession of another. That is, whether a person having a right of entry in fee-simple shall be said to have an estate of inheritance in lands, tenements, or hereditaments, in the language of our statute of wills.

It is unnecessary to pursue the course of reasoning which conducted the court to the conclusion to which it came. The result of the opinion was, that under the comprehensive words used in the act, a right of entry as well as an estate in the actual seisin and possession of the deviser was advisable; and that an estate that would descend to the heir is transmissible equally by will. The judge who delivered the opinion adverted to some cases that had arisen in the same court, wherein a contrary doctrine would seem to have been recognized, but came to the conclusion that no decision had been made upon the point.

In the case of *Wilkes v. Lion* (2 Cowen, 355), decided in the Court of Errors, in New York, one of the points relied upon by the counsel for the plaintiff in error was that this same will of Medcef Eden, the younger, was inoperative as to the premises then in question; they being lands of which he was not seized at the time of his death. I do not find that any direct opinion was given upon this point; but the objection must have been overruled or the court could not have come to the conclusion it did.

It is said, however, by the demandant's **129*** counsel, that these *cases do not apply to the one now before the court but only such estate as would descend to the heir of the deviser, and that the premises in question here would not descend to the heirs of Mrs. Brewerton for want of actual seisin. According to the rule laid down in *Watkins on Descents*, 23, that where the ancestor takes by purchase he may be capable of transmitting the property so taken to his own heirs without any actual possession in himself; but if the ancestor himself takes by descent, it is absolutely necessary in order to make him the stock or terminus from whom the descent should now run, and so enable him to transmit such hereditaments to his own heirs, that he acquire an actual seisin of such as are corporeal, or what is equivalent thereto, in such as are incorporeal.

It is very evident, however, that the court could not have intended to apply this rule to the construction of the statute of wills. For they say, in terms, that the question is whether a person having a right of entry in lands has an estate of inheritance devisable according to the provisions of the statute. But under the common law rule referred to, a person having only a right of entry would not be accounted an ancestor from whom the inheritance would be derived. (2 Black. Com., 209.) Such a con-

struction would be in a great measure defeating the whole operation of the act.

The demandant in this case states in his count that upon the death of Robert R. Randall, the right of the land descended to Paul R. Randall and Catherine Brewerton in moieties. So that, by his own showing, she had a right of entry, which, according to the express terms of the decision in *Jackson v. Varick*, was devisable.

The answer to this question must accordingly be that the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, notwithstanding the adverse possession held by the tenants in this suit at the date of the will.

IV. The fourth point stated is whether the proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to and vested the same *in the trustees appointed under the [***130** said proceedings, or either of them, so as to defeat the demandant in any respect.

Paul R. Randall, as stated in the case, died some time in the year 1820. He and his sister, Mrs. Brewerton, were the heirs-at-law to the estate of their brother, Robert Richard Randall. If, therefore, the will of Mrs. Brewerton operated to pass her right, Paul R. Randall would be entitled to the other moiety. If her will did not operate, then he would be entitled to the whole of his brother's estate.

It does not appear from the case that any objections were made to the regularity of the proceedings against Paul R. Randall under the Absconding Debtor Act; and, indeed, the question, as stated for the opinion of this court, necessarily implies that no such objection existed. The question is whether his right in the land passed to and became vested in the trustees.

As this is the construction of a State law, this court will be governed very much by the decision of the State tribunals in relation to it. The question is whether a right of entry passes under the provisions of the Absconding Debtor Act of the State of New York. (1 Rev. Laws, 157.) By the first section of the act the warrant issued to the sheriff commands him to attach and safely keep all the estate, real and personal, of the debtor. The tenth section authorizes the trustees to take into their hands all the estate of the debtor, whether attached as aforesaid or afterwards discovered by them; and that the said trustees, from their appointment, shall be deemed vested with all the estate of such debtor, and shall be capable to sue for and recover the same. And the trustees are required to sell all the estate, real and personal, of the debtor as shall come to their hands, and execute deeds and bills of sale, which shall be as valid as if made by the debtor himself.

These are the only parts of the act which have a material bearing upon this point. And the first question that would seem to arise is whether the term *estate*, as here used, will extend to the interest which the debtor has in lands held adversely. An estate in lands, tenements, and hereditaments, signifies such interest as a person has therein, and is the condition *or circumstance in which the [***131**

owner stands with regard to his property. (Coke, sec. 245, a; 2 Black. Com., 103.)

The language of the act is broad enough to include a right of entry; and there can be no reason to believe that such was not the intention of the Legislature.

The doctrine of the Court of Common Pleas in England in the case of *Smith v. Coffin* (2 H. Black., 461), has a strong bearing upon this question. The language of this Absconding Debtor Act, with respect to the estate of the debtor to which it shall extend, is as broad as that of the English bankrupt laws, and the same policy is involved in the construction. In the case referred to, the court say, the plain spirit of the bankrupt law is that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors. On general principles, rights of action are not assignable, but that is a rule founded on the policy of the common law, which is averse to encouraging litigation. But the policy of the bankrupt law requires that the right of action should be assignable, and transferred to assignees, as much as any other species of property. Its policy is that every right belonging in any shape to the bankrupt should pass to the assignees.

The estate of the debtor, under the New York statute, becomes vested in the trustees by the mere act and operation of law without any assignment.

The courts in New York have given a liberal construction to this act whenever it has come under consideration, so as to reach all the property of the absconding debtor. In the matter of *Smith*, an absconding debtor (16 Johns., 107), the broad rule is laid down that an attachment under this act is analogous to an execution. And in the case of *Hendy v. Dobbin* (12 Johns, 220), when the proceeding was under another statute (1 Rev. Laws, 398), very analogous to the one under consideration, the court say there can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. And in *Jackson v. Varick* (7 Cowen, 244), it is laid down as a rule admitting of no doubt that a right of entry may be taken and sold under an execution.

132* It is said, however, that this right of entry does not pass, because by the tenth section of the act it is declared that the deeds given by the trustees shall be as valid as if made by the debtor, and that the debtor could not make a valid deed of lands held at the time adversely.

This objection does not apply to the case: the question does not arise upon the operation of a deed given by the trustees. The point is whether the trustees themselves had any interest in these lands: not whether they would give a valid deed for them before reducing the right to possession. If it should be admitted that they could not, it would not affect the present question. The right is vested in the trustees by operation of law, the act declaring that the estate shall be deemed vested in them on their appointment, and that they shall be capable to sue for and recover the same, implying thereby that a suit may be necessary to reduce the estate of possession.

Peters 3.

Again, it is said that after such a lapse of time it is to be presumed that all the debts of Paul R. Randall have been paid, and the trust, of course, satisfied; and that the estate thereupon became revested in Paul R. Randall.

This objection admits of several answers. It does not appear properly to arise under the point stated. But the question intended to be put would seem to be whether the right, being a mere right of entry, passed, and became vested in the trustees. If it did so vest it could not be revested except by a reconveyance, or by operation of law resulting from a performance of the trust by paying off all the debts of the absent debtor. And whether these debts have been satisfied is a proper subject of inquiry for the grand assize. There is not enough before this court to enable it to decide that point. It is a question of fact and not of law. If it was admitted that all the debts have been satisfied, the effect of such satisfaction would be a question of law. The evidence might probably warrant the grand assize in presuming payment; but even that may not be perfectly clear. The order of the court upon the trustees to pay to the agent or attorney of Paul R. Randall five thousand five hundred dollars out of the money remaining in their hands, does not purport to [*133 consider this sum as the surplus after payment of all the debts. It was to be paid out of the moneys remaining in the hands of the trustees, thereby fully implying that their trust was not closed. And if the fact of payment and satisfaction of the debts is left at all doubtful, this court cannot say, as matter of law, that the interest in the land became revested in Paul R. Randall. It must depend upon the finding of the grand assize.

It is objected, however, that the defense set up and embraced in the two last questions is inadmissible. That in a writ of right the tenant cannot, under the *mise* joined, set up title out of himself and in a third person. That it is a question of mere right between the demandant and the tenant. And it has been supposed that this is the doctrine of this court in the case of *Green v. Lister* (8 Cranch, 229). If anything that fell from the court in that case will give countenance to such a doctrine, it is done away by the explanation given by the court in *Green v. Watkins* (7 Wheat., 31); and it is there laid down that the tenant may give in evidence the title of a third person for the purpose of disproving the demandant's seisin. That a writ of right does bring into controversy the mere right of the parties to the suit, and if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. And this is the rule recognized in the Supreme Court of New York. In the case of *Ten Eyck v. Waterberry* (7 Cowen, 52), the court say that in a writ of right the *mise* puts the seisin in issue, as the plea of not guilty in ejectment puts in issue the title, and that under the *mise* anything may be given in evidence except collateral warranty. The same rule is laid down by the Supreme Judicial Court of Massachusetts in the case of *Poor v. Robinson* (10 Mass. Rep., 131); and such appears to be the well-settled rule in the English

courts. (Booth, 98, 115, 112; 3 Wilson, 420; 2 W. Black. Rep., 292; 2 Saund., 45 *f.*, note 4; Stearns on Real Actions, 227, 228, 372.)

The answer to this question will accordingly be in the affirmative, unless the grand assize shall find that the trusts have been fully performed; and, if so, the interest in the land will **134*** by operation of law become revested in Paul R. Randall.

V. Another point submitted to this court is whether, inasmuch as the count in the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

This is rather matter of form, without involving materially the merits of the case. And as the action itself has become almost obsolete, it cannot be very important how the point is settled. I have not, therefore, pursued the question to see how it would stand upon British authority. The leaning of the courts in that country is against the action and against even allowing almost any amendments, holding parties to the most strict and rigid rules of pleading; and it may be that the English courts would consider that the recovery must be according to the count. But whatever the rule may be there, I think it is in a great measure a matter of practice, and that we are at liberty to adopt our rule on this subject. And no prejudice can arise to the tenant by allowing the demandant to have judgment for and recover according to the right which, upon the trial, he shall establish in the demanded premises. The cases referred to, showing that a demandant may abridge his plaint, do not apply to a writ of right. This is confined to the action of assize, and authorized by statute 21 Hen. VIII., ch. 3. This statute has been adopted in New York (1 Rev. Laws, 88), but does not help the case. But independent of any statutory provision, I see no good reason why the demandant should not be allowed to recover according to the interest proved, if less than that which he has demanded.

It is the settled practice in the Supreme Judicial Court in Massachusetts, in a writ of entry, to allow the demandant to recover an undivided part of the demanded premises. The technical objection that the verdict and judgment do not agree with the count is deemed unimportant; the title being the same as to duration and quality, and differing only in the degree of interest between a sole tenancy and a tenancy in common. The tenant cannot be prejudiced by allowing this. He is presumed to know his own title, and might have disclaimed. **135*** ed. *The courts in that State consider that with respect to the right to renew a part of the land claimed there is no distinction between a writ of entry and an action of ejectment. (2 Pick., 387; 3 Pick., 52.) Nor is it perceived that any well-founded distinction, in this respect, can be made between the action of ejectment and a writ of right.

The opinion of the court upon this point is, that under a count for the entire right, a demandant may recover a less quantity than the entirety.

Mr. Justice JOHNSON.

I concur in the opinion in favor of this devise; but this is one of those cases in which I wish my opinion to appear in my own words.

This case comes up on a certified difference of opinion on five points. I take them in their order on the record, not that in which they were argued. The first, which is a technical question and of minor importance, I shall pass over.

The second, which depends upon the civil or political relation in which the demandant Inglis stands to the State of New York, has been exhibited under four aspects. The first, contemplating him as born in the city of New York before the 4th of July, 1776. The second, as born after that period, but before the British obtained possession of the place of his birth. The third, as born in New York while a British garrison. The fourth, as born an American citizen, before the treaty of peace, but having elected to adhere to his allegiance to Great Britain. In the argument there was a fifth aspect of the question presented, which depended upon the Act of Confiscation and Banishment by the State against the father of the demandant. On the subject of descent, in *Shanks'* case, which having been argued first in order I had prepared first to examine; I have had occasion to remark that the right being claimed under the laws of the particular State in which the land lies, the doctrines of allegiance, as applicable to the demandant, must be looked for in the law of the State that has jurisdiction of the soil.

In this respect the laws of New York vary in nothing material from those of South Carolina. By the 25th article of the constitution [***136** of New York of 1777, the common law of England is adopted into the jurisprudence of the State. By the principles of that law, the demandant owed allegiance to the King of Great Britain, as of his province of New York. By the Revolution that allegiance was transferred to the State, and the common law declares that the individual cannot put off his allegiance by any act of his own. There was no legislative act passed to modify the common law in that respect; and as to the effect of the Act of Confiscation and Banishment, the constitution of the State has in it two provisions which effectually protect the demandant against any defense that can be set up under the effect of that act. The thirteenth article declares, "that no member of the State shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of the State by that constitution, unless by the laws of the land or the judgment of his peers." And the forty-first declares, "that no act of attainder shall be passed by the Legislature of the State for crimes other than those committed before the termination of the present war, and that such acts (which I construe to mean acts of attainder generally) shall not work a corruption of blood."

I shall therefore answer the second question in the affirmative; that is, that he was entitled to inherit as a citizen, born of the State of New York.

On the third question there were two points made. 1. That Mrs. Brewerton, having never entered, could not devise. 2. That the issue being joined upon the mere right, it was not competent for the tenant to introduce testimony to prove the interest out of the demandant, unless (I presume it was meant) the right be proved to be in the tenant. On the first of these

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points I am satisfied that the State of New York has not suffered the exercise of the testamentary power to be embarrassed with the subtleties of the English law respecting entries and adverse possessions. The words of their statute of wills are broad enough to carry any right or interest in lands, and such practically seems to have been the uniform understanding in that State.

On the second point, under this question, the facts seem to furnish a very obvious answer.

137*] Whatever be the rule in *other cases, and I do not feel myself called upon to say what the rule is, it certainly can have no application here, since it is through Mrs. Brewerton that the demandant has to trace his title. Certainly, then, it must be a good defense if the tenant can establish that it could not pass through Mrs. Brewerton, if she had prevented its descending by an act of her own, valid to that purpose. That question, also, I should answer in the affirmative.

On the fourth question I feel it difficult to give a precise answer. An attachment, and conveyance under it, are equivalent to an execution executed. But then there is reason to believe that the situation in which we find this attachment is analogous to that of an execution, satisfied without the sale of this particular property levied upon. Then, could such an execution interfere with the rights of the heir?

It does not appear to me that this question can be answered until the fact of satisfaction can be affirmed or repelled. It is for or against the demandant, according to that alternative.

The fifth is the material question, and since it has been acknowledged in argument that this suit was instituted on the authority of the case of the Baptist Association, it is necessary first to determine the doctrine which that case establishes.

The devise there was of lands lying in Virginia; the intended devisee was an unincorporated society described in the will as meeting at Philadelphia; that society became incorporate under a law of Pennsylvania, not of Virginia, and then brought suit in equity in Virginia to recover the property devised.

At the hearing, the court decided upon the single question "whether the plaintiffs were capable of taking under that will," and accordingly this court certify an opinion to no other point. Its language is, "that the plaintiffs are incapable of taking the legacy for which this suit was instituted." And, notwithstanding the marginal notes of the reporter to the contrary, that I consider as the only point decided in the cause. What the law of the case would have been had the Attorney-General of Virginia **138***] been made a party to the *suit, and (I presume also as a necessary inference) had the society been incorporated by Virginia in order to enable them to take the legacy, this court expressly declines deciding (p. 50); and certainly it would have been deciding between parties not before it, had it undertaken in that suit to pass upon the interest in or power over the subject existing in the State of Virginia. The statute of 43 Eliz. had been expressly repealed in Virginia previous to the death of Hart, the testator; and although the learned judge who delivered the opinion of the court goes so much at large into the origin, construction and effect of that statute, it could only Peters 3.

have been to prove all that the case required to have established, to wit, that it is under that statute alone that, even in England, a court of equity could extend to the complainants the relief which they craved. That statute being repealed in Virginia, it followed that the equity powers of the State courts, and of consequence that of the Circuit Court of the United States, could no longer be exercised over the subject of the charities embraced in that statute; that the State of Virginia, where the land lay, and not the State of Pennsylvania, stood in the relation of *parens patriæ*, and, therefore, that those powers and those rights which the crown exercises over charities in England in order to sustain and give effect to them, could only be exercised in that case by Virginia.

So far I consider the decision as authority, and so far it would require more than ordinary ingenuity to excite a reasonable doubt of its correctness. I consider it as too plain to be questioned that the powers which the Court of Chancery in Great Britain exercises over bequests of charities, in cases where the interest cannot vest under the rigid rules of law as applied to other bequests, is vested in that court by, or rather usurped under the statute of Elizabeth. I am not now speaking, it must be noted, of the power of the crown in such cases, but of the portion of the prerogative power over charities now exercised by the Court of Chancery in that kingdom.

I consider it as conclusive to prove the peculiar origin of this power, that there lies no appeal from the decision of the chancellor in *charity cases. (Cro. Ch., 40, 351; [***139** 4 Viner's Abridg., 496.) And when cases occur not enumerated in the statute of Elizabeth or not strictly analogous thereto, the crown still exercises the power of disposing of them by sign-manual. (See the cases collected in Viner Charit. Uses, G. 3, and note; also, 7 Ves., 490.) So that were the statute of Elizabeth repealed in England to-morrow, I see not by what authority this power could be exercised even there in the chancery courts. The history of this branch of the chancellor's jurisdiction proves that it could not be.

The plain object of the Act of 43 Eliz. is to place in commission a troublesome branch of the royal prerogative, and to vest the commissioners with power to institute inquests of office, or by other means to discover charities, or the abuse or misapplication of charities, and to authorize the board to exercise the same reach of discretion over such charities as the crown possessed, subject, however, to a revising and controlling power in the lord chancellor; not a mere judicial power, but a ministerial legislation and absolute power; a power, however, secondary or appellate in its nature, not original. This controlling power being absolute and final, soon swallowed up its parent, and became original and absolute. One judge admitted the precedent of an original bill in a charity case, a second judge satisfied his scruples upon that precedent, and other judges following regarded it as a settled practice. But in whatever way the power is exercised, whether as original or appellate, no other authority for its exercise has ever been claimed by the chancellor but the 43d Elizabeth.

The correctness of the decision of this court,

therefore, in the *Baptist Association* case, cannot, I think, be disputed. And yet it does in no wise affect the case now before us. But, it is argued that if the statute 43 Elizabeth be in force in New York, and its courts can exercise an original power under it, or if they can pursue the intermediate steps necessary to the exercise of an appellate or revising power (six in number, I think, Lord Coke makes them, 2 Inst.), still it can only be a suit in chancery in the name of the people or of their attorney-general, or of the corporation constituted by **140***] *them, although vested with all their interest in or power over the subject.

To me it appears demonstrable that the 43 Elizabeth introduces no new law of charities, makes none valid not valid before it passed, but simply places the right and power of the court over charities in other hands. If this were not the case, why should bequests to the universities and great schools, bequests in all cases constituting private visitors, and bequests to towns corporate (section 2 and 3), hospitals, &c., be excepted from its operation? Why should a more liberal rule be introduced with regard to the enumerated indefinite charities and the excepted cases remain subject to a more rigid system? Certainly the enumerated exceptions in that statute can lose nothing in point of merit or claim to public protection and indulgence by comparison with those acted upon by the statute. Indeed, the preamble explicitly confines the views of the Legislature to enforcing the application of the charities according to the charitable interest of the donor; it is the organization of a machine for carrying that interest into effect without introducing any new rule of law on the subject of construing, applying, or effectuating that intention.

What, then, was the law of that day, of the time when the 43 Elizabeth was passed on the subject of charitable donations? It was a system peculiar to the subject, and governed by rules which were applicable to no other; a system borrowed from the civil law, almost copied *verbatim* into the common law writers. This will distinctly appear by comparing Domat with Godolphin, in the *Orphan's Legacy*.

It has been said that there are neither adjudged cases nor *dicta* of elementary writers on the subject of the law as it stood previous to the 43 Elizabeth; but this I think is not quite correct. In Swinburn on Wills, as well as Godolphin's *Orphan's Legacy*, both books of great antiquity and high authority, we find all the rules for construing, enforcing and effectuating charities which have been maintained and acted upon in the chancery since the 43 Elizabeth, laid down as the existing laws of charitable devises; and yet the statute of Elizabeth is not quoted by either as the authority for **141***] *their doctrines; but their margins are filled with quotations from books which treat of the civil and common law. (God. Orph. Leg., Sec. Ed., 1676, P. 1, ch. 5, sec. 4, p. 17; Swinb. on Wills, P. 1, sec. 16.) And in so modern a book as Maddock's Ch. (Vol. I., 47), we find the law laid down in these words: "It has been a uniform rule in equity, before as well as after the statute of 43 Elizabeth, ch. 4, that where uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such

uses;" and then goes on to enumerate all that variety of cases to which the English courts have applied the latitudinous principle that the statute of charitable uses supplies all the defects of an assurance which the donor was capable of making, even to a devise by a lunatic.

Nor are these authors without adjudications to sustain the position that the law was such before as well as after the statute 43 Eliz. *Rolt's* case in Moore, p. 855, was the case of a will which occurred long before the statute of Eliz. passed. The devise was of land not in use, and not devisable by law or custom; so that had it been to an individual, it had been clearly void. Accordingly, the heir-at-law entered; yet, after the statute of Elizabeth, it was hunted up and returned upon inquest under the statute; and the lord-chancellor on an appeal, having called in the aid of the two common law chief justices, they all held it a good limitation or appointment. Now, there never has been a time when a subsequent statute, general in its provisions as was that of charitable uses, could divest a right legally descended upon an heir-at-law. It follows that the devise must have been good without the aid of that statute; this decision took place in court twenty years after the date of the statute.

So also in *Revett's* case in the same book, p. 890, when the will was made and the death of the deviser took place in 1586, about seven years before the statute of 43 Elizabeth, and there had been no surrender, the land being copyhold, so that the devise to the charity was clearly void if made to an individual, and accordingly the younger son entered; the charity was enforced against the purchaser from the heirs, *under the idea that it was good [***142**] as an appointment; clearly in pursuance of the rule that wherever the donor has power to convey and manifestly intends to convey, the law will make good every deficiency in favor of charities.

And in the case of *Sir Thomas Middleton*, which also happened before the statute, and where the legal defect lay in the legal insufficiency of the party in interest, and which was not a case of devise, yet it was held good.

It is true Perkins gives an instance of a very early date (40 Edw. III.; see Perkins, sec. 510) of a devise to a society not incorporated with power to purchase, in which the devise was held void; but on that case it may be remarked that as the clergy had an exclusive possession of the Court of Chancery for many years after (to 26 Henry VIII.), it is easy to perceive how the law of charities came to be improved to what it appears to have been at the date of the cases quoted from Moore. And there are two other remarks applicable to the cases in Perkins. In a modified sense those devises are held to be void even at this day, and to need the aid of a royal prerogative still existing in the court to relieve the devisees against the rules of the common law. It is obvious that property devised to charities under such circumstances as prevent its vesting by the rules of common law, is placed in a situation analogous to that of escheat, and afterwards disposed of under the king's sign-manual according to his conscience, actual or constitutional; so that in a trial at common law, such devise would be held void unless aided by prerogative power.

And secondly, there is this difference between the case in Perkins and the present case, that the former is expressed in words which contemplate vesting presently; the latter in words which contemplate a future vesting; which I consider an all-important feature in the present case, and one which may give validity to the present devise without resorting to the aid of those principles which appear peculiar to charitable bequests.

But as a charity to be governed by the law of the State of New York, it appears to me all-^{143*}most idle to view this case with *reference to any other rule of decision than their own adjudications. The case of *The Trustees of New Rochelle* (7 Johns. Ch. Rep., p. 292), was a case of greater difficulties than the present; for there the devise is immediate *in presenti* to a devisee having no capacity to take at the time. The Legislature afterwards gave that capacity and the court held the devise valid; nor is it unimportant in that case to observe that the case in Ambler, 422, of the devise to "the poor inhabitants of St. Leonard's Shore-Ditch," is recognized as authority; as well as that of *The Attorney-General v. Clarke*, in the same book, 651.

Now, this decision seems full to these points: 1. That the Legislature of that State can, *ex post facto*, give a capacity to take a charity where there was no such capacity existing at the time of devise over, is a case where the future existence of that capacity was not contemplated by the testator. 2. That an act of incorporation, with capacity to take, dispenses with the presence of the representative of the State in a suit to recover such a charity.

What more can be required in the present case, especially where the devisee is the party demandant?

It is no objection to the authority of *The New Rochelle* case that it was a suit in equity; for in a case like the present, where nothing is wanting but a competent party to sue or be sued whenever that party comes *in esse*, there can be no reason why the suit should not be at law, if courts of law are competent to give relief. Had the devise been void in the case referred to, the estate must have vested in the legal representative, and could no more have been shaken in equity than at law.

But I have said that the defendant here might dispense with the aid of the peculiar principles of the law of charities; and my opinion distinctly is, that the devise is good upon general principles in every respect, unless it be in the time of vesting; then it is not restricted within the legal limits, since the Legislature may, by possibility, never constitute the corporation contemplated in the will.

It is, in general, true, that where there is a present immediate devise there must exist a ^{144*}competent devisee and a *present capacity to take. But it is equally true that if there exists the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise to take effect *in presenti*, then, if confined within the legal limits, it is good as an executory devise.

This is the case of a devise to an infant *in ventre sa mere*; and this the ground of the distinction in Hobart 33, of a present devise to a Peters 3.

corporation where it is or is not in progress towards positive existence.

Now, the present case is one clearly of an alternative devise to such and such official characters, if by virtue of that devise they can take in perpetuity and succession; and if not, then to them when constituted a body politic by positive statute. Here is clearly contemplated a future vesting to depend on a capacity to take to be created by a legislative act; and if the passing of that legislative act had been restricted by the will in point of time to the lives of the individuals filling those offices at the time of the death of the testator, on what possible ground could the devise have been impeached?

Does, then, the law invalidate the devise for want of such restriction or some other equivalent to it? It is perfectly clear that the law of England does not, and never did, as relates to charities; at least where there has been no previous disposition. In this respect it seems to constitute an exception to the law of executory devises, as is implied in the general reference to the prerogative of the crown to give it legal efficiency by his sign-manual, and as is distinctly recognized in the case of *The Trustees of New Rochelle* in the courts of New York; a case in which the plaintiffs might as well have waited forever upon the legislative will as in the present case.

There may be a reason for this distinction, since it depends upon the sovereign will to prevent the perpetuity at once; and the presumption is that the Legislature will not delay to do that which it ought to do. And whence at last arises this rule against perpetuities? It is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power. The authority *from which the exception [¹⁴⁵emanated could certainly limit it so as to prevent its extension to an object under the care of the sovereign power.

Upon the whole, I am of opinion that the Act of Incorporation was at least equivalent to the king's sign-manual, and vested a good legal estate in the tenant. That although in the interval it should have descended upon the heir, it descended subject to be divested and passed over by that exercise of prerogative power. But I perceive no necessity for admitting that it ever descended upon the heir; since the right of succession seems rather to be in the Commonwealth in the case of charities, as *parens patriæ*.

Mr. Justice STORY.

This cause was argued with great ability and learning at the last term of this court, and has been held under advisement until this time. In the interval I have prepared an opinion upon all the points argued by counsel; and upon one of those points of leading importance I have now the misfortune to differ from a majority of my brethren. Upon another leading point, that of the alienage of the demandant, my opinion coincides generally with that of the majority of the court; but the reasons on which it is founded are given more at large than in that now delivered by my brother Thompson. Under these circumstances I propose to deliver my opinion at large upon all the points argued in the cause, mainly in the order in which they were discussed by the counsel. It is not with-

out reluctance that I deviate from my usual practice of submitting in silence to the decisions of my brethren when I dissent from them; and I trust that the deep interest of the questions and the novelty of the aspect under which some of them are presented, will furnish an apology for my occupying so much time.

The first point is, whether the devise in the will of Robert R. Randall of the lands in question is a valid devise, so as to divest the heir-at-law of his legal estate, or to affect the lands in his hands with a trust.

In considering this question, it appears to me that this court is to look into the terms of the **146***] will, and to construe *it according to the intention of the testator. That intention has been justly said to constitute the pole star to guide courts in the exposition of wills. When the intention is once fairly ascertained, it is wholly immaterial that it cannot be carried into effect by the principles of law; for our duty is to interpret, and not to make wills for testators.

In looking at the terms of the present devise, it appears to me clear that the testator's intention was to vest in certain persons in their official, and not in their private capacity, all the residue of his estate for a certain charity stated in the devise. The language is, "I give and bequeath the same unto the Chancellor of the State of New York, the mayor and recorder of the city of New York, the president of the Chamber of Commerce," &c., &c. Did he by these terms mean to devise to the individuals who then occupied these offices the estate in question, or to the persons who might hold them at the time of his death, or to the persons who might successively from time to time hold them? It was certainly competent for him to devise to them personally, and in their private capacity, by their official description. If a testator were by his will to give an estate to the Bishop of New York for life, or to him and his heirs, without giving him his Christian or surname, there is no doubt that the devise might well take effect as a devise to the then incumbent in office as a *descriptio personæ*. The law does not require, to make a devise or legacy valid, that the party should be designated by his name of baptism or surname. It is sufficient if he be pointed out by any description, leaving no room for doubt as to the identity and certainty of the person. A devise to the eldest son of A is just as good as if his name were given. A devise to the present President of the United States could be just as good as if his name were written at large in the will. The maxim of law is, that the designation must be certain as to the person to take; and *id certum est, quod certum reddi potest*. There is no doubt, then, that the chancellor, mayor and recorder, &c., &c., of New York might take as individuals, if such were the intention of the testator. I go farther, and say, that if the testator did intend **147***] the present devise to them in their *private characters, they would take not merely an estate for life in the premises, but an estate in fee. My reason is that the scope and objects of the charity, being perpetual, require that construction of the will to carry into effect the intention of the testator.¹

But the difficulty is in arriving at the conclusion upon the terms of the will that the testator did mean any devise to them in their private capacities. It is manifest from his language that he did not devise to the then chancellor, mayor and recorder, &c., &c., in their private capacities, because his language is that it is to the chancellor, &c., &c., "for the time being, and their respective successors in the said offices forever." It is, then, a devise to them, as officers, during their continuance in office, and the estate is to go to their successors in office forever; so that none of the devisees are to take any certain estate to themselves, but only while they continue in office. It is said that the court may reject the latter words if inconsistent with the avowed intention and objects of the will. If the other language of the will required an interpretation of these words different from the ordinary meaning, there might be good ground for such an argument; but that the devise will, in point of law, become ineffectual if they are not rejected, furnishes no ground for the court to exclude them. Words which are sensible in the place where they occur, and express the testator's intention, are not to be rejected because the law will not carry into effect that intention. If it were otherwise, courts of law would make wills and not construe them. But what ground is there to say that the words "for the time being" and "their successors in office" ought to be rejected? The former clearly designate what chancellor, mayor and recorder, &c., &c., are meant. How, then, can the court take one part and reject the other part of the description? How can the court say that the testator meant the then incumbents in office, when he has spoken of them as the incumbents for the time being? His intention clearly is that the charity shall be a perpetuity. He devises to the successors in *office **[*148]** forever. They are to be the administrators of the charity forever. Upon what ground can the court exclude the successors from the administration of the charity, when the testator has so designated them? Why may we not equally well exclude the present incumbents as the future? Both are named in the will; both are equally within the view of the testator of equal regard. Suppose all the other incumbents had died, or had been removed from office, is there a word in the will that shows that they or their heirs could still act as trustees when they ceased to possess office in exclusion of the actual incumbents? If not, how can the court say that it will defeat the main intention as to the administrators, and yet fulfil the charity as the testator designed it should be executed?

But this exposition does not rest on a single clause of the will. It pervades it in all the important clauses. In another clause of the will the testator directs, that the trustees shall administer the charity "in such manner as the said trustees or a majority of them may from time to time, or their successors in office may from time to time direct." And, again, the testator adds, "it is my intention that the institution hereby directed and created should be perpetual, and that the above-mentioned officers for the time being, and their successors should forever continue and be the governors thereof, and have the superintendence of the

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1.—Cruise's Digest, Devise, ch. 11, sect. 72.

same." Here is a most deliberate restatement of his intention and objects. The governors and administrators of his charity are not to be the then incumbents in office, but the officers for the time being; not the individuals when out of office, but their successors in office. What right, then, can this court have to say that the successors in office shall not be governors? Would it not be a plain departure from the express intention and solemn declarations of the will? The testator seems to have been apprehensive that, after all, there might be some impediment in carrying his intention into effect. What, then, does he provide? That his intention shall be disregarded? That provisions of his will, as to successors, &c., &c., shall be disregarded or rejected? No, so far from it that he goes on to provide for the emergency, so as **149***) to *give full effect to his intention. His words are, "that it is my will and desire that if it cannot be legally done according to my above intention by them (the trustees) without an act of the Legislature, it is my will and desire that they will as soon as possible apply for an act of the Legislature to incorporate them for the purposes above specified." So that the successors in the manner above mentioned constituted a primary, as well as a perpetual object of the devise. It seems to me so plain and clear upon the language of the will, that the testator never abandoned the intention of having the trustees take in their official and not in their private capacity, that, with great deference to the judgment of others, I am unable to perceive any ground on which to rest a different opinion.

If this is so, then it is next to be considered whether such devise is void at law. I am spared the necessity of going at large into that question by the decision of this court in the case of *The Trustees of the Philadelphia Baptist Association v. Hart's Executors* (4 Wheat. Rep., 1), where the subject was very amply discussed; and for reasons, in my judgment unanswerable, it was there decided that such a devise was void at law. Upon that occasion I had prepared a separate opinion; but that of the Chief Justice was so satisfactory to me that I did not deem it necessary to deliver my own.

If the devise was void at law at the time when it was to have effect, viz., at the death of the testator, the subsequent Act of the Legislature of New York could not have any effect to divest the vested legal title of the heirs of the testator. The devise was not a devise to a corporation not *in esse*, and to be created *in futuro*. It was a devise *in presenti*, to persons who should be officers at the death of the testator, and to their successors in office. The vesting of the devise was not to be postponed to a future time, until a corporation could be created. It was to take immediate effect; and if the trustees could not exercise their powers in the manner prescribed by the testator, they were to apply to the Legislature for an act of incorporation. Assuming, then, that a devise *per verba de futuro* to a corporation not *in esse* **150***) which *is to take effect when the corporation should be created, would be good and vest, by way of executory devise, in the corporation when created, as seems to have been Lord Chief Justice Wilmot's opinion (Wilmot's Opinion, p. 15); it is a sufficient answer that such is not Peters 3.

the present case. From the other report of the same case, *Attorney-General v. Downing* (Amb. 550, 571), and *Attorney-General v. Bowyer* (3 Ves., 714, 727), I should deduce the conclusion that the case turned upon the peculiar doctrines of the Court of Chancery in respect to charities; and that Lord Camden's opinion was founded on that. His judgment is not, as far as I know, in print; and whether he thought that at law a devise *in futuro* to an executory corporation would be good, does not appear. In the case before him he acted upon it as a charitable trust, not as a devise of the legal estate.¹

But it is said that there are cases in which it has been held that a devise to persons in their official capacity is good to the party in his natural capacity; and that it is not true that because the devisees cannot take in succession they cannot take at all: a case from Brook's Abridgement, title, Corporation, pl. 34, is relied on. There the principal point was of a different nature: whether a corporation composed of a master and fraternity could present the master to a benefice. And Pollard, J., on that occasion said: "If J. S. is dean of P., I may give land to him by the name of dean, &c., and his successors, and to J. S. and his heirs, and there he shall take as dean, and also as a private man; and he is tenant in common with himself." Now, the plain meaning of this is, that because he took one moiety in his official capacity to him and his successors, that did not disable him to take the other moiety to him and his heirs, but he held the latter in his private capacity. Another case is from Co. Litt., 46 b., where it is said, if a lease for years be made to a bishop and his successors, yet his executors and administrators shall have it in *autre droit*; for regularly no chattel can go in succession in case of a sole corporation, no more than *if a lease be made to a man **151** and his heirs it can go to his heirs.² Now, in the case of a sole corporation, it is manifest that the intention is to give the chattel to the actual incumbent in office for his life, and he is entitled to hold it beneficially. But no chattel can pass in succession; and then the question arises whether the court will declare the gift void as to the residue of the term, or consider the gift absolute. The construction adopted has been to consider the intent to be executed *cy pres*; and, as the testator intended to give the whole, to vest the term absolutely in the bishop, and then by operation of law it would go to his assigns. But this is a case of a sole corporation, where the party is capable to take in his corporate, as well as in his natural capacity for life. The present is a case of aggregate persons not capable of taking in a corporate capacity. To give the estate to them in their natural capacity, and for life only, would defeat the testator's intention; for he meant a perpetuity of trust, and to persons in office, however often the incumbents might change: to give them in their natural capacities an estate for life when not officers would defeat the primary object which he had in view. He meant no beneficial interest to any

1. See also, 1 Roll. Ab. Devise, H., sec. 1; Com. Dig. Devise, K.

2. See Co. Litt., 9, a.

incumbent, but a charitable trust to a succession of official trustees.¹

It is also said that in a will a particular may be made to yield to a more general intent. Certainly it may; but then the difficulty in the application of this rule to the present case is, that the argument insists upon a construction which I cannot but deem an overthrow of the general, to subserve an intent not indicated. Because the testator has expressed an intent to be carried into effect one way, which cannot consistently by law be so; and the court can see another way by which he might have carried it into effect, if he had thought of it; it does not follow that the court can do that which the testator might have done, and new-model the provisions of the will. If a testator should *per verba de presenti* devise an estate to a corporation not *in esse*, *and he knew the fact, or mistook the law, the court could not construe the words as *de futuro*, and declare it a good devise to a corporation to be created *in futuro*. The case in 1 Roll. Abridg. Devise, H., l. 50, is decisive of that. The general intention here appears to me to be to create a perpetual trust in certain trustees in succession, for charity; and I can perceive no particular intent, as distinguishable from that general intent. The perpetuity, the succession and the trusteeship are in his view equally substantial ingredients. So far from allowing any other than the official trustees to administer it, he even points out that if the trust cannot be executed by them, the estate, if it descends to his heirs, shall descend clothed with a trust. And he even appoints the same trustees and their successors in office executors of his will.

I come now to the other part of the question, whether, if the devise be void at law, the estate in the hands of the heirs is affected with the trust in favor of the charity. It appears to me most manifest that it is affected by the trust, if we consult either the intention of the testator or the express terms of the will. The closing paragraph of the will is, in my view of it, decisive, as creating an express trust in the heirs. "It is," says the testator, "my desire, all courts of law and equity will so construe this my said will, as to have the estate appropriated to the above uses; and that the same should in no case, for want of form or otherwise, be construed as that my relations or any other persons, should heir, possess, or enjoy my property, except in the manner and for the uses herein above specified."

If no trustees had been named in the will to execute the charity, it seems to me very clear that these terms would have created a trust in the heirs. There cannot, as I think, be a doubt, that independent of the statute of mortmain, (9 Geo. II., ch. 26), the present devise would be held a good charitable devise, and would be enforced in equity, at least since the statute of 43d of Elizabeth of charitable uses. The case of *White v. White*; of *Attorney-General v. Downing* (Amb. Rep., 550, 571); of *Attorney-General v. Tancred* (Amb., 351; S. C., 1

Eden's Rep., 10); and of *Attorney-General v. Bowyer* (3 Ves., 714, 717), would alone [*153] be decisive; but there are many others to the same effect.² Whether the statute of 43 Elizabeth is in force in the State of New York, or whether, independent of any enactment, a court of equity could enforce this as a charitable trust in the exercise of its general jurisdiction, or as the delegate, for this purpose, of the parental prerogative of the State; or whether such court could hold it utterly void; it is unnecessary for us to consider; that point may well enough be left to the decision of the proper State tribunal, when the case shall come before it. At present I do not think it necessary to say more than that if the trust be utterly void, then the heirs would by operation of law take the legal estate stripped of the trust. If the trust be good, then it is knit to the estate, and the heirs take it subject to the trust.

But it is said that if the trust be valid, the Legislature had a perfect right to enforce it, and their Act of Incorporation amounts to a legal execution of the trusts, and vests the estate in the corporation. Now, whatever may be the rights of the State as *parens patriæ* to enforce this charity, it can enforce it only as a trust. If the legal estate is vested in the heirs subject to the trust, the Legislature cannot by any act, *ipso facto*, divest that legal title, and transfer it to the corporation. It is one thing to enforce a charitable trust, and quite another thing to destroy the legal rights of the parties to which it is attached. If the devise had been to certain trustees by name, upon trust for the charity, could the Legislature have a right to divest the legal title? The case of *The Trustees of Dartmouth College v. Woodward* (4 Wheat. Rep., 518), in its principles, bears against such a doctrine. The right to enforce the trust and operate upon the legal estate is a right to be exercised by judicial tribunals, and not by legislative decrees. The doctrine of the Supreme Court of New York is that the Legislature thereof has no authority to divest vested legal rights.³

*But I cannot admit that the Act of [*154] Incorporation was intended to have such an effect; it has no terms which divest the legal title of the heirs; it merely incorporates the trustees and their successors, and clothes them with the usual powers to carry the trust into effect. It presupposes that the estate was already vested in them by the will. They are made "capable in law of holding and disposing of the estate" devised by the will. It is true that the uses are added, "and the same (estate) is hereby declared to be vested in them and their successors in office for the purposes therein (in the will) expressed." But this was not, as I think, intended to vest the estate in them as a legislative investiture; but to declare that the estate was vested in them for the purposes of the charity and not otherwise. The preamble of the act, too, shows that the trustees did not ask to have the estate vested in them, but that inconveniences had arisen in the management of the es-

1. See 2 Preston on Estates, 5, 6, 7, 46, 47, 48, Common Dig. Estates, a. 2.

2. See note on Charitable Uses, 4 Wheat. Rep. Appendix, 1, 11, 12; Coggeshall v. Felton, 7 Johns. Ch. Rep., 292; Kirkbank v. Hudson, 7 Price, 212.

Duke Charitable Uses, by Bridgman, p. 361, 374, 375, 390.

3.—Dash v. Van Cleek, 7 Johns. Rep., 477; Bradshaw v. Rogers, 20 Johns. Rep., 103; Catlin v. Jackson, 8 Johns., 520; Terrett v. Taylor, 9 Cranch, 93; Wilkinson v. Leland, 2 Peters, 627, 657.

tate from the changes of office. This is very strong to show that the Legislature acted solely for the purpose of avoiding such inconveniences, and not to give them an estate to which they then had no title, and which they then professed to have in their management.

In every view, therefore, in which I can contemplate this point, I feel compelled to say that the devise, if a valid devise, is not a devise valid so as to divest the heir-at-law of his legal estate; but that the devise can have effect, if at all, only as a trust for a charity fastened on the legal estate in his hands.

In this opinion as to the nature and effect of the devise, in which I have the misfortune to differ from that of the court, I am authorized to say that I have the concurrence of the Chief Justice.

Another question is whether the demandant was or was not capable of taking lands in the State of New York by descent? And this question is presented upon four different aspects of the facts.

In order to explain the views which I take of **155*** this part of the case, it will be necessary to state some general principles upon the subject of alienage. The rule commonly laid down in the books is that every person who is born within the ligeance of a sovereign is a subject; and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry what constitutes allegiance, and who shall be said to be born within the allegiance of a particular sovereign; or, in other words, what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage. Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and second, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and, consequently, owe obedience or allegiance to, the sovereign, as such, *de facto*.¹ There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince. Birth within the dominions of a sovereign is not always sufficient to create citizenship, if the party at the time does not derive **156*** protection from its sovereign *in virtue

of his actual possession; and, on the other hand, birth within the allegiance of a foreign sovereign does not always constitute allegiance, if that allegiance be of a temporary nature within the dominions of another sovereign. Thus, the children, of enemies, born in a place within the dominions of another sovereign then occupied by them by conquest, are still aliens; but the children of the natives born during such temporary occupation by conquest, are, upon a reconquest or re-occupation by the original sovereign, deemed, by a sort of postliminy, to be subjects from their birth, although they were then under the actual sovereignty and allegiance of an enemy.

The general principle of the common law also is, that the allegiance thus due by birth cannot be dissolved by any act of the subject. It remains perpetual unless it is dissolved by the consent of the sovereign or by operation of law. Upon the cession of a country it passes to the new sovereign; for the sovereign power is competent to transfer it by a voluntary grant. Upon the conquest of the country it passes by operation of law to the conqueror; who as sovereign *de facto* has a right to the allegiance of all who are subdnd by his power and submit to the protection of his arms. Upon the abdication of the government by one prince, it passes by operation of law to him whom the nation appoints as his successor. Thus, by the conquest of England, the allegiance of all Englishmen passed to William the Conqueror; by the abdication of James II. their allegiance passed to William of Orange; and by the cession to France of the Anglo-French provinces of England, the allegiance of the natives passed to the new sovereign. These cases are plain enough upon the doctrines of municipal law, as well as upon those which are recognized in the law of nation.

But a case of more nicety and intricacy is when a country is divided by a civil war, and each party establishes a separate and independent form of government. There, if the old government is completely overthrown and dissolved in ruins, the allegiance by birth would seem by operation of law to be dissolved, and the subjects left to attach themselves to such party as they may choose, and thus to become the voluntary subjects, *not by birth, [**157** but by adoption, of either of the new governments. But where the old government, notwithstanding the division, remains in operation, there is more difficulty in saying, upon the doctrine of the common law, that their native allegiance to such government is gone, by the mere fact that they adhere to the separated territory of their birth, unless there be some act of the old government virtually admitting the rightful existence of the new. By adhering to the new government, they may indeed acquire all the rights, and be subject to all the duties of a subject to such government. But it does not follow that they are thereby absolved from all allegiance to the old government. A person may be (what is not a very uncommon case) a subject owing allegiance to both governments, *ad utriusque fidem regis*. But if he chooses to adhere to the old government and not to unite with the new, though governing the territory of his birth, it is far more difficult to affirm that the new govern-

1.—See Calvin's case, 7 Co., 1; Doe, ex dem. Duroure, v. Jones, 4 Term Rep., 300; 1 Bl. Comm. Peters 3.

ment can compel or claim his allegiance in virtue of his birth, although he is not within the territory, so as to make him responsible criminally to its jurisdiction. It may give him the privileges of a subject, but it does not follow that it can compulsively oblige him to renounce his former allegiance. Perhaps the clearest analogy to govern such cases is to bring them within the rule that applies to cases of conquest, where those only are bound to obedience and allegiance who remain under the protection of the conqueror.

The case of the separation of the United States from Great Britain is, perhaps, not strictly brought within any of the descriptions already referred to; and it has been treated on many occasions both at the bar and on the bench as a case *sui generis*. Before the revolution all the colonies constituted a part of the dominions of the King of Great Britain, and all the colonists were natural-born subjects, entitled to all the privileges of British-born subjects, and capable of inheriting lands in any part of the British dominions, as owing a common allegiance to the British crown. But in each colony there was a separate and independent government established under the authority of the crown, though in subordination to it. In this posture of things the Revolution **158**]* came; and the Declaration of Independence acting upon it, proclaimed the colonies free and independent States; treating them not as communities in which all government was dissolved and society was resolved into its first natural elements, but as organized States, having a present form of government, and entitled to remodel that form according to the necessities or policy of the people. The language of the Declaration of Independence is, that Congress solemnly publish and declare, "That these united colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown; and that all political connection between them and the State of Great Britain is and ought to be totally dissolved; and that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do." It is plain that this instrument did not contemplate an entire dissolution of all government in the States; which would have led to a subversion of all civil and political rights and a destruction of all laws. It treated the colonies as States, and simply absolved them from allegiance to the British crown, and all political connection with Great Britain. The States so considered it; some of them proceeded to act and legislate before the adoption of any new constitution; some of them framed new constitutions; and some of them have continued to act under their old charters down to the present day. They treated the case as it was treated in England upon the abdication of James II., and provided for it by resorting to that ultimate sovereignty residing in the people, to provide for all cases not expressly provided for in their laws.

Antecedent to the revolution the inhabitants of the colonies, whether natives of the colonies or of any other of the British dominions, owed no allegiance except to the British crown. There

was not, according to the common law, any secondary or subordinate allegiance to the colony itself, or the government therein established, as contradistinguished from the general allegiance to the British crown. When, therefore, the Declaration of Independence absolved all the *States from allegiance to the British ***159** crown, it was an act of one party only. It did not bind the British government, which was still at liberty to insist, and did insist upon the absolute nullity of the act, and claimed the allegiance of all the colonists as perpetual and obligatory. From this perplexing state of affairs, the necessary accompaniment of a civil war, it could not escape the notice of the eminent men of that day that most distressing questions must arise; who were to be considered as constituting the American States on one side, and "the State of Great Britain" on the other? The common law furnished no perfect guide, or rather, admitted of different interpretations. If, on the one side, it was said, that all persons born within a colony owed a perpetual allegiance to that colony whoever might be the sovereign, the answer was that the common law admitted no right in any part of the subjects to change their allegiance without the consent of their sovereign, and that the usurpation of such authority was itself rebellion; for "*nemo potest exuere patriam*" was the language of the common law. In respect to persons who were not natives, but inhabitants only in a colony at the time of the assertion of its independence, there was still less reason to claim their allegiance. If they were aliens, there was no pretense to say that they could be bound to permanent allegiance against their will. If they were born in England, or elsewhere in the British dominions out of the colony, they were as little bound to permanent allegiance; because they inhabited, not as colonists, but as British subjects. In respect to both these cases (*i. e.*, foreigners and British subjects), no colony, upon assuming to be an independent State, could, against their will, make them members of the State. It would be an exercise of authority not flowing from its rights as an independent State, and at war with the admitted rights of other nations, by the law of nations, to hold the allegiance of their own subjects. In order, therefore, to make such persons members of the State, there must be some overt act or consent on their own part to assume a character; and then, and then only, could they be deemed, in respect to such colony, to determine their right of election.

Under the peculiar circumstances of the Revolution, the *general (I do not say ***160** the universal) principle adopted was to consider all persons, whether natives or inhabitants upon the occurrence of the Revolution, entitled to make their choice either to remain subjects of the British crown or to become members of the United States. This choice was necessarily to be made within a reasonable time. In some cases that time was pointed out by express Acts of the Legislature; and the fact of abiding within the State after it assumed independence, or after some other specific period, was declared to be an election to become a citizen. That was the course in Massachusetts, New York, New Jersey and Pennsylvania. In other States no special laws were passed, but

each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party. That the general principle of such a right of electing to remain under the old or to contract a new allegiance was recognized, is apparent from the cases of the *Commonwealth v. Chapman* (1 Dall. Rep., 53); *Caignet v. Pettit* (2 Dall. Rep., 234); *Martin v. The Commonwealth* (1 Mass. Rep., 347, 397); *Pulmer v. Downer* (2 Mass. Rep., 179, note); S. C. Dane's Abridg., ch. 131, art. 7, sec. 4; *Kilham v. Ward* (2 Mass. Rep., 236) and *Gardner v. Ward* (2 Mass. Rep., 244, note); as explained and adopted in *Inhabitants of Cummington v. Inhabitants of Springfield* (2 Pick. Rep., 394, and note); *Inhabitants of Manchester v. Inhabitants of Boston* (16 Mass. Rep., 230) and *Milvaine v. Cox's Lessee* (4 Cranch, 209, 211).¹ But what is more directly in point, it is expressly declared and acted upon by the Supreme Court of New York, in the case of *Jackson v. White* (20 Johns. Rep., 313). It appears to me that there is sound sense and public policy in this doctrine, and there is no pretense to say that it is incompatible with the known law or general usages of nations. The case of *Ainslie v. Martin* (9 Mass. Rep., 454), proceeds upon the opposite doctrine; but that case stands alone, and is incompatible with prior as well as subsequent decisions of the same court; and **161*** so it has been *treated by Chancellor Kent in his learned commentaries. (2 Kent's Comm., 35, 52.)

Another point which necessarily arises in the present discussion is, whether a party, who, by operation of law or by the express enactment of the Legislature of a State, after the Declaration of Independence, became a citizen of the State, could afterwards by any act of his own, *flagrante bello*, divest himself of such citizenship. It is clear that during the war, however true it might be that the State by its own declaration or by his consent might hold him to his allegiance as a citizen and absolve him from his former allegiance, such declaration or consent could be binding only between him and the State, and could have no legal effect upon the rights of the British crown. The king might still claim to hold him to his former allegiance, and until an actual renunciation on his part, according to the common law he remained a subject. He was, or might be held to be, bound *ad utriusque fidem regis*. In an American court we should be bound to consider him as an American citizen only; in a British court he could, upon the same principle, be held a British subject. Neutral nations would probably treat him according to the side with which he acted at the time when they were called upon to decide upon his rights. It might well be presumed that from various motives numbers would change sides during the progress of the contest; some because they were compulsively held to allegiance, and others, again, from a sincere change of opinion. It is historically true that numbers did so change sides. The general doctrine asserted in the American courts has been that natives who were not here at the Declaration of Independence but were then, and for a long while

afterwards remained, under British protection, if they returned before the Treaty of Peace, and were here at that period were, to be deemed citizens. If they adhered to the British crown up to the time of the treaty they were deemed aliens; some of the cases already referred to are full to this point, and particularly *Kilham v. Ward*, and *Gardner v. Ward*. In respect to British subjects not natives who joined us at any time during the war and remained with us up to the peace, a similar rule of deeming them citizens has *been adopted. The cases [***162** in 9 Mass. Rep., 454; 2 Pick. Rep., 394; and 5 Day Rep., 169, are to this effect. The ground of this doctrine is that each government had a right to decide for itself who should be admitted or deemed citizens; that those who adhered to the States and to Great Britain, respectively, were, by the respective governments, deemed members thereof; and that the Treaty of Peace acted by necessary implication upon the existing state of things, and fixed the final allegiance of the parties on each side, as it was then, *de facto*. Hence the recognition on the part of Great Britain of our independence by the Treaty of 1783, has always been held by us as a complete renunciation on her part of any allegiance of the then members of the States, whether natives or British born. And the same doctrine has been in its fullest extent recognized in the British courts in the case of *Thomas v. Acklam* (2 Barn. & Cress., 779.) Lord Chief Justice Abbott, in delivering the opinion of the court on that occasion, said that "the declaration in the treaty that the States were free, sovereign, and independent States, was a declaration that the people composing the State shall no longer be considered as subjects of the sovereign by whom such declaration is made." And in a subsequent case, *Auchmuty v. Mulcaster* (8 Dowl. & Ry. Rep., 593; S. C., 5 Barn & Cress., 771), the same court held that a native American born before the Declaration of Independence who adhered to the royal cause during the war, still retained his allegiance, and was to be deemed, not an American citizen, but a British subject. Mr. Justice Bayley, on that occasion, said, "the king acknowledges the United States to be free, sovereign, and independent States." "Who are made independent? The States. Does not this mean the persons who at that time, (of the treaty) composed the American States" (8 Dowl. & Ry., 603)? And again, he added, "the treaty, &c., &c., made those persons who were at that period of time adhering to the then American government or constituted authorities, free of their allegiance to the crown of these kingdoms, and left them to adopt their allegiance to the new government."

In *Kilham v. Ward* (2 Mass. Rep., 236), and *Gardner v. Ward* (2 Mass. Rep., 244, [***163** note), a like doctrine was avowed. The language of the court there was, that by the treaty those who by their adherence and residence had remained the subjects of the King of Great Britain on the one part, and those who by their adherence and residence were then the people of the United States on the other part, were reciprocally discharged from all opposing claims of allegiance and sovereignty. This doctrine appears to me so rational and just, and founded upon such a clear principle of reciprocity and

1.—See also Chase, J., in *Ware v. Hylton*, 3 Dall., 225; 1 Peters' Condens. Rep., 199; *Hebron v. Colchester*, 5 Day's Rep., 169.

public policy, that it is, I own, extremely difficult for me to admit that the treaty does not indispensably require that interpretation. It is true that the treaty contains no renunciation on our part of the allegiance of any of our citizens who had adhered to the British crown, but the reason of the omission is obvious. Great Britain claimed the allegiance of all the colonists as British subjects; she renounced by the treaty that claim as to all who then adhered to the American States. We acquiesced in that result; and must, in the absence of any stipulation to the contrary, be deemed to admit the allegiance to have been retained of all whose allegiance was not expressly or impliedly renounced.

I am compelled, however, to admit the language of this court in *M'Ilvaine v. Cox's Lessee* (4 Cranch, 209, 214) leads to an opposite conclusion. There is no doubt that the Treaty of Peace does not ascertain who are citizens on the one side or subjects on the other. That is a matter partly of law and partly of fact; but when the fact is ascertained that the party was *de facto* at the time under the allegiance of, and adhering to either government, he is to be treated as a subject of that government, and as such, a party to the treaty. What right have the American States to say that all persons shall be deemed citizens who, at any time previous to the treaty, were deemed citizens under their laws, any more than Great Britain has, to hold all persons subjects whom she had previously deemed subjects in virtue of their original allegiance. Each party must, I think, be presumed to deal with the other upon the footing of equal rights as to allegiance, and to act upon the *status in quo* the treaty found them. If, however, the case of *M'Ilvaine v. Cox's Lessee* [164*] is to be deemed not *an administration of local law but of universal law and the interpretation of treaties, it overthrows the reasoning for which I contend. I cannot admit its universality of application; on the contrary, sitting in Massachusetts, I should feel myself constrained to re-examine the doctrine as applicable to that State upon a point which affected her political rights and her soil, and which the courts of the State had the most ample jurisdiction to entertain and determine. In New York there is no decision either way; and it seems to me, therefore, that it is fit to be re-examined upon principle. I adopt the suggestion of Lord Chief Justice Abbott in *Doe, ex dem. Thomas, v. Acklam* (2 Barn. & Cress., 798), that the inconvenience that must ensue from considering any large mass of the inhabitants of a country to be at once citizens and subjects of two distinct and independent States, and owing allegiance to each, would, if the language of the treaty could admit of any doubt of its effect, be of great weight toward the removal of that doubt. The treaty ought to be so construed as that each government should be finally deemed entitled to the allegiance of those who were at that time adhering to it.¹

With these principles in view, let us now come to the consideration of the question of alienage in the present case. That the father and mother of the demandant were British-born subjects is admitted. If he was born before

the 4th of July, 1776, it is as clear that he was born a British subject. If he was born after the 4th of July, 1776, and before the 15th of September, 1776, he was born an American citizen, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto, are subjects by birth. If he was born after the 15th of September, 1776, and his parents did not elect to become members of the State of New York but adhered to their native allegiance at the time of his birth, *then [165 he was born a British subject. If he was in either way born a British subject, then he is to be deemed an alien and incapable to take the land in controversy by descent; unless he had become at the time of the descent cast an American citizen by some act sufficient in point of law to work such a change of allegiance.

His parents being born British subjects, it is incumbent upon those who set up the defense to establish that having a right of choice, his parents elected to become American citizens. This is attempted to be deduced by operation of law from certain resolutions and acts of the government *de facto* of the State of New York. As early as the 15th of September, 1776, his parents joined the British troops in New York, and remained under the protection of the British arms during the war. At the close of the war his father withdrew (his mother being then dead) with the British authorities; and he continued ever afterwards under the protection and allegiance, *de facto*, of the British crown. So far as the acts, therefore, of the parents, manifested by a virtual adherence to the British side, go, they negative any intentional change of native allegiance. But it is said that they were bound to make their election in a reasonable time. I agree to this; but the effect of the omission to manifest an election in favor of the State of New York was, in my judgment, decisive of their adhering to the allegiance of their native sovereign. But if it were otherwise, if the election to remain British subjects must be affirmatively established, still, I think, in point of law, under all the circumstances, an election by taking the British protection in September, 1776, was within a reasonable time; and the case of *Jackson v. White* (20 Johns. Rep., 313), in my judgment warrants such a conclusion.

But it is said that the ordinance of the 16th of July, 1776, which declares "that all persons abiding within the State of New York and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State," by necessary conclusion and operation of law made the parents of the demandant American citizens; because they were then abiding within the State and deriving *protection from its laws. Now, as- [166 suming that the Convention of the State of New York had plenary powers for this purpose, so as to bind a British subject not born in New York to allegiance to the State from the mere fact of his local residence at the time (a proposition that is encumbered with many difficulties), the term "abiding," as here used,

1.—See also 1 Wood. Lect., 382; Dane's Abridg. ch. 131, art. 7.

has never been construed to exclude the right of election of persons who were inhabitants at that period to adhere to the old or contract a new allegiance. The case of *Jackson v. White* (20 Johns. Rep., 313) is decisive of that.

We must then give a rational interpretation to the word consistent with the rights of parties, and the accompanying language of the ordinance. By "abiding", in the ordinance, is meant not merely present inhabitants, but present inhabitancy coupled with an intention of permanent residence. This is apparent from the next clause of the ordinance, where it is declared "that all persons passing through, visiting, or making a temporary stay in the State being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe during the same allegiance thereto." Their "temporary stay" is manifestly used in contradiction to "abiding," and shows that the latter means permanent intentional residence. So *Mr. Chief Justice Spencer*, in *Jackson v. White* (20 Johns. Rep., 313, 326), considered it. He says, "residence in this State prior to that event (the Declaration of Independence) imported nothing as regards the election or determination of such residents to adhere to the old or adopt the new government. The temporary stay, mentioned in the resolution of the convention, passed only twelve days after the Declaration of Independence by Congress, and within five days after the adoption of the declaration by the Convention of this State, clearly imports that such persons who were resident here without any intention of permanent residence, were not to be regarded as members of the State;" they had a right to a reasonable time, therefore, after the ordinance was passed, to decide whether, with reference to the new government, they would adopt a permanent residence in the State and to become members thereof.

A similar declaration is to be found in the **167*** statute of 1777 of *Massachusetts, and there the term "abiding" has been construed not only to apply to an intention of permanent residence, but of a prospective abiding.¹ The reasoning in the *Commonwealth v. Chapman* (1 Dall. Rep., 53), persuasively conducts us to a similar conclusion. This ordinance, then, cannot be deemed to dissolve the native allegiance of the parents of the demandant, unless it shall be clearly established that they intended a permanent residence in New York, and to become members of the State under the new government, anterior to their assuming British protection in September, 1776.

But even admitting that his parents did elect to become citizens of New York before the 15th of September, 1776, still I am of opinion that the demandant, if he was born after the British took possession of the city of New York in September, 1776, while his parents were under the protection of and adhering to the British government *de facto*, was to all intents and purposes an alien born. To constitute a citizen the party must be born not only within the territory but within the ligeance of the government. This is clear from the whole reasoning in *Calvin's case*, (7 Co., 6, a. 18, a. b.).²

1.—See opinion in note, 2 Pick. Rep., 394, 395.

2.—See also Com. Dig. Alien; Bac. Abridg. Alien., A.

Now, in no just sense can the demandant be deemed born within the ligeance of the State of New York if, at the time of his birth, his parents were in a territory then occupied by her enemies and adhering to them as subjects, *de facto*, in virtue of their original allegiance.

The Act of the 22d of October, 1779, which confiscates the estate of the parents of the demandant, throws great light upon this part of the subject; it demonstrates that they were deemed to be then adhering to the British, the enemies of the State. It begins with a preamble reciting that "divers persons holding or claiming property within this State have voluntarily been adherent to the said king (of Great Britain), his fleets and armies, enemies to this State, and the said other United States, with intent to subvert the government and liberties of this State and of the said other United States, *and to bring the [***168** same into subjection to the crown of Great Britain; by reason whereof the said persons have severally justly forfeited all right to the protection of this State, and to the benefit of the laws under which such property is held or claimed." It further declares that the public safety requires "that the most notorious offenders should be immediately hereby convicted and attained of the offense aforesaid, in order to work a forfeiture of their respective estates and invest the same in the people of this State." It then enacts "that John Murray, Earl of Dunmore, &c., &c., Charles Inglis of the said city (of New York), and Margaret his wife (the parents of the demandant), &c., &c., be, and each of them are hereby severally declared to be *ipso facto* convicted and attained of the offense aforesaid;" and then declares their estates forfeited. In the second section it enacts that the same persons "shall be, and hereby are declared to be forever banished from this State, and each and every of them who shall at any time hereafter be found in any part of this State, shall be, and hereby is adjudged and declared guilty of felony, and shall suffer death."

This act deserves an attentive consideration on several accounts. It is apparent upon its face that it is not an act which purports to be an attainder of citizens of the State only on account of their treason in adhering to the public enemies; for it embraces persons who never were nor were pretended to be citizens; neither does it affect to confiscate the property on account of the alienage of the persons named therein, by way of escheat. The persons described as subjects of attainder are, "persons holding or claiming property within this State," which description equally applies to citizens and British subjects, and may include foreigners of other nations. It seems, indeed, a summary exercise of the ultimate power of sovereignty, in inflicting the penalty of confiscation upon the property of enemies, *jure belli*. But it demonstrates clearly the sense of the Legislature that the persons named therein were at that time voluntary adherents to the British crown, and enemies of the State; and it affords a very cogent presumption of such adherence from the time that they first came under British *protection. It farther [***169** denounces such persons as enemies or traitors who have forfeited all right to the protection

of the State, and punishes them by a sentence of perpetual banishment, and makes their residence within the State a capital felony.

Such a sentence, under such circumstances, must be deemed on the part of the State a perpetual renunciation of the allegiance of those persons, and to deprive them of the rights, and to absolve them of the duties of citizens. There can be no allegiance due where the sovereign expressly denies all protection and compels the party to a perpetual exile. In this view of the matter, the demandant's parents were by the sovereign act of the State itself absolved from all future allegiance, even if they had antecedently owed any to the State. In this state of things the Treaty of 1783 found the father adhering to the British crown as a native-born subject.

What, then, is the operation of the Treaty of 1783? It is clear to my mind that the father of the demandant must be considered as a party to that treaty on the British side. I say this upon the presumption, which is not denied, that he was then adhering to the British crown; and that he was there recognized and protected as a subject owing allegiance to the British crown. In this state of things the treaty must, upon the grounds which I have already stated, be deemed to operate as an admission that he was in future to owe no allegiance to the State of New York, but he was to be deemed a British subject.

The question then arises as to what was the operation of the treaty upon his son, the demandant, who was then an infant of tender years and incapable of any election on his own part. It appears to me that upon principles of public law as well as of the common law, he must, if born a British subject, be deemed to adhere to and retain the national allegiance of his parents at the time of the treaty. Vattel considers the general doctrine to be that children generally acquire the national character of their parents. (Vattel, B. 1, ch. 19, sec. 212, 219); and it is certain, both by the common law and the statute law of England, that the demandant would **170*** be deemed a British subject. The argument itself assumes that the demandant now acts officially in that character, and that ever since his arrival of age he has adhered to his British allegiance.

Upon the whole, upon the point of alienage as presented in the case, the following are my opinions under the various postures of the facts:

1. That if the demandant was born before the 4th of July, 1776, he was born a British subject.

2. That if he was born after the 4th of July, 1776, and before the 15th of September, 1776, he was born an American citizen; and that it makes no difference in this respect whether or not his parents had at the time of his birth elected to become citizens of the State of New York by manifesting an intention of becoming permanently members thereof, in the sense which I have endeavored to explain.

3. That if the demandant was born after the 15th of September, 1776, when the British took possession of New York, and while his parents were there residing under the protection of and adhered to the British crown as subjects, *de facto*, he was born a British subject, even

though his parents had previously become citizens of the State of New York.

4. That if the demandant was born after the 15th of September, 1776, and could be deemed (as I cannot admit) a citizen of the State of New York in virtue of his parents having before the time of his birth elected to become citizens of that State, still his national character was derivative from his parents, and was, under the peculiar circumstances of this case, liable to be changed during the Revolutionary War; and that if his parents reverted to their original character as British subjects, and adhered to the British crown, his allegiance was finally fixed with theirs by the Treaty of Peace.

5. That it was competent for the British government to insist, at all times during the Revolutionary War, upon retaining the allegiance of all persons who were born or became subjects; and for the American States to insist in the like manner. But that the Treaty of Peace of 1783 released all persons from any other allegiance than that of the party to whom they then adhered and under whose allegiance they *were then, *de facto*, found. That if [***171**] the demandant's father was at that time so adhering, it was a final settlement of his allegiance on the British side; and that the demandant, unless born after the 4th of July, 1776, and before the 15th of September, 1776, remained, to all intents and purposes, a British subject.

6. That if the case of *M'Irvine v. Cox's Lessee* (4 Cranch, 209), should be thought to have overturned this doctrine so that it is no longer re-examinable, still that in this case the parents had a right to elect to which government they would adhere; and that a period up to the 15th of September, 1776, was not an unreasonable time for that purpose; and that unless some prior clear act of election could be shown, the adherence to the British from the 15th of September to the close of the war, afforded strong evidence to repel the presumption of any prior election to become citizens, arising from the fact of abiding in the State up to that period.

From these views, meaning to be understood to leave any disputed facts open for inquiry (although no other facts seem in dispute except the actual period of the birth of the demandant), my judgment would be that the demandant was, unless he was born between the 4th of July and the 15th of September, 1776, an alien at the time of the Treaty of 1783, and has ever since remained so. I agree to the doctrine in *Dawson's Lessee v. Godfrey* (4 Cranch, 321), that the right to inherit depends upon the existing state of allegiance at the time of the descent, cast, and not merely upon a community of allegiance at the time of birth; and the same doctrine is recognized in the fullest manner in the British courts.¹ If the demandant, then, was an alien at the time of the descent cast, he is incapable to inherit the estate in point of law.

But it has been suggested as matter of doubt whether alienage of the demandant can be taken advantage of or rejected on the issue joined. This objection cannot, in my opinion, be maintained; it is laid down in the books that everything in bar upon the merits may be

1.—Doc. ex dem. Thomas, v. Acklam, 2 Barn. & Cress., 779.

172*] given in evidence under *the mise except collateral warranty; so it is said in Brooks's Ab. Droit, 48; and Booth on Real Actions, 112. That also seems to have been the opinion of the court in *Tyssen v. Clarke* (2 Wils. Rep., 541). Whether the proposition can be maintained in its general latitude it is unnecessary now to consider; but it is certainly necessary for the demandant to prove his title as set forth in the writ. If he claims by descent from an ancestor who was seized, he must show that he is heir and capable to take by descent. The seisin of the ancestor is nothing without establishing his heirship. The cases of *Green v. Lister* (8 Cranch, 229), and *Green v. Watkins* (7 Wheat. Rep., 28), are decisive that in a writ of right the title and mere right of each party are in issue; and each may establish that the title of the other wholly fails. If, therefore, the demandant has no title by descent, the tenant may show it; for it goes to the very foundation of his claim.

In this connection it may be well to dispose of another objection which was much pressed at the argument. It is this: The demandant in his count alleges the seisin of Robert R. Randall, and makes title by descent to the premises as his next collateral heir on the part of his mother. At the death of Robert R. Randall, he left a brother, Paul R. Randall, and a sister, Catherine Brewerton, on whom the alleged right to the lands descended in moieties, and through whom (though not from whom) the demandant deduces his title by descent, they having died without issue. The tenants offered evidence to establish that Catherine Brewerton had disposed of her right in the premises by will; and that the right of Paul R. Randall also had been transferred during his lifetime. Now, the objection is, that this evidence is inadmissible, because it is an attempt to set up the title of third persons to defeat a recovery in a writ of right, which is inadmissible. The cases of *Green v. Lister* (8 Cranch, 229), and *Green v. Watkins* (7 Wheat. Rep., 28), have been relied on to support this objection. Nothing is better settled in this court than the doctrine that a better title in third persons cannot be set up to defeat a recovery in a writ of right, because that writ brings into controversy and comparison

173*] the titles of the parties *only; but it is perfectly consistent with this doctrine, that the tenant may show that the title set up by the demandant is in fact no title at all. One material allegation in the present count is its seisin of Robert R. Randall, the ancestor; and this seisin is admitted, and, indeed, constitutes a part of the title of both parties in the present case. Another material allegation is that the right to the demanded premises descended to the demandant as heir. Now, it is clear upon the general principles of pleading, that what is essential to the demandant's right, as stated in his count, must, when that right is denied by the issue, be proved by the demandant and may be disproved by the tenant. If, therefore, the demandant be incapable of taking as heir by descent, although there be a right, that may be shown by the tenant as if he be an alien, because it defeats the asserted descent of the title. On the other hand, if the heirship be admitted, and the right was parted with by the ancestor or by any other person upon whom it intermediately devolved before it could reach

the demandant, that, for a better reason, may be shown, because it shows that no right or title descended at all. Both are necessary to establish the demandant's claim; there must be a right or title subsisting capable of descent and a capacity in the demandant to take as heir. If the ancestor has actually parted with his whole right and title in the premises by a legal conveyance, how can it be said that there remains any descendible right in him? If his right has been parted with by any intermediate heir by a legal conveyance, how can it be said to have devolved upon the demandant? The true and real distinction is this: if the demandant shows any right, as stated in his count to have descended to him from his ancestor, the tenant cannot show that there is a better right subsisting in a third person under whom he does not claim, for that does not disprove the title of the demandant as asserted in his writ; and if the demandant's title, such as it is, is better than the tenant's, then the demandant ought to recover; but the tenant may show that the demandant has no right whatsoever by descent, for the possession of the tenant is sufficient against any person who does not show any right, or a better right. And this, *as I understand it, is the doctrine in [**174** *Green v. Watkins* (7 Wheat. Rep., 28). Here, title in third persons is offered, not to prove that there is a better outstanding title, but that no right whatsoever descended to the demandant, as he claims in his count. It seems to me that it is clearly admissible.

The next point is whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question so as to defeat the demandant in any respect; the premises being at the date of the will, and ever since, held adversely by the tenants in the suit.

If this point were to be decided with reference purely to the common law of England, there might be some reasons for doubt. The question whether a right of entry was under the British statute of wills devisable, seems never to have been directly decided until a recent period. There is, indeed, to be found in prior cases, many *dicta* going to affirm the doctrine that such a right of entry is not devisable. Such seems to have been the opinion of Lord Holt in *Bunker v. Cook* (11 Mod. R., 122), and of Lord Eldon in *Attorney-General v. Vigor* (8 Ves., 282), as well as of other judges in former times, whose *dicta* are collected and commented on in *Goodright v. Forrester* (8 East's Rep., 552, 566, and 1 Taunt. Rep., 604).¹ There are also *dicta* the other way; and at all events there is reasoning which leads to the conclusion that in modern times the judges have been disposed to give a far more liberal construction to the statutes, and to hold that whatever is descendible is devisable. The cases of *Jones v. Roe* (3 Term Rep., 88), and *Goodtitle d. Gurnall v. Wood* (Willes's Rep., 211; 3 Term Rep., 94), by Lord Kenyon, are most material. In *Goodright v. Forrester* (8 East's Rep., 552), the Court of King's Bench held a right of entry not devisable. But when that case came before the Court of the Exchequer Chamber in error, Lord Chief Justice Mansfield very much doubted that point, and the case was finally decided on

1.—See also Com. Dig. Devise, M.

another. But it is the less necessary to consider this question upon the English authorities, because it has undergone an express adjudication in the State of New *York upon the construction of their own statute of wills. The statute of New York enacts that any person having an estate of inheritance in lands, tenements and hereditaments, shall have a right to devise them. In *Jackson v. Varick* (7 Cowen's Rep., 238), the Supreme Court of New York, upon very full consideration, held that under this statute a right of entry being an hereditament, was devisable. And this court, in *Waring v. Jackson* (1 Peter's Rep., 571), understood it to be the settled rule in that State that an adverse possession did not prevent the passing the property by devise. This, then, being a point of local law upon the construction of a statute of the State, according to the uniform course of this court in cases of that nature, we should hold it decisive, whatever original doubts might otherwise have surrounded it. But, as one, I confess myself well satisfied with that decision upon principle. It is rational and convenient; and if I should have felt difficulty in arriving at it through the authorities, I should not be inclined to disturb it when made.

It has been said that the present case differs from that in 7 Cowen's Rep., 238, in this, that the demandant claims through, but not under Mrs. Brewerton, not as her heir, but as heir of Robert R. Randall; and that the estate was not descendible to her heirs according to the known principles of the common law, as she was never seized of the premises, but to Robert's heirs, as the person last seized. That is true, but it does not alter the application of the principle of law. If Mrs. Brewerton had been possessed of a reversion by descent from Robert R. Randall, and she had died before the life estate fell in, it would not have gone to her heirs, but to his. And yet there is no doubt that she might grant such a reversion, or devise it, and it would pass by her will to the devisee and thus interrupt the descent. So, if Mrs. Brewerton had a right of entry in the premises and she could devise it, it is of no consequence that it would not, if undevised, have passed to her heirs; for having the *jus disponendi*, when she exercises it, it passes her right to her devisee and so interrupts the descent to the heirs of Robert *R. Randall. It appears to me, therefore, that as to the moiety of Mrs. Brewerton it passed under her will, and that the demandant, in any view of his claim, has no title to a moiety of the demanded premises. A right of entry may well pass under the devise of an hereditament.¹

The next question is whether the proceedings against Paul R. Randall, as an absent and absconding debtor, passed his right or interest to the other moiety in the lands in question to and vested the same in the trustees appointed under the same proceedings, so as to defeat the demandant in any respect.

The answer must depend upon the true construction of the Absconding Debtor Acts of 1786 and 1801 as compared with those proceedings. At the time of those proceedings the premises were in the adverse possession of the tenants; and, consequently, Paul R. Ran-

dall had only a right of entry. And the question is, whether that right of entry passed by the statutes to the trustees; and if so, whether it did not by operation of law revest in him after all these proceedings were *functi officio*, his debts being paid and the surplus paid over to him.

At the common law a right of entry is clearly not grantable or assignable. The party has, in the sense of the common law, no estate in lands of which he is disseized; but his estate is said to be turned to a right, and can be recoverable only by an entry or an action. In the mean time he has not any estate in the lands, but he has merely the right to the estate. For this doctrine it is necessary to do no more than to refer to Littleton, sec. 347; Co. Litt., 214 and 345, *a. b.*; Preston on Estates, 20, and Com. Digest, Assignment, C. 1, 2, 3, and Grant, D. (*a.*) Unless it shall appear that the common law has been differently construed in New York, or altered by some local statute, the same rule must be presumed to prevail there; for, by the constitution of that State, the common law forms the basis of its jurisprudence. No case has been cited in which the rule of the common law on *this subject has been [*177 overturned, or in which it has been decided that the word "estate" includes a right of entry, *proprio vigore*.

But it is said that by the law of New York a right of entry is attachable, and may be taken and sold on execution; and that an attachment under the Absconding Debtor Acts of 1786 and 1801 is deemed analogous to an execution.² It may, doubtless, well be so deemed in a general sense; but it by no means necessarily follows that because there is such an analogy, therefore, whatever may be taken in execution may be taken on such attachment, or, *e converso*. The subject of levies under execution is expressly provided for by the statute of New York of the 31st of March, 1801; and what effects or estate may be taken in execution depends upon the true construction of the terms of that act. It declares that "all the lands, tenements, and real estate" of every debtor shall be liable to be sold upon "execution," &c., for the payment of any judgment against him for debt or damages. What has been the judicial construction of these words in this act, whether they include a right of entry does not, as far as my researches extend, appear ever to have been decided. It is indeed suggested by Mr. Justice Woodworth, in delivering the opinion of the court in *Jackson v. Varick* (7 Cowen's Rep., 238, 244), that the reasonable construction is that it includes such a right; but the point was not then before the court, and he does not treat it as a point settled by adjudication. The words to which he refers in another part of the act, giving the form of the execution (sec. 9) in which it is confined to lands and tenements whereof the debtor was seized on the day when the same land became liable to the debt (by the judgment), would rather incline one to a different conclusion. And it is certain that under the statute of Westminster 2, ch. 18, subjecting lands to execution, lands of which the debtor is disseized at the time of the judgment cannot be taken in execution.³ Be this as it may, it is

1.—See Coffin v. Smith, 2 H. Bl., 444.

2.—Matter of Smith, 16 Johns. Rep., 102.

3.—1 Roll. Abridg., 888, Com. Dig. Execution, c. 14.

178] certain that in New York the process *upon executions and under the Absconding Debtor Act are not co-extensive in their reach. A judgment is not a lien upon a mere equity; and such an equity (not being an equitable estate under the statute of uses of 1787 (sec. 4) is not an interest which can be sold on execution. And choses in action do not appear to be within the scope of the act respecting executions; for the language confines it to "goods and chattels." Yet choses in action by the express terms of the Absconding Debtor Acts pass under the attachment; and there are various other interests which may well pass under these acts which yet are not liable to be taken under a common execution. Several cases illustrative of this position will be found collected in Mr. Johnson's Digest, title Execution 2(a).

It appears to me, then, that the true mode by which we are to ascertain whether a right of entry passes under the Absconding Debtor Acts is not by any forced analogy to the case of common executions, but by a just interpretation of the terms of the act themselves. The Act of 1801 is in substance a revision of the Act of 1786; no material distinction between them, applicable to the case before the court, has been pointed out at the argument; and they may therefore be treated as substantially the same.

The Act of 1801 begins (sec. 1) by providing for cases of absconding and absent debtors, and upon proof thereof, provides that a warrant shall issue to the sheriff commanding him to attach and safely keep "all the estate, real and personal, of such debtor," and make and return a true inventory thereof. Goods, effects and choses in action are expressly declared to be within the reach of the act. It afterwards proceeds to provide for the appointment of trustees, and authorizes them (sec. 2) "to take into their hands all the estate of such debtor, whether attached as aforesaid, or afterwards discovered by them, and all books, vouchers and papers relating to the same; and the said trustees, from their appointments, shall be deemed vested with all the estate of such debtor, and shall be capable to sue for and recover the same; and all debts and things in action due or belonging to such debtor, and all

179*] the estate attached as aforesaid, *shall be by the sheriff, &c., delivered to the said trustees; and the trustees, or any two of them, shall sell at public vendue after fourteen days' previous notice of the time and place all the estate, real and personal, of such debtor as shall come to their hands, and deeds and bills of sale for the same make and execute, which deeds and bills of sale shall be as valid as if made by such debtor, &c. The act afterwards goes on to provide for the distribution of the proceeds of the sales among the creditors, and then declares, that "the surplus, if any, after all just debts and legal charges as aforesaid are satisfied, shall be paid to such debtor or his legal representatives." There is no provision in the act as to what shall be done in respect to any property which never came to the hands of the trustees, nor of any property remaining unsold by them when all the debts were satisfied; and the omission may easily be accounted for from the general policy of the act; for the language is, that the trustees shall sell all the estate which comes to their hands. If the point were material

Peters 3.

I should strongly incline to the opinion that the act did not absolutely divest all right and title out of the debtor of any of his estate, which should not come to the hands of the trustees and be sold by them. But whether this be so or not, I am clearly of opinion that when once all the purposes of the trust are satisfied, and all the debts are paid, if the trustees have any legal interest or title vested in them in the estate of the debtor remaining unsold, it is subject to a resulting use for the benefit of the debtor, in the same manner as the surplus of the property sold. Suppose, before the sale, all the debts should be paid, must the trustees go on to sell? Suppose all the debts are paid by a sale merely of the personal estate, is not their trust extinguished? The trustees take all the estate in the first place for the benefit of the creditors, and in the next place, they being paid, for the benefit of the debtor. Subject to the rights of the creditors, the use is in him; and by operation of law the estate reverts in him as soon as the trust for the creditors is exhausted or extinguished. This seems to me a reasonable, if not a necessary construction of the act; for it has provided for no express reconveyance *by the trustees [***180** to the debtor in any case whatsoever. It certainly could not intend to deprive him of his inheritance after all his debts were paid. And it is but just to give the act a construction favorable to the debtor, when all its other objects are accomplished. In the present case the whole proceedings afford a strong presumption that all the debts of P. R. Randall have been paid; and none are pretended to exist. His right of entry in the demanded premises was never sold by the trustees; and even if it vested in them, it afterwards by operation of law reverted in him, if the trusts were all defunct and satisfied. But I go farther, and incline to the opinion that his right of entry in the demanded premises did not pass to the trustees under either of the attachments. The language of the acts of 1786 and 1801 is indeed quite broad, and extends to all the "estate, real and personal," of the debtor. But a right of entry is not, as has been already shown, an "estate" in any just and legal sense of the word. Neither is it a "thing in action;" for it does not depend upon any right to sue, but may be enforced by a mere entry. Indeed, a right of action and a right of entry are often used in contradistinction to each other.

The case of *Smith, &c., v. Coffin* (2 H. Bl., 444) turns altogether upon other considerations, and upon the interpretation of the words of the English bankrupt laws. Words of a very broad import are used in those laws; and the policy of them is far more extensive than that which governs the laws of New York, now under construction. A construction might be properly adopted in respect to the bankrupt laws, which would not apply to the Absconding Debtor Acts of New York. The general policy of the common law is to discourage the grant or sale of mere rights of entry and action, with a view to suppress litigation. This policy spreads itself over many important interests; and is so fundamental, that nothing but a very clear expression of the legislative intention ought, in my judgment, to overthrow it. No such intention is to be found in the Acts of 1786 and

1801. Can it be reasonably presumed that the Legislature meant to authorize the sale of a right of entry to a purchaser? If not, was it **181***] the intention to enable the trustees *to reduce the right into possession, and afterwards to sell the same? I think the former was manifestly not the intention of the Legislature; and I found myself on the very words of the acts. The trustees are to sell, not all the estate of the debtor, but all the estate, real and personal, "as shall come to their hands;" that is, as I construe the words, such as they shall reduce into possession; so that the estate may bring its uncontroverted value. But for the reasons already stated I incline also to the opinion that it was not the intention of the Legislature to pass the right of entry to the trustees so that they might be enabled to reduce it into possession.

But, supposing it to be otherwise, still it appears to me there is much reason to contend that the trustees, if they took the right of entry at all, took it *sub modo* and exactly as Paul R. Randall held it. The Legislature did not intend to invest them with a better right than he had. He had a right of entry into the estate vested in him by descent, and he might perfect his estate by an actual entry during his lifetime. But if he died without such entry, then the right to the estate devolved not upon his own heir, but upon the next heir in the line of descent of Robert R. Randall. In this view of the act the trustees were bound, then, to reduce the right of Paul R. Randall into possession during his lifetime, if they meant to perfect their title thereto. Not having done so, the title devolved upon the next heir who claimed, not through them, but from the ancestor from whom Paul R. Randall took it. This, however, is not the main ground on which I rely, though it fortifies some of the considerations already mentioned. The main ground on which I rely is, that whatever construction of the act may be adopted in other respects, as soon as all the trusts of the assignment are executed there arises a resulting use to the debtor, which, by operation of law, will revest all the unsold estate in him.

Upon the whole, my opinion is that the proceedings against Paul R. Randall did not pass his right or interest in the lands in question so as to defeat the demandant in any respect; but if they did, and all the trusts have been satisfied, there is a resulting use to him in the unsold estate.

The next question is, whether, inasmuch as **182***] the count in *the cause is for the entire right in the premises, the demandant can recover a less quantity than the entirety.

This is a question somewhat involved in technical learning, and therefore requires an accurate examination of the authorities. Reasoning upon general principles and the analogies of the law, there would be little difficulty in deciding it in the affirmative; for it is deciding no more than that he who has a right shall recover according to his right, so, always, that he does not recover more than he sues for. No injury is done to the tenant by allowing the de-

mandant who sues for ten acres and shows a title only to one to recover for the latter; nor if he sues for an entirety and shows title to a moiety, to recover for the latter. And it is in furtherance of justice that he should so recover; because it prevents multiplicity of suits. For if his suit should abate for this fault (and that is the only judgment which could be pronounced) he would still be entitled to a new action for the part to which he had shown title. The falsity of the former writ would constitute no bar.

Let us see, then, how the case stands upon authority. By the old common law, if the writ of the demandant was falsified by his own confession (for it is far from being certain that it was ever true, when found by a verdict upon the merits, after the general issue joined)¹ as to anything or part of a thing demanded in the writ, it abated for the whole. If the matter did not appear on the face of the record, but was to be made out by facts *dehors*, then the tenant, if he meant to avail himself of it, was compelled to do it by a plea in abatement. Thus, if he meant to avail himself of nontenure of the whole, or a part, he must plead it. But where, upon the whole record, the falsity of the writ was apparent by confession of the party, there, although the tenant had not pleaded in abatement, it was the duty of the court, *ex officio*, to abate the writ.

Now, at the common law, there are two sorts of writs in *real actions. In one the [***183** demand is in a general form, without specification of any lands in particular. Thus, in the writ of assize, the demand is that the tenant "unjustly and without judgment hath disseized him of his freehold in C"² without any further description of the land. So in the writs of dower, the demand is of the demandant's "reasonable dower, which falleth to her of the freehold, which was of A, her late husband in C, whereof she hath nothing"³ without more. The plaint or count is less general, and specifies the particulars of the demand, as a messuage, ten acres of land, &c.⁴ In the other sort of writs, the writ itself is as special as the count. Such is the case of all *precipes quod reddat*, such as writs of right, and writs of entry, &c., where the demand is of a certain messuage, or ten acres of land, &c., &c., and the exigency of the writ is that the said tenant should render the same to the demandant without delay.⁵ Now, it was upon this difference that a distinction took place in the common law as to the right of the demandant to abridge his demand. If the writ was special, he could not abridge his demand in any case. If the writ was general, *de libero tenemento*, he might abridge his demand at his pleasure, so always that he did not abridge it of a moiety or portion where he sued for the entirety of a thing; as if he sued for ten acres he might abridge it to five; but if he sued for the whole of a messuage he could not abridge it to a moiety. This doctrine will be found at large in many cases; but it is nowhere better expounded than in the opinion of *Mr. Justice Juyn* (afterwards Chief Justice) in 14

166; *Fitz.*, N. B., 147.

4.—*Com. Dig.*, Assize, B. 11; *Booth on Real Actions*, 212, and note.

5.—*Fitz.*, N. B., 1, 5, 191; *Booth Real Actions*, 1, 83, 88, 91, 172.

1.—See *Plowden*, 424, 6; *Hobart's Rep.*, 282, 6; *Fitz.*, *Abridg.*, Breve, 272; 9 *Hen.*, 6, 54; 11 *Co.*, 45; *Theol. Dig.*, Lib. 16, ch. 5.

2.—*Booth on Real Actions*, 210; *Fitz.*, N. B., 177.

3.—2 *Saund. Rep.*, 43; *Booth on Real Actions*,

Hen. VI, p. 3, 4. He said, "that in all cases where the writ is *de libero tenemento* generally, as in assize and writs of dower, where the writ is of her reasonable dower, &c., the demandant may abridge his plaint or demand; and the reason is because, although he abridges some acres, yet the writ remains true as to the rest, it being *liberum tenementum* still. But where a certain **184*** number of acres is demanded in the writ, as in a formedon, the demandant cannot abridge, for he acknowledges his writ false; and where a writ is acknowledged to be false in part, it must abate it in the whole; but if in an assize the writ be, he unjustly disseized him *de libero tenemento* in A and B, and he would abridge his demand as to all in B, he shall not abridge; for his writ is false; which supposes him disseized of the tenement in A and B." As to this last position there is some difference in the authorities; but the general position is unquestionable law¹. But this doctrine, even in relation to assizes, was of little value to the demandant in many cases, because it stopped short of the most common sources of mistake. If, therefore, he counted against one as tenant of the whole, and he pleaded nontenure as to part, or joint tenancy, &c., and it appeared by confession or otherwise that the plea was true, the writ abated as to the whole, for the falsity of the writ was established in this, that the tenant was sued as the tenant of the whole, and was tenant only of part. This mischief was cured by the statute 25 Edw. III., ch. 16, which provided, "that by the exception of nontenure of parcel, no writ shall be abated but for the quantity of the 'nontenure, which is alleged'². Still, however, many difficulties remain behind; for if a party sue for an entirety, as of a manor, or a messuage, or one acre, and a bar was pleaded as to a moiety, or part of the land put in view, &c., in the plaint, the defendant could not abridge his plaint to the moiety left, since his writ was for an entirety, and so far false: the distinction was nice, for he might abridge his plaint from two or ten acres to one acre; but not as to the extent of his title or right in the land put in view. Such, however, as the distinction was (and it suited the subtlety of the times) it prevailed until the statute of 21 Hen. VIII., ch. 3, which provided, that in assizes the demandant might in all such cases abridge his plaint, and proceed for the residue.³ But **185*** this statute is confined to assizes; and, therefore, left the common law in full force as to all other real actions.

Such is a brief review of the doctrine at common law in respect to the abridgement of plaints by the demandant. It is not, however, to be imagined that the old authorities are all in harmony on this subject. On the contrary, diversities of opinion seem to have existed from an early period. In *Godfrey's* case (11 Co., 42,

45), the court proceeded mainly on the rule already stated. Lord Coke, however, thought that the common and true rule and difference is where a man brings an action, be the suit general or certain and particular, and he demands two things, and it appears of his own showing that he cannot have an action or better writ for one of them, there the writ shall not abate for the whole, but shall stand for that which is good. But when a man brings an action for two things, and it appears that he cannot have this writ for one thing, but may have another in another form, there the writ shall abate for all, and shall not stand for that which is good. The distinction has sound sense in it; but it is inapplicable to the present case; because here the plaintiff has not shown upon the pleadings that he has no title to maintain his writ for the whole.⁴

Writs of *precipe quod reddat*, then, except so far as the statute 25 Edw. III., of nontenure aided them, stood upon the footing of the common law. In respect to them, therefore, the demandant could not abridge his claim except in cases of nontenure; and if his writ could not by his own confession be maintained for the whole for which he sued, his writ abated for the whole; and it was not material whether he sued for the entirety of a certain number of acres and showed title to a less number, or whether he sued for the whole or a moiety, and showed title only to a less aliquot part.⁵ But *unless the falsity of his writ appeared by his own confession, even though it appeared by the verdict, the better opinion was that the writ was not abated for the whole. Plowden, indeed, in *Bracebridge v. Cook* (Plowden, 424), thought the objection fatal. But Lord Hobart, in *Clanrickard v. Sidney* (Hob., 272, 282), condemned that opinion as erroneous, and against common experience in his day. And in this last case it was further held that the variance was but matter of form, and at all events cured by the statute of jeofails of 18 Elizabeth, ch. 14, after a verdict, even though it appeared by confession of the party upon the pleadings. In that case the writ was formedon for an entirety; and upon the demandant's own confession it appeared that he was entitled to recover but two-thirds. But the court held that the parties having gone to trial upon an issue, and the jury having found a special verdict in favor of the plaintiff for the two-thirds, his suit was not abatable for the whole, but the error was cured by the statute of jeofails of 18 Elizabeth, ch. 14.⁶ Whoever will read Lord Hobart's learned opinion upon that occasion will perceive the most solid reasons brought in support of it. The doctrine that if a demandant sue for an entirety, he may yet after verdict recover for a moiety, is not only supported by the case in Hobart's Rep., 172, but by the case

1.—See Com. Dig., Abridg., A; 2 Saund. Rep., 44 and note 4; Gilb. Com. Pl., 199, 201, 202, 203; Brooks, tit. Abridg.; 14 Hen. VI., p. 4; 9 Hen. VI., p. 42; 3 Lev., 63; Vin., tit. Abridg.; Theol. Dig., Lib. 16, ch. 2; Bac. Abridg., Abatement, L.

2.—See Gilb. Hist. C. P., 201.

3.—See Com. Dig., Abridgement, B; Viner, tit. Abridgement; Theol. Dig., Lib. 8, ch. 28; *Id.*, Lib. 16, ch. 2; Keilway, 116, pl. 56; 5 Hen. VII.; 19 Hen. VI., 13; Brooks, Abridgement, pl. 2.

4.—See 1 Saund. R., 282, 285, note 7; Com. Dig. Peters 3.

Abatement, M. N.; Cro. Jac., 104; Theol. Dig., B. 8, ch. 23, sec. 13; 9 Hen. VII., 4 (*b*).

5.—See Com. Dig. Abatement, L. 1, 2, M.; Saville's Rep., 86; Clanrickard v. Sidney, Hob., 273, 274, 279, 282; Com. Dig. Abridgement, B.; Chatham v. Sleigh, 3, Lev. 67; Viner, tit. Abridgement; Fitzherbert's Abridgement, tit. Breve, 272; Plowden, 424.

6.—See Bacon's Abridgement, Amendment, B. Theol. Dig., Lib. 16, s. 15, 18; 2 Roll. Ab., 719, pl. 19 Cooper v. Frankling, 1 Roll. R., 384; S. C., 3 Bulst R., 148.

Cooper v. Frankling (1 Roll. Rep., 384; S. C., 3 Bulst., 148, and 2 Roll. Ab. Trial, p. 719, pl. 12). The doctrine, that if he sue for a moiety he may recover for a less aliquot part, may be deduced from the same causes, for it stands upon the same reasoning as that applicable to entireties. So was the reasoning in *Saville's Rep.*, 48, pl. 165.¹ There are many cases in ejectment where the same doctrine has been maintained, and in none of them has any distinction been asserted between an ejectment and real actions. The ground of argument has been the variance between the count and verdict; so that it has turned upon the falsity of the plaintiff's **187***] claim and title as propounded in his writ and proved at the trial. So was the case of *Ablett v. Skinner* (1 Sid., 229), where the ejectment was for one-fourth part of a fifth part; and the plaintiff's title upon the trial was but one-third part of a fourth of a fifth part; and yet it was held that he was entitled to recover according to his title. That case was recognized and fully confirmed in the case of *Denn d. Burges v. Purvis* (1 Burr. Rep., 326); where in ejectment the plaintiff sued for a moiety and recovered a third. Lord Mansfield relied on the analogous doctrine in cases of assize.

It may then be assumed as certain, that from the time of Lord Hobart the general doctrine has been that the demandant in any real action is entitled to recover less than he demands in his suit, whether he demands an entirety or an aliquot part, if the variance is not taken advantage of until after a verdict found on trial had. If, indeed, the matter is pleaded in abatement, it is fatal to the whole suit. So if it appears of record by the confession of the demandant in the course of the pleadings, the writ is abatable for the whole, if the tenant choose to take advantage of it before verdict. But if the parties go to trial upon the merits, and a verdict, general or special, is found of any part for the demandant, there the variance between the writ and the title, even though by the confession of the demandant upon the pleadings, is cured by the statute of amendments of 18 Elizabeth, ch. 14. This, then, being the state of the law at the time of the emigration of our ancestors, and the statute of Elizabeth being a remedial and not a penal law, and the general principle being that statutes made in amendment of the law before that period constitute a part of our common law, the court might, if it were necessary, resort to this principle to support the present suit. But such a resort is not necessary; because, in the first place, the present case is not one where the defect appears upon the confession of the party; but if at all, appears from facts proved at the trial upon the general issue. In the next place, the provisions of the Judiciary Act of 1789, ch. 20, sec. 32, upon the subject of amendments and jeofails, are far more extensive than the English statutes, and would justify the most **188***] comprehensive construction in favor of the demandant. And in the last place, the original nicety of the common law doctrine upon this subject, at least since the time of

Lord Hobart, seems to have given way (where the matter was not pleaded in abatement) to the doctrine of common sense. As far as we can trace it, it has been long established in England. Its existence in America has never been maintained by any positive decision in its favor. On the contrary, in Massachusetts, where real actions constitute the ordinary remedy for disseisins and ousters, it has been solemnly adjudged, upon a careful consideration of the English authorities, that the demandant may in all cases recover less than he sues for, whether he sues for an entirety or an aliquot part. So are the cases of *Dewy v. Brown* (2 Pick. Rep., 387); and *Somes v. Skinner* (3 Pick. Rep., 52); and the opinion of very able commentators upon this branch of the law.² There is nothing in the case of *Green v. Litter* (8 Cranch, 229, 242) which trenches upon this doctrine. So far, indeed, as that case goes, it is favorable to the demandant.

I have not thought it necessary to go into a particular examination of the point whether, if the variance between the demandant's title and his demand in his writ be apparent only by the finding of the jury upon the general issue, and not by the pleadings of the parties, or the confession of the demandant, the writ was abatable for the whole upon the old doctrine of the common law. There is much reason to believe, as has been already intimated, that under such circumstances the variance was never fatal to a recovery *pro tanto*; and the modern doctrine in England is certainly in favor of a recovery. But whether it be so or not, independent of the statute of jeofails, that statute certainly cures the defect upon the principles already stated.

Upon the whole, my opinion is that this question ought to be certified in favor of the demandant.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the *Southern [***189** District of New York, and on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion in pursuance of the Act of Congress for that purpose made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court:

I. That although the count in the cause is for the entire right in the premises, the demandant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions:

1. If John Inglis, the demandant, was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

2. If he was born after the 4th of July, 1776, and before the 15th of September of the same year when the British took possession of New York, he would not be under the like disability.

3. If he was born after the British took possession of New York, and before the evacua-

1.—Sec Scot and Scot's case, 4 Leon. R., 39; Com. Dig. Abatement, M.

2.—Jackson on Real Actions, 296; Stearns on Real Actions, 204.

tion on the 25th of November, 1783, he would be under the like disability.

4. If the grand assize shall find that Charles Inglis, the father, and John Inglis, the demandant, did, in point of fact, elect to become and continue British subjects and not American citizens, the demandant is an alien, and disabled from taking real estate by inheritance.

III. The will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant's right to recover, so far as her right or interest extended.

IV. The proceedings against Paul Richard Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in the trustees appointed under the said proceedings, so as to defeat the demandant's right to recover so far as his right or interest extended; unless the grand assize shall find that the trusts vested in the trustees have been performed; and, if so, the said proceedings will not defeat the demandant in any respect.

190*] *V. The devise in the will of Robert Richard Randall of the lands in question is a valid devise, so as to divest the heir-at-law of his legal estate.

Whereupon, it is ordered and adjudged by this court to be certified to the judges of the said Circuit Court of the United States for the Southern District of New York:

I. That, although the count in the cause is for the entire right in the premises, the demandant may recover a less quantity than the entirety.

II. And under the second general point, the following answers are given to the specific questions:

1. If John Inglis, the demandant, was born before the 4th of July, 1776, he is an alien, and disabled from taking real estate by inheritance.

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3. If he was born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he would be under the like disability.

4. If the grand assize shall find that Charles Inglis, the father, and John Inglis, the demandant, did, in point of fact, elect to become and continue British subjects and not American citizens, the demandant is an alien, and disabled from taking real estate by inheritance.

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ceedings will not defeat the demandant in any respect.

*V. The devise in the will of Robert [***191** Richard Randall of the lands in question is a valid devise, so as to divest the heir-at-law of his legal estate.

All of which is accordingly hereby certified to the said Circuit Court.

Mr. Webster, on a subsequent day of the term, submitted to the court an application in behalf of the demandant for a re-argument of this case. He presented, as the ground of the application, a statement in writing signed by the counsel in the case, *Mr. Ogden* and himself, representing "that the question in this cause, which arises on the construction of the will of Robert Richard Randall, is one not only of great importance, but certainly of no small difficulty. The case was argued at a time when there were six judges on the bench. At the time of the decision there were but five judges living who had heard the cause; of these five, three were against the demandant upon the construction of the will, being a minority of the whole court. Under these circumstances, as counsel for the demandant in a foreign country, the counsel feel it their duty to ask for a re-argument; the more particularly, as it appears from an affidavit now submitted to the court, that a sister of the demandant, who is now and long has been a *feme covert*, in case of a decision upon the construction of the will in favor of the demandant, is not subject to the disability of alienism, and may, therefore, maintain a suit to recover the property in dispute."

Mr. Wirt objected to the re-argument, alleging that should it be allowed, it would establish a precedent which would render every decision of the court uncertain and incumber the court with heavier duties than it could perform. It was without example in the whole course of the court since its organization.

Mr. Chief Justice MARSHALL* delivered [*192** the opinion of the court:

The court have considered the application for a re-argument in this case. It must be a very strong case, indeed, to induce them to order a re-argument in any of the causes which have been once argued and decided in this court. The present case has been very fully considered, and the court cannot perceive any ground in the present application to induce them to consent to the motion. It is therefore overruled.¹

Cited—3 Pet., 245; 14 Pet., 628; 14 How., 274; 17 How., 540; 18 How., 238; 19 How., 577; 20 How., 20, 250; 5 Otto, 313; McAl., 189, 190; 2 Cliff., 492; 2 Sawy., 122, 128; 3 Woods, 448, 460, 480; 3 McAr., 578.

1.—In the Appendix will be found the opinion of *Mr. Justice Story*, prepared in the case of the Baptist Association v. Hart's Executrix (4 Wheat., 1), which, by his liberal kindness, the reporter has been authorized to insert in this volume. It will be found to illustrate very fully some of the principles decided in this cause.

193*] **Ex-parte* TOBIAS WATKINS.*Habeas corpus—jurisdiction in criminal cases—judgment—jurisdiction of Circuit Court for District of Columbia—cases discussed.*

A petition was presented by Tobias Watkins for a *habeas corpus* for the purpose of inquiring into the legality of his confinement in the jail of the County of Washington, by virtue of a judgment of the Circuit Court of the United States of the District of Columbia, rendered in a criminal prosecution instituted against him in that court. The petitioner alleged that the indictments under which he was convicted and sentenced to imprisonment, charge no offense for which the prisoner was punishable in that court, or of which that court could take cognizance; and, consequently, that the proceedings were *coram non iudice*.

The Supreme Court has no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the Circuit Court in such a case, where the record is brought up directly by writ of error. [201]

The power of this court to award writs of *habeas corpus* is conferred expressly on this court by the fourteenth section of the Judicial Act, and has been repeatedly exercised. No doubt exists respecting the power.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term used in the Constitution is one which is well understood, and the Judicial Act authorizes the court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." [201]

The nature and powers of the writ of *habeas corpus*. [202]

A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as on other courts. It puts an end to inquiry concerning the fact by deciding it. [202]

With what propriety can this court look into an indictment found in the Circuit Court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. [203]

The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. [203]

If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of its jurisdiction, whether its judgment be for or against the prisoner. The judgment is equally binding in one case and in the other, and must remain in full [194*] force, unless reversed regularly by a superior court capable of reversing it. If this judgment is obligatory, no court can ever look behind it. [203]

Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was committed, or was not committed; that is, whether the indictment did or did not show that an offense had been committed, was a question which this court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment; and until reversed, cannot be disregarded. [203]

NOTE.—*Habeas corpus, nature of, and when granted.*
See note to *The United States v. Hamilton*, 3 Dall., 18.

It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown on the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. This court cannot usurp that power by the instrumentality of a writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied. [207]

The cases of *The United States v. Hamilton* (3 Dall. Rep., 17); *Ex-parte Burford* (3 Cranch's Rep., 447); *Ex-parte Bollman and Swartwout* (4 Cranch 75); and *Ex-parte Kearney* (7 Wheat., 39); examined. [207]

THIS case came before the court on a petition for a *habeas corpus*, on the relation of Tobias Watkins, setting forth that at May Term, 1829, of the Circuit Court of the District of Columbia, in the County of Washington, certain presentments were found against him; upon three of which trials were had, and verdicts passed against him; upon which judgments were pronounced, purporting to condemn him to the payment of certain pecuniary fines and costs, and certain terms of imprisonment for the supposed offenses therein. For the nature and terms of the indictments, and of the convictions and judgments thereon, the petition referred to the same. Copies and exemplifications of the records of the proceedings were annexed to the petition.

The petition proceeded to state that, immediately on the rendition of the judgments, and in the pretended pursuance and execution of the same, the petitioner was, on the 14th of August, 1829, committed to the common gaol of Washington County, in which he has since been confined, under color and pretense of the authority, force, and effect of the said indictments; that he is well advised by counsel that the said convictions and judgments are illegal and wholly void upon *their faces, and [*195 give no valid authority or warrant whatever for his commitment and imprisonment; that the indictments do not, nor does any one of them charge or import any offense at common law whatever, cognizable in the course of criminal judicature, and especially no offense cognizable or punishable by the said Circuit Court; and that his imprisonment is wholly unjust, and without any lawful ground, warrant or authority whatever.

The petitioner prays the benefit of the writ of *habeas corpus*, to be directed to the marshal of the District of Columbia, in whose custody, as keeper of the gaol of the District, the petitioner is, commanding him to bring the body of the petitioner before the court, with the cause of his commitment; and especially commanding him to return with the writ the record of the proceedings upon the indictments, with the judgments thereupon; and to certify whether the petitioner be not actually imprisoned by the supposed authority, and in virtue of the said judgment.

The first indictment referred to in the petition charged the petitioner as fourth auditor of the Treasury of the United States, and as such having assigned to him the keeping of the accounts of the receipts and expenditures of

the public moneys of the United States in regard to the Navy Department; with having obtained for his private use the sum of seven hundred and fifty dollars, the money of the United States, by means of a draft for that sum on the navy agent of the United States at New York, which draft was drawn by him in the city of Washington, in favor of C. S. Fowler, on the navy agent at New York, and negotiated in the city of Washington on the 16th of January, 1828; the said sum of money having been by him represented to the Secretary of the Navy as required by the navy agent for the uses of the United States, and so represented in a requisition made to the navy agent for a warrant on the Treasury of the United States for the amount of the draft, with other sums included in the requisition.

The second indictment charged the petitioner with having received from the navy agent of the United States at New York, the sum of three hundred dollars, money of the United **196*** States, by means of fraudulent misrepresentations made to the navy agent, contained in a letter addressed to him on the 8th of October, 1827, in which it was falsely stated that the said sum of three hundred dollars was required for the use of the United States; and that the same was so obtained from the navy agent, by a draft on him in favor of C. J. Fowler, by whom the money was paid to the petitioner, on his having negotiated the draft.

The third indictment charged the petitioner with having procured to be drawn from the Treasury of the United States the sum of two thousand dollars, by means of a requisition from the Secretary of the Navy; a blank requisition left by that officer in his department having, on the representation of the petitioner that the same was required for the public service by the navy agent at Boston, been filled up for this purpose; and for which he drew and negotiated drafts in the city of Washington, at different times, in favor of C. J. Fowler, in different sums amounting to two thousand dollars, and appropriated the same to his own use.

Messrs. Jones and Coxe moved for a rule on the United States, to show cause why a *habeas corpus* should not issue, and proposed that the argument should take place on the motion upon all the points involved in the case. *Mr. Berrien*, Attorney-General, objected to an argument on the motion. He stated that he was prepared to go into the argument on the return of the rule, but was not willing to do so on the motion.

The counsel for the petitioner observed, that in *Kearney's* case (7 Wheat.), the argument took place on the motion; and, as in this case the petition brought up the indictments and the judgments of the Circuit Court, the whole matter was now fully before the court.

Mr. Chief Justice MARSHALL said that the counsel for the petitioner and the Attorney-General might arrange among themselves as they thought proper when the argument should come on, either on the motion or the return. This not having been done, the rule was awarded returnable on the following motion day.

197* On the return of the rule, *Mr. Coxe* and *Mr. Jones*, for the petitioner, contended that no offense was charged in the indictments which was within the jurisdiction of the Circuit Court for the County of Washington, and therefore all the proceedings of that court were nullities and void.

1. All the proceedings of a court beyond its jurisdiction are void. (*Wise v. Withers*, 3 Cranch, 331; 1 Peters' Condensed Rep., 552; *Rose v. Himely*, 4 Cranch, 241, 268, 552; *Doe v. Harden*, 1 Paine' Rep., 55, 58, 59.)

2. In the case where a court acting beyond its jurisdiction has committed a party to prison, a *habeas corpus* is the proper remedy, and affords the means of trying the question. (3 Cranch, 448; 1 Peters' Condensed Rep., 594; *Bollman and Swartwout*, 4 Cranch, 75; *Kearney's* case, 7 Wheat., 38.)

3. The writ does not issue of course, but the party must show that he is imprisoned by a court having no jurisdiction. (1 Chitty's Crim. Law, 124, 125; 7 Wheat., 88.) A *habeas corpus* is a proper remedy for revising the proceedings of a court in a criminal case. (1 Chitty's Crim. Law, 180.)

It was argued for the petitioner, that it has been decided in many cases that a writ of *habeas corpus* may issue so as to make its action equivalent to that of a writ of error. (1 Chit. Crim. Law, 180.)

The Circuit Court is a court of general criminal jurisdiction in cases within the local law, and within the law of Maryland. What is the effect of the clause of the Act of Congress establishing this court? It is to give it cognizance of "all offenses;" but this does not mean that extraordinary powers are given to make new offenses, and to punish all acts deemed offenses. Offenses are the violations of known and established local laws. The statute means offenses against the laws of the United States in their sovereignty, and against the local laws of the district.

For the purposes of this inquiry it is immaterial whether the Circuit Court is or is not of limited jurisdiction. However extended its jurisdiction may be, it has defined limits, and these restrain it.

Suppose the court should entertain jurisdiction of cases *certainly not criminal, [***198** would not a decision in such a case be a nullity? As if on the face of an indictment an act which is of a civil nature should be made criminal. The court is limited to offenses committed within its jurisdiction. Should it take cognizance of an act done in England, would not this court interfere?

It is admitted that the judgment of a court of competent jurisdiction is conclusive, when the case is one properly submitted to the operation of that jurisdiction. But it is not sufficient to say that its jurisdiction is general; it should also appear it had jurisdiction of the offense charged. (Cited, *Rose v. Himely*, 5 Cranch, 313; *Griffith v. Frazier*, 8 Cranch, 9.)

It is asked whether this court will look into any criminal case which has passed under the judgment of the Circuit Court. Suppose a sentence imposed not authorized by law; would not this court interfere by its writ of *habeas corpus*?

It is not contended that every excess of jurisdiction is within the principle claimed. There is a difference between a rule which is reasonable, and that which goes into extravagance. It may not be defined, but it can be felt; and this

is a case where this rule can apply. The position that the decision of an inferior court of the United States in a criminal case cannot be inquired into unless there is an appellate jurisdiction in such cases, goes too far; and runs into the *argumentum in absurdum*.

In all the cases which have come before this court in which a writ of *habeas corpus* has been applied for, the decision has been in favor of the jurisdiction. There has been enough shown here in this preliminary question to authorize the writ, as the only inquiry is, whether the judgment of the Circuit Court is conclusive upon all the matters before the court.

The counsel for the petitioner proceeded to argue at large upon authorities that the offenses charged in the indictments were not cognizable in the Circuit Court. As this point was not noticed in the opinion of the court, the argument is omitted. (They cited 7 Cranch, 32; 1 199*] Wheat., 415; 1 Gall., *488; 2 East, 814; 2 Maule and Selw., 378; 4 Wheat., 405, 424, 430, 410, 416, 427; 1 Cranch, 164.)

The *Attorney-General* denied that it was competent for this court to revise the proceedings of the Circuit Court in a criminal case, or to award a *habeas corpus* to bring into revision such proceedings.

No such case was to be found since the organization of the court; and as writs of error and appeals are expressly limited to cases which are not criminal, the issuing of such a writ, and for such a purpose, would be contrary to law.

He contended that the cases of *Bollman and Swartwout* was not an authority for the claim of the petitioner. That was a case of bail, and not a case in which the judgment of a court had passed. In *Kearney's* case the writ of *habeas corpus* was refused; the petitioner being in confinement for contempt, which was considered equivalent to a sentence of the court.

It is now to be decided in the case before the court, whether they will, through the means of a *habeas corpus*, revise the sentence of an inferior court in a criminal case, so as to determine whether it had jurisdiction of the offense charged in an indictment found in that court.

The petition asserts, 1. That no offense is charged in the indictment cognizable by the law of Maryland.

2. That no offense is charged which is cognizable by the laws of the United States.

As to the first, if it is competent to this court to examine the point, the whole case of the petition is open, as the Circuit Court is said to have erred in deciding that the offense was cognizable by it. The Circuit Court of the District of Columbia has jurisdiction, such as is possessed by all other Circuit Courts of the United States; and it has also general jurisdiction of offenses committed in the District. In the legitimate exercise of this jurisdiction to decide what is an offense, it is said to have exceeded its jurisdiction. By what authority can this decision of a court of general, final, criminal jurisdiction, be re-examined here? The court below has decided that the facts of the 200*] case amount to a fraud on the *government, committed by false pretenses. It may be they have erred in their judgment; but the error cannot be revised here. They have jurisdiction to decide that the offense was committed in the District, and they have so decided.

The power of the court is: 1. To try the offender; 2. To determine what the offense is; 3. To punish after conviction. These are exclusive and final powers.

There is no power or authority in this court to re-examine a decision of a circuit court as to its jurisdiction in a criminal case. The proposition that the decisions of a court in a case beyond its jurisdiction are void, although true in the abstract, is practically false. Such decisions must stand, unless there is power in another court to reverse them. The truth of this is maintained in civil as well as criminal cases.

It must appear that there is jurisdiction in a superior court to award a writ of error, or a *habeas corpus*, which may bring up the question; not alone that the judgment of the court was erroneous.

If this court possesses such powers, it must be derived from one of three sources: 1. From the Act of Congress appropriating and regulating the powers of this court. No powers are given by the act to revise the proceedings of the Circuit Court in criminal cases. 2. From the powers of this court as the Supreme Court, to exercise supervision over all inferior courts. In the cases of *Bollman and Swartwout*, the court have said they have no such powers. 3. Can those powers be derived from the power to issue writs of *habeas corpus*, and by this to revise the judgments of inferior judicatures exercising criminal jurisdiction?

Congress has carefully guarded against this: it has given appellate powers in civil, admiralty and maritime cases, and has refused them in criminal cases. It cannot be supposed that when thus refused, they can be exerted under a writ of *habeas corpus*, which this court is authorized to issue. There are many cases for the employment of this writ, without claiming for it the rights asserted to belong to it by the counsel for the petitioner.

**Mr. Chief Justice MARSHALL* deliv- [*201
ered the opinion of the court.

This is a petition for a writ of *habeas corpus* to bring the body of Tobias Watkins before this court, for the purpose of inquiring into the legality of his confinement in gaol. The petition states that he is detained in prison by virtue of a judgment of the Circuit Court of the United States for the County of Washington, in the District of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment is annexed to the petition, and the motion is founded on the allegation that the indictment charges no offense for which the prisoner was punishable in that court, or of which that court could take cognizance; and, consequently, that the proceedings are *coram non judice*, and totally void.

This application is made to a court which has no jurisdiction in criminal cases (3 Cranch, 169), which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of *habeas corpus* is conferred expressly on this court by the fourteenth section of the Judicial Act, and has been repeatedly exercised. No doubt exists respecting the power; the question is, whether this be a case in which it ought to be

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exercised. The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution as one which was well understood; and the Judicial Act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, 202*] according to that law which is in a considerable degree incorporated into our own. The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated *Habeas Corpus* Act of the 31st of Charles II. was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.

The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habeas corpus*?

This writ is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, 203*] is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it.

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The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it.

If this judgment be obligatory, no court can look behind it. If it be a nullity, the officer who obeys it is guilty of false imprisonment. Would the counsel for the prisoner attempt to maintain this position?

Questions which we think analogous to this have been frequently decided in this court. *Kemp's Lessee v. Kennedy et al.*, 5 (Cranch, 173), was a writ of error to a judgment in ejectment, rendered against her in the Circuit Court of the United States for the District of New Jersey. An inquisition taken under the Confiscating Acts of New Jersey had been found against her, on which a judgment of condemnation had been rendered by the Inferior Court of Common Pleas for the County of Hunterdon. The land had been sold under this judgment of condemnation, and this ejectment was brought against the purchaser. The title of the plaintiff being resisted under those proceedings, his counsel prayed the court to instruct the jury that they ought to find a verdict for him. The court refused the prayer, and did instruct the jury to find for the defendants. An exception was taken to this direction, and the cause brought before this court by writ of error. On the argument the counsel for the plaintiff made two points: 1. That the proceedings were erroneous. 2. That the judgment was an absolute nullity. He contended that the individual against whom the inquest was found was not comprehended within the Confiscating Acts of New Jersey. Consequently, the justice who took the inquisition had no jurisdiction as regarded her. He contended also that the inquisition was entirely

insufficient to show that Grace Kemp, whose land had been condemned, was an offender under those Acts. He then insisted that the tribunal erected to execute these laws was an inferior tribunal, proceeding by force of particular statutes out of the course of the common law; it was a jurisdiction limited by the statute, both as to the nature of the offense and the description of persons over whom it should have cognizance. Everything ought to have been stated in the proceedings which was necessary to give the court jurisdiction, and to justify the judgment of forfeiture. If the jurisdiction does not appear upon the face of the proceedings, the presumption of law is, that the court had not jurisdiction, and the cause was *coram non judice*; in which case no valid judgment could be rendered.

The court said that, however clear it might be in favor of the plaintiff on the first point, it would avail him nothing unless he succeeded on the second.

The court admitted the law respecting the **205*** proceedings of inferior courts in the sense in which that term was used in the English books, and asked, "was the court in which this judgment was rendered an inferior court in that sense of the term?"

"All courts from which an appeal lies are inferior courts in relation to the appellate courts, before which their judgment may be carried; but they are not, therefore, inferior courts in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

The court then proceeded to review the powers of the courts of common pleas in New Jersey. They were courts of record, possessing general jurisdiction in civil cases, with the exception of suits for real property. In treason, their jurisdiction was over all who could commit the offense.

After reviewing the several Acts of Confiscation, the court said that they could not be fairly construed to convert the courts of common pleas into courts of limited jurisdiction. They remained the only courts capable of trying the offenses described by the laws.

In the particular case of *Grace Kemp*, the court said that "the Court of Common Pleas was constituted according to law; and if an offense had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the State of New Jersey. The question whether this offense was or was not committed; that is, whether the inquest, which is substituted for a verdict on an indictment, did or did not show that the offense had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous; but it is a judgment, and, until reversed, cannot be disregarded."

*This case has been cited at some **[*206]** length, because it is thought to be decisive of that now under consideration.

Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was or was not committed; that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded.

In *Skillem's Executors v. May's Executors* (6 Cranch, 267), a decree pronounced by the Circuit Court for the District of Kentucky, had been reversed, and the cause was remanded to that court that an equal partition of the land in controversy might be made between the parties. When the cause again came on before the court below, it was discovered that it was not within the jurisdiction of the court; whereupon the judges were divided in opinion whether they ought to execute the mandate, and their division was certified to this court. This court certified that the Circuit Court is bound to execute its mandate, "although the jurisdiction of the court be not alleged in the pleadings." The decree having been pronounced, although in a case in which it was erroneous for want of the averment of jurisdiction, was nevertheless obligatory as a decree.

The case of *Williams et al. v. Armroyd et al.* (7 Cranch, 423) was an appeal from a sentence of the Circuit Court for the District of Pennsylvania, dismissing a libel which had been filed for certain goods which had been captured and condemned under the Milan Decree. They were sold by order of the governor of the island into which the prize had been carried, and the present possessor claimed under the purchaser. It was contended that the Milan Decree was in violation of the law of nations, and that a condemnation professedly under that decree could not change the right of property. This court affirmed the sentence of the Circuit Court, restoring the property to the claimant, and said "that *the sentence, if avowedly made **[*207]** under a decree subversive of the law of nations, will not help the appellant's case in a court which cannot revise, correct, or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less because its error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it."

The court felt the less difficulty in declaring the edict under which the condemnation had been made to be "a direct and flagrant violation of national law," because the declaration had already been made by the Legislature of the Union. But the sentence of a court under it was submitted to, as being of complete obligation.

The cases are numerous which decide the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding until reversed. It is universally understood that the judgments of the courts of the United States, although their jurisdiction

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be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only on a writ of error. This acknowledged principle seems to us to settle the question now before the court. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictments on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

The counsel for the petitioner contend that writs of *habeas corpus* have been awarded and prisoners liberated in cases similar to this.

In *The United States v. Hamilton* (3 Dall., 17), the prisoner was committed upon the warrant of the district judge of Pennsylvania, charging him with high treason. He was, after much deliberation, admitted to bail. This was a proceeding contemplated by the thirty-third section of the Judicial Act, which declares that in cases **208*** where the punishment *may be death, bail shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of the District Court.

In the case *Ex-parte Burford* (3 Cranch, 447), the prisoner was committed originally by the warrant of several justices of the peace for the County of Alexandria. He was brought by a writ of *habeas corpus* before the Circuit Court, by which court he was remanded to gaol, there to remain until he should enter into recognizance for his good behavior for one year. He was again brought before the Supreme Court on a writ of *habeas corpus*. The judges were unanimously of opinion that the warrant of commitment was illegal, for want of stating some good cause certain supported by oath. The court added that, "if the Circuit Court had proceeded, *de novo*, perhaps it might have made a difference; but this court is of opinion that that court has gone only on the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain." The prisoner was discharged.

In the cases of *Bollman and Swartout*, the prisoners were committed by order of the Circuit Court, on the charge of treason. The *habeas corpus* was awarded in this case on the same principle on which it was awarded in the case of 3 Dall., 17. The prisoners were discharged, because the charge of treason did not appear to have been committed. In no one of these cases was the prisoner confined under the judgment of a court.

The case *Ex-parte Kearney* (7 Wheat., 39) was a commitment by order of the Circuit Court for the District of Columbia, for a contempt. The prisoner was remanded to prison. The court, after noticing its want of power to revise the judgment of the Circuit Court in any case where a party had been convicted of a public offense, asked, "if, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly?" The case *Ex-parte*

Kearney bears a near resemblance to that under consideration.

The counsel for the prisoner rely, mainly, on the case of **Wise v. Withers* (3 Cranch, 330). [**209** This was an action of trespass *vi et armis*, for entering the plaintiff's house and taking away his goods. The defendant justified as collector of the militia fines. The plaintiff replied that he was not subject to militia duty, and on demurrer this replication was held ill. This court reversed the judgment of the Circuit Court, because a court-martial had no jurisdiction over a person not belonging to the militia, and its sentence in such a case being *coram non judice*, furnishes no protection to the officer who executes it.

This decision proves only that a court-martial was considered as one of those inferior courts of limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. The declaration that this judgment against a person to whom the jurisdiction of the court could not extend is a nullity, is no authority for inquiring into the judgments of a court of general criminal jurisdiction, and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offense to be punishable criminally, which, as we may think, is not so.

Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded.

On consideration of the rule granted in this case, on a prior day of this term, to wit, on Tuesday, the 26th of January, of the present term of this court, and of the arguments thereupon had, it is considered, ordered and adjudged by this court, that the said rule be, and the same is hereby discharged, and that the prayer of the petitioner for a writ of *habeas corpus* be, and the same is hereby refused.

See S. C., 7 Pet., 568.

Cited—12 Pet., 722; 14 Pet., 600, 628; 2 How., 338-342; 5 How., 190; 9 How., 572; 18 How., 329; 2 Wall., 342; 4 Wall., 110; 7 Wall., 382; 18 Wall., 166, 185, 187, 205; 3 Otto, 23; 10 Otto, 23, 283, 375; 1 Wood. & M., 408; 1 Sawy., 319, 340; 2 Sawy., 401, 499; Hemp., 308; McAl., 73; 3 Blatchf., 5; 5 Blatchf., 310; 8 Blatchf., 91, 93; 2 Brock., 476; 2 Abb. U. S., 386; 12 Bank. Reg., 101; 2 Wall., Jr., 528; 4 Cranch, C. C., 287; 3 Cliff., 27.

*JAMES BOYCE'S EXECUTORS, [**210**
Appellants,
v.
FELIX GRUNDY, Appellee.

Equity jurisdiction of federal courts after proceedings at law—16th section of the Judiciary Act—fraud.

The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract.

This court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

It is not enough that there is a remedy at law: it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. [215]

It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud, but it is very far from a conclusive argument. The doctrine will not be contended for that a written agreement cannot be relieved against on the ground of false suggestions. [219]

It is not an answer to an application to a court of chancery for relief in rescinding a contract to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution. [220]

APPEAL from the decree of the Circuit Court of West Tennessee.

A bill in chancery was filed in that court by the appellee, Felix Grundy, against the appellants, the executors of James Boyce, to enjoin a judgment at law which they had obtained against him for four thousand seven hundred dollars, and to rescind a contract made between James Boyce and himself on the 3d of July, 1818, by which Boyce sold and agreed to convey to the complainant, Grundy, nine hundred and fifty acres or arpents of land on the Homochito River, in the State of Mississippi, and for which Grundy agreed to pay him twenty thousand dollars; two thousand of which were to be paid in hand, and the balance in yearly installments of two thousand dollars. A deed of general warranty was, by the written agreement of the partners, to be made to the purchaser in four years.

Grundy having failed to pay the amount of **211*** the installments due January, 1820 and 1821, Boyce's executors commenced suit upon the contract for the two first installments in the Circuit Court for the District of West Tennessee, and recovered judgment for the same with interest. On the 30th of August, 1823, Grundy filed his bill, praying an injunction against the judgment at law, and a rescision of the contract.

The grounds of equity stated in the bill and relied on, were the fraudulent and false representations of Boyce, in making the sale of the land.

1. In regard to an island in the river, part of the land purchased, containing two hundred and sixty-five acres, not being subject to inundation, except a very small part, easily prevented; and of the quantity of the land on said island.

2. In showing and selling a body of good and level land, as part of the tract, which is not included within its limits. And representing that a quantity of bad and hilly ground was not within the tract, which is included.

3. In representing that he had a good title to the land; having no title, and not being able to make a good right.

The answer of the defendants in the Circuit Court denies the allegations charging fraud and misrepresentation by James Boyce, and avers Grundy's information as to the true state of the title, the quantity and quality of the lands; and alleges that they have been pre-

vented from obtaining the legal title by the failure of Grundy to pay the installments due upon the contract, and which were necessary to enable them to obtain a conveyance.

Depositions were taken on the part of the complainant and the defendants, which with other testimony were exhibited in the Circuit Court on the hearing of the cause. The testimony exhibited on the part of the complainant in that court, fully established the allegations in the bill, to the satisfaction of the court. The whole evidence is referred to, and the facts of the case are sufficiently stated in the opinion of this court.

The Circuit Court perpetuated the injunction, and rescinded the contract between Boyce and Grundy; and decreed that ***the** **[212]** money paid by the complainant to Boyce should be refunded with interest. The defendants appealed to this court.

Messrs. Ogden and Wickliffe, for the appellants, contended:

1. That the charge of fraud and misrepresentation, as set forth in the bill, in reference to the title, quantity, boundary, and overflowing of the land, is not sustained by proof.

2. That the court below erred, in decreeing a rescision of the contract, upon the grounds assumed in the decree. That the court erred in refusing to continue the cause for the reasons stated in the exceptions filed by the defendants. The court erred in admitting as evidence in this cause, the papers and parts of depositions referred to in the several bills of exception.

3. The testimony in this cause, the matters of fact involved, were of a character which imperatively called upon the chancellor to direct an issue at law, to try the controverted facts.

4. The court should have referred the cause to a commissioner, with directions to report upon the title.

5. The decree should have been interlocutory, and not final. Time should have been given defendants to make the title and tender it, upon the payment or tender of purchase money.

The counsel for the appellants, after full argument on the facts, as to the law of the case, said that the bill filed in the Circuit Court was to rescind a contract on the ground of fraud. In all cases of fraud, courts of equity in England and chancery courts in the United States, have concurrent jurisdiction with courts of law. (Mad. Chan., 258; 6 Johns. Rep., 110.) It is a well-settled principle of law that fraudulent representations will vitiate any contract. (1 Comyn on Contracts, 38.) In case a contract is obtained by such representations, it will be vitiated and destroyed in its binding force. If money has been paid under such misrepresentations, it may be recovered back. If a suit be brought at law upon the contract, the fraudulent representations may ***be** set up as an effectual defense at **[213]** law. If the vendee takes possession of the property, he may abandon it and consider the contract as not binding on him.

Thus, there is at law an adequate and a competent remedy, and full relief can be obtained at law from the effects of such a contract.

Has, then, a court of the United States jurisdiction in the case. By the Judiciary Act, the equity powers given to the courts of the

United States are not to be exercised when there is a full and adequate relief at law.

2. Fraud cannot be alleged in most cases where the agreement has been reduced to writing. It is an argument of great force against fraud (*Sugden on Vendors*, 129), upon the principle that all the allegations and representations of the parties will be presumed to have been embodied in the writing. (4 Tannt., 785.)

3. They also contended that after a judgment has been obtained in a suit in which the alleged fraud might have been set up as a defense, no injunction will lie. (3 Merivale's Rep., 225, 226; *Clit. on Contracts*, 113; cited, also, *Sugden on Vendors*, 129.) To show that the case was not one for a court of equity, were cited *Hepburn v. Dundas* (1 Wheat., 179; 5 Cranch, 502); *Morgan v. Morgan* (3 Wheat., 290); *Dunlop v. Dunlop* (12 Wheat., 576; 10 Ves., 144; 3 Bro. Ch. Cases, 73; 16 Ves., 83; 9 Ves., 21; 1 Bro. Ch. Cases, 546; 1 Ves. & Beames, 355, 356) 1 Barn. & Cress., 623; 5 Dowling & Riland, 490).

Mr. Isaacks and *Mr. White*, for the appellee, contended that the evidence on the record fully established the allegations of fraud in the bill and that the decree of the Circuit Court was in harmony with the weight of that evidence. A fraud had been committed both as to the quality the quantity, the situation, and the title of the land.

They argued that the case was one which came fully within the jurisdiction of a court of chancery. The construction of the Act of Congress, which would limit the chancery powers of the courts of the United States to cases only in which there is no concurrent legal remedy, [214*] is contrary to that *which it has constantly received since the organization of the court under that law.

The case made out in the complainant's bill is one peculiarly within the jurisdiction of a court of equity; and the relief which such a court can afford is the only adequate means to protect the complainant from gross injustice and fraud; to restore him to the situation in which he was before the contract was made. Without this remedy he would be exposed to a multitude of suits, and subjected to heavy expenses, for which he could not be re-imbursed. Fraud and trusts are peculiarly within the command of the chancery courts. In support of these principles, the counsel for the appellee cited 1 *Mad. Chan.*, 262; 3 *Cranch*, 280; *Ves.*, 9, 21; 1 *Jacob & Walker*, 19; 5 *Johns. Ch. Rep.*, 174; 2 *Cowen*, 129; 2 *Johns. Ch. Rep.*, 596; 6 *Mumford*, 283; 4 *Price's Rep.*, 131.

Mr. Justice Johnson delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of West Tennessee, rendered in a case in which the appellee was complainant.

The bill was filed to obtain the rescission of an agreement entered into on the 3d of July, 1818, between James Boyce, the appellants' testator and devisor, and the complainant, for the sale of a tract of land lying on the Homochito River, in the State of Mississippi.

The grounds set forth in the bill are fraudulent misrepresentations.

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1. As to the testator's title of the land; 2. As to the locality of the land; 3. As to the liability of the land to inundation; 4. As to the general description of the character and quality of part of the land not examined by complainant.

We have weighed the allegations of fraud contained in the bill, and are well satisfied that they are material, and such as entitle the complainant to relief if substantiated.

We have also considered the evidence introduced by the complainant, and compared it with the rebutting testimony introduced by *the appellants, and are of opinion that [*215 the testimony in support of complainant's allegations is full to the purpose of sustaining his bill, and the credibility of his witnesses fully established, wherever it has been necessary; so that in those points in which it has been contradicted by the appellants' witnesses, we cannot avoid giving credit to that of the complainant.

The decree below must therefore be sustained, unless the appellants can prevail upon some legal ground which will except this case from the general rules on this subject. The first and principal ground taken is, that the court of law was competent to give relief, and that this court should refuse relief, as well on the general principle as affirmed in the Judiciary Act, as because:

1. That the complainant was not prompt in insisting upon the fraud as soon as discovered; and,

2. Because he did not avail himself of it in a plea to the action at law.

This court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.

In the case before us, although the defense of fraud might have been resorted to, and ought to have been sustained in that particular suit, and, I will add, would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits; and that, probably, after the death of witnesses.

That he was bound to be prompt in communicating the fraud when discovered, and consistent in his notice to the opposite party of the use he proposed to make of the discovery, cannot be questioned. But we cannot concede to the appellants' *counsel, that the [*216 complainant was chargeable with delay or inconsistency in the particulars.

In his bill he alleges that the fraud did not come to his knowledge until 1821, and that he forthwith gave notice to James Boyce that he might resume possession of the premises and receive the rents and profits, for that he would not comply with the contract; which notice he repeated to the appellants after Boyce's death.

It has been argued that the testimony estab-

lishes an earlier notice, and even a contemporaneous notice of the facts which the complainant alleges were concealed or misrepresented.

The misrepresentations relied upon are of two classes: those which relate to the land, and those which relate to the title.

As to the title, the case furnishes no ground for imputing to the complainant contemporaneous notice of the involved state it was in. The evidence of the fact of representation on this subject, rests chiefly on the deed and the letters from Port Gibson. From these it clearly appears, that so far as relates to the two hundred acres purchased from Ellis, the complainant could not, even at the time of sale, have been put on inquiries respecting the title. For the deed expressly imports that the whole land sold was comprised within the grant to Davis. With regard to the land actually comprised within the grant to Davis, if the agreement to make a present sale of land, for which there was to be made present and successive payments to a large amount within four years, does not imply a present title or a present power to sell, it certainly amounts to a representation that at the end of four years the seller would be able to make a clear title.

But since, upon the discovery made at Port Gibson, the notice given by the complainant was not of an intention to rescind, but of a claim for a deduction *pro rata*, and since time is expressly given to the extent of four years to make title to the whole tract; we will not affirm that, in the absence of any proof of positive loss from want of title in the interval, if the party had been able to make title when the bill was filed, and had so answered, and **217***] duly set out the title **to be tendered, that it would have been a case for relief.* But the defendants in their answer go into an exposition of the only title they can offer, and that is so involved and imperfect that a court of equity would not even refer it. If, then, the appellants were now before this court, under a bill for a specific performance, it is clear that they must be turned out of court, being incompetent on their part to fulfil the contract. The rules of law relating to specific performance and those applied to the rescission of contracts, although not identically the same, have a near affinity to each other.

Again, if the object of the complainant's bill had been confined to obtaining an injunction until he could receive from defendant a good title to the land, can it be doubted that where the cause of action at law is a covenant in the same deed which stipulates for such a title, that he would be enjoined until he made a title? And if so, how long is this state of suspense to be tolerated? The title was to be made in four years; this certainly amounts to a representation that he would be able to make title at that time; but twelve years have now elapsed, and still it is not pretended that a clear legal estate has been acquired.

In excuse for this, it is urged that the complainant committed the first fault; that had he been punctual in his payments, Boyce would have been able to procure to be executed to himself a title that would have enabled him to comply with his agreement. But the state of his title is before us, and a mere tender of

money was not sufficient to give him a legal estate. He must still have passed through the delays and casualties incident to a suit in equity, before he could have acquired such an estate as would have satisfied the just claims of the complainant. The case, however, furnishes a more conclusive answer to this argument. The two hundred acres not included in Davis's grant, valued at the average which complainant would have paid for all the good land actually contained within his purchase, would have satisfied every payment that fell due within the four years. This deduction, he informed Boyce, he would insist upon, and there is no evidence in the cause to make it clear that Boyce did not acquiesce in this agreement.

It is argued, that of the defects in* **[*218] *Boyce's title the court could not be informed; that the complainant did not ask for a specific performance, and the defendants were not therefore called upon to set out their title. But by referring to the bill it will be seen that they are expressly called upon to set out their title, and in their answer undertake to do so, and in the effort, exhibit a title which he cannot deny is defective, but instead of setting out a title free from defects, content themselves with showing that the defects are not incurable.*

With regard to the misrepresentations relating to the land, the only evidence by which it is attempted to fasten on the complainant a want of promptness and consistency in availing himself of the discovery when made, is that by which a knowledge at the time of the contract is supposed to be established. Of the witnesses from whom this evidence has been obtained, it is enough to say that, with the exception of Mr. Poindexter, it is impossible to avoid putting their testimony out of the case. And Mr. Poindexter's testimony, even without his subsequent examination, may, without any forced construction, be reconciled with that of the witnesses who testify to the representations made by Boyce at the time of the sale. It relates exclusively to the subject of inundation; and when the complainant spoke to this witness of the island's overflowing, he accompanied it with the assertion that the overflowing could be prevented by a *terrée* at a small expense. This may well be confined to the representations received from Boyce, and does not necessarily imply a knowledge of its being subject to general inundation. Nor was the information received from Mr. Poindexter on this subject of such a full and decided character as to amount to a communication of knowledge. It is said that it ought to have put him on inquiry; but he was in possession of Mr. Boyce's positive assurances to the contrary, and had a right to rely upon that assurance without inquiry. The bill alleges the time of coming to his knowledge to have been that of the communication authorizing the party to take possession, and the evidence is not sufficient to prove notice at any previous time.

The second ground on this head of the appellants' argument **has been partly an-* **[*219]** *swered by the doctrine laid down upon the construction of the Judiciary Act, on the subject of the remedy at law. And so far as it relies on the adjudication quoted from Merivale, we think it unsustained. The position is, that an injunction to restrain proceeding on a judg-*

ment at law, will be refused by the Court of Equity to a party who had a defense at law and neglected to plead it. The doctrine of the case quoted, we conceive, has no bearing upon the present. The question there was upon a point of practice, whether a special injunction should issue instead of the common injunction; there was no question about the right to the latter, but the circumstances of the case were such that the common injunction did not afford full relief to the party. The rule of practice as laid down by the court is, that the special injunction goes only in those cases in which, from their nature, the defendant can make no defense; such as judgments on warrants of attorney. This was not such a case, but the party went for an exception in his favor, grounded upon a state of facts which brought him within the reason of the rule. And it was, in fact, granted.

It has been farther argued for the appellants, that reducing the agreement to writing precludes a recurrence to all representations; and to establish this doctrine, a passage from Sugden has been quoted. It cannot be doubted that, in the language of the author, reducing an agreement to writing is, in most cases, an argument against fraud. But it is very far from a conclusive argument, as is previously shown by the same author on the same page. The doctrine will not be contended for that a written agreement cannot be relieved against on the ground of false suggestions; and yet if the doctrine of this quotation were the rule, instead of an incident to it, such would be the consequence.

There is no attempt made here to vary the written agreement; the relief is sought upon the ground that, by false suggestions and immoral concealment, the party seeking relief was entrapped into an agreement in which he would not otherwise have involved himself. This is not denying that the agreement in the record was the agreement entered into, but in-
220 *] sisting *that it was vitiated by fraud, which vitiates everything.

It has been farther argued, that the misrepresentation, if at all established, was but of a personal character, and susceptible of compensation or indemnity, to be assessed by a jury.

On this there may be made several remarks; and first, that if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation, or absolution.

Second, that although, locally, a misrepresentation may be partial, yet it may be vital in its effects upon the views and interests of the party affected by it. Such was the case of *Fulton v. Roosevelt*.

But, lastly, the evidence makes out a case very far removed from one of merely a partial character. North, south, east, and west, we find the misrepresentations influencing the estimate of the value of these premises. Indeed, if we are to believe the testimony of Randel M'Garvick (and its clearness, fullness and fairness speaks its own eulogium), a case of more general or more vital misrepresentation can seldom occur, or a case of more absolute devotion to misplaced confidence. Not only for the qualities and incidents, but also for the lines, the representations of the seller were im-

plicitly relied on, and certainly to the most important results as to the value of the property. M'Garvick proves that they were carried to a certain fence, which fence excluded a large knob, as it is called in that country, containing a considerable body of untillable and worthless land, and expressly told by Boyce that the fence was his line, thus explicitly declaring that that body of bad land was not included in the land sold him, whereas, in fact, it was included; and in another direction where the land was fine (as if to make up the deficit in quantity to an experienced eye), he represents the land in view as being included within his survey, when, in fact, it was not all included. And suppose the utmost effect be given to the testimony of the appellants relative to the actual extent to which the island was subject to inundation, still it leaves wide ground for the charge of misrepresentation.

*The testimony is full to establish [***221** that, in several years, the whole has been overflowed. And the most favorable state of facts will leave from one hundred to one hundred and fifty acres, instead of fifteen or twenty, subject to this casualty in ordinary years. This, although partial in one sense, is total as to the diminution of the value of the whole. Compared with the representation proved, it certainly annihilates the very material consideration that it admitted of being prevented at a small expense, more especially as the chief injury was to be expected from the waters of the Mississippi.

In a purchase of nine hundred and fifty acres at twenty dollars an acre, such a discrepancy between facts and representations as would add thirty-three and a third, or perhaps fifty per cent. per acre to the cost, is not a case for mere compensation. And, if not a case for mere compensation, there was no controlling necessity to send the cause to a jury.

The decree must be affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of West Tennessee, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

See S. C., 9 Pet., 275.

Cited—14 Pet., 628; 20 How., 256; 21 How., 591; 2 Black., 551; 5 Wall., 78; 7 Wall., 430, 618; 13 Wall., 621; 15 Wall., 228; 4 Otto, 811; Bald., 403, 408, 409, 416, 420; 1 Wood, & M., 148; 2 Wood, & M., 29, 31, 32, 221; 1 Bond, 427; 5 Blatchf., 487; McAL., 288; 2 Curt., 603; 2 Brock., 525; 4 McLean, 394; Pat. O. Gaz., 1882, p. 1446.

THE PATAPSCO INSURANCE** [222**
COMPANY, Plaintiffs in Error,

v.

JOHN COULTER, Defendant in Error.

Insurance on profits—diligence of captain and crew in extinguishing fire—instructions of court to jury—barratry—loss of profits.

Insurance on profits on board the ship Mary "at and from Philadelphia to Gibraltar and a port in the Mediterranean, not higher up than Marseilles, and from thence to Sonsonate in Guatemala, Pa-

cific Ocean, with liberty of Guayaquil, the insurance to begin from the loading of the goods at Philadelphia, and to continue until the goods were safely landed at the said ports. The insurance, five thousand dollars, declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars." The vessel proceeded with a cargo of flour to Gibraltar, where the same was to be sold, and the proceeds invested at Marseilles in dry goods, to be sent from thence to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. The evidence on the trial went to show that, with proper diligence on the part of the captain and crew, the fire might have been extinguished and the vessel and cargo saved. Soon after the fire commenced, the captain called upon the crew to leave the ship, under an apprehension from a small quantity of gunpowder on board; and after they left her she was boarded by other persons, who endeavored, without success, to extinguish the flames, having, as was alleged, arrived too late. Evidence was given, intended to show that the fire originated from the carelessness of the captain. The Circuit Court refused to instruct the jury that if the fire proceeded from the carelessness or negligence of the captain, the insured could not recover. That court also refused to instruct the jury that if the fire originated from accident, or without any want of due care on the part of the master and crew, and if the jury should find that by reasonable and proper exertions the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover. That court also refused to instruct the jury that the assured, having offered no evidence that the sales of the flour at Gibraltar would have yielded a profit, they were not entitled to recover. Held, that there was no error in these instructions.

What is barratry? Its definition. [230]

The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defense that negligence was the remote cause, and hold the assurers liable for the loss. [236]

The rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. [237]

It seems difficult to perceive, if profit be a mere exercise of the principal, as some judges have said, or identified with it, as has been said by others, why the loss of the cargo should not carry with it the loss of the profits. Proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required if the cargo has been lost. [241]

223*] *ERROR to the Circuit Court of the District of Maryland.

This action was instituted in the Circuit Court on a policy of insurance, executed by the plaintiffs in error, on profits upon goods on board the ship *Nancy*, "at and from Philadelphia to Gibraltar and a port in the Mediterranean, not higher up than Marseilles, and at and from thence to Sonsonate, in the province of Guatemala, Pacific Ocean, with the liberty of Guayaquil: beginning the adventure upon the said goods, from the loading thereof on board the said vessel at Philadelphia, and continuing the same until the said goods shall be safely landed at the ports aforesaid."

The insurance was in the amount of five thousand dollars, with this clause: "This insurance is declared to be on profits, warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars."

The vessel, with a cargo of flour, proceeded from Philadelphia to Gibraltar, at which place the cargo was destined to be sold, and the proceeds to be invested at Marseilles in the

purchase of various specified dry goods. These dry goods were to be sent by the vessel from Marseilles to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. Evidence was taken at Philadelphia as to the circumstances of the destruction of the property, and one witness (Mr. Fulford) was examined in addition as to those circumstances at the trial. The testimony of this witness went to show that, with proper diligence on the part of the captain and crew, the fire might have been extinguished and the vessel and cargo saved; and the evidence obtained at Philadelphia was not inconsistent with that conclusion. It appeared from Mr. Fulford's testimony, that soon after the fire commenced, the captain called upon the crew to leave the ship, exclaiming that there was gunpowder aboard, and that the vessel would be blown up; and the captain and crew did then leave the vessel. It was in evidence that there was a small quantity of gunpowder on board, but that that ought not to have deterred exertions to save the property; an officer and a number of men from two British frigates having, *in fact, a considerable time after [*224 the vessel was deserted by her captain and crew, boarded her and used all efforts to put out the flames, but unsuccessfully, in consequence of their reaching the scene so late. There was evidence to infer that the fire originated from the carelessness of the captain with a candle used by him for sealing letters, or from negligence of the crew.

Evidence was had at Philadelphia, of Mr. Clark, concerning the markets at Sonsonate and Guayaquil, for the specified articles at Marseilles. His testimony tended to show that these articles would have been sold with profit at Guayaquil, at the time the vessel might have reached there. It was proved that at Gibraltar the flour would have sold without loss, but without profit.

The defendants prayed the court to direct the jury,

1. That if they should believe from the evidence that the fire which occasioned the destruction of the ship and her cargo, proceeded from the carelessness or negligence of the captain of the ship or any of her crew, the plaintiff was not entitled to recover.

2. That if they should believe that the fire which occasioned the ship's destruction originated from accident, and without any want of due care and attention on the part of the captain or crew, and if they should further find that the captain and crew, after the discovery of the fire, might, by reasonable and proper exertions, have prevented the spreading of the same, and have preserved the said vessel and cargo from destruction, and that they omitted to use said exertions, then the plaintiff was not entitled to recover.

3. That the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiff a profit, and that therefore they were not entitled to recover.

These prayers the court refused; but as to the second of them directed the jury as follows: "That the plaintiff is entitled to recover, unless they should be of opinion, from the evidence in the cause, that after the vessel was

discovered to be on fire, the master and crew **225***] might have extinguished *the same, and preserved the vessel and cargo. The master was bound to extinguish the fire, if practicable. If he stood aloof, without making any exertion to extinguish the fire and suffered the vessel to be destroyed, it would have afforded evidence of such gross negligence as to amount to barratry."

To the refusal of the prayers, and opinion and direction of the court, the defendants, now plaintiffs in error, excepted.

Mr. Mayer, for the plaintiffs in error, contended,

1. That they are not answerable, under the policy, for any loss by fire, if occasioned by the negligence of the captain and crew of the *Nancy*; that the risk of fire bears on the insurers as other risks in the policy; that the assured being bound to the exercise of reasonable skill and care in his agents to guard the property insured against the perils stated in the policy, under the implied warranty of seaworthiness, the underwriters ought not to suffer loss from a fire which the captain or crew might with ordinary care have prevented taking place.

2. That if it was the duty of the captain and crew to prevent the fire, it was equally their duty to extinguish it; and the consequences of their negligence in this particular ought not to fall upon the insurers; and that even the gross negligence of the captain and crew, in regard to a duty of this kind, is a mere nonfeasance, and is not to be considered barratry; that the remissness of the captain, in this case particularly, is not so to be considered, because, however weak his conduct may have been, he was acted upon by inordinate fears only, and by no motives of interest or any views of unauthorized discretion or willful delinquency.

3. That the profits here insured were incident to the cargo shipped at Philadelphia, and not to any property that might be substituted for it, though acquired with the proceeds of the original cargo; that the contemplated adventure from Marseilles to Guatemala was therefore foreign to the insurance. That even in a valued policy on profits, evidence must be given of some profit likely to result, and that **226***] *without such evidence the insurance has no subject to operate upon; that the flour being destined to be sold at Gibraltar, and not affording there a profit, as was proved, there is in effect no insurable interest whatsoever shown in the defendant, Coulter; and that he cannot, therefore, recover under a valued policy on profits.

Underwriters are not liable for any loss arising from gross negligence or want of skill of the captain and crew. The object of insurance is to guard against extraordinary perils. They necessarily beset every mercantile adventurer, and there must be skill and diligence to meet them. It is a part of the business of the voyage that those who are on board of the vessel shall be on the alert, and if they are not, the underwriters are exonerated. (Marsh. on Ins., 156, 487, 690; 5 Mass., 1; 8 Mass., 321, 436; 13 Johns., 180, 187; Phillips on Ins., 225.) If the first cause of the accident which produces the destruction of the vessel was not within the policy, its consequences do not attach to the policy. There is nothing in the terms of the Peters 3.

policy against fire which exempts them from the operation of these principles.

If the captain and crew omitted reasonable exertions to extinguish a fire which had occurred from accident, the insurers are not liable; gross negligence in both is not barratry; and if they stood aloof without making proper and sufficient efforts to prevent the ravages of the fire, the court should have left these facts to the jury, from which they could have inferred for the assurers. (Abbot on Ship., 128, note; 8 Cranch, 49; 5 Mass., 1; 8 Mass., 531; Marsh. on Ins., 515; Phill. on Ins., 230; 8 East, 133.)

The cargo would have produced no profit, and the plaintiff offered no proof that profits would have been obtained on the cargo sent from Philadelphia; and the insurance attached only to the cargo shipped there. Some profits must be proved before the underwriters are answerable, as this cannot be left to inference. (6 East, 315; 12 East, 124; 16 East, 218.) The policy is a contract of indemnity for actual injury or loss; and the principles of the law of insurance are against wagering policies. (2 Mass., 1; 12 Wheat., 288; Phill., 69.) It is admitted that a party may cover a *series [**227** of adventures, and expected profits on them; but if he has omitted to do this in explicit terms, he must sustain the loss himself. The terms of this policy are not broad enough to cover all the profits anticipated, and which are claimed from the underwriters, the plaintiffs in error. (Marsh. on Ins., 323; Phill., 166; 2 Mass., 409; 4 Camp., 294; 12 East, 283; 1 Taunt., 463; 12 Wheat., 283; 6 Mass., 197; 2 Mass., 420.)

Mr. Wirt, for the defendant in error, argued that the facts of the case made out a loss by accident or misfortune, and of innocence on the part of the master; and that from the situation of the vessel, part of the crew being absent, and the fact of there being powder under the cabin floor when the fire broke out, no other efforts than those which were made to save her would have been prudent or proper; all the skill that could be expected was employed. According to the established principles of the law of insurance, there must be ignorance so gross as to amount to unseaworthiness to excuse the insurer, but not otherwise.

It would be the introduction of a new principle in the law of insurance, if the want of more than common care and usual skill would discharge the underwriters. Every loss would be traced to such a proximate cause. A ship is left in a storm; would proof that setting another sail would have placed her beyond the peril excuse the underwriters? The seaman at the mast-head, whose duty it is to look out for land as a coast is approached, falls asleep, and the vessel is lost; this, under the principle claimed, would release the assurers. The underwriters will undertake to inquire whether the captain and crew should have resisted longer, before they submitted in battle. Human infirmities are at the risk of the insurers, as well as the perils of navigation.

The cases decided in England repudiate the doctrine asserted by the plaintiff in error, and for the reasons and on the principles now submitted to the court. (2 Barn. & Ald., 72; 5 Barn. & Ald., 171; 7 Barn. & Cress., 217; 14

Com. Law Rep., 33; 7 Barn. & Cress., 794; 14 Com. Law Rep., 129.)

228*] *Gross negligence is, upon adjudged cases, barratry; and thus, if such should have occurred in this case, the underwriters would be liable. (2 Camp., 149; 8 East, 126; 11 Petersdorf, 268; 2 Phill. on Ins., 237; 2 Camp., 620; 1 Taunt., 227; 2 New Rep., 336; 4 Taunt., 226; Peake, 212; 1 Camp., 123.)

The policy attached to the whole voyage, and was intended to cover the profits upon it. The interruption or breaking up of the voyage, preventing the earning of those profits; and in whatever part of it the occurrence took place, entitled the assured to recover the amount of the policy. An insurance on profits has been settled to be legal and proper. In the American courts it is not necessary to prove what the profits would have been, but in England the rule is otherwise.

Courts construe the policy liberally, to include all the objects and intentions of the parties, according to the nature of the voyage. In this case, the subject of insurance was the profits on the whole voyage, and the cargo which was taken on board at Philadelphia was to furnish the means of proceeding with the adventure. By its loss, the whole of the profits were lost. (*Catlett v. The Columbian Insurance Company*, 12 Wheat., 383; Phill. on Ins., 319, 29, 70, 46, 47.)

Mr. Justice JOHNSON delivered the opinion of the court:

This was a case of insurance on profits on a voyage from Philadelphia to Gibraltar, and a port in the Mediterranean not higher up than Marseilles, and at and from thence to Sonsonate, in the province of Guatemala, Pacific Ocean, with the liberty of Guayaquil. The risks are those usually inserted in policies, including fire, and barratry. The loss alleged is from fire alone.

The vessel reached Gibraltar in safety, and while lying there, took fire and was entirely consumed, together with her cargo.

The evidence on the part of defendants below went, first, to charge the master with having caused the fire by his own carelessness; second, with having desisted, and restrained the crew and others from efforts which might have extinguished the fire, under apprehensions **229***] not very well founded *that it would communicate with powder, laden near to where the fire originated. It was also objected to the plaintiff's right of recovery, that he had given no kind of evidence of profits, or probable profits, from a sale at Gibraltar.

This difference furnishes the subject of three bills of exception, the first of which went to the refusal of the court to instruct the jury that, if they believed the fire proceeded from the negligence or carelessness of the captain, the plaintiff below was not entitled to recover.

The second, that if they believed the fire originated in accident, without any want of due care and attention in the captain and crew, yet, if after it had commenced, the captain and crew might with ordinary care and exertion have extinguished it, the plaintiff below was not entitled to recover.

The first of these instructions was refused expressly. The second was refused as prayed;

and in its stead the court instructed the jury that the plaintiff was entitled to recover, unless they should be of opinion from the evidence that after the vessel was discovered to be on fire, the master and crew might have extinguished it, and preserved the vessel and cargo. That the master was bound to extinguish the fire, if practicable; and if he stood aloof without making any exertion to extinguish it, and suffered the vessel to be destroyed, it would have afforded evidence of such gross negligence as would amount to barratry.

As the plaintiff below is in possession of the verdict, it is immaterial to him if this charge was more favorable to his adversary than the law admits. We have only to do with so much of the case presented by these bills of exception as makes against the interest of the insurers.

And as to the refusal to instruct the jury that "their verdict must be for the insurers, if they believe the loss to have proceeded from the carelessness or negligence of the captain," it is obvious, since barratry is insured against, that the court must not be held to have affirmed that fire proceeding from negligence was a loss within the policy, independently of the risk of barratry, but that negligence was no defense where barratry was insured against.

*It cannot be denied that, what with **[*230]** adjudged cases and elementary opinions, this doctrine has got into a great deal of confusion. Many attempts have been made to define the term barratry, in its marine sense; but when compared with the ideas attached to the word, as derived from the most respectable sources, such definitions will too generally be found deficient to precision or comprehensiveness; they need commentaries to apply or explain them. And it is remarkable that the point in which all the definitions in the English or American authorities agree, to wit, that fraud must be a constituent of the act of barratry, is that in which practically all the difficulties arise. The question seems to be between *dolus* and *culpa*, which of those two words best conveys the sense of the law.

It cannot be denied that the etymology of the word favors the adoption of the former. The term barratry is known to the common law; and Cowell's Interpreter refers its origin to a Latin word, which would attach to it the idea of meanness, selfishness, and knavery. Some of our English books, following a French writer (*Pasquier sur Emerigon*), derive it from *barat*, an old French or Italian word, which they explain by *tromperie*, *fourbe*, *mensonge*.

I should myself derive the word from the Spanish *barateria*, *baratero*, which are rendered *fraus* and *fraudulentus*. But it is worthy of particular notice that writers on maritime law of the first respectability (I think Emerigon gives six in number), in explaining the marine sense of the word barratry, use the French word *prevariquer*, which can only be translated into "acting without due fidelity to their owners." The best French dictionary we have renders it by *agir contre les devoirs de son charge*, acting contrary to the duties of his undertaking, and *trahir la cause on l'intérêt des personnes qu'on est obligé de défendre*, to betray the cause or interest of those whom we are bound to protect.

Nor will it be found that the idea of the British courts of the meaning of fraud as applied to barratry varies perceptibly from this exposition. In the case of *Moss v. Byron* (6 T. R., 379), we find the very words adopted by one **231***] of the judges: "If the captain acted contrary to his duty to his owners," it was barratry; "and if he did any act to increase the risk," it was barratry. And in the case of *Burk v. The Royal Exchange Insurance Company*, the court lay it down as the law, that the term barratry is used in the policies as applicable to the "willful misconduct" of the master and mariners. And even in the case of *Phyn v. The Royal Insurance Company*, in which Lawrence, Justice, wishes to resume or explain his definition in *Moss v. Byron*, he concludes with adopting the definition of Lee, C. J., in *Stemmer v. Brown*, in which he says, "barratry must be some breach of trust in the master *ex maleficio*," in which, I presume, *maleficio* must mean some willful and injurious act. And as this case is given by the latest English compiler (11 Petersdorf, 269, Case 6) as the authority for the unqualified doctrine "that there must be fraud to constitute barratry," and the definition of C. J. Lee, just quoted, is given in his margin as comprising the substance of this case, we are furnished with an apt opportunity of ascertaining the idea attached in Great Britain to both the terms "fraud" and *maleficio*, by referring to the case itself.

The defense of the underwriters there turned upon a deviation, and the question was whether it was a fraudulent deviation. If a general deviation, the underwriters were discharged; but if a fraudulent deviation then it was a barratry and a risk in the policy. The whole evidence in the cause in which the question of fraud was raised, was this: the vessel was bound from London to Jamaica, but was driven by currents out of her course. Upon recovering her reckoning, she was found to be between the Grand Canaries and the island of Teneriffe. In this situation it was admitted that her course was south-west, instead of which the captain bore up for the island of Santa Cruz, which lay north-west, and in sight about thirty miles off, and came to anchor; for the purpose, as is supposed in the argument, to get refreshments, or in some way for his own accommodation. The jury found it to be a simple deviation without fraud, and the court only decide that they cannot adjudge it a fraudulent deviation in opposition to the finding **232***] of the jury. But it is *nowhere hinted that the jury might not have found it otherwise, and their verdict have been sustained upon the evidence in that cause.

On the contrary, so far as fraud or *maleficio* may be supposed to imply a dishonest or injurious intention towards the owner, the idea is negatived by a variety of cases. In that of *Earle v. Rovercraft* (8 East, 126), it was admitted that the captain unaffectedly acted with a view to promote the owner's interest, and would materially have promoted their interest had he escaped detection. But he had deviated from his instructions, and increased the risks by trading with an enemy; and it was held to be barratry. The court there say, it has been asked how is this act of the captain in going into d'Elmina, in order to purchase the cargo for his owners Peters 3.

more cheaply and expeditiously, a breach of trust as between him and them? Now, I conceive that the trust reposed in a captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where the instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage.

Here we see that an act "inconsistent with written instructions," and an act "not consonant to the laws of the land" are brought within the description of fraud upon the owners, as applied to the definition of barratry. From which it would seem to result, that it is not confined to moral fraud; or that the term is not well chosen; or that practically, in its application to this subject, *culpa* would better express the idea than *dolus*.

The commercial regulations of maritime nations, both of ancient and modern times, are very various on the subject of the liability of insurers for the acts of the master; and it is not without much appearance of reason that Emerigon observes, that the French ordinance has put it upon the just medium.

The regulations on this subject are contained in the twenty-sixth, twenty-seventh and twenty-eighth articles of the fifth title.

By the twenty-sixth article, "all losses and damages happening at sea *by tempest, [***233** shipwreck, running aground or aboard of other ships, changing the course of the voyage or of the ship, ejection, fire, taking, rifling, detention by prizes, declaration of war, reprisals, and generally by all maritime accidents, shall be at the risk of the insurers. By the twenty-seventh, however, if the changing of the course, voyage, or ship happens by the order of the insured, without the consent of the insurers, they shall be discharged from the risk; which shall likewise take place in all other losses and damages happening by the fault of the insured; nor shall the insurers be obliged to restore the premium, if the time of their bearing the risk be begun. Nor shall the insurers be obliged to bear the losses and damages happening to ships and goods by the fault of the master and mariners, except that by the policy they be engaged for the barratry of the master.

It is this last rule to which the observation of Emerigon is particularly directed; and although the British decisions do not adopt the negative language of the regulation without limitation, they certainly come up to the positive rule which it implies, whenever the case of the master is considered a fault with reference to his duty to his owner.

It has been remarked by a British court (*Burk v. The Royal Exchange Assurance Company*, 2 Barn. & Ald., 82), that in France, negligence, as well as willful misconduct, is considered barratry; and they give the authority of the commentator on the ordinance of Louis XIV., Valin, for the assertion. But as the author is commenting upon the twenty-eighth article, I am inclined to consider the passage as only intimating that negligence is a fault within the words of the ordinance.

And the same court, in the same cause, have certainly affirmed the same principle, in its positive sense; that is, that where an insurance is against barratry, a loss arising from fire

originating in negligence shall be borne by the underwriters.

It would be a great relief to this court if there existed such an uniformity in the decisions upon this subject as to place our decision upon adjudged cases. But it is not to be questioned that the English and American decisions **234***] are in *direct hostility with each other, as to a loss by fire arising from negligence, where there is an insurance against barratry.

It must be repeated, that the general question where there is no insurance against barratry need not here be considered. The judge was not bound to give an instruction abstracted from the case. And the question whether, where the breach laid was loss by fire only, the plaintiff could maintain his action by giving in evidence a barratrous burning, did not properly occur. The point when properly stated stands thus: the plaintiff lays the breach by fire, and the defendant, to repel his liability, insists that the fire was produced by negligence of the master; the plaintiff replies that negligence is no defense where the barratry is insured against; the court maintains the doctrine of the plaintiff, and adds, that negligence itself, when gross, is evidence of barratry. And, certainly, a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *prima facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So if, in the height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to and otherwise preparing her to overcome the peril, it may well be left to a jury to determine if such conduct be not barratrous.

The truth is, that in the incidents to this kind of contract, misfeasance and nonfeasance often approach so near to each other in character and consequences, that it is not surprising if courts of justice should incline to the adoption of rules which would relieve them from the difficulty of discriminating, or the inconsistencies that might result from their efforts to discriminate.

The case of *Green v. The Phoenix Insurance Company*, decided in New York, was certainly a very strong case to establish the doctrine that a loss by fire, proceeding from negligence of the master and mariners, was not a loss within the policy, although barratry be one of the risks. It will, however, be found, by looking **235***] into the reasons which governed *the court in that case, that its conclusions were drawn partly from the too general expressions of an elementary writer, and partly from analogy with other decisions in which the expressions of the court, unless restricted to the cases before them, were justly deemed authority for the decision there rendered. The question was one of the first impression, and one on which the best-constituted minds may well have been led to contrary conclusions. It was, however, no unreasonable claim upon the profession made by Lawrence, *Justice*, in the case of *Phyn v. The Royal Exchange Assurance Company*, with regard to his own doctrines in *Moss v. Byron*, "that what fell from him there must be taken in reference to the case then in judgment before the court." Thus, restricted

doctrines will often be found correct, which in a more general sense might well be questioned. And in the case of *Voss & Graves v. The Union Insurance Company*, and also in that of *Clereland v. the same company*, relied upon in the New York decision, the act of the master, for which the underwriters were held to be discharged, was in the first instance sailing towards a blockaded port with intent to violate the blockade, and in the second, leaving his register behind him. The first of these cases did not call for the opinion of Kent, *Justice*, on the subject of negligence; the second is exactly one of those cases in which a nonfeasance becomes a misfeasance, and both relate to the discharge of a duty unquestionably belonging to the insured, and the master is his agent. Attempting a breach of blockade was an unwarrantable increase of risk, which might or might not be barratrous according to circumstances. And for a vessel to leave her register behind in time of war, affected her seaworthiness as much as leaving her compass or quadrant or anchors at home at any time. So, neglecting to take a pilot, neglecting to pay port duties, neglecting to obtain a clearance, neglecting to comply with the laws of any port which the vessel has leave to enter; all these, although nonfeasances, involve misfeasances, which discharge the underwriters, because they violate implied duties incident to navigating the vessel, and produce a positive and definite increase of risk.

It was not until the year 1818 that the question was settled *in the British courts, [**236** on the liability of the underwriters for a loss like the present. In the case of *Busk v. The Royal Exchange Assurance Company*, the question is finally and fully decided there, in direct hostility with the decision in New York; and this court is now for the first time called upon to establish a rule for its own government in similar cases.

Losses by fire must happen either from the act of God, from design, or from accident. If from design, and by the captain and crew, it is barratry; if by any other person, or by pure accident, it is clearly a risk by fire, but from the peculiar character of this risk, it is no easy matter to point out an accident that may not be resolved into negligence. If, by the falling of a candle, it may have been because due care was not bestowed upon securing it; and if from a spark from the caboose, it may have been from neglect is not closing or constricting it; and if from a flue or a stove, the same reason may be assigned. It has already been shown that gross negligence may be evidence of barratry, and when it is considered how difficult it is to decide where gross negligence ends and ordinary negligence begins, and to distinguish between pure accident and accident from negligence, we cannot but think that the British courts have adopted the safe and legal rule in deciding, that where the policy covers the risk of barratry, and fire be the proximate cause, they will not sustain the defense that negligence was the remote cause.

We think this rule also the most consistent with analogy and mercantile understanding. It is very justly observed in the case of *Busk v. The Royal Exchange Assurance Company*, that it is a strong argument against the objec-

tion there raised for the first time, that in the great variety of cases that have occurred upon marine policies, no such point had ever been made. And I will add, it is not improbable from comparison of dates, that the defense maintained in the New York decision, suggested that made in the British courts.

The long acquiescence may have had its origin in a general mercantile understanding, or perhaps in the doctrine of Malynes, whose book unites the recommendations of antiquity, good sense, and practical knowledge. The **237***] passage *has been misquoted as to its place; it is found in page 155, in these words: "Barratry of the master and mariners can hardly be avoided, but by a provident care to know them, or at least the master of the ship upon which the assurance is made. And if he be a careful man, the danger of fire above mentioned will be the less for the ship; boys must be looked unto every night and day. And in this case let us also consider the assurers; for it has oftentimes happened, that by a candle unadvisedly used by the boys, or otherwise, before the ships were unladen, they have been set on fire and burnt to the very keel, with all the goods in them, and the assurers have paid the sums of money by them assured. Nevertheless, herein the assurers might have been wronged, although they bear the adventure until the goods be landed; for it cometh to pass sometimes, that whole ships' ladings are sold on ship board, and never discharged," &c. In the residue of this passage the author certainly intimates that the wrong done to the assurers is in being made to pay after the transfer of the interest to a third person, and the initiation of a new voyage. And the general doctrines involved in this case are certainly sustained by analogy to other cases. It seems generally conceded that in the case of insurance against fire on land, negligence of servants or of the tenant is no defense, nor of the proprietor, unless of such a character as to sustain the imputation of fraud or design. And the rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. The case of *Watkins v. Matland*, cited in argument, is a very strong case of this description. And both in that and the case of *Bishop v. Pentland*, decided as late as 1827, the decision in *Busk v. The Royal Exchange Assurance Company* is expressly quoted by the court, and affirmed as law. So that the doubt expressed by Mr. Phillips upon the authority of that case does not seem well founded. (Phillips on Insurance, 249)

It is true that in the application of the principles to particular cases, courts of justice will sometimes find themselves *embarrassed in discriminating between that *crassa negligentia* which will discharge the underwriters by varying or increasing the risk, and that upon which they may be made liable on the ground of barratry; but the difficulty is only one which those engaged in the administration of justice have often to feel and lament—to wit, the difficulty of fathoming men's motives; and in this the court can only rely on the judgment and experience of juries. While the captain is not regardless

of his duty to his owner, his actions cannot be barratrous; but if no act of infidelity to the owner be imputable to him from the evidence, then it is affirmed in various cases that a material increase of the risk from gross negligence may discharge the underwriters. Such was admitted to be the law in *Toulmin v. Anderson* (1 Taunt., 627); and *Toulmin v. Inglis* (1 Camp.) The case of *Pipon v. Cope* (1 Camp., 434) was decided on this distinction, and the defense set up in *Heyman v. Parish* (2 Camp., 149) went upon the same ground. It is true these are *nisi prius* cases, but they serve to illustrate the doctrine and course of decision.

In the case of *Arcangelo v. Thompson* (2 Camp., 620), it was ruled that where the loss was laid by capture, it was no defense for the underwriters to prove that the capture was barratrous; and it would indeed be singular, if where one breach is laid and proved, the party defendant could avail himself of another breach for which he was equally liable on the same contract.

The third prayer for instruction is in these words: "that the plaintiffs had offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and that therefore they were not entitled to recover," This was refused, and the question is, whether the defendants were entitled to it, as prayed.

This instruction presents two propositions:

1. That it was necessary to prove loss of profits, otherwise than by the loss of the cargo; 2. That the plaintiff was limited to prove of profits on a sale at Gibraltar. With regard to the second it is clear that the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the *course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty.

Courts of justice have got over their difficulties on the question whether profits are an insurable interest, but how and where that interest must be established by proof, in case of loss, is not well settled. Here again there appears to be a conflict between the British and American decisions.

The earliest of the British decisions, that of *Barclay v. Cousins* (2 East, 544), certainly supports the doctrine that the profits sink with the cargo, or, at least, that the loss of one is *prima facie* evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court (p. 551), and the recovery was had in that case without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson v. Margetson* (2 East, 549), of which a note is given in that case, the recovery was also had without proof that the profits would have been made, or any other proof than an interest in and loss of the cargo; and Lord Mansfield seems to have suggested the true ground for dispensing with such proof: to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port.

The two subsequent cases which are cited in elementary books to sustain the contrary doctrine, are not full to the point. In that of

Hodgson v. Glover (6 East, 316), there was another question of as great difficulty: to wit, whether in a clear case of average loss, the plaintiff could recover as for a total loss, or recover anything without evidence to determine the average. Of the four judges who sat, two decided against the plaintiff upon the one ground, and two upon the other.

In the second case, that of *Eyre v. Glover* (16 East, 218); although the point was touched upon in argument, yet the court neither expressly affirm nor deny it; it was not the leading question in the cause; and at last, judgment is rendered for plaintiff without requiring such proof. But the case of *Mumford v. Hallet* 240*] (1 Johns., 429) goes further. It *was a case of insurance on profits, in which there was no evidence given that profits would have been made upon an arrival, nor was any other loss proved than an incident to the loss of the goods. On that state of facts, Livingston, Justice, who delivers the opinion of the court, remarks, "It does not follow that a profit will be made if the cargo arrived, yet its loss would give a right to recover on such a policy." There are other questions in the case; but, after all were settled, this principle was essential to the plaintiff's right to recover.

In the case of *Fosdick v. The Norwich Insurance Company*, decided in the Supreme Court of Errors of Connecticut, the question was moved in argument that to justify a recovery the plaintiff must show that profits would have accrued upon safe arrival of the goods; but the language of the court, in expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the proof of loss as to the insurable interest. Yet the right of the plaintiff to recover being affirmed in that case without other proof than the loss of the goods, it would seem to be an authority for the doctrine that no other was necessary.

The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the cause, the Chief Justice asks "if profits are anything more than an excrescence upon the value of goods beyond the prime cost."

As to the American cases, Mr. Phillips quotes that of *Loomis v. Shaw* (if I understand his language as he meant to use it), as going farther than the case warrants (2 Johns. Ca., 36). The court waives the question now under consideration, by suggesting that the defendant had waived it by an act of his own.

In the case of *Abbot v. Sebor* (3 Johns. Ca., 39), which was a motion for a new trial, the decision turned chiefly on the question whether the court had misdirected the jury in instructing them that the plaintiff must recover the whole sum insured on profits, or nothing. That 241*] is, that he could *not recover for an average loss. The question, if proof that profits would have been made had the vessel arrived in safety was necessary to his recovering, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required, beyond the loss of the goods on which the

profit was expected. But the authority amounts to no more than an implication.

We must now dispose of the question upon reason and principle; and here it seems difficult to perceive why, if profit be a mere excrescence of the principle, as some judges have said, or an incident to or identified with it, as others have said, why the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it: of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill-fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it, would have been subjecting the rights of the plaintiff to mere mockery.

On this point we must support the American decisions.

Justices THOMPSON and BALDWIN, dissenting.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs and damages, at the rate of six per centum per annum.

Cited—19 Pet., 517; 11 Pet., 224; 14 Pet., 628; 6 How., 426, 429; 2 Wood. & M., 320; 1 Sumn., 469, 474; 2 Sumn., 260; 3 Sumn., 276; 1 Blatchf., 255.

*ANN SHANKS, MARGARETTA [*242
SHANKS, SARAH P. SHANKS, GRACE
F. SHANKS, AND ELIZA SHANKS (ap-
pellants below), *Plaintiffs in Error*,

v.

ABRAHAM DUPONT, AND JANE, HIS
WIFE, DANIEL PEPPER, AND ANN PEPPER, *Defendants in Error*.

*Citizenship—allegiance—treaty with England of
1794, of 1783—feme covert.*

Thomas Scott, a native of South Carolina, died in 1782, intestate, seized of land on James Island, having two daughters, Ann and Mary, both born in South Carolina before the Declaration of Independence. Sarah married D. P., a citizen of South Carolina, and died in 1802, entitled to one-half of the estate. The British took possession of James Island and Charleston in February and May, 1780; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott in right of their mother, under the ninth article of the Treaty of Peace between this country and Great Britain of the 19th of November, 1794. Held, that they were entitled to recover and hold the same.

If Ann Scott was of age before December, 1782,
Peters 3.

as she remained in South Carolina until that time, her birth and residence must be deemed to constitute her by election a citizen of South Carolina, while she remained in that State. If she was not of age then, under the circumstances of this case, she might well be deemed to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his natural character as a citizen of that country. [245]

All British-born subjects whose allegiance Great Britain has never renounced, ought, upon General principles of interpretation, to be held within the intent, as they certainly are within the words of the Treaty of 1794. [250]

The capture and possession of James Island in February, 1780, and of Charleston on the 11th of May in the same year, by the British troops, was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. [246]

The marriage of Ann Scott with Shanks, a British officer, did not change or destroy her allegiance to the State of South Carolina, because marriage with an alien, whether friend or enemy, produces no dissolution of the native allegiance of the wife. [246]

The general doctrine is, that no person can, by any act of their own, without the consent of the government, put off their allegiance and become aliens. [246]

The subsequent removal of Ann Shanks to England with her husband, operates as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the Treaty of Peace in 1783. [246]

The Treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects [243*] of that crown. The Treaty of *Peace was a treaty operating between States and the inhabitants thereof. [247.]

The incapacities of *femes covert* provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. These political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. [248]

THIS was a writ of error from the Supreme Court of Appeals in Law and Equity, in and for the State of South Carolina.

The suit arose out of a partition of a tract of land in the State of South Carolina; the right of the plaintiffs in error to a moiety having been denied on the ground of their alienage, and their consequent incapacity to inherit the same.

The case was argued at January Term, 1829, by *Mr. Cruger* and *Mr. Wirt* for the plaintiffs in error, and by *Mr. Legare* for the defendants, and was held under advisement to this term.

The facts of the case are fully stated in the opinion of the court.

The counsel for the plaintiffs in error contended that Anu Shanks, the mother of the plaintiffs in error, was a British subject, and that her title was protected by the Treaty of 1794. The decree of the court of the State of South Carolina was therefore erroneous, and should have been in favor of the plaintiffs, for a moiety of the land of which Thomas Scott died seized.

The defendants in error insisted that the decree of the State court ought to be affirmed, because Mrs. Shanks was an American citizen, capable of holding by the laws of South Carolina; so that there was no interest or title in her, Peters 3.

to which the ninth article of the Treaty of 1794, by which the titles of British subjects holding lands in this country were saved from the disabilities of alienage, could in any wise attach.

Mr. Justice STORY delivered the opinion of the court.

This was a writ of error to the highest court of appeals in law and equity of the [*244 State of South Carolina; brought to revise the decision of that court, in a bill or petition in equity, in which the present defendants were original plaintiffs, and the present plaintiffs were original defendants. From the record of the case it appeared that the controversy before the court respected the right to the moiety of the proceeds of a certain tract of land, which had been sold under a former decree in equity, and the proceeds of which had been brought into the registry of the court. One moiety of the proceeds had been paid over to the original plaintiffs, and the other moiety was now in controversy. The original plaintiffs claimed this moiety also upon the ground that the original defendants were aliens, and incapable of taking the lands by descent from their mother, Ann Shanks (who was admitted to have taken the moiety of the land by descent from her father, Thomas Scott), they being British-born subjects.

The facts, as they were agreed by the parties, and as they appeared on the record, were as follows:

Thomas Scott, the ancestor and first purchaser, was a native of the Colony of South Carolina, and died intestate, seized of the lands in dispute, in 1782. He left surviving him two daughters, Sarah and Anu, who were also born in South Carolina, before the Declaration of Independence.

Sarah Scott intermarried with Daniel Pepper, a citizen of South Carolina, and resided with him in that State until 1802, when she died, leaving children, the present defendants in error, whose right to her share of the property is conceded.

The British took possession of James Island on the 11th of February, 1780, and Charleston surrendered to them on the 11th of May in the same year.

In 1781, Anu Scott was married to Joseph Shanks, a British officer, and at the evacuation of Charleston, in December, 1782, went with him to England, where she remained until her death, in 1801. She left five children, the present plaintiffs in error, British subjects, who claimed in right of their mother, and under the ninth article of the Treaty of Peace between this country and Great Britain of the 19th of November, 1794, a moiety of their grandfather's estate in South Carolina.

The decision of the State court was against this claim, as *not within the protection [*245 of the treaty, because Mrs. Shanks was an American citizen.

The cause was argued by *Cruger & Wirt* for the plaintiffs in error, and by *Mr. Legare* for the defendants in error.

After the elaborate opinions expressed in the case of *Inglis v. The Trustees of The Sailor's Snug Harbor* (ante, p. 99), upon the question of alienage, growing out of the American Revolution, it is unnecessary to do more in delivering the

opinion of the court in the present case, than to state, in a brief manner, the grounds on which our decision is founded.

Thomas Scott, a native of South Carolina, died in 1782, seized of the land in dispute, leaving two daughters surviving him, Sarah, the mother of the defendants in error, and Ann, the mother of the plaintiffs in error. Without question Sarah took one moiety of the land by descent; and the defendants in error, as her heirs, are entitled to it. The only question is, whether Ann took the other moiety by descent; and if so, whether the plaintiffs in error are capable of taking the same by descent from her.

Ann Scott was born in South Carolina, before the American Revolution; and her father adhered to the American cause, and remained and was at his death a citizen of South Carolina. There is no dispute that his daughter Ann, at the time of the Revolution, and afterwards, remained in South Carolina until December, 1782. Whether she was of age during this time does not appear. If she was, then her birth and residence might be deemed to constitute her by election a citizen of South Carolina. If she was not of age, then she might well be deemed under the circumstances of this case to hold the citizenship of her father, for children born in a country, continuing while under age in the family of the father, partake of his national character, as a citizen of that country. Her citizenship, then, being *prima facie* established, and, indeed, this is admitted in the pleadings, has it ever been lost; or was it lost before the death of her father, so that the estate in question was, upon the descent cast, incapable of vesting in her? Upon the facts stated, it appears to us that it was not lost, and that she was capable of taking it at the time of the descent cast.

The only facts which are brought to support **246*** the supposition *that she became an alien before the death of her father, are, that the British captured James Island in February, 1780, and Charleston in May, 1780; that she was then and afterwards remained under the British dominion in virtue of the capture; that in 1781 she married Joseph Shauks, a British officer, and upon the evacuation of Charleston in December, 1782, she went with her husband, a British subject, to England, and there remained until her death in 1801. Now, in the first place, the capture and possession by the British was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance, indeed, to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. It did not annihilate their allegiance to the State of South Carolina, and make them *de facto* aliens. That could only be by a Treaty of Peace which should cede the territory, and them with it; or by a permanent conquest, not disturbed or controverted by arms, which would lead to a like result. Neither did the marriage with Shauks produce that effect; because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can,

by any act of their own, without the consent of the government, put off their allegiance and become aliens. If it were otherwise, then a *feme alien* would by her marriage become, *ipso facto*, a citizen, and would be dowable of the estate of her husband; which are clearly contrary to law.¹

Our conclusion, therefore, is, that neither of these acts warrant the court in saying that Ann Shanks had ceased to be a citizen of South Carolina at the death of her father. This is not, indeed, controverted in the allegations of the parties.

The question, then, is, whether her subsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by *the Treaty of Peace of 1783. Our [**247** opinion is that it did. In the first place, she was born under the allegiance of the British crown, and no act of the government of Great Britain ever absolved her from that allegiance. Her becoming a citizen of South Carolina did not, *ipso facto*, work any dissolution of her original allegiance, at least so far as the rights and claims of the British crown were concerned. During the war, each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The American States insisted upon the allegiance of all born within the States respectively; and Great Britain asserted an equally exclusive claim. The Treaty of Peace of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British crown. All those who then adhered to the British crown, were deemed and held subjects of that crown. The Treaty of Peace was a treaty operating between the States on each side, and the inhabitants thereof; in the language of the seventh article, it was a firm and perpetual peace between his Britannic majesty and the said States, "and between the subjects of the one and the citizens of the other." Who were, then, subjects or citizen, was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her, and were claimed by her as subjects, the treaty deemed them such. If they were originally British subjects, but then adhering to the States, the treaty deemed them citizens. Such, I think, is the natural, and indeed almost necessary meaning of the treaty; it would otherwise follow that there would continue a double allegiance of many persons; an inconvenience which must have been foreseen, and would cause the most injurious effects to both nations.

It cannot, we think, be doubted that Mrs. Shanks, being then voluntarily under British protection, and adhering to the British side, by her removal with her husband was deemed by the British government to retain her allegiance, and to be, to all intents and purposes, a British subject. It may *be said that, being [**248** *sub potestate viri*, she had no right to make an election; nor ought she to be bound by an act of removal under his authority or persuasion.

1.—See *Kelly v. Harrison*, 2 Johns. Cas., 29; Co. Litt., 31, b.; Com. Dig. Alien., C. 1; Dower A., 2; Bacon's Abridg. Alien.; Dower, A.

If this were a case of a crime alleged against Mrs. Shanks, in connection with her husband, there might be force in the argument. But it must be considered, that it was at most a mere election of allegiance between two nations, each of which claimed her allegiance. The governments, and not herself, finally settled her national character. They did not treat her as capable by herself of changing or absolving her allegiance; but they virtually allowed her the benefit of her choice, by fixing her allegiance finally on the side of that party to whom she then adhered.

It does not appear to us that her situation as a *feme covert* disabled her from a change of allegiance. British *femes covert* residing here with their husbands at the time of our independence, and adhering to our side until the close of the war, have been always supposed to have become thereby American citizens, and to have been absolved from their antecedent British allegiance. The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law applicable to ordinary transactions, but stand upon the more general principles of the law of nations. The case of *Martin v. The Commonwealth* (1 Mass. Rep., 347), turned upon very different considerations. There the question was, whether a *feme covert* should be deemed to have forfeited her estate for an offense committed with her husband, by withdrawing from the State, &c., under the Confiscation Act of 1779; and it was held that she was not within the purview of the act. The same remark disposes of the case of *Sewell v. Lee* (9 Mass. Rep., 363), where the court expressly refused to decide whether the wife, by her withdrawal with her husband, became an alien. But in *Kelly v. Harrison* (2 Johns. Cas., 29), the reasoning of the court proceeds upon the supposition that the wife might have acquired 249*] the same citizenship with her husband, by withdrawing with him from the British dominions.¹

But if Mrs. Shanks' citizenship was not virtually taken away by her adherence to the British at the peace of 1783, still it must be admitted that, in the view of the British government, she was, at that time, and ever afterwards to the time of her death, and indeed at all antecedent periods, a British subject. At most, then, she was liable to be considered as in that peculiar situation in which she owed allegiance to both governments, *ad utriusque fidem regis*. Under such circumstances, the question arises whether she and her heirs are not within the purview of the ninth article of the Treaty with Great Britain of 1794. It appears to us that they plainly are. The language of that article is, "that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, &c.,

&c.; and that neither they, nor their heirs or assigns shall, so far as respects the said lands, and the legal remedies incident thereto, be regarded as aliens."

Now, Mrs. Shanks was at the time a British subject, and she then held the lands in controversy; she is therefore within the words of the treaty. Why ought she not also to be held within the spirit and intent? It is said that the treaty meant to protect the rights of British subjects, who were not also American citizens; but that is assuming the very point in controversy. If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude, private rights; why should not the most liberal exposition be adopted? The object of the British government must have been to protect all her subjects holding lands in America from the disability of alienage, in respect to descents and sales. The class of American loyalists could at least, in her eyes, have been in as much favor as any other; there is nothing in our public policy which is more [*250] unfavorable to them than to other British subjects. After the peace of 1783 we had no right or interest in future confiscation; and the effect of alienage was the same in respect to us, whether the British subject was a native of Great Britain or of the colonies. This part of the stipulation, then, being for the benefit of British subjects who became aliens by the events of the war, there is no reason why all persons should not be embraced in it who sustained the character of British subjects, although we might also have treated them as American citizens. The argument supposes that because we should treat them as citizens, therefore Great Britain had no right to insist upon their being British subjects within the protection of the treaty. Now, if they were in truth and in fact, upon principles of public and municipal law, British subjects, she has an equal right to require us to recognize them as such. It cannot be doubted that Mrs. Shanks might have inherited any lands in England, as a British subject, and her heirs might have taken such lands by descent from her. It seems to us, then, that all British-born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the Treaty of 1794.

In either view of this case, and we think both are sustained by principles of public law, as well as of the common law, and by the soundest rules of interpretation applicable to treaties between independent States, the objections taken to the right of recovery of the plaintiffs cannot prevail.

Upon the whole, the judgment of the court is, that the plaintiffs in error are entitled to the moiety of the land in controversy, which came by descent to their mother, Ann Shanks, and of course to the proceeds thereof; and that the decree of the State Court of Appeals ought to be reversed, and the cause remanded, with directions to enter a decree in favor of the plaintiffs in error.

Mr. Justice JOHNSON, dissenting.

This cause comes up from the State Court of South Carolina.

1.—See also *Bac. Abridg. Alien A.*; *Cro. Car.*, 601, 602; 4 *Term Rep.*, 300; *Brook. Abr. Denizen*, 21; *JACKSON v. Linn*, 3 *Johns. Cas.*, 109.

251*] *The question is whether the plaintiffs can inherit to their mother. The objection to their inheriting is, that they are aliens, not born in allegiance to the State of South Carolina, in which the land lies. From the general disability of aliens they would exempt themselves, 1. On the ground that their mother was a citizen born, and in that right, though born abroad, they can inherit under the statute of Edward III.; 2. That if not protected by that statute, then that their mother was a British subject, and that she and her heirs are protected as to this land by the Treaties of 1783 and 1794.

The material facts of their case are, that their mother and her father were natives born of the Province of South Carolina before the Declaration of Independence; that, in 1781, while Charleston and James Island, where the land lies and she and her father resided, were in possession of the British, their mother married their father, a British officer. That the descent was cast in 1782; and in December of that year, when the town was evacuated, she went to England with her husband, and resided there until her death in 1801: in which interval the appellants were born in England.

There is no question about the right of the appellees, if the right of the appellants cannot be maintained.

The first of the grounds taken below, to wit, the statute of Edward III., was not pressed in argument here, and must be regarded as abandoned. The second requires, therefore, our sole attention.

Was Mrs. Shanks to be regarded as a British subject, within the meaning of our treaties with Great Britain? If so, then the land which was acquired in 1782 has the peculiar incident attached to it of being inheritable by aliens, subjects of Great Britain.

Until the adoption of the Federal Constitution, titles to land, and the laws of allegiance, were exclusively subjects of State cognizance. Up to the time, therefore, when this descent was cast upon the mother, the State of South Carolina was supreme and uncontrollable on the subject now before us.

By the adoption of the Constitution, the power of the States in this respect was subject-**252***] ed to some modification. But *although restrained in some measure from determining who cannot inherit, I consider her power still supreme in determining who can inherit. On this subject her own laws and her own courts furnish the only rule for governing this or any other tribunal.

By an Act of the State passed in 1712, the common law of Great Britain was incorporated into the jurisprudence of South Carolina. In the year 1782, when this descent was cast, it was the law of the land; and it becomes imperative upon these appellants, after admitting that their parent was a native-born citizen of South Carolina, daughter of a native-born citizen of South Carolina, to show on what ground they can escape from the operation of these leading maxims of common law: *Nemo potest exuere patriam*, and *proles sequitur sortem paternam*.

The unyielding severity with which the courts of Great Britain have adhered to the first of these maxims in *Dr. Storrie's* case, furnished

by Sir Mathew Hale, and in *Æneas M'Donald's* case, to be found in Foster, leaves no ground of complaint for its most ordinary application in the case of descent, and its most liberal application when perpetuating a privilege.

The Treaty of Peace can afford no ground to the appellants, nor the construction which has extended the provisions of that treaty to the case of escheat; for the question here is not between the alien and the State, but between aliens and other individual claimants. The words of the sixth article of the Treaty of 1783 are the same as those in the preliminary Treaty of 1782: "There shall be no future confiscations made, or future prosecutions commenced against any person or persons by reason of the part which he or they may have taken in the present war."

Conceding that escheat may be comprised under confiscation, a decision between individuals claiming under no act of force imputable to the State, cannot possibly be considered under that term.

Nor will her case be aided by the following words of that article, to wit: "nor shall any person on that account (the part which he or they may have taken in the present war) suffer *any future loss or damage either in ***253** person, liberty, or property." The decision of the State court gives the most liberal extension possible to this provision of the treaty, since it declares that Mrs. Shanks never was precluded by any act of hers from claiming this property. It never entered into the minds of that court that the very innocent act of marrying a British officer, was to be tortured into "taking a part in the present war;" nor that following that officer to England and residing there under coverture, was to be imputed to her a cause of forfeiture.

I consider it very important to a clear view of this question, that its constituents or several members should be viewed separately.

The State court has not pretended to impugn the force of the Treaty of 1794, or denied the obligation to concede every right that can be fairly and legally asserted under it; but has only adjudged that the case of the appellants is not one which on legal grounds of construction can be brought within its provision.

The words of the treaty are: "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty," shall continue to hold and transmit to their heirs, &c.

The decision of the State court which we are now reviewing, presents two propositions:

1. That Mrs. Shanks was, in the year 1782, when the descent was cast, and continued to be in 1794, when the treaty was ratified, a citizen of South Carolina.

2. That she was not a British subject in the sense of the treaty.

As to the first of these two propositions, I consider it as altogether set at rest by the decision itself; it is established by paramount authority, and this court can no more say that it is not the law of South Carolina, than they could deny the validity of a statute of the State passed in 1780, declaring that to be her character, and those her privileges.

The only question, therefore, that this court

can pass upon is, whether, being recognized under that character, and possessing those **254**]*rights, she is still a British subject within the provisions of the treaty.

It is no sufficient answer to this question that it cannot be denied that Mrs. Shanks was a British subject. She was so in common with the whole American people. The argument, therefore, proves too much, if it proves anything; since it leads to the absurdity of supposing that Great Britain was stipulating for the protection of her enemies, and imposing on us an obligation in favor of our own citizens.

It also blends and confounds the national character of those, to separate and distinguish whom was the leading object of the Treaty of 1783.

It cannot be questioned that the Treaty of 1783 must have left Mrs. Shanks a British subject, or the Treaty of 1794 cannot aid her offspring. And the idea of British subject under the latter treaty, will be best explained by reference to its meaning in that of 1783. The two treaties are *in pari materia*.

The provisions of the third article show that persons who come within the description of "people of the United States," were distinguished from subjects of Great Britain. That article stipulates for a right in the people of the United States to resort to the Gulf of St. Lawrence for fishing; a stipulation wholly nugatory, if not distinguishable from subjects of Great Britain.

The fifth article is more explicit in the distinction. It first contains a provision in favor of real British subjects, then one in favor of persons resident in districts in possession of his majesty's arms; and then stipulates that persons of any other description shall have liberty to go to and remain twelve months in the United States to adjust their affairs. These latter must have included the loyalists who had been banished or in any way subjected to punishment, who are explicitly distinguished from real British subjects, and thus classed, in order to avoid the question to whom their allegiance was due, or rather, because, by the same treaty, the king having renounced all claim to their allegiance, could no longer distinguish them as British subjects.

Can those any longer be denominated British **255**]* subjects *whose allegiance the King of Great Britain has solemnly renounced?

I know of no test more solemn or satisfactory than the liability to the charge of treason; not by reason of temporary allegiance, for that is gone with change of domicile; were those who could claim the benefit of the king's renunciation to the colonies, subject to any other than temporary allegiance, while commorant in Great Britain? I say they were not. Their right to inherit is not a sufficient test of that liability as to other nations, for that right results from a different principle, the exemption of a British subject from being disfranchised, while free from crime.

Was Mrs. Shanks an individual to whose allegiance the king had renounced his claim?

The commencement of the Revolution found us all, indeed, professing allegiance to the British crown, but distributed into separate communities, altogether independent of each other, and each exercising within its own limits

its sovereign powers, legislative, executive and judicial. We were dependent, it is true, upon the crown of Great Britain, but as to all the world beside, foreign and independent. It lies, then, at the basis of our Revolution, that when we threw off our allegiance to Great Britain, every member of each body politic stood in the relation of subject to no other power than the community of which he then constituted a member. Those who owed allegiance to the king, as of his Province of South Carolina, thenceforward owed allegiance to South Carolina. The courts of this country all consider this transfer of allegiance as resulting from the Declaration of Independence; the British from its recognition by the Treaty of Peace. But as to its effect, the British courts concur in our view of it. For, in the case of *Thomas v. Acklam* (2 B. & C., 229), the language of the British court is this: "A declaration that a State shall be free, sovereign and independent, is a declaration that the people composing that State shall no longer be considered as the subjects of that sovereign by whom the declaration is made."

From the previous relations of the colonies and mother country, it is obvious that the Declaration of Independence *must have [**256** found many persons resident in the country besides those whose allegiance was marked by the unequivocal circumstance of birth; many native-born British subjects voluntarily adhered to the Americans, and many foreigners had by settlement, pursuits or principles, devoted themselves to her cause.

Whatever questions may have arisen as to the national character or allegiance of these as to the case under review, which is that of a native-born citizen of South Carolina, there would be no doubt. And the courts of that State have put it beyond a doubt, that the Revolution transferred her allegiance to that State.

Whoever will weigh the words "real British subjects," used in the fifth article, and consider the context, can come to but one conclusion, to wit, that it must mean British subjects to whose allegiance the States make no claim. "Estates that have been confiscated belonging to real British subjects" are the words. Now, it is notorious that, although, generally speaking, the objects of those confiscations were those to whose allegiance the States laid claim, yet in many instances the estates of British subjects resident in England or this country, or elsewhere, were confiscated, because they were British subjects, on the charge of adhering to the enemy. But if the right of election had ever been contemplated, why should the term *real* have been inserted? The loyalists were British subjects, and had given the most signal proofs of their election to remain such. What possible meaning can be attached to the term *real*, unless it raised a distinction to their prejudice? And, historically, we know that Great Britain acknowledged their merits by making large provisions for their indemnification; because for them there was no provision made for restoring their property.

It has been argued that the British courts, in construing the Treaty of Peace, have recognized this right of election, and the case of *Thomas v. Acklam*, before cited, is supposed to

establish it. But a very little attention to that case will prove the contrary. It is in fact the converse of the present case. Mrs. Thomas was the daughter of Mr. Ludlow, an American citizen born before the Revolution, and was **257*** born in America long after the separation; so that her alien character was unquestionable, unless protected by the statute of Geo. II. explaining those of Anne and Edward. The decision of the Court of King's Bench is, that to bring herself within the provisions of the statute, her father must be shown at her birth to have been both a native born and a subject of Great Britain; that by the Treaty of Peace the king had renounced all claims to his allegiance, and his subsequent residence in America proved his acceptance of that renunciation.

But when did South Carolina renounce the allegiance of Mrs. Shanks? We have the evidence of the States having acquired it; when did she relinquish it? Or, if it be placed on the footing of an ordinary contract, when did South Carolina agree to the dissolution of this contract, or when did she withdraw her protection, and thus dissolve the right to claim obedience or subjection?

It is true, the Treaty of 1794 drops the word *real*, and stipulates generally for British subjects and American citizens; construing the two treaties as instruments in *pari materia*. This circumstance is of little consequence; and however we construe it, the argument holds equally good, that the treaty could have been only meant to aid those who needed its aid, not those who were entitled under our own laws to every right which the treaty meant to secure; that is, those whose alien character prevented their holding lands, unless aided by some treaty or statute. Mrs. Shanks was not of this character or description; her right at all times to inherit has been recognized by paramount authority. But it is contended that it was at her election whether to avail herself of her birthright as a citizen of the State, or her birthright as a subject of Great Britain.

To this there may be several answers given. And first, the admission of this right would make her case no better under the construction of the treaty; for, having no need of its protection, as has been authentically recognized by the State decision, it cannot be supposed that she was an object contemplated by the treaty; **258*** she was not a British subject in the sense of those treaties, especially if the two treaties be construed on the principle of instruments in *pari materia*.

Second, if she had the right of election, at what time did she exercise it? for she cannot claim under her election, and against her election. If she exercised it prior to her father's death, then was she an alien at his death, and could not take even a right of entry by descent, as has been distinctly recognized in *Hunter v. Fairfax* (7 Cranch, 619), and I think in some other cases. She then had nothing for the treaty to act upon.

But if her election was not complete until subsequent to her father's death, then it is clearly settled, that taking the oath of allegiance to a foreign sovereign produces no forfeiture, and she still had no need of a treaty to secure her rights to land previously descended

to her. If the facts be resorted to, and the court is called upon to fix the period of her transit, it would be obliged to confine itself to the act of her marrying against her allegiance. It is the only free act of her life stated upon the record, for from thence she continued *sub potestate viri*; and if she or her descendants were now interested in maintaining her original allegiance, we should hear it contended, and be compelled to admit, that no subsequent act of her life could be imputed to her because of her coverture; and even her marriage was probably during her infancy.

But, lastly, I deny this right of election altogether, as existing in South Carolina, more especially at that time.

I had this question submitted to me on my circuit some years since, and I then leaned in favor of this right of election. But more mature reflection has satisfied me that I then gave too much weight to natural law and the suggestions of reason and justice in a case which ought to be disposed of upon the principles of political and positive law, and the law of nations.

That a government cannot be too liberal in extending to individuals the right of using their talents and seeking their fortunes wherever their judgments may lead them, I readily agree. There is no limit short of its own security, to which a wise and beneficent government would restrict its liberality on this subject. But the question now to be decided is of a very different feature; it is not one of expediency, but of right. It is, to what extent may the powers of government be lawfully exercised in restraining individual volition on the subject of allegiance; and what are the rights of the individual when unaffected by positive legislation?

As the common law of Great Britain is the law of South Carolina, it would here, perhaps, be sufficient to state that the common law altogether denies the right of putting off allegiance. British subjects are permitted, when not prohibited by statute (as is the case with regard to her citizens), to seek their fortunes where they please, but always subject to their natural allegiance. And although it is not regarded as a crime to swear allegiance to a foreign state, yet their government stands uncommitted in the subject of the embarrassments in which a state of war between the governments of their natural, and that of their adopted allegiance, may involve the individual. On this subject the British government acts as circumstances may dictate to her policy. That policy is generally liberal; and as war is the calling of many of her subjects, she has not been rigorous in punishing them even when found with arms in their hands, where there has been no desertion, and no proclamation of recall. The right, however, to withdraw from their natural allegiance, is universally denied by the common law.

It is true that, without any act of her own, Mrs. Shanks found herself equally amenable to both governments under the application of this common law principle. But from this only one consequence followed, which is, that so far as related to rights to be claimed or acquired, or duties to be imposed under the laws of either government, she was liable to become the victim of the will or injustice of either.

If we were called upon to settle the claims of the two governments to her allegiance, upon the general principles applicable to allegiance even as recognized by the contending governments, we should be obliged to decide that the superior claim was in South Carolina. For, although before the Revolution a subordinate **260** State, yet it possessed every attribute of a distinct State; and upon principles of national law, the members of a State or political entity continue members of the State notwithstanding a change of government. The relations between the body politic and its members continue the same. The individual member and the national family remain the same, and every member which made up the body, continues in the eye of other nations in his original relation to that body. Thus we see that the American government is at this day claiming indemnity of France for the acts of those who had expelled the reigning family from the throne and occupied their place.

But it is obvious that, although the common law be the law of South Carolina, and its principles are hostile to the right of putting off our national allegiance, the constitution and legislative acts of South Carolina, when asserting her independence, must be looked into to determine whether she may not then have modified the rigor of the common law, and substituted principles of greater liberality.

South Carolina became virtually independent on the 4th of June, 1775. The association adopted by her Provincial Congress on that day constituted her in effect an independent body politic; and if in international affairs, the fact of exercising power be the evidence of legally possessing it, there was no want of facts to support the inference there; for officers were deposed, and at one time the most influential men in the State were banished under the powers assumed and exercised under that association. It required the indiscriminate subscription and acquiescence of all the inhabitants of the province, under pain of banishment.

Neither of the constitutions adopted in 1776 or 1778 contains any definition of allegiance, or designation of the individuals who were held bound in allegiance to the State; but the legislative acts passed under those constitutions will sufficiently show the received opinion on which the government acted in its legislation upon this subject.

Neither the ordinance for establishing an oath of abjuration and allegiance, passed February 13, 1777, nor the Act of March 28, 1778, entitled "An act to oblige every free male inhabitant of this State, above a certain age, to **261** give assurance of fidelity and allegiance to the same," holds out any idea of the right of election. The first requires the oath to be taken by anyone to whom it is tendered, and the last requires it to be taken by every male inhabitant above sixteen, under pain of perpetual banishment.

The preamble to the latter act, indeed, admits that protection and allegiance are reciprocal; but the whole course of its legislation shows that the Legislature understands the right of election to belong to the State alone, and an election to withdraw allegiance from the State as a crime in the individual. The eleventh, or penal clause, is very explicit on this subject.

Peters 3. U. S., Book 7.

It runs thus: "That if any person refusing or neglecting to take the oath prescribed by this act, and withdrawing from this State shall return to the same, then he shall be adjudged guilty of treason against this State, and shall, upon conviction thereof, suffer death as a traitor."

Now, therefore, where there is no allegiance, there can be no treason.

Since, then, the common law of England was the law of allegiance and of descents in South Carolina when this descent was cast upon the mother, and since remained unaltered by any positive act of legislation of the only power then possessing the right to legislate on the subject, it follows that the representatives of Mrs. Shanks can derive no benefit from her election, unless the right to elect is inherent and unalienable in its nature, and remains above the legislative control of society, notwithstanding the social compact.

All this doctrine I deny. I have already observed that governments cannot be too liberal in extending the right to individuals; but as to its being unalienable, or unaffected by the social compact, I consider it to be no more so than the right to hold, devise, or inherit the lands or acquisitions of an individual. The right to enjoy, transmit, and inherit the fruits of our own labor, or of that of our ancestors, stands on the same footing with the right to employ our industry wherever it can be best employed; and the obligation to obey the laws of the community on the subject of the right to emigrate, is as clearly to be inferred from the reason and nature of things, as the obligation to **262** use or exercise any other of our rights, powers, or faculties, in subordination to the public good. There is not a writer who treats upon the subject who does not qualify the exercise of the right to emigrate, much more that of putting off or changing our allegiance, with so many exceptions as to time and circumstances, as plainly to show that it cannot be considered as an unalienable or even perfect right. A state of war, want of inhabitants, indispensable talents, transfer of knowledge and wealth to a rival, and various other grounds, are assigned by writers on public law, upon which a nation may lawfully and reasonably limit and restrict the exercise of individual volition in emigrating or putting off our allegiance. All this shows, that whenever an individual proposes to remove, a question of right or obligation arises between himself and the community, which must be decided on in some mode. And what other mode is there but a reference to the positive legislation or received principles of the society itself? It is therefore a subject for municipal regulation; and the security of the individual lies in exerting his influence to obtain laws which will neither expose the community unreasonably on the one hand, nor restrain one individual unjustly on the other.

Nor have we anything to complain of in this view of the subject. It is a popular and flattering theory that the only legitimate origin of government is in compact, and the exercise of individual will. That this is not practically true, is obvious from history; for, excepting the State of Massachusetts, and the United States, there is not perhaps on record, an instance of a government purely originating in compact.

And even here, probably, not more than one-third of those subjected to the government had a voice in the contract. Women, and children under an age arbitrarily assumed, are necessarily excluded from the right of assent, and yet arbitrarily subjected. If the moral government of our Maker and our parents is to be deduced from gratuitous benefits bestowed on us, why may not the government that has shielded our infancy claim from us a debt of gratitude to be repaid after manhood? In the course of **263*** nature, man has need *of protection and improvement long before he is able to reciprocate these benefits. These are purchased by the submission and services of our parents; why, then, should not those to whom we must be indebted for advantages so indispensable to the development of our powers, be permitted, to a certain extent, to bind us apprentice to the community from which they have been and are to be procured?

If it be answered that this power ought not to be extended unreasonably, or beyond the period when we are capable of acting for ourselves, the answer is obvious—by what rule is the limit to be prescribed, unless by positive municipal regulation?

It is of importance here, that it should be held in view that we are considering political, not moral obligations. The latter are universal and immutable, but the former must frequently vary according to political circumstances. It is the doctrine of the American court, that the issue of the Revolutionary War settled the point that the American States were free and independent on the 4th of July, 1776. On that day Mrs. Shanks was found under allegiance to the State of South Carolina as a natural-born citizen to a community, one of whose fundamental principles was that natural allegiance was unalienable; and this principle was at no time relaxed by that State, by any express provision, while it retained the undivided control over the rights and liabilities of its citizens.

But it is argued that this lady died long after the right of passing laws of naturalization was ceded to the United States, and the United States have in a series of laws admitted foreigners to the right of citizenship, and imposed an oath which contains an express renunciation of natural and every other kind of allegiance. And so of South Carolina; she had previously passed laws to the same effect. In 1704 she passed a law “for making aliens free of this Province,” which remained in force until 1784, when it was superseded by the Act of the 26th of March, “to confer the right of citizenship on aliens;” to which succeeded that of the 22d of March, 1786, entitled “An act to confer **264*** certain *rights and privileges on aliens, and for repealing the act therein mentioned.”

In both the latter acts the oath of allegiance is required to be taken; and that oath, as prescribed by the Act of the 28th of March, 1778, contains an abjuration of allegiance to any other power, and particularly to the King of Great Britain.

These legislative acts, it cannot be denied, do seem to hold out the doctrine of the right to change our allegiance, and do furnish ground for insisting that it is absurd in a government to deny to its own citizens the right of doing

that which it encourages to be done by the citizens of other States.

Most certainly it is to be regretted that Congress has not long since passed some law upon the subject, containing a liberal extension of this right to individuals, and prescribing the form and circumstances under which it is to be exercised, and by which the Act of Expatriation shall be authenticated. A want of liberality in legislating on this subject might involve the government in inconsistency; but the question here is whether, in absence of such declaration of the public will or opinion, courts of justice are at liberty to fasten upon the government, by inference, a doctrine negatived by the common law, and which is in its nature subject to so many modifications.

I think not. Great Britain exercises the same power either by the king's patent or by legislative enactment; and permanent laws exist in that country which extend the rights of naturalization to men by classes, or by general description. Yet, this implication has never been fastened upon her; nor is the doctrine of her common law less sternly adhered to, or less frequently applied, even to the utmost extent of the punishing power of her courts of justice. In practice she moderates its severities; but in this it is will and policy that guides her, not any relaxation of the restriction upon individual rights.

There is, indeed, one prominent difficulty hanging over this argument which it is impossible to remove. If it proves *anything, [**265** it proves too much; since the inference, if resulting at all, must extend to put off one's allegiance, as well to adopted citizens as to natural-born citizens, and to all times and all circumstances. What, then, is that obligation, that allegiance worth, which may be changed an hundred times a day? or by passing over from one army to another, perhaps in the day of battle? The truth is, it leaves but a shadow of a tie to society, and converts that which is considered as one of the most sacred and solemn obligations that can be entered into (although confirmed by the sanctity of an oath) into nothing but an illusory ground of confidence between individuals and their governments.

The idea brings man back to a state of nature; at liberty to herd with whom he pleases, and connected with society only by the caprice of the moment.

Upon the whole, I am of opinion that Mrs. Shanks continued, as she was born, a citizen of South Carolina; and, of course, unprotected by the British treaty.

I have taken a general view of the subject, although it does not appear precisely whether or not Mrs. Shanks had attained an age sufficiently mature to make an election before marriage, or was ever discovered during her life, so as to be able to elect after marriage. I have reasoned on the hypothesis most favorable to her, admitting that she had made an election in authentic form. Nor have I confined myself to authority; since I wished, as far as I was instrumental, to have this question settled on principle. But it does appear to me that, in the case of *Coze v. M'Leaine*, this court has decided against the right of election most expressly; for if ever the exercise of will or choice might be

inferred from evidence, it is hardly possible for a stronger case to be made out than that which is presented by the facts in that case.

With regard to State decisions upon this question, I would remark that it is one so exclusively of State cognizance, that the courts of the respective States must be held to be best acquainted with their own law upon it. Though every other State in the Union, therefore, should have decided differently from the State of South Carolina, their decisions could only determine their own respective law upon **266***] this subject, and *could not weaken that of South Carolina with regard to her own law of allegiance and descents. It does appear singular, that we are here called upon to overrule a decision of the courts of South Carolina on a point on which they ought to be best informed, and to decide an individual to be a British subject, to whose allegiance the British courts have solemnly decided the king has no claim. On this point the case of *Ludlow*, in *Thomas v. Acklam*, is the case of Mrs. Shanks; it is impossible to distinguish them. The State of South Carolina acknowledges her right to all the benefits of allegiance; the King of Great Britain disavows all claim to her allegiance; and yet we are called upon to declare her a British subject.

I have not had opportunity for examining the decisions of all the States upon this subject, but I doubt not they will generally be found to concur in principle with the court of South Carolina, except so far as they depend upon local law. This is certainly the case in Massachusetts. The decision in the case *Palmer v. Downer*, does, it is true, admit the right of the election; but besides that that case is very imperfectly, and, I may add, unauthoritatively reported, it is most certainly overruled in the subsequent case of *Martin v. Woods*.

Before I quit the cause it may be proper to notice a passage in a book recently published in this country, and which has been purchased and distributed under an Act of Congress; I mean Gordon's Digest. There is no knowing what degree of authority it may be supposed to acquire by this act of patronage; but if there is any weight in the argument in favor of expatriation drawn from the Acts of Congress on that subject, I presume the argument will at some future time be applied to the doctrines contained in this book. If so, it was rather an unhappy measure to patronize it; since we find in it a multitude of *nisi prius* decisions, *obiter dicta*, and certainly some striking misapprehensions, ranged on the same shelf with Acts of Congress. On the particular subject now under consideration, art. 1649, we find the following sentence: "Citizens of the United States have a right to expatriate themselves in time of war **267***] as well as in *time of peace, until restrained by Congress;" and for this doctrine the author quotes *Talbot v. Jansen* (3 Dall.), and the case of the *Santissima Trinidad* (7 Wheat., 348); in both which cases the author has obviously mistaken the argument of counsel for the opinion of the court; for the court in both cases expressly waive expressing an opinion, as not called for by the case, since, if conceded, the facts were not sufficient to sustain the defense.

The author also quotes a case from 1 Peters' Peters 3.

C. R., which directly negatives the doctrine, and a case from 4 Hall's Law Journal, 462, which must have been quoted to sustain the opposite doctrine. It is the case of *The United States v. Williams*, in which the Chief Justice of the United States presided, and in which the right of election is expressly negatived, and the individual who pleaded expatriation is convicted and punished.

This cause came on to be heard on the transcript of the record from the Supreme Court of Appeals in Law and Equity in and for the State of South Carolina, and was argued by counsel; on consideration whereof, it is considered and declared by this court that Ann Shanks, the mother of the original defendants, was at the time of her death a British subject, within the true intent and meaning of the ninth article of the Treaty of Amity, Commerce and Navigation made between his Britannic majesty and the United States of America on the 19th of November, 1794, and that the said original defendants, as her heirs and British subjects, are capable to take, and did take by descent from her the moiety of the land in the proceedings mentioned, and are entitled to the proceeds of the sale thereof, now in the registry of the Circuit Court of Equity, as in the said proceedings mentioned. It is therefore considered and adjudged by this court, that there is error in the decree of the said Court of Appeals in Equity of the State of South Carolina, in affirming the decree of the Circuit Court, in said proceedings mentioned, whereby it was ordered and decreed, that the money arising from the sale of the land in question, theretofore reserved *subject to the order of [***268** the court, be paid over to the petitioners, as the only heirs who are capable of taking the same. And it is further ordered and adjudged by this court, that for this cause the decree of the Circuit Court aforesaid, and of the Court of Appeals aforesaid be, and each of them is hereby reversed. And it is further ordered and adjudged by this court, that the cause be remanded to the said Court of Appeals, with directions that a decree be entered therein, that the said moiety of the said proceeds of the said sale be paid over to the original defendants (the present plaintiffs in error) as their right, and that such further proceedings be had therein as to justice and equity may in the premises appertain.

Cited—3 Pct., 99; 14 Pet., 628; 19 How., 577; 20 How., 20; 16 Wall., 434; 10 Otto, 487, 490,

*JAMES D. WOLF [***269**

v.

GEORGE F. USHER.

Practice—jurisdiction.

Where the point on which the judges of the Circuit Court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case.

THIS cause came before the court on a certificate of a division between the judges of the Circuit Court of the District of Rhode Island.

When the ease was opened by the counsel for the plaintiff, it was found on inspecting the record, that the particular point on which the judges of the Circuit Court had differed, was not certified. The whole record had been sent up, and it contained a certificate that the judges of the court had differed in opinion, without a specific statement of what the difference was.

The court refused to take jurisdiction of the cause, and remanded the same to the Circuit Court of Rhode Island, with directions to proceed therein according to law.

Mr. Cove, for plaintiff; *Mr. Whipple*, for defendant.

270*] *WILLIAM MCCLUNY, *Plaintiff in Error*,

WYLLIS SILLIMAN, *Defendant in Error*.

Refusal of register of land-office to enter application—Ohio statute of limitations—lex fori—construction of statutes of limitations in general.

The plaintiff sued the defendant, as register of the United States land-office in Ohio, for damages, for having refused to note on his books applications made by him for the purchase of land within his district. The declaration charged the register with this refusal, the lands had never been applied for nor sold, and were at the time of the application liable to be so applied for and sold. The statute of limitations is a good plea to the suit.

It is a well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. [276]

Under the thirty-fourth section of the Judiciary Act of 1789, the Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the State courts. [277]

Construction of the statute of limitations of the State of Ohio. [278]

Where the statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which such action may be prosecuted is within the statute. [278]

In giving a construction to the statute of limitations of Ohio, the action being barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred for causes specified in the statute; for the statute only operates against such actions, when prosecuted on the grounds stated. [278]

Of late years the courts in England and in this country have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation. [278]

ERROR to the Circuit Court of Ohio.

In the Circuit Court of Ohio, the plaintiff in error instituted a suit on the 15th of December, 1823, against the defendant, who was register of the United States land-office at Zanesville, to recover damages for having, as register, refused to enter an application in the books of his office, for certain lands in his district; the entry having been required to be made according to the provisions of the tenth section of the Act

of Congress, passed the 18th of May, 1796, entitled "An Act providing for the [*271 sale of the lands of the United States, in the territory north-west of the River Ohio, and above the mouth of the Kentucky River." The declaration charges that the register, on the 2d of August, 1810, refused to enter the application, although the lands had never been legally applied for or sold, and were then liable to be applied for and sold.

The defendant pleaded not guilty, and not guilty within six years before the commencement of the suit. To the latter plea there was a demurrer, and joinder in demurrer. The Circuit Court overruled the demurrer, and sustained the plea of the statute of limitations. The plaintiff prosecuted this writ of error and sought to reverse the judgment on the grounds:

1. That the statute of limitations does not apply to an action upon the ease brought for an act of nonfeasance or misfeasance in office.

2. That no statute of limitations of the State of Ohio, then in force, is pleadable to an action upon the case brought by a citizen of one State against a citizen of another, in the Circuit Court of the United States for malfeasance or nonfeasance in office, in a ministerial officer of the general government; and especially where the plaintiff's rights accrued to him under a law of Congress.

Mr. Doddridge, for the plaintiff in error, argued that there are many cases within the words of the statute of 21 James I., ch. 16, for limitation of personal actions, which are not within its meaning; as debt against a sheriff for an escape; debt against a sheriff for money levied; actions *ex maleficio*; debt for not setting out tithes under the statute, although founded on the highest record, an act of Parliament; debt on award, although founded on contract. (1 Saund. Rep., tit. Statute; 5 Bac., 509; 2 Lev., 191; Esp. N. P., 653.)

Out of the clause limiting actions for words, are excepted, slander of title; *scandalum magnatum*. (Cro. Ch., 141; Esp. N. P., 519.)

The statute does not extend to trusts, to charities or to legacies. (3 Bac. Ab., 510; [*272 2 Lord Ray., 852, 935, 1204; Salk., 361, pl. 11; 5 Mod., 308; 1 Wash., 145; 4 Munf., 222.)

Statutes of limitation are *leges fori*; and it rests with the sovereign power of the State to say how far the interests of the society it represents require that its own courts shall be kept open to give redress in each particular case, or whether there shall be any limitation of personal actions. It peculiarly belongs to each government to say how long its ministerial officers shall be exposed to the claims of those who consider themselves aggrieved by their acts of misfeasance or nonfeasance; consequently, in such cases, the statutes of limitation of one State cannot be pleaded in bar in the courts of another State. (2 Mass., 84; 1 Caines, 402; 3 Johns., 261, 263; 2 Johns., 198; 2 Vern., 540; 13 East, 439, 450; 7 Mass., 515; 3 Johns. Ch. Rep., 217, 219; 17 Mass., 55.)

Neither in Virginia, nor in Pennsylvania, nor in New York, are cases found of a plea of the statute of limitations in an action arising *ex maleficio*. It is claimed, that the right to such a plea does not exist in the courts of either of those States. There are no cases in this court. In all those in which the plea of the statute of limitations

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has been sustained, the statutes of the State have been pleaded to suits in the federal courts. (2 Cranch., 272, 1 Condensed Rep., 411; *Hopkirk v. Bell*, 3 Cranch, 454, 1 Condensed Rep., 595; *Mundeville et al. v. Wilson*, 5 Cranch, 15; 7 Cranch, 156; 8 Cranch, 84; 3 Wheat., 541; 5 Wheat., 124; 6 Wheat., 481, 497.)

The nature of the case prevents there being a State decision in affirmance of the principles claimed for the plaintiff in error. The question is no more or less than this: where a duty is created by an Act of Congress, to be performed by a ministerial officer of the general government for the benefit of a citizen of another State whose rights grow out of the same law, and the injured party, as a citizen of another State, sues the officer in a federal court for malfeasance or for nonfeasance, can that officer plead in bar a statute of the State made for the protection of its own ministerial officers?

273*] *The Circuit Court in the trial of civil actions arising under the law of a State, or cognizable by its courts, where a citizen of another State or a foreigner is plaintiff, act precisely as a State court, and is bound to interpret and enforce its laws as they are made to operate in the State courts.

If the law of Ohio can be pleaded at all, it is the Act of the 24th of January, 1810, which went into operation the 1st of June, 1810; the act which is the cause of action in this suit having been done in August, 1810. That law (4 Ohio Laws, page 62, sec. 1) provides "that all actions of trespass for assault, menace, battery, or wounding, actions of slander for words spoken or libel, or false imprisonment, shall be brought within one year next after the cause of such actions or suits; and all actions upon book accounts, and for forcible entry and detainer shall be brought within four years next after the cause of such actions and suits; and all actions of trespass upon real property, trespass, detinue, trover and conversion, and replevin, all actions on the case, or of debt for rent, shall be sued or brought within six years next after the cause of such action arose."

This act is not a copy of the statute of James I., ch. 16; and all the objections that would urge the exemption of suits, *ex maleficio*, from that statute, may be presented under the law of Ohio; other exceptions may also be claimed. "Actions on the case" are associated with actions arising *ex contractu*; and thus actions arising out of contract are only intended to be provided for—nothing is said in the law of actions *ex maleficio*.

If actions of this kind are embraced by the Act of 1810, they are only so by a forced construction of the words "actions on the case," associated and classed in the same statute with various actions arising *ex contractu*; while in a subsequent law of Ohio passed in 1824, they are described in express terms, and naturally associated in the same sentence with various other actions, arising *ex delicto*.

But if these actions are embraced in the Act of 1810, they must be such only as may be prosecuted against officers of the State. Actions against officers of the United States were not in the view or contemplation of the Legislature of **274*]** *Ohio when the law was enacted, nor did they intend to afford protection to any officer but one of the State. Certainly, the Legislature 3,

ture had not before them the protection of the registers of the United States land-office, from suits for a violation of duties by which the citizens of Ohio might be injured.

To apply the regulations of the several States to such cases would produce the absurdity and injustice of different laws, and different limitations existing in different States. If the power of State Legislatures to limit actions against officers of the United States is admitted, the power over those officers might be exercised in other and in oppressive legislative provisions.

The statute of Ohio cannot be enlarged by construction, so as to apply it to things not properly within State control, nor within the intention contemplated by those who enacted it.

Mr. Berrien, Attorney-General, for the defendant in error, contended, that the application and authority of State statutes of limitations to suits in the circuit courts of the United States, had been frequently decided in this court. What may have been the intention of the Legislature of the States in enacting limitation laws is not inquired into, and is not material; the only question is, whether the law applies to the case. (*Farr v. Roberdeau*, 3 Cranch, 174; 1 Condensed Rep., 483; *Hopkirk v. Bell*, 3 Cranch, 454; 1 Condensed Rep., 595; *Marsteller v. M'Lean*, 7 Cranch, 156, 158; *King v. Riddle*, 7 Cranch, 168; *Bond v. Jay*, 7 Cranch, 350; *Clemenston v. Williams*, 8 Cranch, 72, &c.)

It is admitted that this action was not commenced within six years, and that it is in its nature an action which would be within the operation of the law of Ohio, unless a construction shall be given to that law different from the general and usual import of its terms.

The argument that the association of the action on the case with debt for rent, proves that pecuniary actions were only to be barred, will not be found correct, as "forcible entry and book accounts" are in the same association.

*The plain and obvious construction [**275** of the law is that which has been given by the Circuit Court. The different kinds of action, and causes of action upon which the limitations of the law were intended to operate, were in the view and purpose of the Legislature of Ohio; the association or classification was not because the cases were analogous, or had an affinity one to the other, but because of the intention that the action of the statute should be the same as to time on each of the members of the class.

The words of the statute of Ohio being general, unless the officers under the government of the United States are especially exempted, they may avail themselves of its provision. (Cited, 2 Stark. on Ev., 901; 1 Saund., 37; 3 Bacon, 509; Ballantine on Limitations, 88.)

Mr. Justice M'LEAN delivered the opinion of the court:

This suit was brought by the plaintiff against the defendant, as register of the United States land-office at Zanesville, in the District of Ohio. The declaration charges, that on the 2d of August, in the year 1810, the plaintiff produced to the defendant, in his office of register, the receipts of the receiver of public moneys at that office, as follows, viz.: one number three thousand two hundred and fifty-five, and another number three thousand two hundred and fifty-six, amounting together to the sum of

one hundred and ninety dollars eighty-nine cents of moneys paid by the plaintiff to the receiver, for the purchase of public lands in the said district, being the one-twentieth part of the purchase money for section number six, in township number twelve, and range number thirteen, and fraction number five, in the same township and range adjoining the said section; and for section number twelve, and fraction number one, adjoining in township number thirteen, and range number fourteen of public lands within that district; and that the plaintiff then and there applied to the defendant for the purchase of the said lands, that is, each of the said sections with the fractions attached according to law, and requested that his **276***] application *should be entered on the books of the defendant's office; upon which application, the defendant informed the plaintiff that the said lands had been sold at Marietta, before the establishment of the land-office at Zanesville; and if not so sold there, that they had not been offered at public sale at Zanesville; whereupon the plaintiff insisted on his applications, and requested to have them entered, according to the provisions of the tenth section of the Act of Congress, approved the 18th of May, 1796, entitled "An Act providing for the sale of the lands of the United States, in the territory north-west of the River Ohio, and above the mouth of Kentucky River." The declaration then charges, that the register refused to enter the application, although the lands had never been legally applied for nor sold, and were then liable to be applied for and sold. The damages are laid at fifty thousand dollars.

To this declaration the defendant pleaded not guilty, whereupon issue is joined; and not guilty within six years before the commencement of the suit. To the latter plea there is a general demurrer, and joinder in demurrer. The Circuit Court of the United States for the District of Ohio overruled this demurrer, and sustained the plea of the statute of limitations; and this writ of error is brought to reverse that decision.

For the plaintiff in error it is contended:

1. That the statute of limitations does not apply to an action upon the case, brought for an act of nonfeasance or malfeasance in office.

2. That no statute of limitations of the State of Ohio, then in force, is pleadable to an action upon the case brought by a citizen of one State against a citizen of another, in the Circuit Court of the United States, for malfeasance or nonfeasance in office, in a ministerial officer of the general government, and especially where the plaintiff's rights accrued to him under a law of Congress.

The decision in this cause depends upon the construction of the statute of Ohio, which prescribes the time within which certain actions must be brought. It is a well-settled principle **277***] *that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction.

In the thirty-fourth section of the Judiciary Act of 1789, it is provided, "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common

law, in the courts of the United States, in cases where they apply."

Under this statute, the Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the State courts. The act in question provides, "that all actions hereinafter mentioned, shall be sued or brought within the time hereinafter limited; all actions of trespass for assault, menace, battery and wounding, actions of slander for words spoken or libel, and for false imprisonment, within one year next after the cause of such actions or suits; and all actions of book accounts, or for forcible entry and detainer, or forcible detainer, within four years after the cause of such action or suits; and all actions of trespass upon real property, trespass, detinue, trover and conversion and replevin, all actions upon the case, and of debt for rent, shall be sued or brought within six years next after the cause of such actions or suits."

It is contended, that this statute cannot be so construed as to interpose a bar to any remedy sought against an officer of the United States, for a failure in the performance of his duty; that such a case could not have been contemplated by the Legislature; that the language of the statute does not necessarily embrace it; and, consequently, the statute can only apply in cases of nonfeasance or malfeasance in office, to persons who act under the authority of the State, and are amenable to it.

It is not probable that the Legislature of Ohio, in the passage of this statute, had any reference to the misconduct of an officer of the United States. Nor does it seem to have been their intention to restrict the provision of the statute *to any particular causes for [***278** which the action on the case will lie. In the actions of trespass, debt, and covenant specified, the particular causes of action barred by the statute are stated; but this is not done in the action on the case, nor is it done in the action of detinue, trover and conversion, and replevin.

Where the statute is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which the action may be prosecuted is within the statute.

If the statute required the action of debt for rent to be brought within six years from the time the cause of action arose, the bar could extend to no other action of debt. But, if the statute provided that all actions of debt should be prosecuted within six years, then it would operate against the action, for whatever cause it was brought.

The action on the case must be brought within six years from the time the cause of action arose, and it is immaterial what that cause may be; the statute bars the remedy, by this form of action, if it be not prosecuted within the time.

In giving a construction to this statute, where the action is barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred when brought for causes specified in the statute, for the statute only operates against

such actions when prosecuted on the grounds stated.

By bringing his action on the case, the plaintiff has selected the appropriate remedy for the injury complained of. This remedy the statute bars. Can the court, then, by referring to the ground of the action, take the case out of the statute.

The demurrer admits the plea of the statute; and as it declares, in express terms, that the action is barred, the court can give no other effect to it by construction.

Of late years the courts in England, and in this country, have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, **279*** unless *compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation.

The judgment in this case must be affirmed.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

See S. C., 2 Wheat., 369; 6 Wheat., 598.

Cited—9 How., 414; 2 Black., 603; 1 Wall., 210; 13 Wall., 249; 20 Wall., 150; 1 Dill., 377; 7 Blatchf. 231, 433; 9 Blatchf., 127; 2 Biss., 15; 6 Bank. Reg., 318; 12 Bank. Reg., 426, 540; 1 Cliff., 290, 439.

280* *JAMES JACKSON, on the Demise of HARMAN V. HART, Plaintiff in Error,*

v.

ELIAS LAMPHIRE, Defendant in Error.

State laws and State constitutions—violation of contract—power of State Legislature.

This court has no authority, on a writ of error from a State court, to declare a State law void on account of its collision with a State constitution; it not being a case embraced in the Judiciary Act, which gives the power of a writ of error to the highest judicial tribunal of the State. [288]

The plaintiff in error claimed to recover the land in controversy, having derived his title under a

patent granted by the State of New York to John Cornelius. He insisted that the patent created a contract between the State and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the State, and that an Act passed by the Legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all the lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent.

This is not a case within the clause of the Constitution of the United States, which prohibits a State from passing laws which shall impair the obligation of contracts. The only contract made by the State is a grant to John Cornelius, his heirs and assigns of the land. The patent contains no covenant to do or not to do any further act in relation to the land; and the court are not inclined to create a contract by implication. The Act of the Legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent. [289]

It is within the undoubted powers of State Legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same, whether the deed is dated before or after the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. So, too, is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court. [290]

THIS was a writ of error to the Court for the Trial of Impeachments and Correction of Errors for the State of New York.

*An action of ejectment was commenced in the Supreme Court of New York, to May Term, 1825, for a tract of land, part of lot number thirty-six, in Dryden, Tompkins County, part of the military tract, and formerly part of Onondaga County. The cause was tried in June, 1826, and a verdict and judgment were rendered for the defendant. On the trial of the cause, a bill of exceptions was tendered by the plaintiff, and a

NOTE.—*Jurisdiction of U. S. Supreme Court to declare a State law void as in conflict with a State constitution.*

The Supreme Court has no authority on a writ of error from a State court to declare a State law void on account of its collision with a State constitution. Withers v. Buckley, 20 How., 84; Medberry v. Ohio, 24 How., 413; Porter v. Foley, 24 How., 14; Jackson v. Lamphire, *supra*; Satterlee v. Mathewson, 2 Pet., 380; Solomon v. Graham, 15 Wall., 208; W. Tennessee Bank v. Citizens' Bank, 13 Wall., 432, 14 Wall., 9; Palmer v. Marston, 13 Wall., 10; Seirer v. Haskell, 13 Wall., 12.

The Supreme Court of the United States has no power, under the 25th sec. of the Judiciary Act of 1789, to revise the decree of a State court, where no question was raised or decided in the State court upon the validity or construction of an Act of Congress, nor upon the authority exercised under it, but on a State law only. McBride v. Hoey, 11 Pet., Peters 3.

167; Grand Gulf R. R. Co. v. Marshall, 12 How., 165; Watts v. Territory of Washington, 91 U. S., 1 Otto, 580.

It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized by statute. Commercial Bank v. Buckingham, 5 How., 317; Adams v. Preston, 22 How., 473; Congdon Mining Co. v. Goodman, 2 Black, 574; Scott v. Jones, 5 How., 243; Smith v. Adsit, 16 Wall., 185; Klinger v. Missouri, 13 Wall., 257; Murray v. Gibson, 15 How., 421; Nichols v. Levy, 5 Wall., 433.

When the Supreme Court of the United States have jurisdiction to review decrees or judgments of State courts, see note to Martin v. Hunter, 1 Wheat., 304; note to Matthews v. Zane, 4 Cranch, 382; and note, to Gibbons v. Ogden, 6 Wheat., 448; also Houston v. Moore, 3 Wheat., 433; also note to Williams v. Norris, 12 Wheat., 117.

writ of error was prosecuted by him to the Supreme Court of Errors of the State of New York, where the judgment of the court below was affirmed; and the plaintiff brought up the case to this court by writ of error. The title of the plaintiff, as stated in the bill of exceptions, was derived under letters patent, for the whole lot number thirty-six, issued to John Cornelius, and his heirs and assigns, under the great seal of the State of New York, dated the 17th of July, 1790; and a conveyance in fee of the lot from the patentee to Henry Hart, dated the 17th of January, 1784, duly proved and deposited for record, according to the provisions of a statute of the State, on the 25th of April, 1795. Evidence was also given to prove that Henry Hart died some time in the summer of 1788, leaving the lessor of the plaintiff his heir-at-law, he being then a minor, aged about five years. That about the year 1791, he was taken to Canada by his paternal uncle, and afterwards entered into the employ of the North-west Company, and continued in the same for upwards of sixteen years, and then returned to New York; and has since resided in Albany in that State.

The title of the defendant was derived from the same patent to John Cornelius, and under a deed executed by him, dated June 23, 1784, duly proved October 31, 1791, and deposited, according to the statute, April 3, 1795. By this deed, the premises in dispute were conveyed to Samuel Brown. On the 25th of January, 1793, Brown conveyed to William J. Vredenburg and John Patterson; on the 9th of June, 1800, Vredenburg, for himself and as attorney for Patterson, regularly constituted, conveyed to Gerret H. Van Wagoner; who on the 9th of June, 1800, conveyed to William J. Vredenburg; and by deed duly executed by Vredenburg, July 5, 1800, **282*** acknowledged and recorded, *the premises were vested in Elias Lamphire, the defendant in error.

On the 24th of March, 1797, the Legislature of New York passed "An Act to settle disputes concerning the titles to lands in the County of Onondaga."

The preamble of that law recites:

"Whereas, a convention of delegates from a number of towns in the County of Onondaga have, by their petition presented to the Legislature, prayed that a law may be passed authorizing a speedy and equitable mode of settling disputes relative to the titles of land in that county: therefore, be it enacted," &c.

The first section appoints commissioners, with full power to hear, examine, award and determine, according to law and equity, all disputes and controversies respecting the titles, and all claims whatsoever to any lands in the County of Onondaga, and to examine any party or parties submitting to their examination and witnesses on oath, and to commit any witness refusing to be sworn or to answer any question or questions touching the premises, to the gaol of the county in which they may then sit, there to remain until he or she shall submit to be sworn, and to answer such question or questions: provided always, that no person shall be obliged to answer any question which may tend to charge himself or herself with any crime, nor shall any witness be

compelled to answer any question or questions wherein he or she shall be interested.

The second section directs that the commissioners shall proceed to execute their trusts, and shall meet for the purpose at times most convenient, in the County of Onondaga, and shall cause their award or determination upon every claim or controversy respecting any lands in the said County of Onondaga, to be entered in a book or books to be by them provided for that purpose; which award or determination shall, after the expiration of two years after the making thereof, become binding and conclusive to all persons, except such as, conceiving themselves aggrieved by any such award or determination, shall within the said two years dissent from the same, and give notice thereof to the said commissioners *or file the same in the office of the **[*283]** clerk of the County of Onondaga; and shall also, if not in the actual possession of such land, within three years after such award or determination, commence a suit or suits, either at law or in equity, to recover the land or to establish his or her right to the same, and shall prosecute such suit or suits to effect; in which case, such award or determination shall not operate as a bar to such suit or suits, but if no such suit or suits are brought within the times aforesaid and prosecuted to effect, then the said award or determination of the commissioners shall be final and conclusive; and in case any such suit commenced within the time aforesaid shall abate by the death of the defendant, then the party dissenting, or if by his death, then his heirs or devisees, may at any time within one year revive such suit, or if necessary, commence a new suit for the purpose aforesaid, and prosecute the same with like effect as such first suit might have been prosecuted, if it had not abated as aforesaid; and the said commissioners are hereby directed to enter in the said book or books a note of the time of receiving every such dissent; and when they shall have executed the trusts and duties by this act committed to them, they shall deposit the said book or books in the office of the clerk of the said County of Onondaga, there to remain as records of their proceedings: provided always, that if the parties in any case will enter into an agreement before the said commissioners, to abide by their determination, then and in every such case the award or determination of the said commissioners shall be final and conclusive as to such parties and their heirs forever.

The third section directs notice of their appointment and of the time and place of their meeting to be given by the commissioners, and that the notice shall require all persons having any dispute or controversy respecting any title or claim to any land in the said County of Onondaga to appear in person, or by their agents or attorneys, before the said commissioners, at the time and place therein mentioned, to exhibit their claims, that the said commissioners may proceed in the execution of the trusts committed to them.

*By the sixth section it is declared, **[*284]** that as to all lands in the county to which no adverse claim shall be made, an entry to that effect shall be made in the books of the commissioners, but in cases of interfering

claims they shall examine and determine the same; and in all cases where there are filed or recorded in the said office two or more deeds from one and the same person, or in the same right to different persons, if any persons interested under either of them shall neglect to make his claim, and in all cases where several persons appear to have claims to one and the same piece of land, and any of them do not appear before the said commissioners, they shall cause a notice to be published in the newspapers aforesaid, and continued for six weeks, requiring all persons interested in such lands to appear at a certain time and place therein mentioned, not less than six months from the date of such notice, and exhibit their claims to the same land; and after the expiration of the time therein mentioned, it shall be lawful for the said commissioners to proceed to the examination and determination of all matters concerning the said land, and the title of the same, whether all or any of the parties interested therein appear and exhibit their claims or not; saving to all persons aggrieved by any such award or determination the right of dissenting and prosecuting in the manner aforesaid.

The seventh provides, that if the party dissenting from the award of the commissioners shall be in the actual possession of the premises, then the award of the commissioners shall be as to such person of no effect; and unless the party in whose favor the award of the commissioners shall be made, shall within three years commence a suit to establish his title to the land, and shall prosecute the same to effect, then he shall be forever barred of all right or claim to the land.

The eighth section declares, that neither the act nor anything therein contained shall be construed to the prejudice of any person under the age of twenty one years, or *feme covert*, or person not of sound mind, or in prison; if such infant, *feme covert*, person not sound of mind, or prisoner, shall within three years after coming **285*** to the age of twenty-one years, becoming discoverd, of sound mind, and at liberty, make their dissent, and bring their suit and prosecute the same to effect.

The twelfth section prohibits the exercise of any powers under the act after the 1st day of June, 1800.

On the 17th of December, 1799, two of the commissioners made an award in the following terms:

"Having heard the proofs and allegations, and examined the title of such of the parties interested in lot number thirty-six, in the township of Dryden, in the County of Cayuga, as have appeared and exhibited claims to the said lot, and having also inspected the records and files remaining in the office of the clerk of the county aforesaid, relative thereto, and due deliberation being had thereon, we, the commissioners, appointed by and in pursuance of the act entitled "An act to settle disputes concerning titles of lands in the County of Onondaga," do, in pursuance of the authority given us in and by the said act, award and determine, that William J. Vredenburg and John Patterson are entitled to and stand seized in their demesne of an absolute estate of inheritance, in and to the same lot, subject to the Peters 3.

reservations, provisions, and conditions contained in the original grant."

Mr. Storrs, for the plaintiff in error, contended that the judgment of the Supreme Court of Error for the State of New York was erroneous, and should be reversed, for these reasons:

1. The letters patent, granting the lot to John Cornelius, created a contract with the grantee, his heirs and assigns, that they should enjoy the same free from any legislative regulations, to be made in violation of the constitution of the State.

2. The Act of the Legislature of the State of New York violated the constitution of the State and the United States; and the determination or award of the commissioners under it was a nullity.

3. It violated that provision of the constitution of the State which ordains that "The Legislature of this State shall, at no time [***286** hereafter, institute any new court or courts, but such as shall proceed according to the course of the common law."

4. It violated that article of the State constitution which ordained that "trial by jury, in all cases in which it hath heretofore been used in the Colony of New York, shall be established and remain inviolate forever."

5. It was, therefore, as well for these violations of the State constitution as on general principles, a statute which impaired the obligation of contracts.

6. The Onondaga commission was a court, within the meaning of the constitution of the State, which did not proceed according to the course of the common law.

7. It was without precedent; and was an arbitrary, *ex-parte*, and summary tribunal, proceeding in violation of all the securities of property, which the citizens of that State had confided by their constitution to the protection of their common law courts.

Mr. Hoffman, for the defendant in error, made the following points:

1. On a writ of error, to the court of last resort, in a State, under the circumstances of this case, the only error which can be alleged or regarded is, that the Act of the Legislature, in pursuance of which the award was made, is repugnant to the Constitution of the United States.

2. The Act of the Legislature of New York, entitled "An act to settle disputes concerning the title of lands in the County of Onondaga," passed the 24th of March, 1797, is not repugnant to the Constitution of the United States, nor is the award under it.

3. The plaintiff in error contends that the patent of the State of New York implies a contract on the part of the State with the grantee, his heirs and assigns, forever; that the Legislature of the State should not pass any law affecting the estate, contrary to the State constitution: that the law constituted a court which did not proceed by jury, according to the course of the common law, and thus the act impairs the obligation of an implied contract, and violates the Constitution of the United States.

*For the defendant, it is denied that [***287** any such contract] can be inferred or implied

from the grant, nor any other than such as could have been fairly implied from it, if it had been made by the late Colony of New York, or by any citizen of the State, or of lands lying without the State; and the law will not imply a covenant not to do an act which the State constitution had made impossible.

The Act of March 24, 1797, is not contrary to the constitution of the State; but has been uniformly declared by the courts of the State, and lately by its highest court of judicature, to be constitutional; and their decision is final on this question.

5. The Onondaga commissioners were not a court; and could not make any judicial sentence respecting these lands: by the proviso to the third section of the act, where the parties would agree before them to abide by their determination, this award is declared to be final; in all other cases they acted as commissioners to ascertain and report the state of the title to these lands.

6. Their award, as such, had no effect or force to divest or impair the estate; and if a party is concluded by it, it is because he has consented and agreed thereto, by his neglect to file his dissent, and bring his suit within the period prescribed by law.

The act is a beneficial statute of limitations, which did not begin to run until after the award was made, and does not impair the obligations of any contract.

Mr. Justice BALDWIN delivered the opinion of the court:

Both parties claim the premises in question, under John Cornelius, to whom the State of New York granted them by patent, dated the 7th of July, 1790, in consideration of his military services in the Revolutionary War.

Six years before the date of the patent, and while the title of Cornelius was imperfect, he conveyed the premises to Henry Hart, the father of the plaintiff's lessor, by deed dated January the 17th, 1784, proved and deposited in the office of the clerk of the county of Albany, according to law, on the 25th of April, 1795.

288* Henry Hart died in 1788, leaving the plaintiff, his only child, and heir-at-law, who was born the 21st of September, 1784, removed to Canada in 1791, and remained there till 1807 or 1808, when he returned to Albany, where he resided till the commencement of this suit of May Term, 1825. He claims as heir-at-law to his father.

On the 23d of June, 1784, John Cornelius conveyed the same premises to Samuel Broom by deed, duly proved and deposited as aforesaid on the 3d of April, 1795. The title of Broom, by sundry mesne conveyances, became vested in William J. Vredenburg, who conveyed to the defendant. The premises were vacant till 1808, when possession was taken under Vredenburg, who then held the title of Broom.

The defendant did not question the original validity of the deed to Henry Hart, but rested his defense on an Act of Assembly of the State of New York, passed the 24th of March, 1797, to settle disputes concerning titles to lands in the County of Onondaga, the provisions of which are set forth in the case.

The defendant offered in evidence an award made by two of the commissioners appointed by this act, awarding the land in controversy to William J. Vredenburg and John Patterson (to whom Broom had conveyed); the award was dated December 17th, 1799, and no dissent was entered by the plaintiff. The court admitted the award to be read in evidence; and gave in charge to the jury, that it was competent and conclusive to defeat the title of the plaintiff. Judgment was rendered for the defendant in the Supreme Court and affirmed in the Court of Errors; and the case comes before us by writ of error, under the twenty-fifth section of the Judiciary Act.

The plaintiff contends that the Act of the 24th of March, 1797, and all proceedings under it, are void; being a violation both of that part of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, and of the constitution of the State of New York, which declares that the Legislature shall at no time institute any new court but such as shall proceed according to the course of the common law; and that trial by *jury in all cases [***289** in which it hath heretofore been used, shall be established, and remain inviolate forever.

This court has no authority, on a writ of error from a State court, to declare a State law void on account of its collision with a State constitution; it not being a case embraced in the Judiciary Act, which alone gives power to issue a writ of error in this case; and will, therefore, refrain from expressing any opinion on the points made by the plaintiff's counsel, in relation to the constitution of New York.

The plaintiff insists that the patent to John Cornelius creates a contract with the grantee, his heirs and assigns, that they should enjoy the land therein granted, free from any Legislative regulations to be made in violation of the constitution of the State; that the act in question does violate some of its provisions; and therefore impairs the obligation of a contract.

The court are not inclined to adopt this reasoning, or to consider this as a case coming fairly within the clause of the Constitution of the United States relied on by the plaintiff. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land in question; the patent contains no covenant to do or not to do any further act in relation to the land; and we do not, in this case, feel at liberty to create one by implication. The State has not by this act impaired the force of the grant; it does not profess or attempt to take the land from assigns of Cornelius and give it to one not claiming under him; neither does the award produce that effect; the grant remains in full force, the property conveyed is held by his grantee, and the State asserts no claims to it. The question between the parties is, which of the deeds from Cornelius carries the title. Presuming that the laws of New York authorized a soldier to convey his bounty land before receiving a patent, and that at the date of the deeds there was no law compelling the grantees to record them, they would take priority from their date. This is the legal result of the deeds, but there is no contract on the part of the State that the priority of title shall depend solely on the principles of the

common law, or that the State shall pass no **290** law imposing on a grantee the *performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of State Legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the Recording Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one.

The State of New York, in 1794, had felt the necessity of legislating on these military lands. The preamble to the Recording Act of January, 1794, shows very strongly the policy of compelling the deeds for these lands to be recorded; and the known condition of that part of the State, covered by military grants, presented equally cogent reasons, in our opinion, for the passage of the act in question.

As this court is confined to the consideration of only one question growing out of this law, we do not think it necessary to examine its provisions in detail; it is sufficient to say that we can see nothing in them inconsistent with the Constitution of the United States, or the principles of sound legislation. Whether it is considered as an act of limitations, or one in the nature of a recording act, or as a law *sui generis*, called for by the peculiar situation of that part of the State on which it operates, we are unanimously of opinion that it is not a law which **291** impairs the obligation *of a contract; and that in receiving the award in evidence, and declaring it to be competent and conclusive on the right of the plaintiff, there was no error in the judgment of the court below. The judgment is therefore affirmed.

This cause came on to be heard on the transcript of the record from the Court for the Trial of Impeachments and Correction of Errors for the State of New York, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court for the Trial of Impeachments and Correction of Errors for the State of New York in this cause be, and the same is hereby affirmed with costs.

Cited—11 Pet., 546, 640, 646; 12 Pet., 448; 14 Pet., 594, 628; 2 How., 613; 6 How., 319, 331, 332, 542, 549; 7 How., 782; 10 How., 539; 20 How., 89; 13 Wall., 71; 5 Otto, 638; 14 Otto, 675; 1 Biss., 186.

Peters 3.

*SAMUEL D. HARRIS, Plaintiff in [**292**
Error,
v.

JAMES DENNIE.

Claim of United States on imported goods for duties—attachment—jurisdiction—lien for duties—who entitled to enter goods or give bonds—custom-house store-keeper—rights of government.

Twenty-three cases of silk were imported from Canton in the ship Rob Roy into the port of Boston, consigned to George D'Wolf and John Smith. After the arrival of the vessel with the merchandise on board, the collector caused an inspector of the customs to be placed on board. Soon afterwards, and prior to the entry of the merchandise, and prior to the payment or any security for the payment of the duties thereon, the merchandise was attached by the deputy-sheriff of the county, in due form of law, as the property of G. D'Wolf and J. Smith, by virtue of several writs of attachment issued from the Court of Common Pleas for the County of Suffolk, at the suit of creditors of G. D'Wolf and Smith. These attachments were so made prior to the inspector's being sent on board the vessel. At the time of the attachment, the sheriff offered to give security for the payment of the duties on the merchandise, which the collector declined accepting. The merchandise was sent to the custom-house stores by the inspector, and several days after, the custom-house store-keeper gave to the deputy-sheriff an agreement signed by him, reciting the receipt of the merchandise from the inspector; and stating, "I hold the said merchandise to the order of James Dennie, deputy-sheriff." The marshal of the United States afterwards attached, took, and sold the merchandise under writs and process, in favor of the United States, against George D'Wolf; which writs were founded on duty bonds, due and unpaid, for a larger amount than the value of the merchandise, given before by D'Wolf and Smith, who, before the importation of the merchandise, were indebted to the United States on various bonds for duties, besides those on which the suits were instituted. Held, that the attachments issued out of the Court of Common Pleas of the County of Suffolk did not affect the right of the United States to hold the merchandise until the payment of the duties upon them; and that the merchandise was not liable to any attachment by an officer of the State of Massachusetts for debts due to other creditors of George D'Wolf and John Smith.

It has often been decided in this court that it is not necessary that it shall appear, in terms, upon the record, that the question was presented in the State court, whether the case was within the purview of the twenty-fifth section of the Judicial Act of 1789, to give jurisdiction to this court in a case removed from a State court. It is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the State court would not have been what it is, if there had not been a misconstruction of some Act of Congress, &c., &c., or a decision against the validity of the right, title privilege or exemption set up under it. [301]

The United States have no general lien on merchandise, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the Act of 1799, ch. 128, is that the delinquent debtor is denied at the custom-house any further credit for duties until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods imported. *The mari- [**293**

NOTE.—As to jurisdiction of the Supreme Court of the United States, depending on federal question in State courts, see note to Matthews v. Zane, 4 Cranch, 382; and note to Martin v. Hunter, 1 Wheat., 304; also Houston v. Moore, 3 Wheat., 433; Cohens v. Virginia, 6 Wheat., 264; also note to Jackson v. Lamphire, ante, 280, and note to Williams v. Norris, 12 Wheat., 117.

As to what is a final judgment or decree of State court, as affecting the right of appeal, see note to Gibbons v. Ogden, 6 Wheat., 264.

As to lien of United States for duties, see note to United States v. 350 Chests of Tea, 12 Wheat., 486.

fest intention of the remaining clause in the section is to compel the original consignee to enter the goods imported by him. [302]

No person but the owner or original consignee, or in his absence or sickness, his agent or factor, is entitled to enter the goods at the custom-house or give bond for the duties, or to pay the duties (sec. 36 and 62.) Upon the entry, the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or to take the oath prescribed on the entry. [304]

The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a State officer is an interference with such lien and right to custody; and, being repugnant to the laws of the United States, is void. [305]

The acknowledgment by the custom-house store-keeper that he holds goods upon which the duties have not been secured or paid, subject to an attachment issued out of a State court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorized by the law of the United States, and cannot be admitted to vary the rights of the parties. [305]

WRIT of error to the Supreme Judicial Court of Massachusetts for the Counties of Suffolk and Nantucket.

In the Court of Common Pleas of the County of Suffolk, Massachusetts, James Dennie, the defendant in error, a deputy-sheriff of that county, under a precept issued by the authority of the State, attached twenty-three cases of silks imported in the brig Rob Roy, from Canton, for a debt due by the importers and owners of the goods, George D'Wolf and James Smith. Soon after the arrival of the vessel, the collector of the port caused an inspector of the customs to be placed on board. The attachment was made before the entry of the merchandise, and payment made or security given for the payment of the duties thereon, and before an inspector was put on board the vessel. At the time of the attachment, the plaintiff offered to give the collector security for the payment of the duties to the United States, which he declined to accept. About seventeen days after the attachment, the merchandise being in the custom-house stores, under the following agreement, to wit: "District of Boston and Charleston, port of Boston, August 29th, 1826. I certify that there has been received into store, from on board the brig Rob Roy, whereof — is master, from Canton, the following merchandise, to wit, twenty-three cases silks, A. O. 1 to 23, lodged by D. Rhodes, Jr., in-
294*] spector, under whose care the *vessel was unladen. B. H. Scott, public store-keeper: I hold the above-described twenty-three cases silks subject to the order of James Dennie, Esq., deputy-sheriff. B. H. Scott." The defendant, being the Marshal of the United States for the District of Massachusetts, attached and took the same merchandise, by virtue of several writs in favor of the United States against D'Wolf, duly issued from the District Court of the United States. These writs were founded upon bonds for duties given by D'Wolf and Smith, amounting to a sum much larger than the value of the merchandise, which duties were due and unpaid when the merchandise arrived.

The deputy-sheriff, James Dennie, brought an action of trover against the marshal for the goods; and the judgment of the Supreme

Judicial Court of the State, to which the case was removed by writ of error from the inferior court, was in favor of the original plaintiff; and the defendant prosecuted this writ of error.

The following errors were assigned in the Supreme Judicial Court of Massachusetts. That, according to the true construction of the several Acts of the Congress of the United States, imposing duties on certain goods, wares and merchandise imported into the United States from foreign ports, and also of the Act of said Congress made and passed on the 2d day of March, 1799, entitled, "An act to regulate the collection of duties on imposts and tonnage," it is contended,

1. That upon the arrival of the said merchandise in question at the port of Boston and Charleston, and prior to the supposed attachment thereof by the said Dennie, a debt immediately accrued to the United States for the amount of the duties thereon; and the collector for said port had therefore a legal lien on the said merchandise for the debt aforesaid; and, consequently, they were not then subject to the said Dennie's attachment aforesaid.

2. That the offer of the said Dennie, at the time of making his said attachment, to give to the said collector security for the payment of the duties on said merchandise, did not in point of law give validity to the said attachment; inasmuch as the said collector was not at that time, it being prior to any entry of the merchandise at the custom-house, authorized by law *to receive security from the said Den- [*295
nie, or any other person or persons whomsoever, for payment of the duties aforesaid.

3. That after the said merchandise was placed in the custom-house store, as is found by the special verdict, and from that period to the time when they are stated to have been attached in behalf of the United States by the said Harris, as marshal of said district, the legal lien of the United States constantly remained with them; and that the certificate of B. H. Scott, the store-keeper, which appears in the said verdict, can have had no effect to discharge, or in any degree to impair, the force of the said lien.

4. That by the provisions contained in the sixty-second section of the aforesaid Act of March 2, 1799, the goods in question, the same having been imported by and consigned to George D'Wolf and John Smith, as by said verdict is found, are in point of law to be considered as their property, so far as to be holden liable for the payment of all the debts then due from them to the United States for duties on merchandise heretofore imported by them into the said port of Boston and Charleston.

It was also in this court contended that the defendant in error had no property, either absolute or special, nor possession, nor the right of possession in the goods, which were the object of the supposed trover and conversion in the declaration mentioned.

The case was argued by Mr. Berrien, Attorney-General, and Mr. Dunlap, District Attorney of the United States for the District of Massachusetts, for the plaintiff in error, and by Mr. Webster for the defendant.

For the plaintiff in error, Mr. Dunlap stated that the position contended for in the State court was, that under the revenue law the government of the United States has a lien on

goods imported, not only for the duties accruing on that importation, but also for the payment of all debts due from the consignees arising from antecedent importations. This question, he admitted, had since been disposed of against the United States. (*Conard v. The Atlantic Insurance Company*, 1 Peters. *386.) It is supposed that the great question in the cause now before the court is, whether goods imported can, before entry at the custom-house, and while under the lien of the government, in possession of the custom-house officers, be legally attached by virtue of process from a State court. Such an attachment, it is claimed, is not only void by the laws of the United States, but also by the laws of the State of Massachusetts; and, therefore, the defendant in error did not by the process obtain any property or right of possession in the goods, which could enable him to maintain an action of trover.

The laws of the United States provide that goods imported shall, until entered at the custom-house, be taken into the possession of the officers of the government, and after a certain time be deposited in the custom-house stores; and afterwards, a further time having expired, if they have not been entered by or for the importer, they are to be sold according to the thirty-sixth and fifty-sixth sections of the Act of March 3, 1799.

An attachment, at the suit of any creditor of the importer, upon goods thus situated, would interfere with and destroy the possession and lien of the government, thus secured by law. Such an attachment, thus interfering with rights thus given, is the exercise of "an authority under a State" which "is repugnant to the laws of the United States." The exercise of such an authority is in opposition to the exemption claimed to exist in favor of those goods from such process, and is a defense for the Marshal of the United States to this action of trover by the deputy-sheriff. This case is therefore one properly within the action of the ninety-fifth section of the judiciary law; and is well brought before this court to reverse the judgment of the Supreme Judicial Court of Massachusetts.

The attachment from the State court is void, as well by the laws and adjudged cases of Massachusetts, as by the laws of the United States. A statute of the State, if it interfered with a law of the general government in reference to subjects within its legitimate operation, would be void; but no such law, in reference to the proceedings and claims of the defendant in error, is to be found. To constitute a legal *attachment of goods, they must be taken within the actual or constructive possession of the officer; and when this cannot be done, on account of the existence of prior liens, or from any other cause, no attachment can be valid. The decisions in the State of Massachusetts fully sustain this position. (*Phillips v. Badger*, 11 Mass., 247; *Bedlam v. Tucker et al.*, 1 Pick., 389; *Watson v. Todd et al.*, 5 Mass. Rep., 271.)

In *Pierce v. Jackson* (6 Mass. Rep., 242), the court say that when goods are attached, they must be seized under execution within thirty days, or the lien of the judgment is gone. The goods in the custom-house stores could not have been sold under any process. Cited, Peters 3.

Vinton v. Bradford (15 Mass., 114); *Lane v. Jackson*, (5 Mass., 157), decides that the officer must have the actual possession and custody of the goods. Cited also, *Odiorne v. Polley*, (2 New Hamp. Rep., 66; also 2 New Hamp. Rep., 317); *Holbrook v. Blake* (5 Greenleaf's Rep., 371; 6 Conn. Rep., 356; 1 Shower, 169; Vin. Ab. Distress, E. 2; H. 42; H. 52).

The effect of the acknowledgment of the store-keeper could not be to vest a property in the goods in the deputy-sheriff. It was unauthorized; and the store-keeper had nothing to dispose of. He was the agent of the United States, to protect and preserve the property while in the public stores; and he could not divest himself of these relations, and become the bailee of the sheriff.

If the sheriff had no right to make the attachment, he acquired by it either a general or a special property, which is necessary in order to maintain trover; and, in fact, he never had the actual possession of the goods. The only title he asserts is, as an officer by virtue of the attachment; and if that is adjudged illegal and void, the foundation of his action fails. (2 Saunders' Rep., 47; 7 T. R., 9.)

Mr. Webster, for the defendant, contended that this court had no jurisdiction of the case, according to the provisions of the judiciary law.

It is not required that it should appear, in form, that an Act of Congress has been misconstrued; if it has been substantially the fact, *it is sufficient to give the writ of error [*298 to the highest State tribunal. But it does not appear in any part of this record that such was the proceeding in the Supreme Judicial Court of Massachusetts.

The question originally raised in this case was, whether the United States had a general lien on goods imported for debts due to them by the importer; and that question has, since this action was brought, been decided in the negative in *Conard v. The Atlantic Insurance Company*. The only question remaining in this case was, whether the goods were liable to attachment, and this was a question properly for the decision of the State courts. The United States claimed to attach and hold the goods for the debts due to them by D'Wolf and Smith, and the other creditors of those persons denied this claim, and proceeded by an attachment. The United States stood in no other relations and with no other rights before the State court than the other creditors. In the State court, and upon the State decisions, the attachment for the creditors was considered valid. This is an answer to the argument that such is not the law of Massachusetts. This decision does not, therefore, bring into question the construction of any Act of Congress.

Mr. Berrien, Attorney-General, in reply, argued that there was enough in the record to show that a question of the application of a statute of the United States was decided by the Supreme Judicial Court of Massachusetts; and this would sustain the jurisdiction, although it may not have been the only question in the case. (2 Wheat., 363; 1 Wheat., 304.)

This is an action of trover against an officer of the United States, the marshal, for taking goods out of the hands of an alleged bailee, for a debt due to the United States; and the ques-

tion is, was there then an existing lien in favor of the United States under the sixty-second section of the Duty Act?

The construction of this statute was thus brought into question by the inquiry whether there was a conversion by the marshal. He says, that his proceedings were under the authority of the law, and it was therefore essential that the State court should decide upon the law, and construe the law.

299*] *2 In an action of trover and conversion, the plaintiff must show property, and a right to retain it.

The goods were in the possession of the custom-house, and subject to duties which were unpaid. It was necessary that the court should decide that goods, before the payment of the duties, can be taken out of the possession of the custom-house by the process of State courts. This question is to be decided by a reference to the laws of the United States.

Such an exercise of power would be inconsistent with the provisions of the laws of the United States.

The position which is asserted by the plaintiff in error, is that goods so situated are exempt from such process.

The plaintiff in the State court contended that they could be taken under the authority of the State of Massachusetts; and this was the assertion of a claim of authority under a State, against the laws of the United States.

Upon these grounds it is manifest that the construction of the laws of the United States immediately entered into the question before the State court. It must appear to this court, 1. That the goods were liable to be attached; 2. That there is nothing in the laws of the United States which prevents this; 3. That the United States had no lien on the goods. All these points must be decided in favor of the plaintiff below, before it can be held that the marshal was guilty of a conversion.

Mr. Justice STORY delivered the opinion of the court:

This is a writ of error to the judgment of the Supreme Judicial Court of the State of Massachusetts.

The original action was trover, brought by the defendant in error, against the plaintiff in error, for twenty-three cases of silk, which had been attached by Dennie, as deputy-sheriff of the County of Suffolk, and afterwards attached by Harris, as marshal of the District of Massachusetts. The cause was tried upon the general issue, and a special verdict found, upon which the State court rendered judgment in favor of the original plaintiff.

The special verdict was as follows: The jury **300***] find that *the merchandise described in the declaration was brought in a vessel of the United States into the port of Boston, in the collection district of Boston and Charleston in Massachusetts, from a foreign port, prior to the commencement of this action. That the said merchandise came consigned to George D'Wolf and John Smith, as was evidenced by the manifest of the cargo of the said vessel at the time of the importation. That soon after the arrival of the said vessel with the merchandise on board, as aforesaid, the collector of the said port caused an inspector of the custom-house

to be placed on board thereof, in conformity with the requirements of law in such cases. That soon after the arrival of the said vessel, and prior to the entry of the said merchandise with the collector, and prior to the payment or any security for the payment of the duties thereupon, the same were attached in due form of law as the property of the said George D'Wolf and John Smith, by virtue of several writs of attachment issued from the Court of Common Pleas for the said County of Suffolk, in favor of Andrew Blanchard and others; the said attachment having been made by the plaintiff in his capacity of a deputy of the sheriff of the aforesaid County of Suffolk, prior to the inspector's being put on board, as aforesaid. That at the time of the said attachment, the said sheriff offered to give to said collector security for the payment of the duties upon the said merchandise, which the said collector declined to accept. That about seventeen days subsequently to the time of the attachment, the said merchandise being in the custom-house stores, under the following agreement, viz.: "District of Boston and Charleston, port of Boston, August 29th, 1826. I certify that there has been received in store, from on board the brig Rob Roy, whereof ——— is master, from Canton, the following merchandise, viz.: twenty-three cases of silk, A. O. 1 to 23, lodged by D. Rhodes, Jun., inspector, and under whose care the vessel was unladen (Signed) B. H. Scott, public store-keeper. I hold the above twenty-three cases of silks subject to order of James Dennie, deputy sheriff. (Signed) B. H. Scott." The defendant (Harris) being marshal, &c., attached the said merchandise, and took the same, by virtue of several writs to him *directed, in favor of the United States, [***301** against the said D'Wolf; which writs were duly issued from the District Court of the United States for the District of Massachusetts; which writs were founded on bonds for duties theretofore given by the said D'Wolf and Smith, and which bonds were then due and unpaid, being for a large sum of money. That the said D'Wolf and Smith, at the time of the said importation of the merchandise aforesaid, were jointly and severally indebted to the United States on various other bonds for duties, besides those on which the writs aforesaid were instituted, which said first-mentioned bonds were also then due and unsatisfied; and that the bonds for duties above referred to, and upon which the attachment by the said marshal was made, amounted to a much larger sum than the value of the merchandise thus attached. But whether or not, &c., &c., in the common form of special verdicts.

As this case comes from a State court, under the twenty-fifth section of the Judiciary Act of 1789, ch. 20, it is necessary to consider whether this court can entertain any jurisdiction thereof, consistently with the terms of that enactment. That section, among other things, enacts that a final judgment of the highest State court may be revised, where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the

Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up, or claimed by either party, under such clause of the said Constitution, treaty, statute or commission.

The objection is, that this court has not jurisdiction of this case, because it does not appear upon the record that any question within the purview of the twenty-fifth section arose in the State court upon the decision on the special verdict. But it has been often decided in this court that it is not necessary that it should appear, in terms, upon the record, that any such question was made. It is sufficient, if from the **302*** facts stated such a question must have arisen, and the judgment of the State court would not have been what it is, if there had not been a misconstruction of some Act of Congress, &c., &c., or a decision against the validity of the right, title, privilege or exemption set up under it. (4 Wheat., 311; 12 Wheat., 117; 2 Peters' Rep., 245, 380, 409.)

In the present case it is contended that the United States, by virtue of the sixty-second section of the Revenue Collection Act of 1799, ch. 128, had a lien on the present merchandise for all debts antecedently due on custom-house bonds by D'Wolf and Smith, and that consequently the attachment of the marshal overreached that of the private creditors, and that the State court have decided against such lien. If there be no such lien, still it is contended that under the provisions of the Revenue Collection Act of 1799, ch. 128, the merchandise was not liable to attachment at the suit of any private creditors under the circumstances; and that the State court in giving judgment for the plaintiff, must have overruled that defense, and misconstrued the act.

The question as to the lien of the United States for duties antecedently due, was certainly presented by the special verdict. But we are all of opinion, that the decision of the State court, disallowing such a lien, was certainly correct.

The sixty-second section of the Act of 1799, ch. 128, after providing for the manner of paying duties, and of giving bonds for duties, and the terms of credit to be allowed therefor, goes on to provide, "that no person whose bond has been received, either as principal or surety, for the payment of duties, or for whom any bond has been given by an agent, factor or other person in pursuance of the provisions herein contained, and which bond may be due and unsatisfied, shall be allowed a future credit for duties, until such bond be fully paid or discharged." The only effect of this provision is, that the delinquent debtor is denied at the custom-house any future credit for duties, until his unsatisfied bonds are paid. He is compellable to pay the duties in cash; and upon such payment he is entitled to the delivery of the goods imported. There is not the slightest suggestion in the clause that the United States shall have any lien on such goods **303*** for any duties due on any other goods for which the importer has given bonds, and for which he is a delinquent. It was at once perceived by Congress that the salutary effect of this provision, denying credit upon duties, would be defeated by artifices and evasions, Peters 3.

and the substitution of new owners or consignees after the arrival of the goods in port, and before the entry thereof at the custom-house. To repress such contrivances, the next succeeding clause of the act provides, "that to prevent frauds arising from collusive transfers, it is hereby declared that all goods, &c., imported into the United States, shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, &c., may be consigned, any sale, transfer or assignment prior to the entry and payment, or securing the payment, of the duties on the said goods, &c., and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding." The manifest intent of this clause was to compel the original consignee to enter the goods; and if he was a delinquent, to compel him to pay his prior bonds, or to relinquish all credit for the duties accruing upon the goods so imported and consigned to him. It does not purport to create any lien upon such goods for any duties due upon other goods; but merely ascertains who shall be deemed the owner, for the purpose of entering the goods and securing the duties. The State court, therefore, did not, so far as this question is concerned, misconstrue the Act of Congress, or deny any right of the United States existing under it.

The other point is one of far more importance; and, in our opinion, deserves a serious consideration. If, consistently with the laws of the United States, goods in the predicament of the present were not liable to any attachment by a State officer, it is very clear that the present suit could not be sustained, and that judgment ought to have been given upon the special verdict in favor of the original defendant. And in our opinion these goods were not liable to such an attachment. In examining the Revenue Collection Act of 1799, ch. 128, it will be found that numerous provisions have been solicitously introduced in order to prevent any un- **[304]** livery, or removal of any goods imported from any foreign port in any vessel arriving in the United States, until after a permit shall have been obtained from the proper officer of the customs for that purpose. These provisions not only apply to vessels which have already arrived in port, but to those which are within four leagues of the coast of the United States. The sections of the act, from the twenty-seventh to the fifty-eighth, are in a great measure addressed to this subject. From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act. Now, an attachment of such goods by a State officer, presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has a right to hold the possession to answer the exigency of that process. If he attaches upon an execution, he is bound to sell or may sell the goods within a limited period, and thus virtually displace the custody of the United States. The Act of Congress recognizes no such authority, and admits of no such exercise of right.

No person but the owner or consignee, or, in

his absence or sickness, his agent or factor in his name, is entitled to enter the goods at the custom-house or give bond for the duties or pay the duties. (Sec. 36, 62.) Upon the entry the original invoices are to be produced and sworn to, and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry. The sheriff is in no just or legal sense the owner or consignee (and he must, to have the benefit of the act, be the original consignee), or the agent or factor of the owner or consignee. He is a mere stranger, acting in *invitum*. He cannot then enter the goods, or claim a right to pay the duties, or procure a permit to unlade them; for such permit is allowed in favor only of the party making the entry, and paying or giving bond for the duties. (Sec. 49, 50.) If within the number of days allowed by law for unlading the cargo the du-
305*] ties are not paid or secured, the *goods are required to be placed in the government stores, under the custody and possession of the government officers. And at the expiration of nine months, the goods so stored are to be sold if the duties thereon have not been previously paid or secured. (Sec. 56.)

It is plain that these proceedings are at war with the notion that any State officer can, in the interval, have any possession or right to control the disposition of these goods; and the United States have nowhere recognized or provided for a concurrent possession or custody by any such officer. In short, the United States having a lien on the goods for the payment of the duties accruing thereon, and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a State officer is an interference with such lien and right of custody; and being repugnant to the laws of the United States, is void.

It has been suggested that the certificate of the store-keeper, declaring that he held the silks subject to the order of the attaching officer, might vary the application of this doctrine. But such an agreement was a plain departure from the duty of the store-keeper, and was unauthorized by the laws of the United States. It cannot, then, be admitted to vary the rights of the parties. See fifty-sixth section of the Act of 1799, ch. 128.

This view of the subject renders it wholly unnecessary to consider the point, so elaborately argued at the bar, whether by the laws of Massachusetts an attachment would lie in such a case. If it would, the present attachment would not be helped thereby; because it involves an interference with the regulations prescribed by Congress on the subject of imported goods.

Upon the whole, it is the unanimous opinion of the court, that the judgment of the State court ought to be reversed; and that a mandate issue to that court, with directions to enter judgment upon the special verdict, in favor of the original defendant.

306*] *This cause came on to be heard on the transcript of the record from the Supreme Judicial Court of the Commonwealth of Massachusetts, and was argued by counsel; on consideration whereof, it is the opinion of this
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court that the goods in the special verdict mentioned, were not, by the laws of the United States, under the circumstances mentioned in the said verdict, liable to be attached by the said Dennie upon the process in the said verdict mentioned; but that the said attachment so made by him as aforesaid, was repugnant to the laws of the United States, and therefore utterly void. It is therefore considered and adjudged by this court that the judgment of the said Supreme Judicial Court of Massachusetts rendered upon the said verdict be, and the same is hereby reversed, and that a mandate issue to that court with directions to enter a judgment upon the said verdict in favor of the original defendant, Samuel D. Harris; and that such further proceedings be had in said cause as to law and justice may appertain.

See 8 Pet., 271.

Cited—4 Pet., 151, 429; 5 Pet., 255, 256; 6 Pet., 48, 281; 10 Pet., 396, 397; 12 How., 124; 20 How., 596, 598; Bald., 140; 2 Sawy., 432; 2 Curt., 415; 3 Ware, 143.

*RACHEL CANTER, Administra- **[*307**
 trix of DAVID CANTER, Deceased, *Claimant*,

v.

THE AMERICAN INSURANCE COM-
 PANY AND OCEAN INSURANCE COM-
 PANY OF NEW YORK, *Appellants*.

Practice—damages and costs—counsel fees.

The libelants, in their original libel in the District Court of the United States for the District of South Carolina, prayed that certain bales of cotton might be decreed to them with damages and costs. Canter, who also claimed the cotton, prayed the court for restitution, with damages and costs. The District Court decreed restitution of part of the cotton to the libelants, and dismissed the libel, without any award of damages on either side. Both parties appealed from this decree to the Circuit Court, where the decree of the District Court was reversed, and restitution of all the cotton was decreed to Canter, with costs; without any award of damages, or any express reservation of that question in the decree. From this decree the libelants in the District Court appealed to this court. No appeal was entered by Canter. Held, that the question of a claim of damages by Canter is not open before this court. The decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages. It was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution and costs only.

The counsel fees allowed as expenses attending the prosecution of an appeal to the Circuit Court and to the Supreme Court, in an admiralty case.

This is not a proper case for the award of damages. The proceedings of the libelants were in the ordinary course to vindicate a supposed legal title. There is no pretense to say that the suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libelants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised them an effectual and speedy redress. Where parties litigate in the admiralty, and there was a probable ground for the suit or defense, the court considers the only compensation which the successful party is entitled to, is a compensation in costs and expenses. If the party has suffered any loss beyond these, it is *damnum absque injuria*. [318]

It is of great importance to the due administration of justice, and in furtherance of the manifest intention of the Legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments or

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successive appeals. It would occasion very great delays and oppressive expenses. [318]

The settled practice of this court is, that whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal or cross appeal to sustain that claim. [318]

Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court; and no appeal lies from a mere decree respecting costs and expenses. [319]

308*] THIS case was heard at January Term, 1828, upon questions submitted to the court, on an appeal from the Circuit Court of the District of South Carolina. (1 Peters, 511.) The court then decided in favor of the claimant, and directed restitution of the cotton, which was the subject of the controversy between the parties; having affirmed the decree of the Circuit Court of South Carolina. By the mandate to the Circuit Court it was ordered, "that such execution and proceedings be had as, according to right and justice, according to the laws of the United States, ought to be had." Upon the filing of the mandate the Circuit Court ordered, "that the case be put on the docket, and it be referred to the officer of this court to examine into the damages sustained by the claimant, David Canter, in consequence of the proceedings of the libellants, and report thereon at as early a day as possible to this court."

The appellant, David Canter, thereupon filed in the Circuit Court "a statement of damages sustained by him, by the illegal seizure of three hundred and fifty-six bales of cotton, by order of the underwriters."

The statement set forth losses on the sales of the cotton, and expenses and payments connected with the same, amounting to \$3,639.87. Losses and probable gain on sales of rice purchased by the appellants, and which was sold instead of being shipped, in consequence of the proceedings of the appellees; the cost of protest and damages on a bill of exchange drawn by him, and dishonored in consequence of the seizure of the cotton; law expenses at Charleston and Columbia, in South Carolina, and in Washington, and traveling expenses to and in Washington; papers from Key West, relative to judicial proceedings there; postages and protests, costs of the Supreme Court of the United States, and briefs; loss in the value of the cotton during the pendency of the proceedings, \$2,860.

The counsel for the appellees filed with the register of the court a protest against the order of reference made by the Circuit Court to ascertain the damages alleged to have been sustained by the appellant, on the grounds, 1. That the mandate of the Supreme Court of the **309*]** United States gives no *authority or instructions to the Circuit Court to inquire into damages; 2. That the decrees of the District, Circuit and Supreme Court, do not award damages to the appellant; 3. That the appellees were not in any manner liable for damages; 4. That at all events, the inquiry into damages cannot extend beyond the amount of the stipulations entered into by the appellees in the original proceedings, by which alone they are before the court.

The clerk of the Circuit Court refused all Peters 3.

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the claims preferred by the appellant, with the exception of the following:

| | |
|--|--|
| Papers from Key West, to establish legality of proceedings there | |
| \$51, postages and protest | \$71.00 |
| Costs of the Supreme Court and briefs | \$72.02, protest and damages on bill drawn by claimant |
| \$222 | 294.02 |

This grew out of the cotton speculation, the bill was dishonored in consequence of the seizure, the claimant not being in funds to take up the draft.

| | | |
|---|---------|------------------|
| Counsel fees at Charleston and Washington | - - - - | 1,150.00 |
| | | <hr/> \$1,515.02 |

Also the loss on the sale of the cotton, which was made before the proceedings were instituted against the cotton, and which sale was not completed by reason of the same, with interest on the balance of the sale after deducting the actual proceeds of the cotton, when sold by order of the District Court \$3,991.77; and also the actual loss on the rice purchased, to be paid for out of the proceeds of the cotton, rejecting the claim of probable profits, the sum actually allowed being \$2,820.67.

These allowances were all excepted to by the appellees, and the appellant also excepted to the refusal of the clerk of the Circuit Court to admit all of the claims preferred in "the statement."

The Circuit Court refused to allow to the appellant any of the items reported by the clerk, with the exception of some of those comprehended in the "incidental expenses." As to *those items, the clerk rejected the sum [***310** of \$222 for protests and damages on a bill of exchange, and ordered the counsel fees of the appellant to be paid under the mandate, upon the authority of *The Apollon* (9 Wheat., 362), as the costs awarded him by the Supreme Court \$1,372.82.

The appellant appealed to this court.

At the last term *Mr. Cruger* moved to dismiss the appeal on the ground that the mandate from this court gave no authority to the Circuit Court of South Carolina to assess damages to the appellant. This motion was opposed by *Mr. Cox*, for the appellant; and the court ordered the cause to be argued upon all the questions it involved, when it should be regularly called.

At this term, *Mr. Cox*, for the appellant, contended that the decree of the Circuit Court from which the former appeal was taken, left the question of damages open. That appeal was taken by the claimants in the Circuit Court, now the appellees, and it was from a decree, in its nature interlocutory, and not final; and if this was not so, it was the act of those who are now appellees, and cannot prejudice the rights of the appellant.

In the case now before the court, the appeal has been taken by Canter only, and not by those who claimed the cotton. The only question, therefore, in this court is, whether sufficient damages have been awarded, as no cross appeal was entered, and there can be no inquiry whether damages may be assessed at all; this

having been decided in the Circuit Court. The appellee cannot here impugn the decree below upon this point.

Is this, then, a case for damages, or rather for full compensation?

The entire record is now before this court; the pleading, and the evidence which were under consideration during the last term, still constitute a part of the case upon which the decision must be based.

It will be recollected that the claimant became the proprietor of the cotton at Key West, where it was found in the possession of certain salvors. The libelants were present, by their **311*** agent, who was cognizant in the proceedings, acquiesced in them, and received the portion of the proceeds of sale to which they were entitled. The captain of the wrecked vessel was also present, and all participated in what was done there.

No proceedings were ever instituted by the libelants against the authors or abettors of the acts of which they complained. No attempt was ever made to arrest them in the progress of the business, to punish them afterwards, or to pursue the money in their hands. All was reserved for this innocent purchaser. Innocent he was, for this court has decreed the sale to be valid, and his title to be incontrovertible; innocent as regards them, for he did no one act in which they had not concurred.

They avowed their object to be to break up these proceedings at Key West, and this was to be effected by the ruin of this claimant.

This court has definitively settled the question of right between these parties; the libelants had no interest in the cotton, the subject-matter of the suit. It was the property of the claimant.

In the prosecution of this suit against him, however, he has been deprived of this property; he has incurred heavy expenses and losses, and he asks not vindictive damages; he asks nothing *nomine pœnæ*; he merely asks to be placed in the situation he would have occupied had these proceedings never been instituted against him. He claims, in fact, nothing which may not properly be awarded under the name of restitution. This is emphatically the case in regard to the first item. The property has long since been disposed of, it probably has no longer an existence; restitution in specie must be had; the mandate of this court cannot be literally executed.

This has been rendered impracticable by the acts of libelants. They seized upon the article; they withdrew it from the control of the claimant. While thus retained by them, it is so disposed of that the owner can never be restored to the actual enjoyment of it. What, then, are his rights, and what will satisfy the order of this court that the property shall be restored?

312* He had entered into an actual contract to sell it for \$17,425; that amount of money was in fact and in substance the object of the suit. The claimant had no right to the cotton which he had sold. He had a right to this amount of purchase money, and that was what the libelant sought to obtain from him. That was substituted in lieu of the cotton. To that sum, then, which was the real value of the cotton to him, the amount for which it had been sold, he is now entitled under the decree for restitution. This would have been the

measure of damages had Canter brought trover for these goods. (*Kennedy v. Strong*, 14 Johns., 128.) In replevin the same result would have happened; and it is stated by the court to be no more than an indemnification. (*Rowley v. Gibbs*, 14 Johns., 385.)

But this seizure has been decided to be illegal and groundless. It was made upon a claim of right which has been disaffirmed. It is essentially a seizure without probable cause.

In the case of *Gelston v. Hoyt* (13 Johns., 30, and 3 Wheat., 46), it was held in the State courts as well as here, that a decree of restitution was conclusive, that the seizure was illegal, and that where such seizure was made without legal process, such decree entitled the party to recover in an action of trespass to the amount of the damage actually sustained by the seizure. Here the seizure was made through the intervention of the process of the court, but the only difference which is thereby produced is, that the claimant is not compelled to resort to an action of trespass to recover his damages; they may be awarded in the principal suit.

The general rule established in the case of *The Apollon* (9 Wheat., 373), is that the party who seizes, seizes at his peril. The rule for estimating damages in that case was the actual value of the property with interest. (9 Wheat., 377.)

But the professed object is admitted to be indemnification. (12 Wheat., 17.) How is that indemnification to be afforded? By placing the party where he would have been, if no such proceedings had been instituted.

The doctrines of the civil law may furnish the proper rule. *(2 Bro. Civ. & Adm. [***313** Law, 407; Venius, Com., 889; Digest, B. 4, T. 4, s. 33, p. 166; Inst., B. 4, T. 16, s. 2.)

The amount of the stipulation entered into in the District Court furnishes no rule for damages, excepting so far as it operates in favor of the sureties. Had no stipulation been required by the court, they still might have gone on to assess damages. It is not by the stipulation that the party subjects himself to the jurisdiction and judgment of the court, but by the very fact of filing his libel and proceeding in his suit. (10 Wheat., 446.)

Mr. Ogden, for the appellees, argued that this was a claim for damages in a case where one judge had decided in favor of the claimants or appellees; and the appellees were now called upon to respond in damages to an extent which, were the appellees private persons, would produce their ruin. The claim, he contended, was against every principle of law. In case of a seizure by a revenue officer, a certificate from the judge of probable cause will excuse damages. In case of capture, probable ground for making the capture is not a case for damages. There has been no case in which mere civil proceedings in a court to establish a supposed right has exposed the party to such liability, unless the proceedings have been malicious. The penalty is costs and expenses, in cases of the former description.

In the case of *Gelston v. Hoyt*, the vessel was acquitted, and a certificate of probable cause was refused by the district judge. Had the District Court condemned the vessel in that case, would it have been said there was no probable cause? *The Apollon* (9 Wheat., 373),

was a case of capture without probable ground of proceeding.

1. Inasmuch as there was a decree of a competent court that the seizure made by the appellees was one they had a right to make, this is not a case for damages.

2. It was also a case of first impression. It was a new case, and the party had a right to bring it before a court of the United States for examination. This also prevents its being a case for damages. (*The Lewis*, 2 Dodson Ad. Rep., 210.)

314*] *Suppose the appellant entitled to damages. The decree of the Circuit Court of South Carolina was a final decree, or this court had no jurisdiction on the first appeal. If the party was entitled to damages, he should have presented his claim to the Circuit Court; not having done so, he could not prefer such a claim when the case went back on the mandate of this court. The matter in dispute was the cotton. It was sold by order of the court, and the proceeds paid into court. Those proceeds were all the court would look to, in any view of those proceedings. All cases of sale by a marshal would bring up claims to damages. The test of the value of the goods, and the sum in controversy between parties, is properly ascertained by sales, under the order or authority of a court by a regular officer.

It is said that if the cotton had not been taken out of the hands of Canter by the proceeding of the appellees, it would have sold for more. He had at all times the right to take it out of the possession of the marshal by an appraisement and security.

As to probable cause exempting parties from damages. (Cited, 1 Wheat., 21; 2 Rob. Ad. Rep., 132; *Rose v. Himely*, 4 Cranch, 41.)

There is no difference between actions for marine trespass, and civil proceedings, in the law of damages. (*Mariana Flora*, Wheat., 58; *The Palmyra*, 12 Wheat., 17; 2 Bro. Civ. & Adm. Law, 100, 105, 398; *The Appollo*, 1 Hag. Adm. Rep., 306.)

As to the costs of the appeal to this court. The counsel fees are a reasonable, but it may be doubted if they are a legal claim. (3 Dall., 301; 9 Wheat., 309.) It is said in the latter case, that the allowance of counsel fees is in the discretion of the court. The case is not then a case for damages. If it is such a case, the appellant has waived them.

Mr. Webster, in reply: A view of this case may be taken, differing entirely from that which is entertained by the counsel for the appellees.

The vessel on board of which the cotton was originally shipped was wrecked. Salvage was decreed by the court at Key West, to be paid **315*]** out of the proceeds of the cargo, *and Canter purchased the cotton at the sale made under the order of the court, and shipped it to Charleston. The right of the court at Key West to proceed against the property saved, for salvage, was denied; and at Charleston, the underwriters seized the property. Canter was in possession of the property under the decree of a court, and his right to the property was afterwards confirmed in the Circuit Court and in this court.

This is the case of an action for a marine Peters 3.

tort or trespass, not a question of prize. Jurisdiction of the case was taken on the ground of the case being of this character. It is an action in the admiralty to try the right of property between parties thus situated. What are the principles which apply to such a case? Not those which operate in revenue cases. In those cases certificates of probable cause are allowed, because it is the duty of the officer to act, and if he proceeds on reasonable grounds he is protected. Cases of prize rest on similar principles; those of policy.

This case is not of such a character. The courts of common law and admiralty had concurrent jurisdiction of the case, and the insurance offices might have brought trespass at common law. They have chosen a proceeding in the admiralty, *in rem*, and they have taken the goods out of the possession of the owner. Goods cannot be taken without the taker being responsible in damages. In a suit at common law, bail would have been given, and the owner would have been left in the use of his property. The proceeding was like replevin for goods, where security is given to respond in damages.

Had Canter a right to anything beyond what he received? To ascertain his loss, the value of the property at the time it was taken out of his possession must be ascertained. The property was taken out of his possession by the libellants; they elected this as their remedy, and one ordinarily leading to loss, and it is not for them to complain when they are called upon to make recompense for the loss. Cases of this kind arising on land are frequently tried. In all cases where property is seized unlawfully, the actor must respond in damages. It is no answer in such cases to say the party was proceeding in the course of regular litigation. He proceeds at his peril.

*Every man may litigate at the charge [**316** of costs; but if in his proceedings he will change the possession of the property he claims, then he must indemnify the real owner when the claim is decided against him. In case of marine trespass, it is always in the equitable powers of the court to give damages, and the Circuit Court should have given them instead of putting the appellant to a separate action.

It is said that Canter should have made a claim to damages in the Circuit Court. The case was brought before the court by the appellees, on its former appearance here, and was sent back for further proceedings. It was in the power of the Circuit Court, when the case was again before them, to do all that the appellant could properly claim. Restitution, which the appellant was entitled to, was not to be made by restoring the thing itself; restitution could only be made by placing the appellant in the situation in which he was before the seizure.

Mr. Justice Story delivered the opinion of the court:

This case was formerly before this court, upon an appeal taken by the original libellants, the American and Ocean Insurance Companies, to the decree of the Circuit Court, awarding restitution of the property to the claimant, Canter, with costs. That decree was affirmed by this court, and a mandate issued to the Circuit

Court, commanding "that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the appeal notwithstanding." The case is reported at large in 1 Peters' Rep., 547.

When the case came before the Circuit Court upon the mandate, Canter made an application to the court to refer the same to the proper officer to examine into the damages sustained by him in consequence of the proceedings of the libelants, and to report thereon. A reference was accordingly made to the register to ascertain the damages; and when the case came on before him, the libelants entered a protest against any such proceedings, upon the grounds that the mandate gave no authority to inquire into damages; that none had been in fact **317*** awarded, either by the District,* Circuit, or Supreme Court, and that the libelants were not in any manner liable for damages. The register, notwithstanding the protest, proceeded to inquire into the damages, and made his report thereon to the Circuit Court, where the same grounds of objection were again taken by the libelants. The court, upon the hearing, asserted the right to inquire into the damages, as a matter undisposed of in the former decree; but denied any allowance of them upon the merits, and decreed costs and expenses only to the claimant. From this last decree both parties have appealed to this court; and the case now stands before us for judgment upon these cross appeals.

It is proper to add that the libelants in their original libel prayed that the three hundred and fifty-six bales of cotton might be decreed to them, with damages and costs; and that the claimant, Canter, in his claim, also prayed for restitution of the cotton, with damages and costs. The District Court decreed restitution to the libelants of part of the cotton, and dismissed the libel as to the residue, without any award of damages on either side. Both parties appealed from this decree to the Circuit Court; where, upon the hearing, the decree of the District Court was reversed and restitution of all the cotton was decreed to Canter, with costs (as has been before mentioned), but without any award of damages, or any express reservation of that question in the decree.

Two questions have been made and argued at the bar. The first is, whether, under the circumstances, the inquiry into damages could be entertained by the court below, after the cause was remanded for execution by the mandate of this court. The second is, whether, if such proceedings could be had, the present is a fit case for damages.

In respect to the last question, if we felt at liberty to entertain it, we should have no difficulty in concurring in the opinion of the Circuit Court, that this case was not a fit one for an award of damages. The proceedings of the libelants were, in the ordinary course, to vindicate a supposed legal title to the property. There **318*** is no pretense to say that the *suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libelants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised them an effectual

and speedy redress. They have failed; not so much from any infirmity in their original title, as from the sentence of a court of competent jurisdiction (whose very jurisdiction was the matter in question), having been adjudged to be conclusive upon that title. Where parties litigate in the admiralty, and there was a probable ground for the suit or defense, the court consider the only compensation which the successful party is entitled to is a compensation in costs and expenses. If the party has suffered any loss beyond these, it is, as was justly observed in the opinion of the Circuit Court, *damnum absque injuria*.

But we are of opinion that the question of damages is not now open before this court. The original decree of restitution with costs, without any allowance of damages, or any express reservation of that question, was a virtual denial of damages, and a final decree as to the demand of damages set up by Canter in his original claim. It was his duty at that time to have filed a cross appeal, if he meant to rely upon his claim for damages; and not having then done so, it was a waiver of the claim, and a submission to the decree of restitution and costs only. It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the Legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses. We have already had occasion to advert to this subject in the cases of *The Santa Maria* (10 Wheat. Rep., 431); *The Palmyra* (10 Wheat. Rep., 502); *Chace v. Vasquez* (11 Wheat. Rep., 429). We wish it now to be understood by the bar, as the settled practice of this court, that wherever damages are claimed by the libelant or the claimant in the original proceedings, if a decree for restitution and costs only passes, it is a virtual *denial of [**319** damages; and the party will be deemed to have waived the claim for damages, unless he then interposes an appeal, or cross appeal, to sustain that claim.

As to the costs and expenses, we perceive no error in the allowance of them in the Circuit Court. They are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court. And, besides, it may be added that no appeal lies from a mere decree respecting costs and expenses.

The decree of the Circuit Court is therefore affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, without costs, for the libelants.

Cited—17 How., 585; 5 Wall., 412; 12 Wall., 135; 4 Otto, 599; 10 Otto, 113; 14 Otto, 774, 792; 2 Wood. & M., 70; Abb. Adm., 390; 2 Cliff., 551; Olcott, 378; 2 Curt., 12, 27, 148; McAl., 93; 2 Biss., 292.

320*] *DANIEL STRINGER, PHILIP M. LINGER, NICHOLAS, MARGARET AND JOSEPH LINGER, *Plaintiffs in Error.*

v.

THE LESSEE OF JOHN YOUNG, ARCHIBALD M'CALL, MARY CADWALLADER, WILLIAM REED AND ANNE, HIS WIFE, AND HARRIET M'CALL.

Ejectment—evidence—Virginia land law—record—deputy-surveyor—issue of patent—fraud—division of county between entry and survey—misnomer of county.

On a trial in ejectment, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants, within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove by a witness that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce as evidence official copies of entries made by other and third persons since the date of the plaintiffs' grant; for the purpose of proving a general opinion, that the land contained in the plaintiffs' survey, made under the order of the court, after the commencement of the suit, were vacant at the date of such entries; and to disprove notice to him of the identity of plaintiffs' claim, when he made the entries under which he claimed. This evidence was unquestionably irrelevant. [337]

Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry. [337]

The admission of evidence which was irrelevant, but which was not objected to, will not authorize the admission of other irrelevant evidence offered to rebut the same, when the same is objected to. [337]

The land law of Virginia directs that, within three months after a survey is made, the surveyor shall enter the plat and certificate thereof in a book, well bound, to be provided by the court of his county, at the county charge. After prescribing this, among other duties, the law proceeds to enact that any surveyor failing in the duties aforesaid shall be liable to be indicted. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded. [338]

The chief surveyor appoints deputies at his will; and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself, to the register of the land-office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual or irregular, cannot affect the grant. [340]

Objections which are properly overruled, when urged against a legal title in support of an equity dependent entirely on a survey of land for which a patent has been issued, can have no weight when urged against a patent regularly issued in all the forms of law. [340]

In Virginia, the patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud. Not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned. [340]

321*] *It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy, and that the defendants were at liberty to resist the testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal. The court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a

regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted. [342]

The warrant for the land in controversy was entered with the surveyor of Monongalia County on the 7th of April, 1784. At the May session of that year, the General Assembly of Virginia divided the County of Monongalia, and erected a new county, to take effect in July, by the name of Harrison. The land on which the plaintiffs' warrant was entered laid in the new county. The certificate of survey is dated in December, 1784, and in accordance with the entry, states the land to be in Monongalia.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location specially and precisely. It also directs despatch in the survey of all lands entered in the office. No provision is made for the division of a county between the entry and the survey. The act establishing the County of Harrison, does not direct that the surveyor of Monongalia County shall furnish the surveyor of Harrison with copies of the entries of lands which lay in the new county, and with the warrants on which they were made. In this state of things, the survey of the land in controversy was made by the surveyor of Monongalia; the plat and certificate on which the patent was afterwards issued were transmitted to the land-office, and the patent described the land as in Monongalia County. No change was made in the law until 1788. This will not annul the patent, or deprive the unoffending patentee of his property. [343]

The misnomer of a county, in a patent for land, will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent on which the misnomer is found is not absolutely void. [344]

ERROR to the District Court of the Western District of Virginia.

This was an ejectment brought by the defendants, against the plaintiffs in error, in the District Court of the United States for the Western District of Virginia, exercising circuit court powers, for the recovery of a tract of four thousand acres of land in the said district, being a tract lying in the north-east corner of a large connection of surveys made together, owned by Reed and Ford, the said Youngs, Thomas Lardley, and others; some in one name and some in others, as appearing by the surveyor's diagram. There was a *verdict* [*322] dict and judgment for the plaintiffs, which this writ of error is brought to reverse.

During the trial the counsel of the defendants tendered three bills of exceptions to opinions of the court, which are signed, sealed, and made part of the record, and which are substantially as follows:

The first bill of exceptions states that the plaintiffs below, on the trial of the case before the District Court, introduced a grant for the lands claimed, which grant is described in the third bill of exceptions, and the plat and report of the surveyor made in the cause.

That the plaintiffs also offered in evidence a number of entries of recent date, made by the defendant, Stringer, within the bounds of the said land, as designated on said report, as John Young's four thousand acres, being the land claimed by the plaintiffs, and attempted to prove by a witness that Stringer, when he made those entries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered as evidence official copies of entries made by others and third persons, since the date of the plaintiffs' grant, for the purpose of proving a general opinion that the lands claimed were vacant at the date of the said

entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim when he made the entries under which the defendants claim to hold. The court decided this evidence to be inadmissible, to which the defendants excepted.

The second bill of exceptions, after setting out the plaintiffs' grant, states that the defendants then offered in evidence the surveyor's book of Monongalia County, to prove no such survey had ever been returned to the office of said surveyor, and recorded in the books of the said surveyor; and further offered to introduce evidence to prove that Henry Fink, the deputy upon whose survey the grant purports to have issued, resided at the date of the said survey in Harrison County, and was not then a deputy surveyor of Monongalia County. The defendants offered the said evidence to prove that no survey had ever been made, and that the register issued the grant without proper authority; on which *account the same was void. The plaintiffs objected to this evidence as inadmissible for the purpose stated; and the court rejected it as such. The defendants' counsel then offered the same evidence to disprove the identity of the land contained in the plaintiffs' grant with that now claimed by the plaintiffs, and represented by the surveyor's report, as contained by the blue lines thereon, and thereon designated by the Roman numeral V. The court also rejected the said evidence for the last-mentioned purpose, and the defendants excepted.

The third bill of exceptions states that the plaintiffs, on the trial of the cause, introduced a grant in the words and figures following, setting it forth at large. The grant is issued to John Young, the lessor, and dated the 10th of June, 1786, for four thousand acres, the premises in question; bounded as follows, to wit: describing it by metes and bounds.

The defendants thereupon offered in evidence a certified copy of an Act of Assembly of Virginia, establishing the County of Harrison, and a copy of the certificate of the survey on which the plaintiffs' said grant issued, dated December 13th, 1824, after the act for creating the County of Harrison was in operation; and proved that the land purporting to be granted, and the land claimed as having been surveyed, lay in the bounds of the County of Harrison; and, upon this evidence, the counsel moved the court to instruct the jury that, if they were satisfied from the testimony that the lands lay in a different county from that in which the survey imports to have been made, then the grant was void at law; and that it was not competent for the plaintiffs to contradict the call for the county in the grant. But the court delivered its opinion that the foregoing facts, if true, should not avail the defendants in the present action, as the grant was not void; to which opinion the third bill of exceptions is taken.

The case was argued by *Mr. Smyth*, for the plaintiffs in error, and by *Mr. Doddridge*, for the defendants.

For the plaintiffs, on the first bill of exceptions [*324*] it was contended *that the court admitted illegal evidence offered by the plaintiffs below and stated in the bill, to go to the jury. That the court rejected evidence offered by the defendants below, which was proper to

counteract the said evidence offered by the plaintiffs.

On the second bill of exceptions, it was argued that the evidence offered was legal, and should have been admitted to the jury.

On the third bill of exceptions, the counsel for the plaintiffs contended that the court should have instructed the jury that the plaintiffs' grant was not evidence to support their claim to the land in controversy. That the court should have instructed the jury that if they were satisfied, from the testimony, that the lands lay in a different county from that in which the survey purports to have been made, that the grant was void. That the court should have instructed the jury that the plaintiffs could not, by parol evidence, contradict the call for the county in their grant. That the court erred in giving no instruction on that point, although required so to do by the defendants; and on the whole record, the plaintiffs in error contended that this court should have decided that the grant under which the plaintiffs claimed was void. That the instruction of the judge to the jury that it is no objection to the plaintiffs' grant that the survey was made by a surveyor of Monongalia, in the County of Harrison, is erroneous. That the court erred in admitting hearsay evidence to identify corners and establish boundaries of the lands claimed by the plaintiffs; and that the verdict is contrary to evidence; and, therefore, the court should have ordered a new trial.

Smyth, for the plaintiffs in error, argued that the court admitted the plaintiff below to introduce illegal evidence, as stated in the first bill of exceptions.

They produced copies of a number of entries of recent date, made by Stringer, one of the defendants below, within the bounds described in the surveyor's report; and attempted to prove by a witness that when those entries were made, the said Stringer had heard of the claim of the plaintiffs. This *was an attempt [*325*] to deprive an individual of the right to enter vacant land, because he has heard that another has a claim to it. Has there not been an attempt, sanctioned by the court, to lead the jury to believe that having heard that another had a claim to the land, the defendants had no right to locate it, although it might be vacant? Has there not been an attempt to lead the jury to believe that the law of purchaser with, or without notice, had some bearing on the cause? The doctrine of notice has no application to purchasers from the government. If the plaintiffs' grant gave no title, notice to Stringer would not make it good against him. Suppose that Stringer and some other person had made entries on the same day, Stringer having heard of Young's claim, the other not having heard of it; will it be contended that the one could, and the other could not, obtain a right? What had the plaintiff to do with these entries of the defendants? They could not stand in the way of the claim of the plaintiffs, if they had a grant for the land. The tendency of this evidence, if not the object of producing it, was to perplex and mislead the jury, and excite a prejudice against the defendant Stringer. And the law is that "illegal or improper evidence, however unimportant it may be to the case,

ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them; and if it should have none, it is useless, and may at least produce perplexity." (2 Wash., 281.)

The court erred in rejecting evidence offered by the defendants, which was proper to rebut the said evidence offered by the plaintiffs.

The illegality of Young's evidence we admit; but as the court received it, thereupon it became necessary and proper to counteract it. Copies of entries, if evidence for the one party, were evidence for the other; and a general reputation that the land was vacant, was persuasive evidence that Stringer had no notice of Young's claim, and believed the land to be vacant. This evidence was important to remove prejudice; and refusing to receive it secured the effect of the plaintiffs' illegal evidence.

326*] *The evidence stated in the second bill of exceptions should have been left to the jury.

The evidence offered was the book of the surveyor of Monongalia, and testimony that Henry Fink, who made the survey, was not a deputy of the surveyor of Monongalia in December, 1784, when the plaintiffs' survey was made. You cannot, in a court of law, go into the consideration of a deed; but you may avoid it by proving fraud in the execution. If there was no survey, or only a survey by Henry Fink, as deputy-surveyor of Monongalia, when in fact he was not so, the signature of the governor was obtained by fraud. There is fraud in the execution of the deed, which may be shown in a court of law; so this evidence should, for that purpose, have been permitted to go to the jury.

The plaintiffs below were to identify their land; their grant called for land in Monongalia, and their survey was made by Henry Fink, as deputy-surveyor of Monongalia; the surveyor's book was offered to disprove the identity of the land; the judge refused to receive the book as evidence, no matter what it proved. It never was heard before that the survey was not evidence on the question of identity. And if the survey is evidence, the surveyor's book is evidence. The grant calls for a corner to the lands entered by George Jackson. The book might show where those lie. The book might prove that the survey began on the head of the Gladly Fork, of Stone Coal Creek, and extended down it. The land claimed includes the right-hand fork of Stone Coal, below the mouth of the Gladly Fork, and does not include the mouth of the Gladly Fork which is a branch of the right-hand fork. The grant does not say, as the survey does, "beginning at the head of the Gladly Fork of Stone Coal Creek." Hence the necessity of exhibiting the survey; because it contains evidence of the locality not in the grant. If the surveyor's book was legal evidence, it should have been left to the jury whether offered for one purpose or another; but it was rejected by the court.

On the question of identity, the copy of an entry is evidence. (5 Wheat., 359, 362.)

327*] *The court should have instructed the jury that the plaintiffs' grant was not evidence to support their claim.

The defendants produced the Act of Assembly

which established Harrison County on the 20th of July, 1784; a copy of the plaintiffs' survey, dated December 13th, 1784, signed Henry Fink, assistant to S. Hanway, S. M. C.; and proved that the lands in controversy lay in Harrison at the date of the survey. The court instructed the jury that if the facts were so, it could not avail the defendants in this action; and that the grant was not void. If we admit, for the sake of argument, that the grant is not void, it can take no lands elsewhere than in Monongalia. And however land in another county may seem to suit the description, they cannot be the granted lands. The grant is no evidence of title to lands in Lewis, a county formed from Harrison. The jury should have been instructed that the grant was no evidence of title to land which lay in Harrison at the date of the survey. The commonwealth has granted lands in Monongalia. If you cannot find them there, you can find them nowhere else. Can a grant for lands in the County of Brooke pass lands lying in the County of Princess Anne? A party must identify the land according to the call of his grant. If he calls for crossing James River, he must cross James River. Is not the call for the county the most important of all calls?

Should it be contended that the surveyor of Monongalia might survey, in Harrison, lands entered in Monongalia before Harrison County was formed, it is answered, this was never authorized; and in this act the sheriff of Monongalia is specially authorized to complete his business in Harrison; but no such authority is given to the surveyor.

The court should have instructed the jury that the plaintiffs could not, by parol evidence, contradict the call for the county in the grant under which they claim.

There is no latent ambiguity. (In *Dowlie's* case, 3 Coke's Rep., 9, 10), the grant was held void because the parish was wrong named. But if parol evidence could have been offered to contradict the call for the name of the parish, the grant would have been made good. A grant in the county of S. will not pass what lies in the county of D. (3 Bac. *Abr., [*328 389.) But if parol evidence could have been received to contradict the call for the county, the grant would have been made good. A grant to one, as a knight, when he is an esquire, has been held void. But this would have been remedied, had parol evidence been admissible.

Parol evidence is admissible to vary or contradict the grant. (2 Cranch, 29.) The name Hosmer in a grant, cannot be proved by parol to be Houseman. (12 Johns., 77.) In the appendix to Potlier on Obligations, the law is thus laid down (Vol. II., p. 210): "But where there is an existing subject, to which a description may be properly applied, parol evidence cannot be allowed that a different subject was intended." Here there is an existing subject, the County of Monongalia, to which the description, lying in the County of Monongalia, may be applied.

The court was asked to instruct the jury "that it is not competent to the plaintiffs to contradict by parol the call for the county in his grant," and gave no instruction on that point. The court, when asked for an instruction, are bound to give the instruction asked

for, or another on the same point. (2 Wash., 272, 273.)

The court should have decided that the grant under which the plaintiffs claimed was void.

It is contended that a grant is void if there is an insufficient or false description; or if it has been obtained on a false suggestion; or if it has been obtained by fraud; or if it has been obtained against the rules of the land-office. And that in all these cases, if the objection appears on the face of the grant, or if it judicially appears, the grant is void in a court of law.

As to an insufficient or false description. If lands are described as lying in a wrong parish, the grant is void. (Cited, 3 Bac. Abr., 388; 2 Co. Rep., 10; 2 Mod., 3, 4; Anderson, 148; 4 Cruise Dig., 225.)

It is, therefore, contended that this grant is void, for an insufficient and false description. And it always was within the jurisdiction of a court of law to declare that for such a defect, a grant or any other deed of conveyance was void. (See 14 Vin. Abr., 100; 2 Co. Rep., 33; Hobart, 171.)

329* It has been decided that to omit the name of the county will not vitiate the grant, if there is otherwise a sufficient description of the land. But to give the name of the county, and give it falsely, is a defect that never was excused. (5 Mumf., 520.) Let us consider the consequences to which the false description in the grant in question would lead. One searches the records of Harrison and the books of the commissioners of the revenue; he finds no notice of any such grant; he searches the office of the surveyor of Harrison and Monongalia; he finds no survey recorded.

Recording a deed in a wrong county is a fatal objection, when urged by a purchaser without notice. So, after the district of Zanesville was formed from that of Marietta, the lands in Zanesville district could not be purchased at the office of Marietta. If lands ought to be conveyed by a deed recorded in the proper county, so they ought to be granted in the proper county. (4 Wheat., 478, 479; 5 Cranch, 92; 1 Wash. C. C. Rep., 322.)

Of the false suggestion. The commonwealth's grant issues on the suggestion of the grantee, and on evidence offered by him, true or false, that he has complied with the law. A grant on a false suggestion is void. The king being deceived, his grant is void. He should be truly informed. If the suggestion is false of the parties' knowledge, the grant is void. (5 Bac. Ab., 602; 10 Co. Rep., 112; 1 Co. Rep., 46, 52; Skinn., 656; 5 Co., 94, 113; Yelv., 48.) "Lying in Monongalia," is the suggestion of the grantee, and it is false. The grant is notice to all men that the grantee does not claim lands in Harrison. The commonwealth is deceived, and every citizen is deceived who may see this grant, and locate the lands claimed in Harrison.

The king's grant can do no wrong; rather than do wrong, it is void; where it would do wrong, it is void. (1 Co. Rep., 44; Shep. Abr., 91.) Here fees are due to the surveyor of Harrison County and the college. The grant is issued on a survey made by a man falsely pretending to be a deputy-surveyor of Monongalia; the surveyor of Harrison is certainly defrauded.

The grant has been obtained by fraud. The

register had *no authority to issue a [***330** grant for lands in Harrison. In this way all the vacant land in Harrison might have been surveyed as in Monongalia, and granted as in Monongalia, and thus the surveyor of Harrison be defrauded of his fees. They are a part of the consideration; a portion of them is appropriated to the college. The governor supposed that the surveyor's fees were paid. The commonwealth is interested that her officers shall receive their dues, and that the college shall receive the fund appropriated for the support of education. (5 Wheat., 293, 303; 5 Mumf., 522.)

A grant fraudulently obtained is void. In the case of *Huidekōoper's Lessee v. Burrus*, Judge Washington decided that a patent for land is only *prima facie* evidence of title; but if the previous steps for vesting a title be not performed, proof of such omission will defeat the same. (5 Harris & Johns., 223; 1 Wash. C. C. Rep., 109; 1 Harris & Johns., 370; 2 Harris & Johns., 456, 458; 1 Hen. & Mumf., 306, 307.)

Perhaps it will be said that, although the grant might have been repealed by petition in chancery, yet it is good in a court of law. It is contended that the statutory provision of Virginia for repealing grants does not affect the authority of the common law courts to declare grants void. It is a new remedy in some cases; in others it is conclusive; in others it does not apply; and this is one of those latter cases. There is no law by which this grant may be repealed: for he who would repeal a grant, must have a prior equitable claim. We are taught that for every wrong there is a remedy; but there is no remedy for this wrong, unless a court of law may adjudge this grant void. Might one have taken all the good lands in the County of Cabel by plats fabricated, purporting to have been made by the surveyor of Henrico, had them granted as lands lying in Henrico, sold them as lands lying in Henrico; and have the title adjudged good because there was no prior equitable claimant to ask for a repeal of the grant?

The providing of a remedy by the repeal of patents, obtained regularly and without fraud, in favor of a prior equitable claimant, did not take away the power of courts of law to adjudge grants void for insufficiency or fraud. The *English courts of law declare [***331** grants and other deeds void on trials of writs of right and ejectments. Virginia has adopted the common law of England. Where is the Act of Assembly that takes this power from her common law courts?

The law which avoids a grant, is the same in Virginia as in England. Judge Blackstone says a patent is void in a court of law if the cause appears on its face. (2 Black., 348.) Judge Roane says the same thing. (1 Mumf., 141.) Is it required that the falsehood and the truth shall both appear on the face of the grant? Certainly no. The falsehood appears on the face of the grant; the truth appears by the evidence in the cause; and then the grant is adjudged void. In this case the truth appears by the record, and that which avoids the grant, appears on its face. It calls for lands in Monongalia. If the land claimed is identified in Harrison, that circumstance renders the grant void; for on its face, it appears that the

land was surveyed after Harrison became a county.

When it appears judicially that the king is deceived, his grant is void. (Skin., 659; 6 Mumf., 120.)

It is not necessary to repeal a grant, unless that grant, unrepealed, confers a title: but this grant confers no title to land in Harrison, therefore it is unnecessary to repeal it.

With regard to deeds, a distinction has been taken that you cannot, in a court of law, invalidate them by proving a fraud in the consideration; but that you may prove a fraud in the execution. Here we say the execution was obtained by fraud. The governor was, by falsehood, induced to execute the grant. Would he have signed it had he been truly informed? Certainly not.

It has been decided in Virginia, in a similar case, that a grant might be declared void in a court of law; and that decision has never been declared not to be law. (*Hambledon v. Wells.*)

Mr. Doddridge, for the defendant in error. The matters alleged in the first bill of exceptions are wholly unimportant. The testimony offered and rejected, was not receivable for any purpose. The plaintiffs stood on the oldest grant, or the only grant appearing in the cause; **332*** and in such a case, besides *the formalities affirmed by the common rule, the only question between the parties was that of identity, and neither for this nor for any other purpose were they permitted to look behind the grant. This will hereafter be proved, when considering the questions raised by the second and third bills of exceptions. The evidence offered and given by the plaintiffs, except the grant and surveyor's report, was unnecessary; as he had nothing to do with the conscience of Stringer. Perhaps it might be admitted that this testimony was improper, yet it was not objected to. But the testimony offered by the defendants and rejected, was improper in every view. It was offered to prove a general belief that the bond was vacant; a fact which, if admitted, could avail them nothing.

The questions raised by the second bill of exceptions are:

1. Whether a defendant, when a legal grant for the land claimed, and the official survey on which it is founded, are given in evidence against him, can avoid the grant by showing by the book of surveys that the survey was not recorded; and by parol proof that the deputy was not the deputy of the surveyor certifying the plat, but of another surveyor.

2. Whether the defendant can offer the same evidence to disprove the identity of the land.

The question raised by the third bill of exceptions was this: The official plot and certificate of survey is dated the 13th of December, 1784; and the plaintiffs' grant thereon the 10th June, 1786. The County of Harrison was created the 3d of May, 1784. The law commenced in force the 20th of July, 1784. So that, when the survey bears date, the County of Harrison was in being, and the land in fact was in that county; and the question is, ought the court to have instructed the jury that, if they found these facts, the grant was void at law, and the plaintiffs could not disprove the descriptive call, "Monongalia County," in the survey and the grant?

Peters 3.

The questions raised by the second and third bills of exceptions may be considered together.

1. The first position is, that the parties can go behind the grant for nothing in an action at law, because evidence before the grant would take the party by surprise; and because, the grant is, *ipso facto*, an appropriation, and the *question to be determined is the identity of the thing granted. Again, in the case of a land office warrant, in Virginia, the entry is, and the survey is not, an inceptive appropriation. The title is transferred by the grant, towards obtaining which the survey is but a progressive step. Even the entry cannot be brought before the court. (*Wilson v. Mason*, 1 Cranch, 45, 101; *Johnston v. Brown*, 3 Call, 359, 268; *McArthur v. Browder*, 4 Wheat., 488, 491; *Finley v. Williams*, 9 Cranch, 164, 167.)

In the case of a military warrant under the colonial government it was otherwise. There was no entry, and, of course, the survey was an inceptive act of appropriation. (*Taylor v. Brown*, 5 Cranch, 234, 241.)

It follows that the warrant in the latter case, without any other act, conferred on the surveyor an authority to survey; whereas, under the land law of Virginia, of May Session, 1779, ch. 13, the warrant must be lodged with the surveyor, and the party must make an entry on the land he selects. This entry, alone, confers on the surveyor the authority to survey; and his certificate of survey proves as well that the possession of the warrants were necessary, as the entry under which he surveys; as under the military warrant it proved the possession of the warrant. That is, it proves the existence of the authority by which it was made. (*Taylor v. Brown*, 5 Cranch, 234, 241.)

1. The whole duty of a surveyor, in relation to a survey and recording it, is prescribed by the Act of 1779, ch. 13., 10 Hen., S. L., page 57.

These duties are again prescribed in 1784, by an act reducing into one the several acts concerning surveyors (10 Hen., S. L., page 352); but by the latter act these duties are not varied. These laws require the surveyor to run, and plainly mark and bound the survey, except where the same is bounded by water-courses, the lines of surveys before made. They require him, in his certificate, to note the boundaries, courses, and distances, variation from the true meridian, and to set down the names of adjoining owners, and of the hundreds, where any are established; and to observe a due proportion between length and breadth. The *law does not expressly **334** require the county to be named, but it is admitted that it does so impliedly.

Yet, as a survey is a progressive step, and those duties merely directory, it has been holden that the name of the owner of the survey itself may be mistaken in the certificate and grant, and both contradicted by parol testimony; as where the survey imported to be made for one Vineyard, it was allowed to be proved that, in fact, it was made for one Unrod. (*Johnston v. Buffington*, 1 Wash., 116.)

That the duties imposed on the surveyor are directory, and the omission to perform them does not affect the right of the party, is settled by this court in *Craig v. Rudford* (3 Wheat., 594), and several other cases.

3. The name of the county is matter of general description, and although a surveyor ought to state it truly, yet if he does not, the name of the county may as well be corrected by evidence as the name of the owner. If he misstate it, he fails in his duty; but this shall not injure the party.

In a grant, a description that will identify the land is all that is necessary. (*M'Arthur v. Browder*, before quoted.) If even a location have certain material calls sufficient to support it, and to describe the lands, other calls less material and incompatible with the essential calls may be disregarded. (*Taylor v. Brown*, 5 Cranch, 234, 241.) Now, water-courses are natural, material, permanent and essential calls; while the lines of a county are immaterial and artificial ones.

4. The omission of the name of the county does not vitiate a grant, which proves this description immaterial. (*M'Lean v. Tomlinson*, 5 Mumf., 220, 223.)

The patent in that case, on its face, purports to have issued on a certificate of survey bearing date the 14th of July, 1773; on warrants of a subsequent date in that and the next year, and the name of the county is left blank. The court decided the omission to be immaterial, the patent containing other sufficient descriptions, as "at the round bottom" "on the Ohio," &c., &c.

The history of that title is as follows: General Washington procured a deputy-surveyor of **335***] West Augusta to make a private survey for him in 1773. He possessed the field notes, and afterwards purchased warrants to cover it of a date subsequent to his private survey. In October, 1776, the counties of Monongalia, Ohio and Yohogania, were formed out of West Augusta. (See Hen., S. L., Vol. IX., 262, 269.) The law creating these counties took effect the 8th of November, 1777; 263. After this period, the surveyor of West Augusta ceased to be surveyor of either of those counties; yet, on these private field notes, and of the acquired warrants, he returned a plat and certificate of survey; but not knowing into which of those new counties the land fell, he left the name blank.

Here the survey was made without any authority whatever; the special verdict having found the true date of the survey and warrants, and all this appearing on the face of the grant, and yet it was sustained as valid at law.

5. But if it were granted that the surveyor's book of surveys could be produced for any purpose, it would follow, of course, and, *a fortiori*, that the book of entries could also be produced; which would be contrary to the decisions of this court and of the courts of Kentucky. If parties in another county were supposed to be ready to do this, then the real fact would appear that the entries were made in Monongalia, while Harrison was part of that county, and remained unsurveyed at the time of the separation.

The date of the entry does not appear from the patent, and the true date of the survey does not appear in the case otherwise than by the certificate. This date should be controlled by the certificate that the lands are in Monongalia County, which they could not be at the date of the certificate. Or if the court would not

sustain the position, then this court have already decided that the official certificate of a survey proves the authority by which the same was made, and therefore proves a good and valid entry made in Monongalia before the separation of the counties, and at that time remaining unsurveyed.

If it is contended that this entry ought to have been certified to the surveyor of the new county, the law on the subject is misunderstood. Prior to the act of October Session, *17th, ch. 51, there was no provision [**336** for so certifying an entry. (See 12 Hen., S. L., 709.) The preamble puts the matter beyond dispute.

An unsurveyed entry remains subject to forfeiture if not surveyed in time, and all the duties and responsibilities attached to that surveyor with whom the entry was made. Should he have stated the lands to have been in Harrison County at the time of survey? If so, he has made a mistake. Ought he to have recorded the survey, and did he fail to do so? Then he has, in both cases, failed in the discharge of a directory duty, merely; by which the right of the party is not impaired.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This was an ejectment brought in the Court of the United States for the Western District of Virginia. The jury found a verdict for the plaintiffs, on which the judgment of the court was rendered, which judgment has been brought to this court by writ of error. At the trial, three bills of exception were taken to opinions given by the court to the jury, and the cause depends on the correctness of these opinions. The first bill of exceptions is in substance; the plaintiffs at the trial of this cause produced a grant (setting it forth in words and figures therein). This grant is issued to John Young, dated the 10th of June, 1786, for four thousand acres, bounded as follows: Beginning at a black oak corner to land entered by George Jackson, and running thence N. 3° W. 1,001 poles, crossing waters of Stone Coal Creek to a beech, thence N. 80° E. 641 poles, crossing a branch of said creek to a white oak S. 3° E. 1,001 poles, by lands surveyed for Thomas Laidley, to a white oak, and thence S. 80° W. 660 poles, crossing waters by lands of said waters to the beginning. Also the plat and report of the surveyor, Thomas Haymond, made in this cause, in pursuance of an order, &c. The plaintiff also offered in evidence a number of entries of recent date, made by the defendant, Stringer, within the bounds of the tract of land designated on said report as John Young's four thousand acres, being the land claimed by the plaintiffs; and attempted to prove by a witness that Young, when he made said en- [**337** tries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered to introduce as evidence official copies of entries made by other and third persons, since the date of the plaintiffs' grant, for the purpose of proving a general opinion that the lands contained in the report and diagram of the surveyor, made in this cause, were vacant at the date of such entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim when he made the entries under which

the defendants claim; but the court declared its opinion to be that the said evidence was inadmissible, and rejected the same.

The testimony offered by the defendants was unquestionably irrelevant. Entries made subsequent to the plaintiffs' grant, whatever might be the impression under which they were made, could not possibly effect the title, and were, therefore, clearly inadmissible. This principle has never been controverted; but the plaintiffs in error insist that they had a right to introduce this testimony, in order to rebut other equally irrelevant testimony which had been offered by the plaintiffs in ejectment. This testimony was the recent entries made by Stringer, and the witness who proved that at the time of making them, he had no notice of the plaintiffs claim. This testimony was undoubtedly irrelevant, and had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error. The defendant, however, has not taken this course; but has chosen to repel the testimony by other evidence, which was clearly inadmissible. Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion. It is unnecessary, because the testimony rejected by the court is not of this character. Entries **338*** made subsequent to the plaintiffs' grant by others, can have no tendency to disprove the evidence of notice by the defendant when its entries were made.

The second bill of exceptions is in these words: Upon the trial of this cause, the plaintiffs, in support of the issue on their part, introduced a grant to the lessor of the plaintiffs in the words and figures following: "Patrick Henry, &c." The defendants thereupon offered to introduce the surveyor's book of Monongalia County, to prove no such survey had ever been returned to the office of said surveyor, and recorded in the book of said office; and further, offered to introduce evidence that Henry Fink, the deputy upon whose survey said grant purports to have issued, resided at the date of the said survey in Harrison County, and was not a deputy-surveyor of Monongalia County. The defendants offered said evidence to prove the said grant issued without any survey having been made, and that the register of the land-office issued said grant without proper authority, and that the same was therefore void. To the giving of which evidence the plaintiffs, by their counsel, objected, and the court declared its opinion to be that such evidence could not be given for the purposes aforesaid, and rejected the same. Whereupon the defendants, by their counsel, offered the same evidence to disprove the identity of the land contained in the plaintiffs' grant with that now claimed by the plaintiffs, and represented by the figure in the said surveyor's report. But the court declared its opinion to be that the said evidence ought not to be received for the last-mentioned purpose.

port. But the court declared its opinion to be that the said evidence ought not to be received for the last-mentioned purpose.

In rejecting this testimony, the court decided that the nonappearance of the survey on which the grant of the plaintiffs had been issued on the book of the surveyor of Monongalia County, where it ought to have been recorded, and the fact that the person who made the survey was not at the time a deputy-surveyor of Monongalia County, could not avoid the patent; and that the evidence of those facts was consequently inadmissible.

The land law of Virginia directs that within three months after a survey is made, the surveyor shall enter the plat and ***certifi- [339]** cate thereof in a book, well bound, to be provided by the court of his county, at the county charge. After prescribing this among other duties, the law proceeds to enact that any surveyor failing in any of the duties aforesaid, shall be liable to be indicted, &c. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded.

The act also directs that the surveyor "shall, as soon as it can conveniently be done, and within three months at the farthest after making the survey, deliver to his employer or his order, a fair and true plat and certificate of such survey," &c. This plat and certificate is to be returned into the land-office within twelve months at farthest. It may be returned immediately, and consequently may be returned to the land-office before the expiration of the three months allowed to the surveyor for recording it in his book. This plat and certificate of survey is an authority to the register to issue a patent.

The surveyor undoubtedly neglects his duty if he fails to record the plat and certificate of survey, and is punishable for this neglect; but the act furnishes no foundation for the opinion that the validity of the survey or of the patent is in any degree affected by it.

This point occurred in the case of *Taylor v. Brown* (2 Cranch, 234). That was a suit in chancery, brought by a junior patentee to establish an elder equitable title against the elder patent. Both claimed under old military surveys, made in virtue of military warrants, granted for service under the regal government, an entry of which with the surveyor was not required by law; consequently the survey was the foundation of a title to be asserted in a court of equity, against a title which was valid at law. The omission of any circumstance affecting his title was not, as in this case, cured by the patent.

In answer to the objection that the survey was not recorded within the time prescribed by the Act of 1748, which contains a similar provision to that which is found in the present land law, the court said: "This section is merely directory to the surveyor. It does not make the validity of the survey ***de- [340]** pendent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey; and it would be unreasonable to deprive him of that title, by the subsequent neglect of an officer not appointed

by himself, in not performing an act which the law does not pronounce necessary to his title, the performance of which he has not the means of coercing." We adhere to this opinion.

The circumstance that Fink, who is stated not to have resided at the time in Monongalia nor to have been a deputy-surveyor of that county, has also been considered as vitiating the patent.

The chief surveyor appoints deputies at his will, and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself to the register of the land-office. He recognizes the actual surveyor as his deputy, in that particular transaction; and this, if it be unusual or irregular, cannot effect the grant. This point also appears to have been substantially decided in the case of *Taylor v. Brown*. In that case Taylor's survey was made by Hancock Taylor, who was killed by Indians, so that he never returned the plat and certificate of survey to William Preston, the principal surveyor, as was required by law. His field notes, however, were brought to the principal surveyor, who made out a plat and certificate of survey from them. To the objection that the plat and certificate not having been returned to the office, the survey was not completed, the court answered, "this survey, then, is in law language made by William Preston. It is confirmed as a survey made by him. The law recognizes it as his survey. Assuredly, then, his certificate may authenticate it."

It cannot escape observation that if these objections were properly overruled when urged in support of the legal title, against an equity dependent entirely on the survey, they can have no weight when urged against the validity of a patent which has been regularly issued in all the forms of law.

In Virginia, the patent is the completion of **341***] title, and establishes *the performance of every prerequisite. No inquiry into the regularity of those preliminary measures which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud; not legal and technical, but actual and positive, fraud in fact, committed by the person who obtained it; and even this is questioned.

In *Hambledon et al. v. Wells*, reported in a note in 1 Hen. & Mun., 307, the defendants in ejectment in the District Court offered evidence to prove that the grant under which the lessor claimed, was defective in several prerequisites to a patent. The Court of Appeals overruled these objections; but determined "that the District Court erred in not permitting the appellants to give evidence that the appellee procured the plat on which the patent was obtained to be returned to the office, knowing that an actual survey had not been made." In this case the objectionable act was a fraud, knowingly committed by the patentee himself. Even this case has been questioned; though not, as far as is known, expressly overruled.

In *Witherington v. McDonald* (1 Hen. & Mun., 306), the defendant in ejectment offered evidence to show that the survey upon which the plaintiff's patent was founded was illegal; and also that the patent was obtained upon a certificate signed by Charles Lewis, as clerk of

the land-office, instead of being signed by the register or his deputy, as is required by law. The defendant excepted to the opinion of the court rejecting this testimony, and appealed to the Court of Appeals. The judgment was unanimously affirmed in that court. In the course of the trial, the case of *Hambledon v. Wells* was mentioned by several of the judges with disapprobation; and it was said that a single case decided by three judges against two, was not considered as conclusively settling the law.

The case of *Hoofnagle v. Anderson* (7 Wheat., 212) was a suit in chancery, brought to obtain a conveyance for a tract of land in the Virginia military reserve, in the State of Ohio, for which Anderson had obtained a patent. After its emanation, the plaintiff had located a military land warrant *on the same land, issued [***342** for services performed by an officer in the Virginia line, on continental establishment. The services performed by the officer on whose warrant Anderson's patent had been issued, were in the State line; though the warrant was expressed by mistake, to be for services in the continental line. This court said: "It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all whose rights did not commence previous to its emanation."

After the rejection of this testimony, when offered to defeat the patent, it was offered for the purpose of disproving that the land contained in the patent was the same land claimed in the suit. The court rejected it when offered for this purpose also.

It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy; and that the defendants were at liberty to meet this testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal.

Now, this court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted.

The third exception stated that the plaintiffs had offered in evidence a grant as set forth in the second bill of exceptions, &c. The defendants thereupon offered in evidence a certified copy of an Act of the Assembly of Virginia, establishing the County of Harrison in the words and figures following: "An act for dividing," &c., and a copy of the certificate of survey on which said grant issued, in the words and figures following: "December 13th, 1784," &c., and proved *that the land pur- [***343** ported to be granted, and the land claimed as having been surveyed, lay in the bounds of the County of Harrison, established as aforesaid; and, therefore, the defendants moved to instruct

the jury that if they are satisfied, from the testimony, that the land lay in a different county from that in which the survey purports to have been made, that the grant was void; and that it was not competent for the plaintiffs to contradict the call for the county in the patent and survey; but the court then and there declared its opinion to the jury, that if even the facts aforesaid were true, they could not avail the defendants in the present action, and that the grant under these circumstances would not be void.

The warrant was entered for the land in controversy with the surveyor of Monongalia County, on the 7th of April, 1784. At the May Session of that year the General Assembly divided the County of Monongalia, and created a new county, to take effect in July, by the name of Harrison. The land on which Young's warrant was entered lay in the new county. The certificate of survey is dated in December, 1784, and, in accordance with the entry, states the land to lay in Monongalia. The grant conforms with the certificate.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location thereof specially and precisely. It also enacts that "every chief surveyor shall proceed with all practicable dispatch to survey all lands entered for in his office." No provision is made for the division of a county between the entry and survey. The act establishing the County of Harrison does not direct that the surveyor of the County of Monongalia shall furnish the surveyor of the new county with copies of the entries of lands lying in Harrison, and with the warrants on which they were made. In this state of things the survey was made under the authority of the surveyor of Monongalia, and the plat and certificate on which the patent afterwards issued were transmitted to the land-office. It was not till the year 1788 that the Legislature passed an act on this subject, which directs that when any county shall be thereafter divided, the *surveyor of the new county shall be furnished with copies of the entries of all the surveyed lands lying in his county.

If, in this uncertain state of the law, the surveyor of Monongalia County has surveyed an entry properly made in his office for land which, by a subsequent division of the county, falls into Harrison, and has made his certificate as if the county still remained undivided; ought this error, if it be an error of the officer, to annul the patent, and deprive the unoffending patentee of his property?

The counsel for the plaintiffs in error has produced several cases to show that a mistake of this character in a royal grant, or any misinformation to the officers of the crown, will vitiate the instrument. We are not sure that grants which may be supposed to proceed from royal munificence are to be placed precisely on the same footing with grants which are the completion of a contract of sale, every preliminary step in which is taken by officers appointed for the purpose by government, who act without the control of the purchaser. After making his location, he may show the land located, but has nothing to do with the authority of the surveyor, or the language in which he may

make out his plat and certificate of survey. In this case there could have been no imposition attempted on the government by the purchaser. The mistake is accounted for, and there can be no imputation on the intrinsic fairness of the transaction. The misnomer of the county might take place, as has been suggested at the bar, in a case in which all the proceedings were perfectly regular. Had the survey been made the day before the law dividing the County of Monongalia took effect, the plat and certificate of the surveyor must have stated the land to be in Monongalia. The patent could not have issued until six months afterwards, and must have stated the lands to lie in Monongalia; although at the time of its emanation, they would, in fact, lie in Harrison. To say, in such a case, that the misnomer of the county could avoid the patent, would shock every sense of justice and of law too much to be maintained. This misnomer of the county, then, must admit of explanation; and if explanation can be received, the patent is not absolutely void.

*The circumstances on which the [*345 motion to reject the grant was made, might be very proper for the consideration of the jury, on the question whether it comprehended the land in controversy; but do not, we think, destroy its validity.

A vast deal of testimony, of which the court can take no notice, is crowded into this record.

The bills of exceptions taken to the opinions of the district judge present the only points which we are at liberty to consider. In those opinions there is, we think, no error. The judgment is affirmed with costs.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of West Virginia, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

Cited—6 Pet., 344-346.

*ALEXANDER FINLAY AND JOHN [*346 MITCHELL, *Plaintiffs in Error*,
v.
WILLIAM KING'S LESSEE.

Construction of a will—condition subsequent—trust.

The testator was seized of a very large real and personal estate in the States of Virginia, Kentucky, Ohio and Tennessee. After making, by his will, in addition to her dower, a very liberal provision for his wife, for her life, out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife and certain other bequests; his will declares: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel, his wife, lately Rachel

NOTE.—Conditions in Wills, precedent and subsequent.

See note to Taylor v. Mason, 9 Wheat., 325.

Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife to John Mitchell, and to their issue."

The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood, who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander McCall. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg.

BY THE COURT. We have found no case in which a general devise in words, importing a present interest in a will making no other disposition of the property, on a condition which may be performed at any time, have been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent. [377]

It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent: and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent. [374]

It is a general rule that a devise in words of the present time, as, "I give to A my lands in B," imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of [347*] the testator. It is also a general rule that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be, that a devise to A, on condition that he shall marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B at any time during his life. The condition is subsequent. [376]

The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance. [377]

As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction. [378]

The introductory clause in the will states: "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my wordly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life, is postponed until her death. [379]

Quere. Did William King take an estate which, in the events that have happened, enures to his own benefit; or is he, in the existing state of things, to be considered a trustee for the heirs of the testator? This question cannot be decided in this cause; it

belongs to a Court of Chancery, and will be determined when the heir shall bring a bill to enforce the execution of the trust. [383]

ERROR to the District Court of the United States for the Western District of Virginia.

This was an ejectment brought in the District Court of the Western District of Virginia, and the question involved in the suit was the construction to be given to the will of William King, deceased, formerly of Washington County, in Virginia.

The cause was argued in the court below on the following case agreed; and the judgment of that court being in favor of the defendant in error, the plaintiffs brought the case into this court.

The following is the case agreed:

We agree that William King departed this life on the 8th *day of October, 1808, [*348] having first duly made and published his last will and testament, which was afterwards admitted to record in the County Court of Washington County in Virginia, where he had resided, and is in the words and figures following:

"Meditating on the uncertainty of human life, I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my wordly estate in the manner following, to wit:

"To my beloved wife Mary, in addition to her legal dower of all my estate, the dwelling-house and other buildings on lot number ten in Abingdon, where I now reside, together with the garden, orchard, and that part of my fruit hill plantation south of the great road and lands adjacent to Abingdon, now rented to C. Finlay & Co., and at my father's decease, including those in his occupancy on the north side of the great road, for her natural life.

"I also will and declare that in case my beloved wife Mary hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal; excepting one-third part of specified legacies and appropriations hereinafter mentioned; which, in case of my having children, will reduce each legacy hereinafter mentioned to one-third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned in that case wholly void.

"In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg that will marry a child of my brother James King's or of sister Elizabeth's, wife to John Mitchell, and to their issue—and during the lifetime of my wife, it is my intention and request, that William Trigg, James King and her, do carry on my business in copartnership, both salt-works and merchandising, each equal *shares, and that in consideration of [*349] the use of my capital they pay out of the same the following legacies:

"To John Mitchell, on condition of his as-

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sisting and carrying on business with them at the usual salary as formerly, viz., \$1,000 per year, for from two to five years, as they may wish his assistance. An additional sum of \$10,000, payable five years after my decease, and to each of his children upon coming of age \$1,000 more than the general legacy hereafter mentioned.

"To Connally Finlay a like sum of \$10,000, payable in five years.

"To my nieces, Elizabeth Finlay and Elizabeth Mitchell (being called for my grandmother with whom I was brought up), \$10,000 in twelve months after marriage, provided they are then eighteen years of age; if not, at the age of eighteen; to each of my other nephews and nieces at the age of eighteen, that is, children of my brother James, sisters Nancy and Elizabeth, \$1,000 each—to each of the children of my half-brother Samuel and half-sister Hannah, \$300 each, as aforesaid; to my said sister Hannah, in two years after my decease, \$1,000; and to my said half-brother Samuel, in case of personal application to the manager at Saltville or to my executors in Abingdon, on the 1st day of January annually during his life \$150; if not called for on said day to be void for that year, and receipt to be personally given.

"It is my wish and request that my wife, William Trigg, and James King, or any two of them that shall concur in carrying on the business, should either join all the young men that may reside with me and be assisting me in my decease, that are worthy; or furnish them with four or five thousand dollars' worth of goods at a reasonable advance, on a credit of from three to five years, taking bonds with interest from one year after supply.

"In case my brother James should prefer continuing partnership with Charles S. Carson (in place of closing the business of King, Carson & King, as soon as legal and convenient), then my will is that William Trigg and my wife carry on the business, one-third of each **350**]* for their own *account, and the remaining third to be equally divided between the children of my brother James and sisters Nancy and Elizabeth.

"To my father, Thomas King, I leave during his life the houses he now resides in and occupies at Fruit Hill, together with that part of my land in said tract north of the great road that he chooses to farm, with what fruit he may want from the orchard; the spring-house being intended for a wash-house with the appurtenances, subject to the direction of my beloved wife Mary, as also the orchard, except as aforesaid. I also leave and bequeath to my father the sum of two hundred dollars per annum during his life, and if, accidentally, fire should destroy his Fincastle house and buildings, a further sum of two hundred dollars per annum while his income from there would cease.

"I also leave and bequeath to the Abingdon Academy the sum of \$10,000, payable to the trustees in the year 1816, or lands to that amount, to be vested in said academy with the interest or rents thereon forever.

"Abingdon, Virginia, 3d of March, 1806.

WILLIAM KING.

Test. WM. D. NEELSON,
JNO. DOHERTY.

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"I hereby appoint William Trigg of Abingdon and James King of Nashville executors of my last will and testament inclosed, written by my own hand and signed this 3d day of March, 1806.

WILLIAM KING.

"The other wills of previous dates to said 3d of March, 1806, being void.

WILLIAM KING.

We agree that William King, at the time of his death, was seized and possessed of seventy-six tracts of land in the said County of Washington, containing in the whole 19,473 acres of land, on one of which tracts is the salt-works, which have, since his death, been leased for years, at the annual rent of thirty thousand dollars; also of nineteen lots in the town of Abingdon in Washington County, nine of which produced *an annual rent of six [***351** hundred and sixty dollars; also of fourteen tracts of land in the County of Wythe, containing 3,494½; also of eighteen tracts of land in the State of Tennessee, containing in the whole 10,880; also of shares in town lots in several of the towns in the said State of Tennessee. We also agree that the said William King survived his father in the will mentioned; that the said William King had brothers and sisters, to wit: James King, a brother of the whole blood; Nancy, a sister of the whole blood, the wife of Connally Finlay in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; all of which brothers and sisters before named, survived the said William King; that another sister of the said William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will.

We agree that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will.

We further agree that William Trigg, in the will mentioned, departed this life on the 4th of August, 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having borne them to the said William Trigg, and not having borne any daughter to him the said William Trigg, at any time, which said sons are now living; that Mary, who was the wife of the said William King, is still living, aged forty-three years, and is now the wife of Francis Smith.

We further agree that William King, the lessor of the plaintiff, is married to Sarah Bekem; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander M'Call; and that Elizabeth, the wife of John Mitchell, had only two daughters, to wit: Elizabeth, who is now the wife of William Heiskill, and Polly, who is now the wife of Abraham B. Trigg.

We agree that William King, the testator, died seized and possessed of the house and lot in the declaration mentioned. We agree the lease, entry, and ouster in the declaration supposed; *and that the defendants are in [***352** possession of the house and lot in the declaration mentioned.

If upon this state of facts the lessor of the plaintiff ought to recover at this time, we agree that judgment shall be entered for him; and

that if the court shall be of opinion that he ought not to recover until after the death of Mary, the wife of Francis Smith, or that he ought not at any time to recover, judgment shall be entered in favor of the defendants. We also agree that the property in controversy is worth more than two thousand dollars.

The case was argued for the plaintiff in error by *Mr. Sheffy*, and by *Mr. Smyth* and *Mr. Webster* for the defendant, at the last term; and was held under advisement by the court.

Mr. Sheffy proposed to consider the case under two general aspects:

1. Has the defendant in error any title to the estate in question, regarding the devise as personal to himself?

2. Has he any title, should the devise be considered as a trust?

It is contended that he has no title. That no interest whatever vested in him, because the condition presented by the testator has not been performed. He has not married a daughter of William Trigg and Rachel, his wife.

This has a condition precedent, without the performance of which no right could vest in the devisee.

If the will is construed literally, the words employed by the testator are as strong as they can be. He gives the estate "on condition" that the devisee shall marry a person not in being, but expected to come into existence, the offspring of his wife's brother and his own niece. He anticipates that such a marriage may not take place. In this event he directs that his whole real estate shall go to such other persons, among certain collateral relations, as shall give effect to the object he had in view.

But it is admitted that the question whether the condition is precedent or subsequent, does not depend on any form of expression. It depends on the testator's intention. *He has a right to bestow his estate on whom, and on what condition he pleases, so that he violates no established rule of law. To ascertain that intention, we must be governed by those rules of construction which have been established by a series of judicial decisions.

The decisions enable us to determine the general principles which give a character to conditions in contracts, and devises and bequests; either as conditions precedent or subsequent. So far as the present question is concerned, they establish that where the testator requires the devisee to do an act which he regards as important to be accomplished, or where he prescribes a qualification which the devisee is to acquire, the performance of the act, and the attainment of the qualification, will be regarded as conditions precedent, unless a manifest intention to the contrary is apparent.

In the case before the court, the testator had no children. He had a strong desire to effect a union between the family of his wife and his own. In the disposition of his real estate, he contemplated the attainment of that object as paramount to all personal considerations. There is no reason to believe that his nephew, William King, was the object of his peculiar attachment. So far from it, he withholds from him (though he bore his own name) even the smallest bounty, unless he should become instrumental in the accomplishment of his prim-

ary purpose. Looking to his marriage with a daughter of William Trigg and Rachel, his wife, as an event which might never happen, he endeavored to stimulate others, standing in the same relation to him, to effect the desired union of the two families. He did not dedicate his estate to gratify a particular personal attachment, or to promote individual interests; but to bring about an event which he strongly desired.

The case of *Bertie v. Falkland* (2 Vernon, 333) strongly supports the construction contended for by the plaintiff in error. There the testator devised an estate to Elizabeth Willoughby, an infant of ten years old "in case she married Lord Guilford within three years from his death." The marriage did not take place, though there was no fault on the part of the devisee. The marriage was held to be a condition precedent. *Lord Chief Justice Treby*, in delivering the opinion of the court, says "that the defendant Elizabeth's being willing and consenting, or endeavoring to bring about the marriage, could not be of any avail or moment in this case; for that the will was formed not on the endeavors or agreement of the parties to marry, but on the event." In *Acherley v. Vernon* (P. W. Rep., 783), the case in Vernon is referred to by *Lord Chief Justice Wills*, and considered by him as settling the law. The case before him involved the same principle. The question was whether the performance of an act required by the testator from his sister, was a condition precedent on which her title to a legacy depended, or whether the legacy vested at her brother's death. It was decided that the act being an object with the testator, and desired by him, was the consideration of the legacy, and therefore a condition precedent.

A great variety of authorities might be cited, all tending to establishing the same principle. It is sufficient to refer the court to the following: *Creagh v. Wilson* (2 Vernon, 572); *Elton v. Elton* (1 Ves., Sen., 4); *Gillet v. Wray* (1 P. Williams, 284); *Graydon v. Graydon* (2 Atkins, 16); *Reynish v. Martin* (3 Atkins, 333); *Grascott v. Warren* (12 Modern, 128); *Harvey & Wife v. Aston* (1 Atkins, 361); *Randal v. Payne* (1 Bron. Ch. Rep., 55, and 2 Atkins, 151, 2 Powell on Devises, 252; 2 Cruise, 20.)

The intention of the testator, that nothing should vest until the condition should be performed, is further manifest, as the will postpones all right of the devisee of the real estate until the death of his wife. She was at the date of the will not more than twenty-five years of age, and he reasonably supposed that a marriage such as he wished to effect would take place before her death. In the meantime, the legal estate descended to the heirs-at-law, who could hold it until the event contemplated by the testator should happen. (Ferne on Remainder, 513, 516; 2 Fonb. Eq., 93.)

It will probably be said that though the intent of the devisee is postponed in terms until the death of the testator's wife, yet that it ought to be construed into an immediate interest by implication. Such was the opinion of the court below. Courts have sometimes allowed implications when they are very apparent, in order to give effect to the intention of the testator. But they must be necessary, not probable implications; for the title of

the heir-at-law being plain and obvious, no words in a will ought to be construed to defeat it, if they can have any other signification. (Cruise, title Devise, 205.)

But the devise over shows in the strongest light that the testator did not intend to part with the estate, unless the event which he sought to bring about should happen. He directs that "in case such marriage should not take place, then I leave and bequeath the said estate to any child of the said William and Rachel Trigg, that will marry a child of brother James King or of sister Elizabeth." It is immaterial whether the devise could take effect according to law or not; the testator thought it could, and intended that the estate should pass to others in the event mentioned in his will. According to the pretensions of the defendant, it never could pass, though the event mentioned in the clause referred to should happen, and though it should be decided that the devise was within the legal limitation. For the ground on which he rests his claim (as is understood) is, that on the death of the testator he took a vested contingent fee, which would become absolute on the marriage with a daughter of William Trigg and Rachel, his wife; that as there never was any such person, he could not perform the condition, and is therefore absolved from it, and holds the estate absolutely. If, then, a son of William Trigg and Rachel, his wife, had intermarried with a daughter of James King or Elizabeth Mitchell, the defendant would have kept the estate against the express intention of the testator. This cannot be law, because it is contrary to all reason. It would be sporting with the right which the law guarantees to the citizen to dispose of his property to whom and on what condition he pleases, so that he violates no established rule of public policy.

But it is contended that if the estate vested in the defendant at the death of the testator, that all right in him became extinguished on the death of William Trigg. That event placed it beyond all doubt that such a marriage as the **356*** testator wished to promote could not take place. As to the defendant, therefore, his title ceased with the possibility of his becoming instrumental in uniting the two families.

But it will be contended that if the marriage of William King with a daughter of William and Rachel Trigg, is a condition subsequent, then the estate is discharged from the condition, it being impossible to perform it; the correctness of the conclusion is not admitted.

If the testator's primary legal object was the union of the two families, and if he devised the estate to the defendant on condition that he should become instrumental in effecting that object, it is immaterial whether the condition is precedent or subsequent, or whether the failure to accomplish the purpose desired is owing to one cause or another. The question still recurs, did the testator intend that his nephew should have his whole estate, whether the marriage prescribed should take place or not, provided the failure was not attributable to him? Suppose the testator had declared that on his death his nephew should have his whole estate, in fee, on condition that he married the daughter of William and Rachel Trigg; but that whenever it was ascertained that such marriage could not

take place, from any cause whatever, that all his right should cease, and that the estate should go to such person as is actually designated in the will. Could it be seriously argued that the impossibility of such a marriage, on the part of the defendant, would render the estate absolute in him, against the express intention of the testator? It is believed it could not; and yet this is the very case before the court, if the defendant had a vested interest at the death of the testator.

The argument that the defendant acquired an absolute estate, whenever it became impossible to perform the condition of the devise on his part, has no other support except the idea that the devise over was intended as a penalty on him for not doing what the testator desired, and that there can be no penalty when there is no fault. This is a perversion of the obvious meaning of the will. The testator was fully acquainted with all the circumstances; he knew that William and Rachel Trigg had no daughter, and consequently foresaw that it was *possible that such a marriage could [**357** not take place. In this state of things, if he had intended that his nephew should have the estate, unless he was guilty of a fault in disobeying his wishes, would he not have restricted the devise even to the occurrence of such fault? Would he not have indicated that it was resistance or indifference to his views, that should take the estate from the party in fault and place it at the disposal of others? The testator never thought of any such thing. He wished to effect an object dear to his heart. If that object was not effected, he cared not for the cause. Individual personal attachment had no share in the purpose. The act which united the two families was the meritorious and only consideration with him.

In this view of the subject, it is not material whether the condition was, at the date of the will, or afterwards became impossible. But if it was, it could be easily shown that this condition falls within neither of the classes mentioned in the books where performance is excused. It was not a condition impossible at the date of the will; on the contrary, it was quite probable that William Trigg and Rachel, his wife, who were both very young, would have a daughter to whom the defendant could be united in matrimony. An impossible condition, which is considered as void, is of this character; that at the time it is required to be performed, nothing short of a miracle could accomplish its performance. It is laid down in 5 Viner's Abridgment, 111, that if the condition be that a person shall go to Rome in a day, it is impossible; but if the condition be that the Pope shall be at Westminster to-morrow, this is not an impossible condition, though the event is highly improbable. If a person should be required by a testator to qualify himself for and take holy orders by the time he should arrive at the age of twenty-five years, on the condition and consideration of a legacy, and that the interest should be paid to him in the meantime (which would make it a vested legacy), would it be an excuse for the legatee to allege that his intellect was unequal to the attainment of the necessary learning and the performance of the ecclesiastical functions, and that therefore it was an impossible condition? Most assuredly

358*] not. *This is not a condition which became impossible after the death of the testator, the nonperformance of which will be excused. Those conditions belong to cases where all the means to accomplish the testator's purpose are in his view and in being; but when subsequent events change the existing state of things so essentially as to render the performance impossible; for instance, if a devise be made on condition that the devisee consent to marry a particular person, and that person dies, the performance is rendered impossible by the happening of an event subsequently, which the testator never contemplated; and where the estate had previously vested, it will become absolute by the death of such person.

The leading case for the defendant, and which will be doubtless relied upon, is the case of *Thomas v. Howell* (4 Mod. Rep., 66). But that case is essentially different from the one before this court. There the testator devised to his daughter Jane an estate called Lawhorn, on condition that she, at or before the age of twenty-one years, "do consent" to marry Theophilus Thomas, who was the testator's nephew. Then he devised other estates to his two remaining daughters, and then follows this proviso: "And my will is, that in case my daughter Jane shall refuse to consent to marry my nephew Theophilus Thomas, at or before she shall be of the age of twenty-one years, or in the meantime shall marry another person, the devise shall be void." He proceeds to devise Lawhorn to his other daughters in succession, on the same condition; and then adds, "but in case neither of my said daughters marry my said nephew, then the estate given them in Lawhorn shall be void;" and devises the estate over to trustees.

Theophilus Thomas died at the age of twelve years; Jane never refused to marry him, and after his death, at the age of seventeen, married another person. She had entered on Lawhorn on the death of her father, and the question was, whether the estate was divested, the contemplated marriage never having taken effect.

Three judges to one were of opinion that under the first proviso to divest the estate, Jane **359***] must have "refused to consent." *to marry Theophilus Thomas; that what followed in the subsequent clause had reference to the same proviso, and ought not to be taken in a larger sense than the proviso itself; and upon this ground decided that the estate of Jane was absolute.

This case, instead of being an authority for the defendant, bears strongly against his pretensions. It shows that the court decided the case on the proviso, which made the refusal of Jane to "consent to marry" Theophilus Thomas the basis on which the devise over should take effect. And then arises an irresistible implication from the opinion of the court, that if the case had rested on the last clause, the estate would have gone to the trustees.

To establish that, in the case now before the court, the defendant acquired a title which can be defeated only by his voluntary default, would overthrow the principle well established in many cases of conditional devises and limitations. For example: A testator devises to A an estate for the term of thirty years, and if at the end of the term he has a child living, to A

in fee, but if he should have no child living, then to B. It might not be the fault of A that he had no child living at the end of the term, and yet it has never been questioned that B would take the estate.

Again, suppose a case which is very common. A testator devises an estate to A and his heirs; but if A shall die without issue living at his death, then to B and his heirs; would the heir-at-law of A be permitted to keep the estate on the ground that his ancestor had committed no fault, and that therefore the estate became absolute? Such a defense has never been offered.

It is contended, in the second place, that the defendant has no title if we regard the devise as a trust.

There is nothing in this case which authorizes the belief that the testator had any personal predilection for the defendant. He mentions him as the son of his brother, James King; but there is nothing peculiar in that, as he likewise refers, and with the same view, to all the other children of James King, and those of his sister Elizabeth. If we confine ourselves to the words employed, all idea of any beneficial interest *being intended for William King, is [***360** excluded. He is to take the estate on condition that a certain marriage shall take effect; but it is "in trust for the eldest son or issue of the said marriage." If we regard the union of the two families as the great object which the testator sought to bring about, then those in whom should be united the blood of both, must have been the objects of his peculiar favor.

The testator probably thought that a person not in being could not take the estate, unless it was through the instrumentality of a trustee. He regarded his nephew merely as a conduit, through whom his bounty should flow to those whom he considered as pre-eminent, because they would inherit the blood of both families.

If the devise is to be considered as a trust, then the question arises whether any trust interest vested on the death of the testator, or whether it was to arise when the marriage took effect. No immediate interest is expressly devised; on the contrary, the words used are, "at the death of my wife." There is no reason to support an immediate interest by implication, because there was no necessity for it; as the beneficial interest could not vest, until those who were to enjoy it would come into existence. Besides, the statute of uses makes a devise to A to the use of B the same as a devise to B, so that this devise is in point of law to "the eldest son or issue of the marriage." The doctrine is well established that in such a case the legal title descends to the heir-at-law, and remains until the birth of the issue, when it vests in him. In this case, there being no possibility of any such issue, the title in the heirs-at-law is no longer in trust for the purposes of the will, but is absolute in themselves.

But admitting, for argument sake, that the trust vested on the death of the testator, it is urged that whenever the possibility of a marriage between the testator's nephew and a daughter of William and Rachel Trigg became extinct, the trust terminated.

The purpose of such a trust is, that the trustee holds the estate for the sole and exclusive benefit of those who are to be beneficially interested; but if no such person shall be brought

into existence, then the testator has not disposed **361** of the estate; because he has never contemplated such a state of facts. No person ever doubted that if the testator had given the estate to the eldest son of William King, when he should be born, and William King should never have a son, that the estate would go to the heirs-at-law of the testator. Whatever manifestations might appear to show that the testator did not intend to die intestate, such manifestations never have any other effect than to aid a court where the donation of an estate is in question, or when it is doubtful what property a general description includes. But to give to a naked trustee the absolute title to an estate, merely because the person for whom the beneficial interest was intended has not been born, and because the testator did not intend to die intestate, is not supported by reason or authority; on the contrary, it is considered that the title of the heir-at-law will always be supported, unless the devisee can show a clear intention against him.

The doctrine of resulting trusts is peculiarly applicable to this part of the case. It is well-settled that wherever the purposes of a trust have been satisfied, or cannot be executed, that the estate reverts to the heir-at-law. (3 P. Williams, 20, 252; 1 Saunders on Uses and Trusts, 164; 1 Brown's Ch. Cases, 508, 60, note; 4 Brown's Ch. Cases, 409.)

Mr. Smyth and *Mr. Webster*, for the defendant in error.

In this case three questions are presented for consideration:

1. Whether the condition on which the real estate is given to William King, is precedent or subsequent.

2. Supposing it to be subsequent, when does the estate vest in possession in William King?

3. What is the nature of the estate when vested?

We admit that if a condition precedent becomes impossible, the estate will never arise; and equity will not relieve. But we contend that if a condition subsequent becomes impossible, the estate will not be defeated, or forfeited. (2 Bl. Com., 156, 157; 7 Co. Litt., 206, a, b; 2 Vern., 339; Powell on Contracts, 266; 2 Atk., 18; 2 P. Williams, 626, 627; Powell on Devises, 262.)

362 *The same words make a condition precedent or subsequent, according to the intent of the person who creates it. (Willes, 156; 2 Bos. & Pull., 295; 1 Durnf. and East, 645; 2 Caines, 352; Powel on Devises, 183; Cases T. T., 166.)

Whether the condition is precedent or subsequent, depends on the order of time in which the intent of the testator requires the performance. (Willes, 157; 2 Bos. & Pull., 297.) *Justice Heath* said: "The question always is, whether the thing is to happen before or after the estate is to vest. If before, the condition is precedent; if after, it is subsequent."

In the case before the court, the intention of the testator is clear that William King should have the whole estate on the death of Mrs. King. Mrs. King might have died within a year after the death of the testator; yet the daughter of William Trigg and Rachel, his wife, whom William King was required to marry, might have been born twenty years

afterwards, and the marriage might have taken place at the end of forty years more. It could not have happened in less than thirteen years, and might have happened more than sixty years after the death of the testator. Clearly, the testator intended that under those circumstances, the marriage might be subsequent to the vesting of the estate.

Unless the intent of the testator required that the devisee should, before the death of Mrs. King, marry a female who was unborn at the time he made his will, and at the time of his death, this cannot be a condition precedent. Why should it have made any difference to the testator whether the marriage happened before or after the death of Mrs. King?

A condition is precedent or subsequent, as the act is to be done before or after the estate vests. This act, the marriage, was not necessarily to be done before the whole estate should vest in possession. A condition which might be complied with sixty years after the time prescribed for vesting the whole estate in possession, must be a subsequent condition. If the act may as well be done after as before the vesting of the estate, the condition is subsequent. All conditions in wills are either precedent or subsequent. A condition which may be performed either before or after, is not a precedent condition, and, therefore, is a condition subsequent.

*The testator says: "I then leave all **363** my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying," &c. The whole estate must vest in possession at the death of Mrs. King. But William King, who was three years old when the will was made, had his whole life to perform the condition. A marriage after the death of Mrs. King would be a fulfillment of the condition, as well as a marriage before her death. Therefore, it is a condition subsequent; and being impossible, the estate will not be defeated or forfeited. (2 Atk., 18; Cases T. T., 164, 166; 2 P. Wms., 626; Pow. Dev., 257, 258; 1 Salk., 170; 4 Mod., 68; *Rice v. Aislatic*, 3 Madd., 256, 260.)

There are some cases reported which, at first view, may seem adverse to us; but which, on examination, will be found to differ essentially from our case. In the case of *Bertie v. Falkland*,¹ the condition was adjudged to be precedent. There was a devise to trustees for three years, and if there was a marriage in three years the estate was to vest. There the marriage was obviously a condition precedent; for it was to take effect in three years, and the estate, being in trustees, was not to vest until the termination of the three years. So where there was a settlement in trust, that if A marries B after the age of sixteen, and they have issue male, the estate shall be to A and B for themselves; the condition is precedent; for the estate is expressly given to trustees, until the marriage and the birth of issue. (2 Vern., 333; Com. Dig., Condition, B. 1, pl. 10.)

2. When does the estate vest in possession of William King, the lessor of the defendant in error?

1.—A note in a late edition of Freeman's Reports, p. 36, says this decision was reversed in the House of Lords.

We contend that all the estate of William King, the testator, is devised by the will. If all is devised by the will, the right of possession of the real estate, from the death of the testator to the death of Mrs. King, is devised. It is not devised to Mrs. King by implication. The real estate is devised to William King; therefore he takes the right of possession during **364***] ing *the life of Mrs. King, unless it is devised to some other person.

We contend that, as to all the lands of William King, the testator, except the dower of Mrs. King, the salt-works, and those lands devised to Mrs. King, to Thomas King, and to the academy; the estate passed to William King, the devisee, immediately on the testator's death.

Did the testator intend his hundred tracts of land, and thirty or forty town lots, should descend to his heir until the death of his wife? We insist that the testator did not intend that his lands should descend to his heir for a moment. The heir shall not take, where, from the will, the intention of the testator that he shall not take appears. The limitation over, although supposed not to be a good one, shows the determination of the testator to defeat the claim of his heir. (1 Dall., 227.)

If the estate does not pass immediately to William King, there must be either a life estate by implication, or a descent to the heir, during the lifetime of Mrs. King. As Mrs. King has dower devised to her in the whole of the lands, and a life estate in a part of them, she cannot also take a life estate in the residue by implication. She cannot claim a life estate in parts, and also in the whole. Had William King, the devisee, been the heir, and had there been no devise to Mrs. King, this devise to him, "at the death of my wife," would have given to her an estate for life, by implication. (4 Bac. Abr., 288; 2 Vern., 572, 723.)

The father of the testator was, at the time of making his will, his heir presumptive. To him is devised, for life, the use of a cottage, and perhaps twenty acres of land, as many apples from the orchard as he could eat, and an annuity of \$200. After his death, this piece of land was to go to Mrs. King for her life. This devise shows that the defendant did not intend that his presumptive heir should take one hundred plantations, during the life of Mrs. King. The testator manifestly expected his wife to outlive his father, and has spoken as if that was beyond a doubt.

The testator intended to dispose of the whole **365***] of his real *estate. He speaks of "the disposition of the real estate," and uses the expressions, "my worldly estate," "all my estate," "my whole estate," "all my real estate." Did the testator intend to die intestate as to his one hundred plantations and thirty or forty lots, during the life of Mrs. King? He did not intend to die intestate as to any part of his estate. He makes his will, "leaving and bequeathing my worldly estate, in the manner following." If after the use of such words, a part of the testator's property was clearly omitted, it is admitted that such part would not pass by the will; but if property is given by the will, these words will signify that all the testator's interest therein is given. (Ca. T. T., 157, 160, 161; 3 P. Wms., 295, 297, 298; 1 Wils., 333; 1 Vesey, 226; 1 Wash., 97, 107; 2

Binney, 17, 33; 1 Call., 132; 1 Munf., 543, 545.)

In the case of *Ibbetson v. Beckwith*, Lord Chancery Talbot said: "I am of opinion that these words (worldly estate) prove him (the testator) to have had his whole estate in his view, at that time. Indeed, he might have made but a partial disposition; but if the will be general, and that taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm, they shall be taken in that sense which is most likely to be agreeable to his intent of disposing of his whole estate."

"All my real estate," is descriptive of the duration as well as of the extent of the estate; therefore, it includes the right to possession, before the death of Mrs. King, as well as after, in those lands not devised to her, or to others during her life. (Salk., 236; 2 P. Wms., 524; 1 Vesey, 228.)

"Leaving and bequeathing my worldly estate," means the same thing as if the testator had said, "I intend to give by this will everything I have in the world." (3 Wils., 143.) The testator having said this, devised the most valuable portion of his estate to his wife, and to others, for her life. Then he devised all his real estate to his nephew, at the death of his wife. To make this agree with his declaration that he intended to give by the will all he had in the world, this devise must be so construed that the devisee will take immediately, on the testator's decease, that part of the estate *which has not been devised to another, [**366** and that he shall take, on the death of Mrs. King, that portion of the estate which had been devised to her, and to others, for her life. He shall take it all then, because he cannot take it all sooner.

Taken in connection with the introductory words, "all my estate at the death of my wife," it is a devise of the whole duration of the estate after the death of the testator; but it may by implication give it to Mrs. King, during her life. Now, if it has been shown that the estate is not devised to Mrs. King by implication, as it is devised, it must go to William King, the specific devisee.

"All my estate, at the death of my wife," carries the whole, as well before as after her death; but if there was no devise to the wife, those words would divide the duration, the wife taking during her life and the specific devisee afterwards. When the wife cannot take, these words must be otherwise satisfied. And if the specific devisee can take only a part immediately, and the residue at the death of the wife, so that then he will take all, they are satisfied.

The intention of the testator is the polar star in construing wills. (4 Mod., 68; 1 Wash., 102; 1 Munf., 537, 547; 2 S. C. Rep., 32.) The court will execute the intention of the testator, as far as they can. They will transpose the words of a will to effectuate the intent of the testator. Let the word "all" be transposed, and the clause made to read, "I then leave and bequeath my real estate, all, at the death of my wife, to William King." (1 Call, 132.)

Nothing could be further from the intention of the testator than the distribution of his

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estate, either to his brothers and sisters, or to his nephews and nieces. He intended that all his real estate should vest in one man, his eldest nephew, of his own name, the son of his only brother, of the full blood, and in the eldest son or issue of that nephew. The distribution would include Samuel King, or his children, to which half-brother the testator grudgingly gave an annuity of \$150.

The question, when shall the estate vest in possession? is to be decided from the intention **367*** of the testator, as gathered *from the whole will. (1 Doug., 342.) The testator intended that his heir or heirs should not have his plantations. To take the estate from the heir, during the life of Mrs. King, requires a necessary implication; and such an implication is here. (4 Bac. Abr., 282; 2 Vent., 571; 1 Dall., 227.) The devise to Thomas King, the presumptive heir at the time of making the will, of a house and a few acres of land for life, remainder to Mrs. King during her life, is inconsistent with his taking the large real estate of William King, and a necessary implication that he is not to take it, during Mrs. King's life.

The counsel on the other side has said in argument, that Thomas King, the father of the testator, was an alien. That is going out of the record, by which it appears that the testator considered his father capable to take a freehold, and that he was in fact a proprietor of real estate. It has never been shown that Thomas King was an alien; and, from information, it is probable that he never was an alien in the United States.

Either the heir or the devisee must take; for the testator cannot put the freehold in abeyance. (1 Doug., 231.)

If the condition of marriage is subsequent, which we deem proven, there is no reason for postponing the commencement of the estate of William King, the devisee, in possession, of the real estate not devised for the life of Mrs. King. If the estate is given on a condition subsequent, why may not the estate, except what is devised to Mrs. King and others, vest in possession immediately on the testator's death? To what end suspend it, when it is not to wait for the performance of the condition?

These words, "at the death of my wife," were inserted in consideration of the devise of the use of the salt-works during her life, the devise of dower, and the devise of certain portions of the real estate, during her life. These words have their effect; because a large part of the estate, far the most valuable, cannot, consistently with other clauses in the will, come to the possession of the devisee, William King, until Mrs. King's death.

Suppose that a testator had made his will **368*** thus: to A, my *father, who is seventy years old, during his life, one three-hundredth part of my real estate; to B, my wife, who is twenty years old, during her life, one-half of my real estate, including the part devised to my father, after his death; to C, my nephew, the whole of my real estate at the death of my wife; the testator dies, the father, who is heir, surviving. Would a court give to A, the father, and his heirs, half the real estate during the life of B, the widow, when the testator clearly intended and expressed that A should

have only one three-hundredth part for his own life? Certainly they would not. In such a case the words, "at the death of my wife," would be applicable to the moiety devised to her for life. The death of the father before the testator, in this case, cannot change the meaning of the will.

All the real estate could not vest in possession of William King, the devisee, at the death of the testator, but all is devised to him; therefore, the words, "at the death of my wife," are used; as then, and not till then, all might vest in possession.

Should the testator be regarded as having died intestate, as to his lands not devised to Mrs. King, until her decease, they would have descended to his brothers and sisters, his father having died before him; and it is apparent that he did not intend that those brothers and sisters should take his real estate, during the life of Mrs. King.

To James King he gives the use of one-third part of the salt-works during the life of Mrs. King, say \$10,000 annually; to Samuel King, an annuity of \$150; and to Hannah Allen, a legacy of \$1,000; thus to James King sixty-six times as much as to Samuel King, and more than two hundred times as much as to Hannah Allen; but if his plantations are distributed during the life of Mrs. King, then Samuel King and Hannah Allen will have a part equal to that of James King, although they stood so unequally in the affections of the testator as objects of his bounty. It seems manifest that he did not intend that his great estate in lands should pass to, and be distributed among his brothers and sisters, during the life of Mrs. King.

Unless the will is construed to give to William King, *immediately, the lands, other [**369** than those devised during Mrs. King's life, the marriage intended might have taken place within fifteen years from the testator's death, and the issue of the favorite nephew, the desired family of Kings, might have been without a maintenance for the period of forty years; as Mrs. King, who was twenty-four years old at the death of the testator, might have so long lived; while one hundred plantations and thirty or forty town lots would be in the possession of the heirs. This cannot have been the intention of the testator. (2 P. Williams, 627.)

It may be proper to notice the very imperfect manner in which the testator expressed himself in this will, for want of legal knowledge. He devises the use of his capital; that has been construed to be a bequest of his capital. He requests that his executors and his wife will carry on his salt-works business in copartnership; that has been construed a devise of the salt-works. He devises \$10,000 to two of his nieces; that has been construed a devise of \$10,000 to each of them. To give effect to the intention of this testator, requires the liberal aid of the courts.

3. What is the nature of the estate of William King, the devisee, when vested?

If the condition is subsequent, the devisee has his lifetime to perform it, before he forfeits; even where performance is impossible. And if it becomes impossible, without his default, or never becomes possible, we contend that he will never forfeit. Had Mrs. King died

within a year after the death of the testator, the whole real estate would have vested in William King, in possession, although the daughter of William Trigg was unborn. The devisee would have his lifetime to perform the condition, even if William Trigg had ten daughters. Even if William King had stood by and seen those ten daughters all married, he would have time to perform; for he might marry one of them when a widow. Should he even marry another woman, he would still have time to perform; for he might, when a widower, perform the condition.

An impossible condition is the same as none. It is void, and there can be no breach. It is **370***impossible that there **should* be such a marriage as the testator desired, therefore the devisee takes and holds as if there was marriage, or rather, as if there was no condition, for the condition is void. The counsel on the other side contended that this was not an impossible condition; for that it was probable the marriage might be had. The law says nothing of probable conditions. And it is asked, what is more impossible than to marry a person who never came, and never can come into existence?

If it is impossible to do a thing, no one can be under any obligation to do it. The condition was not possible when made, and never became possible; and being subsequent, the estate is absolute. If the condition had been possible when the will was made, and afterwards became impossible by the act of God, without the default of the devisee, the estate would also be absolute. (2 P. Wms., 628; Com. Dig., Condition, D. 1, pl. 4; Pow. Con., 265.)

Had a daughter been born to William Trigg, and had the marriage taken place, William King would have taken the profits, without having issue. There is no devise over, in the event of not having issue. The application of the profits to the use of such issue, would have been another impossible condition; therefore, he would keep the profits, and hold the legal estate discharged from the trust, the performance of which was impossible.

If the condition is subsequent and impossible, and the application of the profits, as directed, also impossible, then the estate must be held discharged of the condition, and exonerated from a trust which cannot be performed. When the impossible condition is stricken out of the will, the trust to arise thereon goes out with it. The devise is to William King, subject to an impossible condition, an impossible executory trust, and a void limitation; yet the legal estate remains in him. He is devisee in fee, on a void condition. The whole condition being void, every part of it is void.

We contend that William King, the devisee, takes beneficially, and keeps the profits. The devise is unquestionably a beneficial one; for, in one event, that of marriage and having no issue, the estate is not devised over, and the **371***profits **would* belong to the devisee. Why should the profits be taken from the devisee? There are none who seem better entitled under the will. This is the only devise made by the testator to his favorite nephew, the eldest son of his only brother of the full blood, and the heir of his name. The testator was obviously attached to the principle of primo-

geniture, and paid great regard to names. To two of his nieces he gave \$10,000 each, because they were named after his grandmother. Did he mean to give nothing to the nephew who bore his own name? He cannot have intended that his favorite nephew should be a mere trustee for his, the testator's heirs, in any event, entitled only to commissions on his receipts. Did he mean to devise to his favorite nephew trouble, and nothing more, on condition that he would marry the daughter of his favorite brother-in-law and niece?

A consideration was required of him: marriage. He is therefore entitled to the estate on the condition imposed, if performance shall be possible, and on no other condition; to take the profits for his children if such there be; and, if not, for his own use. This consideration shows that, had the marriage taken effect, the devisee could not have been regarded as a mere trustee. Here is also the consideration of nearness of blood, which is often decisive of the question whether a devisee takes beneficially, or as a mere trustee. (See *Loyd v. Spillet*, 2 Atk., 150, and *Hobart v. The Countess of Suffolk*, 2 Vern., 645.)

Will the estate determine on the death of William King, the devisee, in consequence of his not performing the condition?

The words of the devise convey a fee-simple, and he takes a fee-simple, if he takes at all. What would be the construction of the will, should the void clause be stricken out? That it conveys an absolute estate in fee-simple. Strike out the void clause, and the devise will read, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King."

The failure of issue is not made a condition on which the **estate* shall pass over. [**372** Consequently, the devisee would take the estate and profits, after marriage, without issue. And we contend that as soon as the estate vests in possession, he will take the profits without marriage, the condition being subsequent and impossible. It is a devise to him in fee-simple; and there are none to whom the profits are directed to be paid. A beneficial devise to him was intended, and there is no implication in favor of the heirs.

The important question is, "does the legal estate pass by the devise?" If so, there is no trust for the heirs. The heir is entitled to the real estate not given to another; but here all the real estate is given from the heir. The estate is devised over, on failure to perform the condition. A question may yet arise whether that devise over is good. Whether that devise is good or not, we contend that we have a right to recover. The heir cannot prevail, unless it is decided that the devise to William King, and the devise over, are both void.

There is a class of cases which have some analogy to that before the court, although they are essentially different from it. The cases referred to are those wherein a question has arisen between the heir and executor, the heir and next of kin, or the heir and devisee; whether there is, or is not a resulting trust for the heir.

Where lands are devised to be sold for payment of debts and legacies, or in trust for the payment of debts and legacies, and the devisee

or executor is a stranger, or has a legacy, and there is a residue; there is a resulting trust for the heir, especially if there is nothing given to him by the will. In this case the devisee is no stranger, he has no legacy, and there is no residue. (1 P. Wms., 309; 2 Atk., 150; 2 Vern., 644; 1 Meriv., 301.)

But if it appears from the will that a benefit was designed for the executor or devisee, being a relation, and especially where the heir has some other benefit from the will, there will be no resulting trust for the heir, although there is a residue. In this case the devisee is a relation; a benefit is intended him, and the heirs are provided for by the will. (See *Rodgers v. Rodgers*, 373*] 3 P. Wms., 193; *North v. *Crompton*, 1 Ch. Ca., 196; *Coningham v. Melish*, 1 Eq. Ca. Abr., 273, or Prec. Ch., 31; *Malabar v. Malabar*, Ca. T. T., 78, in which case the devise was in trust, yet there was no resulting trust for the heir; *Hill v. The Bishop of London*, 1 Atk., 618, 619, 620; *Smith v. King*, 16 East, 282; *Kennell v. Abbot*, 4 Ves., 6.)

The rule that an heir, taking a benefit by the will, cannot have a resulting trust, would exclude the heirs of William King, the testator; as not only the presumptive heir at the time of making the will, but also those who were heirs at the time of his decease; every one of them take benefits by the will.

Wherever there is a consideration, there can be no resulting trust. (7 Bac. Abr., 143.) Here marriage was required, and the devisee might have waited twenty years to perform the condition. Had a daughter been born to William Trigg, when William King was twenty-five years of age, and had he waited for her fifteen years, and she had died, surely his claim would have been strong; yet it would have been no better than it now is, because the words and meaning of the will would have been the same. If in that case the claim of the devisee would have been good, it is good in this case.

This case is not like that of a devise upon trust to pay debts and legacies (1 Meriv., 301), for in such a case there may be a residue; but here the whole estate is devised away upon condition, and, upon failure of that condition, devised over. Thus, no residue is left for the heir to claim. The trust is of equal extent in point of duration with the legal estate. No part of the trust remains undisposed of. It would be difficult to express more clearly an intention that the heir shall not take. The estate is devised in fee on condition, and, on failure to perform that condition, devised over.

But if the plaintiff is a mere trustee, he has a right to recover in ejectment. (2 Doug., 722; 5 East, 138; 1 Schoales & Lefroy, 67.)

A mere trustee may recover against him who 374*] claims the *benefit of the trust, where the right is not clear. (4 Bos. & Pull., 171.)

It is hoped that the opinion of the court will elucidate and ascertain the rights of all parties claiming the real estate of the testator, as they know not certainly to what they are entitled.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error brought to a judgment rendered in an ejectment by the Court of the United States for the Western District of Vir-

ginia. The judgment was pronounced on a case agreed. Three questions have been made at the bar:

1. Is the condition on which the testator has devised his real estate in trust to William King, a condition precedent or subsequent?

2. If subsequent, at what time does the estate vest in possession?

3. What is the nature of the estate, when vested?

1. Is the condition precedent or subsequent? The words of the will are, "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage, and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of William and Rachel Trigg that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchel, and to their issue.

It was admitted in argument, and is certainly well settled,¹ that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, *shows [*375 that the act on which the estate depends must be performed before the estate can vest, the condition is of course precedent; and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

In the case under consideration, the testator does not in terms give his real estate to William King on his marrying the daughter of William and Rachel Trigg, but at the death of his (the testator's) wife, on condition of his marrying a daughter of William and Rachel Trigg. Whatever doubt may be entertained respecting the lands not given to the wife for life, the testator has expressed clearly his intention that the lands incumbered with his wife's life estate should come to the possession of William King at her death. He gives the estate at that time, without requiring that the condition annexed to it should be previously performed. The estate then vests in possession, whether the condition on which it was to depend be or be not performed. It cannot be supposed to have been his intention that the devisee should take possession under this devise, before the interest vested in him. The interest, therefore, must have vested previously, or at the time. The language of the testator does not indicate the intention that the marriage must take place during the life of his wife; nor do the circumstances of the parties justify us in imputing such an intention to him. The time of her death was uncertain, and it might follow close upon his own. The contemplated marriage could not possibly take place until the lapse of many years, because one of the parties had not

1.—Willis, 156; 2 Bos. & Pull., 295; 1 D. & E., 645.

come into existence. William and Rachel Trigg had not at the time, and never have had, a daughter. The testator, therefore, has fixed a time when the estate is to vest, which might probably precede the happening of the event on which its continuance is to depend. This is clearly a condition subsequent, as to those lands in which an estate for life is given to the wife of the testator.

Does any reason exist which will authorize a distinction between those lands in which the **376*** wife took a life estate, and *those of which no other present disposition is made in the will?

The testator makes no distinction. In one clause he gives "his whole real estate at the death of his wife to William King, son of his brother James King, on condition," &c. If, as the language would seem to indicate, the devisee was entitled to possession of the whole property, at the same time, that is, at the death of the testator's wife, it would follow that the condition on which the whole depends is a condition subsequent. If the devise should be construed, as the defendant in error contends, to give William King a right to the immediate possession of that part of the estate of which no other disposition is made, does this circumstance furnish any reason for the opinion that this part of the estate depends on a condition precedent? We think not. The will might then be construed as if it were expressed thus: "in case of having no children, I then leave and bequeath all my real estate, subject to the devise to my wife for life, to William King, son of my brother James King, on condition of his marrying," &c. This is the most unfavorable manner for the defendant in error in which the question can be presented. It waives the benefit derived from fixing a time for the possession of a considerable part of the estate, which might very probably precede the event on which its continuance is made to depend. Had even this been the language of the will, the estate in the lands would, we think, depend on a condition subsequent.

It is a general rule that a devise in words of the present time, as I give to A my lands in B, imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance. The result of those two principles seems to be, that a devise to A, on condition that he shall marry B, if uncontrolled by other words, takes effect immediately; and the devisee performs the condition, if he marry B at any time during his life. The condition is subsequent. We have found no case in which a general devise **377*** in words, importing a present interest in a will making no other disposition of the property on a condition which may be performed at any time, has been construed from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided.¹ We think, then,

that the condition on which the devise to William King depended was a condition subsequent.

2. The second point is one of more difficulty. Does that part of the real estate which is not otherwise expressly disposed of, vest in William King immediately, or at the death of the testator's wife?

The words are, "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition," &c.

These words certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be controlled only by a strong and manifest intent, to be collected from the whole will. But the intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence.

The counsel for the defendant in error insists that the intent to give the real estate not otherwise disposed of immediately to William King, is apparent on the face of the will, and must control the construction of the clause under consideration. This proposition has been so fully discussed at the bar, that the court need only restate the principles which have been already advanced in the argument.

*Of the immense estate left by the **[*378]** testator, about one-half, including her dower, was given to his wife and others for her life. The residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir-at-law.

As the devise to William King was on a condition subsequent, it may be construed, so far as respects the time of taking possession, as if it had been conditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction.

We will first consider the supposed implied devise to the wife.

As William King was not the heir of the testator, a devise to him at her death does not necessarily imply an estate in her during life; and the will itself furnishes strong reason for rejecting this construction. His wife, as might well be supposed, was first in his mind, and was kept in mind throughout the will. He notices her legal right to dower, so as to avoid a possible implication that what he gave her was in lieu of dower, and to secure her from the necessity of relinquishing all interest in the estate bequeathed to her as preliminary to claiming her dower. She claims her dower under the will, as she does the other large estate bequeathed to her. It is not probable that a person who was careful to notice even that to which she would have been entitled under the law, would have omitted totally a very large property which she could claim only under the will. He even notices the remainder of small property in the occupancy of his father,

1.—2 Atk., 18; Cases T. T., 164, 166; 2 P. Wms., 626; 2 Pow. on Dev., 257; 1 Salk., 170; 4 Mod., 68; 2 Salk., 570.

his will in a manner to add to the improbability of his having totally omitted her name when a very large benefit was intended. It seems to us to be contrary to reason and to the ordinary rules of construction to intend that a large estate is given by an unnecessary implication to a wife who takes her dower in the whole, and also a large part by express words. We think it very clear that there is no implicative devise to the wife.

Does the property in question descend to the **379*** heir-at-law *during the life of the wife? Was it the purpose of the testator to die intestate with respect to it until her death?

We cannot think that such was his purpose, or that his will authorizes the court to say so.

The introductory clause indicates an intention to dispose of all his estate. He says: "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King," &c.

It is admitted that if this clause stood alone, unexplained by other parts of the will, the real estate, not otherwise disposed of, would descend to the heir. The law gives to him whatever is not given to others. But if other provisions in the will show an intent that the legal title of the heir should not prevail, those other provisions must be respected in construing the instrument.¹

When the will was made the testator's father was alive, and was consequently to be considered as his heir. He was an old man; and the provision made for him seems to have contemplated only a comfortable supply for the wants of one who had grown up and lived in simple unexpensive habits. The testator gives him for life the houses in which he then resided, with so much land as he might choose to farm, what fruit he might want, and the spring-house, subject to the direction of his wife; also the sum of \$200 per annum during his life; and, if fire should destroy his Fincastle house, a farther **380*** *sum of \$220 per annum while his income from that source should be suspended. This property is given to his wife for life on the death of his father. These moderate provisions for the heir, contemplating only the ease and comfortable supply of the wants of an old man, comport very little with the idea of leaving an immense estate, consisting among other articles of numerous tracts of land, remote from each other, most probably of very difficult management, to descend to him. It is not probable that this estate would be left to descend to him for the life of Mrs. King. Her surviving him was probable, and the testator expected she

would survive him. The lands devised to him are given to her for life.

The father, who was the presumptive heir when the will was made, died during the life of the testator. This event is not supposed to affect the construction of the will. But were it otherwise—were it supposed that he might look forward to that event and contemplate his brothers and sisters as his probable heirs—the will furnishes arguments of great weight in support of the opinion that he did not intend them to take anything not expressly devised to them. The heirs of the testator at the time of his death were James King, a brother of the whole blood; Nancy Finlay, a sister of the whole blood; Elizabeth and Polly, the daughters of Elizabeth Mitcheil, a sister of the whole blood; Samuel King, a brother of the half blood, and Hannah Allen, a sister of the half blood. Each of these persons is noticed in the will. For some of them an ample provision is made. To others, less favor is shown. The legacies to his brother and sister of the half blood are inconsiderable, while his bequests to those of the whole blood are large. No one of them is omitted. The circumstances that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion that he intended to leave a very large property to descend upon them by the silent operation of law.

The whole will proves the primary intention of the testator *to have been to keep his **[*381** immense real estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family with that of his wife. In case of having no children, he gives all his real estate at the death of his wife to William, the son of his brother James, on condition of his marrying a daughter of William Trigg and Rachel, his wife, in trust for the eldest son or issue of said marriage. If such marriage should not take place, he gives said estate to any child, giving preference to age, of William and Rachel Trigg, who should marry a child of his brother James, or of his sister Elizabeth. William Trigg was the brother of his wife. His primary object, then, is the issue of a marriage between his nephew, William King, and a daughter of William Trigg, by his then wife, the niece of the testator. His second object was the issue of any marriage which might take place between any child of William and Rachel Trigg, and any child of his brother James or of his sister Elizabeth. That both these objects have been defeated by the course of subsequent events, does not change the construction of the will. The testator undoubtedly expected the one or the other of them to take place; and his intention respecting the immediate interest of the devisee or the descent to the heir, is the same as if a daughter had afterwards been born to William and Rachel Trigg, who had intermarried with William King. The will, therefore, is to be construed in that respect, as if the contemplated marriage had been actually consummated. It was not very probable, at the date of the will, that the devisee of this immense fortune might come into existence in less than twenty years, nor that the wife might live fifty

1.—Cases T. T., 157; 1 Coke, 1; 3 P. Wms., 295; 1 Wils. 333; 1 Ves., 225; 1 Wash., 97, 107; 1 Call., 132; 1 Munf., 143, 145.

years. In the meantime no provision whatever is made for him. To what purpose should the profits of the estate intended for him be withheld during the lifetime of the testator's wife, since those profits were not to be received by her? Why should her death be the event on which lands in which no interest was given to her, should be enjoyed by the devisee? We perceive at once the reason why the devise of those lands in which she had a life estate should take effect at her death, but there is no reason for postponing the possession of lands from **382***] which she could derive no *benefit, and which were not given to others to the same period.

The devise over, too, has considerable influence in this question. It may be on a contingency too remote to be supported by law, but the testator's intention is not the less manifested on that account. He did not suppose it too remote, and, in fact, it might have happened in a few years. Had William King, the devisee, died young, or had William or Rachel Trigg died without leaving a daughter, a fact which has actually happened, and any child of William and Rachel Trigg had married a child of James King or of Elizabeth Mitchel, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. It consists very well with the general intention of the testator and his mode of thinking, as manifested in his will, to suppose an intention that the profits should accumulate for the benefit of those for whom the estate was designed; we can perceive nothing in the will to countenance the idea that he contemplated the descent of these lands to his heirs. Nothing could be more contrary to his general purpose than the distribution which the law would make of his real estate among his heirs. This may be the result of a total failure of all the provisions in the will, but cannot be considered as the immediate effect, if a contrary intention is perceived, and if the words can be so construed as to support that intention.

The words used by the testator show that nothing was farther from his mind than a partial intestacy. He says he has thought proper to make his will, "leaving and bequeathing his worldly estate in manner following:" after making a considerable provision for his wife, and devising to others during her life, he gives "all his real estate at her death" to his nephew, on condition, and on failure to perform the condition, gives "the said estate" over. Being about to devise all his estate to his nephew, and knowing that his wife and others would hold a large part of it for her life, it was obvious that his nephew could not take all till her death. But if he devised the whole estate, that which could not be taken by the wife or by others for her life, would pass to the nephew, **383***] ew, *if a clear intention appears in the whole will to intercept the descent to the heir; although the clause, taken literally, would postpone the possession, even of that part in which the wife has no interest, till her death. To effect this intention the court will vary the strict meaning of words, and sometimes transpose them. (1 Call, 132.) The word "all" may be transposed so that the clause may read "in case of having no children, I then leave

my real estate, all, at the death of my wife, to William King," &c. Let the clause be thus read and no one could hesitate on its construction. The whole estate is devised to William King; but the possession of that part of it which is given to the wife or others for her life, is postponed till her death. The whole will bears marks of being written by a man whose language was far from being accurate, and whose words, if taken literally, would in some instances defeat his intention. That intention, we think, was to devise his whole real estate to William King, in trust, on a condition subsequent, postponing the possession of that part of it which was given to the wife and others for her life, till her death.

3. The third point is one of great interest to the parties. Did William King take an estate which, in the events that have happened, ensures to his own benefit, or is he, in the existing state of things, to be considered as a trustee for the heirs of the testator?

This question cannot properly be decided in this cause. It belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. We do not mean to indicate any opinion upon it. The legal title is, we think, in William King, whoever may claim the beneficial interest, and the judgment is therefore affirmed with costs.

Mr. Justice JOHNSON, dissenting.

The defendant here was plaintiff in ejectment in the court below, in a suit to recover certain lands, part of the estate of William King the elder.

The cause comes up on a case stated according to the *practice of Virginia, and [**384**] upon which judgment was rendered for the plaintiff.

The right to recover depends upon the will of William King the elder, and the events that have occurred to defeat or give effect to the provisions of that will.

The operative words of the will are these: "In case of my having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel, his wife, in trust for the eldest son or issue of such marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James or of my sister Elizabeth, wife to John Mitchell."

The testator died without issue, and none of the devisees intended to be provided for came within the description of heir-at-law.

As Mrs. Trigg died without having had issue female, the marriage contemplated for William, the defendant, never became possible; neither has any one of the marriages contemplated in the alternative taken place between the issue of the Triggs and the issue of testator's brother or sister; but from the case stated it appears that, although remote and improbable, the event of one of the contemplated marriages is not impossible.

These, however, appear to be immaterial

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facts in the present case, since it has not been contended in argument that the limitation over depending upon the failure of William's marriage with the daughter of the Triggs, is limited by the will to take effect within the term prescribed by the law of executory devises. Unless it could be confined to the life of Mrs. King on the failure of William's marriage, it is obvious that the object of that devise over might not come *in esse* until after every life in being had terminated, and might not marry for more than twenty-one years afterwards.

Without committing myself, however, on this point, I shall pass it over; considering it **385***] only as assumed for the purpose *of the present argument. After the most diligent attention to the questions in this cause, I cannot help coming to the conclusion that its difficulties are rather artificial or factitious, and that the true legal view of it is that which is most simple and most consistent with the truth of the case, to wit: that as to the mass of his estate comprised in this clause, the testator's views had been wholly baffled by events; that the devise in favor of the offspring of certain marriages in his own family having altogether failed, the law must dispose of his property, he having made no ulterior disposition of it; and this, at last, will probably come the nearest to a correct view of the testator's intentions; for we are at liberty to conclude, in the absence of such ulterior disposition, that unless the estate should vest in the manner in which he had proposed to vest it, he was indifferent as to what became of it, or could do no better than leave it to the law. If he had felt that strong predilection for his supposed favorite nephew, the present defendant, which was so much insisted upon in argument, it may be presumed that the interests of that nephew would not have been forgotten.

Much use has been made of this assumed predilection, in order to establish an inference of intention in William's favor.

To my mind the will seems calculated to induce a contrary conclusion, for there is not a provision in the will made in his favor, individually. He takes, if at all, in trust for his own issue, and even that issue is only conditionally an object of favor; unless mingled with the blood of the Triggs it is rejected, and the blood of the Triggs is followed up into other connections, to William's entire exclusion. Nor is the offspring of his brother and sister admitted to higher favor, unless they be connected with the offspring of the Triggs.

I think it clear, then, that the primary objects of testator's bounty were the children of the Triggs, or their offspring; and not William or his offspring.

At the close of the argument at the last term, I intimated to counsel my impression that the cause had not been argued on its true grounds. I considered it a case of conditional **386***] *limitation, whereas it was argued exclusively with reference to the law of conditions; the one party maintaining that the marriage of William was a condition precedent, and therefore, as it never took place, nothing ever vested in him; the other, that the marriage was a condition subsequent, and having become, without default in him, impossible, he took the estate discharged of the condition;

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but both conceding that the cause must be disposed of on the law of conditions.

It is clearly a case of conditional limitation; but if it is to be decided on the law of conditions, instead of the law of contingencies, I think there is abundant reason for maintaining that it is a case of condition precedent, not subsequent. Were this a common law conveyance, I should think differently, for reasons well known to the profession; but in a will there is not one case in a thousand in which it would ever enter the mind of a testator, when he gives upon condition generally, that any interest vests until performance. I feel no hesitation in laying it down as the ordinary import of words of condition in a will, that they impose a condition precedent, unless accompanying words or the general purpose for imposing the condition suggest the contrary. In the present instance, there cannot be a reason consigned, why any interest should vest in William, prior to that marriage which was to give birth to the issue that was the sole object of the testator's bounty. It was not William for whom any beneficial interest was intended, but the issue of a particular marriage, in which the will distinctly shows that the blood of the Triggs was the favored object. We must force the words of the testator from their simple and natural meaning, before William can in any event become more than a mere trustee in interest. And why create him trustee? at his tender age, too, for an event so remote and uncertain, for persons whose coming *in esse* depended upon so many contingencies, must necessarily be so long deferred, and whose interests would by operation of law be committed into hands so much more competent. Why make him a trustee, who would need himself a guardian?

It has been urged that the testator has declared he did not mean to die intestate as to any part of his property, *and that [**387** marriage being a valuable consideration, William must be considered a purchaser.

As to the first of these arguments, it is clear that the testator never lost sight of his avowed intention, and actually did dispose of all his property, though not of all his estate in it; and with so many alternatives and precautions, as might well have satisfied an ignorant man, if not any man, that he could not die intestate as to any part of it. And as to William's being a purchaser, although it might well be denied before the event of his marriage, yet if it be admitted, the consideration in view was not his own advancement, but that of his issue. That was to him a legal and adequate consideration, either for marrying or waiting for the marriage. A purchase made for a child, is a case excepted from that class of resulting trusts which arise when one individual pays the consideration and another takes the title. The natural feelings imputed to the parent are held sufficient to take the case out of the general rule. (2 Mad. Ch., 116, *et passim*).

If this will is to be adjudged to vest a present interest in William, subject to be defeated by breach of the condition, or rather waiting to be rendered absolute by the performance of the condition; in other words, if it is to be construed to create a condition subsequent, it must be for the purpose of carry-

ing into effect this will, or some purpose of the testator expressed in it. But if it can be shown that it would be nugatory as to William and unnecessary as to all other interests, the argument falls.

I can conceive of no interests that can be involved in this question, unless it be, 1. The interests of the devisees over; 2. Those of the heir-at-law; or, 3. Those of William himself.

Now, as to the first, it would be contrary to the most express terms of the will to give William a continuing interest, or any present interest. On a question of intention, it is immaterial whether the devise over be too remote or not too remote. The argument is the same, and as to them, the devise creates a legal interest: they are not to take under the trust to William; but in the event of his marriage failing, the devise over is of a legal interest, so that the trust is expressly restricted to the object of its creation, which object arises only upon the marriage of William. The words are, "and in case such marriage should not take effect, I leave and bequeath such estate to any child," &c. So that upon the failure of the marriage, the trust was intended to be, as to the devise over, as though it never had been mentioned.

This is expressly limiting William's interest to the purposes of its creation, and rendering it idle and useless, except in the event of the marriage.

And why should the heir-at-law ask to invest William with an existing interest? He has no need of a legal estate in William to maintain his right. His claim, as of an undisposed residue, is better than of a resulting trust under the devise to William.

Or why should the court adjudge this a condition subsequent in behalf even of William himself? The law is clear that he can take no beneficial interest under this will; his case is one of the strongest possible against the arising of any implication in favor of a devisee. In the case of *Wheeler v. Shervel* (Mosely 301, case 165), in which the executors claimed a beneficial interest in the residue of property given them in trust, the court declares it to be the strongest case possible against them, that they take expressly in trust.

And in the case of *Milnes v. Slater* (8 Ves., 308), where a similar claim was preferred, it was held to be conclusive against it, that one of their number was created trustee. The heir is not to be precluded or postponed, except upon express words, or strong, if not unavoidable implication. Here the implications are all against him who would preclude the heir-at-law.

If, then, the purpose and the words of the will point to the marriage of William for the initiation of the testator's bounty, and no interest or object whatever will be subserved by vesting in William a present interest; it follows that the marriage, which is the condition, should be held a condition precedent.

Nor can I feel the force of that argument in favor of a present or beneficial devise to William which is deduced from the circumstance that no provision is made by the will for the application of the income during the interval that must ensue between the mar-

riage of William and birth of issue; an interval which, by possibility, might last many years.

If this were an application for a maintenance out of that income, such an implication might have weight; but it certainly goes no further; and even to that point the inference is not unavoidable, since it is perfectly consistent with the character and duties of a trustee to receive and invest the rents and profits of the trust estate in expectancy of the event which is to appropriate them. And where no specific instructions are given him, a prudent man will claim and receive the directions and protection of a court of equity in applying such income; it is every day's practice.

If, then, neither does the will give nor the law imply any beneficial interest to William, there can be no reason for vesting anything in him before the marriage.

Believing, as I do, that if the case must be disposed of upon the question whether the condition, if a case of condition, be precedent or subsequent, it ought to be adjudged a condition precedent, I should here conclude. But as the case has been laid over, and there is no knowing on what point it may go off, I must proceed to examine it in other points of view.

I will, then, next examine the rights of William upon the hypothesis that it is a condition subsequent.

If a condition subsequent, he can only, in the most favorable view of his interests, be placed in the same relations and acquire the same rights by its becoming impossible, that would have resulted from the performance of the condition.

Suppose, then, the condition performed, and what would have been the character and extent of his rights? On what principle could he be discharged from the trust on which everything is given to him that the will gives? Would he have held to his own use or to that of his issue? He would not have acquired an estate tail under the rule in **Shelley's case*, [*390 because he was a mere trustee; his legal estate could not unite with the use to his issue so as to make one estate. And if he would have held in trust for his issue by that marriage, what would have been the consequence of his dying without issue? The question is easily answered.

The reversion of the use in the event supposed, never passed from the testator. The disposition of the law was this: upon the death of testator, the whole descended upon the heir to await the event of William's marriage. Upon his marriage he would have become entitled to take and hold in trust for the issue of that marriage. But what is the rule of the law when a trust is created for an object that never comes into existence, or a purpose that fails? It cannot be questioned that the trustee then holds to the use of the heir-at-law. I will not say it is absurd, but it does appear to me irreconcilable with any principles that I am acquainted with, that a trust should be converted into a beneficial interest by the occurrence of an event which makes the trust idle and without an object; and it is not easily reconcilable with reason or with the views of the testator, that an interest which the heir-at-law would unquestionably have retained even after the mar-

riage, should be devested by the impossibility that the marriage should ever take place.

There is not wanting legal authority for maintaining, on the contrary, that had the marriage taken place and the wife died without issue, so as to render it impossible that the object of the trust should ever come *in esse*, the estate would immediately have returned to the heir-at-law. I allude to the case of *Mansfield v. Dugard* (1 Eq. Ca. Abr., 195; 1 Fearn, 372), in which the devise was to the wife until the son attained his age of twenty-one years. The son died at thirteen, and it was ruled that the wife's estate determined on the son's decease.

But it is with reluctance* I bestow time upon examining these questions, so thoroughly am I satisfied that this case does not turn on the doctrine of conditions. It is a case of conditional limitation, and, therefore, to be disposed of upon very different principles. Cases of conditional limitation*partake of the nature of conditions; but they are cases of contingency, and to be adjudged upon the principles applicable to contingent estates. Their distinguishing characteristics are, that they contain a condition either to divest an estate vested, or to prevent the vesting of an estate contemplated, and to carry over the interest to another party, or to some other purpose, not to the heir. Whereas, it is indispensable to the legal idea of a condition that it should enure to the benefit of the heir, that he should enter, and that the effect of entry should be the restoration of the original estate, not the creation of a new estate. A conditional limitation is comprised among executory devises, and, therefore, can be created by will alone; but estates on condition may be created by deed or will. As to the estate to be created or carried over, as well as in those instances in which it anticipates or prevents an estate from vesting, it is obvious that conditional limitations must be assimilated to conditions precedent. But as the contingency may also operate to divest an estate taken presently, it is equally obvious that it then approximates to a condition subsequent in one of its effects. In either case, however, it is regarded as a contingency, and the law of conditions is not applied to it to any purpose that would defeat the estate of the second taker. It is, on the contrary, so moulded and applied as may give effect to the devise over.

The question whether this is a case of condition or of conditional limitation, is easily decided by subjecting it to a very simple and obvious test.

Let us assume, for argument, that the devise over on failure of William's marriage is not too remote, that he took under a condition subsequent, and committed a clear breach of the condition. In that event, if this is a case subject to the law of conditions, the heir alone could enter, and his entry would restore the original estate, not carry over an estate to another; for it is a canon of the law of conditions that although entry for condition broken may defeat one estate, it cannot create a new one, or carry over another estate; it may restore the estate of him who imposed the condition, but does no more.

392* What, then, would become of the devise over? of the will? and of testator's intention? They would be defeated; and hence Peters 3.

words of condition in such cases are construed words of limitation, and the condition converted into a contingency, upon the happening or failure of which the estate devised in the alternative goes over and vests without entry. There is no other mode of carrying into effect the intention of the testator but by giving to his language a meaning that will comport with that intention. The only difficulty in this cause, and that which probably preoccupied the attention of counsel with the law of conditions, has resulted from mere casualty. By a series of unanticipated events, the heir-at-law is at this time actually thrown into the same relation, with regard to the defendant here, in which he would have stood had the case been one purely of condition. That is, if the devise over be put out of the will, as too remote in its creation, then, in effect, the entry of the heir, if he has a right to enter, would enure to his own benefit.

But this can make no change in the law of the case. Whatever was the legal character of the right of the parties, it was the effect of the testator's intention as deduced from the will. His intention remains the same, although the arbitrary rules of law may prevent that intention from being carried into effect. The rule of law which converts words of condition into words of limitation in certain cases, proceeds upon intention, and cannot be affected by the occurrence of incidents which defeat the execution of that intention. The present is one of the most frequent and familiar occurrence in the books, of those instances in which that rule of construction prevails. Neither the first taker nor the devisee ever was heir-at-law, and in that case Lord Hale has said (*Fry's case in Venetris*) "that it is a rule which has received as many resolutions as ever point did, that although the word *condition* is used, limiting the estate over to a stranger makes it a limitation."

For these reasons I am clearly of opinion that the rule of law applicable to conditions subsequent, when become impossible, is not to govern this case. That it must be disposed of on the law of conditional limitations, and William's *marriage is to be regarded as a [**393** contingency, not a condition.

I have already given my reasons for holding this to be a condition precedent, or rather a contingency which is to vest, not to divest an interest; and this is always a question of intention to be deduced from the views of the testator in imposing conditions. If a condition precedent, then it is one of those instances in which the first estate is anticipated, and never vests; the case becomes a very plain and simple one, and the will must operate as if it read thus: "if W. K. shall marry a daughter of the Triggs, then I give the residue to him in trust, &c.; if such marriage shall not take place, then I give it over." And thus construed, there can be little doubt that the will comes nearest to the good sense of the case and the views of the testator. Nor can there be any ambiguity in the law of the case, if so construed. William would take nothing, because he never married; and the devise over being too remote, there is no first taker to carry the estate. It is, then, an undisposed residue, and to be distributed according to the *lex loci*. Under this view of the case, the judgment must certainly be against William King.

But if he took a present interest, defeasible upon the condition or contingency of refusing to marry a daughter of the Triggs, then the inquiry is, what effect has it upon the state of right in a case of conditional limitation, that without his fault such condition or contingency becomes impossible? On this point, which is very much of an authority question, it must be acknowledged there is a great dearth of adjudged cases, as well as of learning in elementary writers.

If it may be decided with analogy to trusts, the objects of which have failed or never come *in esse*, then they are considered as determined in favor of the heir-at-law, as in *The Bishop of Durham's* case. If it may be determined by analogy to the case of estates to endure until the happening of an event that has become impossible, then I have shown that it determined presently in favor of the devise over; the court declaring in the case of *Mansfield v. Dugard* that he may wait forever if his right is to be suspended on an impossible event.

394*] *And if in the absence of any other established rule we may be guided by the pole star of devises—the testator's intention—certainly nothing could comport less with his views than to permit an event which he looked forward to as the certain cause of divesting William of even his fiduciary interest, to have the effect of vesting in him an absolute beneficial interest, or any other interest which could stand in the way of the claim of his own legal representatives.

If we submit the question to the plainest test of reason as applied to the law of limitation and contingencies, then it seems incontrovertible that when a limitation over is made to depend upon the failure of a certain event, the limitation ought to take effect whenever it is ascertained that the event must fail, as when it has become impossible; and equally so, that when a previous interest, although passing presently into possession, awaits its confirmation from the happening of a certain event, that there is no reason for continuing that estate when it is definitively established that the event on which it depends for confirmation can never happen. These were the principles recognized in the case of *Mansfield v. Dugard*, and, I think, the reasonable result of all the doctrine of conditional limitations considered under the three heads into which the cases are usually distributed. There was a case cited in argument to sustain the judgment below, on which so much reliance was placed that I shall not pass it over unnoticed. It is the case of *Thomas v. Howel*, reported in Salkeld and Modern (1 Salk., 170; 4 Mod., 66), and very defectively reported in both. The report in Salkeld does not give the half of the case, and that in 4 Mod. gives a very unsatisfactory account of the reasons which governed the court. An attentive examination of the facts, however, will enable us to understand the case, and to explain it in perfect conformity with the principles which governed my opinion.

It was a curiously mixed case, in which the law of conditions and conditional limitations were so blended as to have been scarcely severable. It was the case of a father, tenant in fee, and his three daughters, constituting his heirs-at-law. The father devises to one of the daughters

a messuage called *Lawhorn, [***395** “upon condition that she marry T. T., and if she refuse to marry him, then over to trustees in trust to be divided among the three co-heiresses, equally or otherwise as they please.” The marriage became impossible by the death of T. T. under twelve, and the question was which to apply to it—the law of conditions or the law of limitations. The majority of the court (three out of four) decided that it came within the law of conditions. One held it to be a conditional limitation. On this case I would remark—

1. That it was well disposed of upon the law of conditions, for the devise over was in effect to the heir-at-law; so that the entry for condition broken would not have defeated the will, but have carried it into effect; the reason, therefore, for construing words of condition into words of limitation did not exist, especially as it is presumable that there was nothing to prevent the operation of the statute of uses in favor of the devise over under the trust in the will, but.

2. There was room for a doubt on the question arising from the effect of interposing the trust, especially if the power of making an unequal distribution was well given to the trustees; for then the entry of the heirs would have defeated the testator's views; and it ought to have been held a limitation, according to the opinion of the dissenting judge.

3. I think it very clear that the case alluded to was argued and decided under a general admission of bench and bar, that if held to be a case of condition, the effect of the condition's becoming impossible would be in favor of the first taker; but if held to be a case of conditional limitation, that it would be in favor of the party claiming under the devise over. If the effect had been held to be the same in both cases, it would have been utterly idle to raise a question upon the will.

And, lastly. That when the judges in that case come to the conclusion that it was a case of condition, and not of limitation, they proceed to examine the question, whether a condition precedent or subsequent, with a view to the leading motive of the testator, little regarding any particular phraseology. And, certainly, with a view to induce T. T. to address the *daughter, the more beneficially the will [***396** operated in her behalf, the greater would be the inducement held out; and, accordingly, they make it a condition subsequent. But a contrary reason operates here, for the leading motive is not the establishment of William King, but the formation and advancement of a particular family connection. It would then have comported best with this testator's views to superadd the inducement of necessity, in order to incline William King to the proposed matrimonial connection.

There could have been no reason for giving it to him until the marriage took effect; it would have been better to let it accumulate in the hands of the executors, especially considering his tender age at the date of the will.

Upon the whole, I am satisfied that if this case is to be disposed of on the law of conditions, there is nothing in the will or the views of the testator that should make it a condition precedent, and nothing certainly has occurred

since to make it necessary to give it that character; for had he married, there would have been a resulting trust in favor of the heirs if the marriage failed to produce issue, and that would only have left the heir-at-law where he is now, without owing anything to the aid of a trust. Whence, it results, that it would have been useless and idle to have vested any interest in William at any time.

But I am perfectly satisfied that the case is one to which the law of limitations and contingencies alone is applicable, and that according to the principles that govern that class of cases, the impossibility of the contingency does not confirm the estate in the first taker, but defeats it.

I am therefore of opinion that the judgment below should be reversed.

See S. C., 8 Pet., 326.

Cited—8 Pet., 348, 349; 14 How., 501; 6 Wall., 475, 478; 3 Wood. & M., 493; 1 Cliff., 577; 3 Cliff., 21; 17 Bank. Reg., 526.

397*] *ANONYMOUS.

Practice.

Certified copies of the opinions of the court, delivered in cases decided by the court, are to be given by the reporter, and not by the clerk of the court.

MR. WIRT moved the court to order copies of the opinion of the court delivered at this term in the case of *Shanks et al. v. Dupont et al.* (ante, 242), to be certified with the judgment of the court under the seal of the court. He stated that he made the application on behalf of a gentleman who was interested in a case depending in England upon similar principles with those decided in the case referred to, and the object was to lay the proceedings of this court, in an authenticated form, before the court in Great Britain which was to decide the case depending there.

Mr. Chief Justice MARSHALL said that the reporter of the court is the proper person to give copies of the opinions delivered by the court. The opinions were delivered to him after they were read, and not to the clerk, and they were not therefore in his office to be copied. Not being filed in the clerk's office, he could not certify copies of the opinions under the seal of the court.

If an authenticated copy of the opinion of the court is desired, the reporter only could furnish it, certified; and the clerk of the court may certify, under the seal of the court, that he is the reporter, if this should also be required.

398*] *WILLIAM FOWLE, Surviving Partner, Plaintiff in Error,

v.

THE COMMON COUNCIL OF ALEXANDRIA.

Insolvency of auctioneer—liability of a municipal corporation for granting license to auctioneer without taking a bond—Act of Congress amending charter of Alexandria.

Peters 3.

The plaintiff placed goods in the hands of an auctioneer in the city of Alexandria, who sold the same and became insolvent, having neglected to pay over the proceeds of the sales to the plaintiff. The auctioneer was licensed by the corporation of Alexandria, and the corporation had omitted to take from him a bond with surety for the faithful performance of his duties as auctioneer. This suit was instituted to recover from the corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency of the auctioneer, on an alleged liability, in consequence of the corporation having omitted to take a bond from the auctioneer.

The power to license auctioneers, and to take bond for their good behavior not being one of the incidents to a corporation, must be conferred by an Act of the Legislature; and, in executing it, the corporate body must conform to the act. The Legislature of Virginia conferred this power on the mayor, aldermen and commonalty of the several corporate towns within that Commonwealth, of which Alexandria was then one: "provided that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen and commonalty of such corporation." This was a limitation of the power. [407]

Though the corporate name of Alexandria was "the mayor and commonalty," it is not doubted that a bond taken in pursuance of the act would have been valid. [407]

The Act of Congress of 1804, "An Act to amend the charter of Alexandria," does not transfer generally to the common council the powers of the mayor and commonalty, but the powers given to them are specially enumerated. There is no enumeration of the power to grant licenses to auctioneers. The act amending the charter changed the corporate body so entirely as to require a new provision to enable it to execute the powers conferred by the law of Virginia. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body. [408]

The common council granted a license to carry on the trade of an auctioneer which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern-keeper, or any other person who may carry on any business under a license from the corporate body. [409]

Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transact business with the persons acting under the clause? [*399] The court find no case in which this principle has been affirmed. [409]

That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves are liable for torts is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. [409]

The Act of Virginia, passed in 1792, authorizes a defendant to plead and demur in the same case. [409]

ERROR to the Circuit Court for the County of Alexandria in the District of Columbia.

This was an action on the case brought by the plaintiff in error against the defendants in the Circuit Court for damages charged to have been sustained by the plaintiff in consequence of the neglect of the defendants to take due bonds and security from one Philip G. Marsteller, licensed by them as an auctioneer, for the years 1815, 1816, 1817, and 1818, according

to the alleged provisions of the statute in that behalf enacted.

The declaration and pleadings are fully stated in the opinion of the court. The defendants filed a general demurrer, and pleaded the general issue.

The counsel for the plaintiff objected to the defendants' demurring and pleading at the same time to the declaration, but the court overruled the objection, conceiving that they had a right to permit such a course of proceeding under the statute of Virginia, which is in these words: "The plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defense."

The court then proceeded to consider the matters of law arising upon the demurrer, and decided that the declaration and the matters therein contained, were not sufficient in law to maintain the plaintiff's action; and the plaintiff prosecuted this writ of error.

The case was argued by *Mr. Swann* for the plaintiff, and by *Mr. Jones* and *Mr. Taylor* for the defendants.

For the plaintiff, it was contended that the Circuit Court erred:

400* 1. In deciding that the action was not sustainable on the declaration.

2. In permitting the demurrer and plea to be both filed at the same time to the declaration.

Mr. Swann, for the plaintiff in error, stated that this case had been before the court in 1826, and was sent back, the court having determined that a new trial should be awarded. (11 Wheat., 320.) On the argument on the former hearing, the plaintiff in error, as he does now, contended that the corporation of Alexandria were liable for the neglect of their duties, and for the damages sustained by individuals in consequence of the same. On that argument, and in support of the principles then asserted, there were cited, *Yarborough v. The Bank of England* (16 East's Rep., 6); *Riddle v. The Proprietors, &c.*, (7 Mass. Rep., 169). The principles on which the whole claim of the plaintiff rested having been thus fully stated and discussed, and the authorities for them having been vouched, the plaintiff had a right to believe that when the case was remanded upon technical rules, and without a disaffirmance of the principles on which the claim was then placed, they had the sanction of this court. The court will now say whether the question of responsibility is still open.

If it is to be discussed, a reference to the authorities formerly cited will dispose of it in favor of the plaintiff in error. The liability charged to the corporation is fully within the rules to be found in adjudged cases. Those which were cited sustain the principle. Banks are liable for negligence, and the law of corporation, as it is now understood, places such bodies under the same obligations, and gives the same remedies against them as are given in the cases of individuals. They have been held answerable to this extent by this court. (*Clark v. The Corporation of Washington*, 12 Wheat., 40; *The Bank of Columbia v. Patterson's Administrators*, 7 Cranch, 209.)

As to the second point. There cannot be a plea and a demurrer to the same declaration. It is competent for a defendant to plead as

many matters of fact as he desires, or he may do so as to matters of law; but upon the rules of *pleading, both cannot be done. A [*401 demurrer admits the facts and raises questions of law upon them; a plea puts them in issue. There is, therefore, a direct contradiction between them.

This practice does no good to the party adopting it. Nothing is decided by either course until all is decided, and the opposite party is exposed to great trouble. By pleading alone, the whole questions of law and fact which arose in the case would have been fully presented for decision. It is denied that the law of Virginia sanctions this practice. The Act of Virginia of 1784 prohibited pleading and demurring to the same declaration.

Mr. Taylor and *Mr. Jones*, for the defendants.

The plaintiff in error intended to present this question of the liability of the defendants, but this has not been done in the declaration. It is asserted by him that the defendants, a municipal corporation, are liable to him for damages for not carrying their own laws into effect.

The suit is against the common council of Alexandria for appointing an auctioneer without taking a bond with sureties for the performance of his duties. The second count alleges the liability of the defendants for suffering the auctioneer to act without having given security. It should appear what the damages sustained by the plaintiff were, and the declaration should have shown the power of the corporation, and their obligation to exercise those powers for the protection of the plaintiff from those damages.

What damages has the plaintiff sustained? It is assumed that had the bond been taken, he would have been indemnified by its provisions, and that it would have covered the defalcations of the auctioneer. The duties of the defendants should have been specified by a reference to the laws enjoining them; the suit is in the nature of a penal action, and nothing should have been left to inference.

It has not been shown that the common council of Alexandria has the power to grant licenses to auctioneers. The law of Virginia of 1796 gave that authority to "the mayor, aldermen and commonalty;" but does this extend to authorize "the common council?" The [*402 next law gives the authority to "the mayor and commonalty." There is no averment that the common council is the same body with the corporations mentioned in these acts.

The counsel then went into an examination of the laws of Virginia incorporating the city of Alexandria, and of the Act of Congress on the same subject, to show that the power to take a bond from an auctioneer did not exist, or had not been continued or transferred from the corporation as originally established to that now existing, and against which the suit was instituted.

They also contended that the claim of the plaintiff presented a case in which a corporation was asserted to be liable for having omitted to legislate for the protection of those who dealt with an officer acting under an authority derived from the corporation. Such a claim could not be maintained. It was also urged that had a bond been taken from the auction-

eer, it would not have enured to the benefit of individuals transacting business with him. Its operation would have been to govern his public duties, and not to operate on his private transactions. Between the corporation taking such a bond, and those who dealt with the auctioneer, there was no such affinity as would permit them in case of default to claim the benefit of the bond. Such a provision might have been by law made, but this not having been done, its omission gave no ground of action.

As to the second point; a reference to the Act of the Legislature of Virginia, passed in 1792, would fully satisfy the court that a defendant has a right to plead and demur in the same case. This has been decided in the courts of Virginia. (4 Hen. & Mun., 276, 277; 2 Mun., 100.)

Mr. Swann, in reply, contended that the acts incorporating the city of Alexandria, and particularly the Acts of Congress, were public acts, and it was not, therefore, necessary to introduce them into the pleadings. The court would take notice of those laws as public laws.

Until 1804, the corporate name of the defendants was "the mayor and the commonalty;" since that year it has been "the common council of Alexandria." The law of 403*] Virginia *in 1796 was a general public law relating to all corporations, and became necessarily a law of this district. Without that law, the corporation had no right to license the auctioneer. The Act of 1800 was passed under the authority of the law of 1796, and that act authorizes a suit on the bond of an auctioneer by the party injured.

By the law of 1804 the corporation may pass all laws not inconsistent with the laws of the United States; and the plaintiff claims the benefit of the obligation imposed by the laws. The corporation was bound to take a bond with security on granting a license to an auctioneer.

By the appointment of the auctioneer the defendants held out to the community that they had taken a bond. They gave the auctioneer the credit upon which the plaintiff trusted him with his goods. They authorized him to carry on the business out of which the loss arose; a business he could not have entered upon without the license he received from the corporation.

On a demurrer, everything is to be inferred against the party demurring. The facts are admitted, and whatever conclusion they warrant may be drawn by the court. The facts show the omission to take the bond, and the inference is authorized that this was gross negligence, for which the defendants are answerable.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

In December, 1796, the General Assembly of Virginia passed an act entitled "An Act concerning corporations," declaring, "that from and after the passing thereof, the mayor, aldermen, and commonalty of the corporate towns within the said commonwealth, and their successors should, upon request of any person desirous thereof, grant licenses to exercise, in such town, the trade or business of an auctioneer; provided, that no such license should be

granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen, and commonalty of such corporate town and their successors, in such penalty and with such *condition as by the laws [*404 and ordinances of the town shall be required.

In the year 1779 the town of Alexandria was incorporated by the name of "the mayor and commonalty of the town of Alexandria." The corporation consisted of the mayor, recorder, aldermen, and common councilmen.

The mayor, recorder, and aldermen, and their successors, were constituted justices of the peace, with power to appoint constables, surveyors of the streets and highways, and to hold a court of hustings once in every month; and to appoint clerks, a sergeant, and other proper officers.

In the year 1800 the mayor and commonalty passed an ordinance "for licensing auctioneers agreeably to an Act of the General Assembly, passed on the 22d of December, 1796," by which it was enacted that the mayor and commonalty shall grant to any person or persons during the same, a license to exercise the trade or business of an auctioneer within the town. Provided that no such license shall be granted until the person or persons applying shall enter into bond, with one or more good securities, in the sum of twenty thousand dollars, payable to the mayor and commonalty, and conditioned for the payment of the annual rent of five hundred dollars to the mayor and commonalty, in quarterly payments, for the said office; and for the due and faithful performance of all the duties of the same; which bond shall not become void on the first recovery, but may be put in suit and prosecuted from time to time, by, and at the costs of any person injured by a breach thereof, until the whole penalty shall be recovered.

In 1804 Congress passed an Act "To amend the charter of Alexandria," in which provision was made for the election of a common council. The judicial duties of the mayor, recorder, and aldermen, having been transferred to the Circuit Court of the United States for the County of Alexandria, it was enacted that the common councils elected "and their successors shall be, and hereby are made a body politic and corporate, by the name of the common council of Alexandria." The estate, &c., vested in the mayor and commonalty was transferred to the common council, and the usual corporate *powers to sue and be sued, [*405 &c., to erect work-houses, &c., to provide for the police of the town, &c., were conferred on that body. They were authorized "to appoint a superintendent of police, commissioners and surveyors of the streets, constables, collectors of the taxes, and all other officers who may be deemed necessary for the execution of their laws, who shall be paid for their services a reasonable compensation, and whose duties and powers shall be prescribed in such manner as the common council shall deem fit for carrying into execution the powers hereby granted."

The twelfth section enacts "That so much of any act or acts of the General Assembly of Virginia as comes within the purview of this act shall be, and the same is hereby repealed. Provided, that nothing herein contained shall

be construed to impair or destroy any right or remedy which the mayor and commonalty of Alexandria now possess or enjoy, to or concerning any debts, claims or demands against any person or persons whatsoever, or to repeal any of the laws and ordinances of the mayor and commonalty of the said town, now in force, which are not inconsistent with the act."

In June, 1817, the common council of Alexandria passed "An Act to amend the act for licensing auctioneers, and for other purposes," in the following words: "Be it enacted by the Common Council of Alexandria, that every person or persons obtaining a license to exercise the business of an auctioneer within the town of Alexandria, shall annually apply for and obtain a renewal of his or their licence, and shall also annually renew his or their bonds for the same in the manner provided by law; and every person failing to renew such license, and give bond annually, shall cease to exercise the business of an auctioneer, and shall be proceeded against accordingly."

The declaration, after reciting the Act of 1796 and the several ordinances of the corporate body of the town of Alexandria, charges that the common council of Alexandria, on the — day of —, in the year 1815, in the town of Alexandria, did grant a license to one Philip G. Marsteller, to exercise the trade and business of an auctioneer within the said town for the term of one year; and at the expiration *of the said year, did renew the said license to the said Philip G. Marsteller for one other year, and did continue to renew the said license from the end of the said last-mentioned year, from year to year, until the — day of —, in the year 1819, during all which time, that is to say, from the — day of — in the year 1815, to the — day of —, in the year 1819, he, the said Philip G. Marsteller, did exercise the trade and business of an auctioneer in the said town of Alexandria, under the said license and authority of the said common council, and that, during the period aforesaid, the said plaintiff delivered to him, the said Philip G. Marsteller, sundry goods, wares and merchandise, to be sold by him at auction in the said town of Alexandria, and that the said Philip did, from time to time, during the period he so carried on the trade of an auctioneer under the license aforesaid, sell at auction the said goods, &c., so delivered to him by the plaintiff, to the amount of \$1,583.09, which said sum the said Philip, though often requested, failed to pay to the said plaintiff.

The declaration then states that a judgment was obtained against the said Philip for the said sum, which he was totally unable to pay; by means of which premises the plaintiff became entitled to the benefit of the bond and security, which ought to have been taken by the common council previous to granting the said license to exercise the trade of auctioneer as aforesaid. Yet, the defendants, not regarding their duty in that behalf, but contriving to deceive and injure the plaintiff, did not, and would not take any bond and security as aforesaid, from the said Philip G. Marsteller, during the time when the transactions aforesaid took place; but on the contrary, so carelessly, negligently, and improperly conducted themselves in the premises, that by and through the negli-

gence, carelessness, and default of the defendants, no bond and security was taken from the said Philip, and that the money due from the said Philip was wholly lost to him, the said plaintiff, to his damage \$3,000.

To this declaration the defendants filed a general demurrer, and at the same time pleaded the general issue.

The counsel for the plaintiff objected to receiving at the *same time a demurrer [*407 and a plea to the whole declaration; but the court overruled the objection, under the Act of Assembly, which is in these words: "The plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or facts, as he shall think necessary for his defense."

The court, having sustained the demurrer and entered judgment for the defendants, the plaintiff has brought the cause by writ of error in this court.

The power to license auctioneers, and to take bonds for their good behavior in office not being one of the incidents to a corporation, must be conferred by an Act of the Legislature; and in executing it, the corporate body must conform to the act. The Legislature of Virginia conferred this power on the mayor, aldermen, and commonalty of the several corporate towns within that commonwealth, of which Alexandria was one; "provided that no such license should be granted until the person or persons requesting the same should enter into bond, with one or more sufficient securities, payable to the mayor, aldermen, and commonalty of such corporation." This was a limitation on the power.

Though the corporate name of Alexandria was "the mayor and commonalty," it is not doubted that a bond taken in pursuance of the act would have been valid. (Jones, 261.)

In the year 1800, when the corporation of Alexandria determined to act upon this law, an ordinance was passed authorizing "the mayor and commonalty" to grant licenses to auctioneers, provided that no such license should be granted until bond with sufficient sureties should be given, payable to "the mayor and commonalty." It may well be doubted whether this ordinance is sustained by the legislative act, in pursuance of which it was made. That act authorized "the mayor, aldermen and commonalty" to grant licenses to auctioneers, first taking bonds payable to the "mayor, aldermen and commonalty." The ordinance omits the "aldermen," both in the clause which empowers the body to grant licenses, and in that which names the obligees in the bond.

But supposing this difficulty to be entirely removed, we are next to inquire [*408 whether the powers to grant licenses to auctioneers, and to take bonds for the performance of their duty, which were given by the Act of 1796 to the mayor, aldermen, and commonalty, and by the ordinance of 1800 to the mayor and commonalty, have been transferred to, and vested in the common council of Alexandria.

This depends on the Act of Congress passed in 1804, "To amend the charter of Alexandria." Under this instrument, the corporate body consists of the common council alone. The mayor is separated from them, and the aldermen are discontinued. The power of the mayor and

commonalty are not transferred generally to the common council, but the powers given them are specially enumerated. We do not find, in the enumeration, the power to grant licenses to auctioneers. If it could be maintained that the repealing clause does not comprehend the Act of 1796, still the act amending the charter changes the corporate body so entirely as to require new provisions to enable it to execute the powers conferred by that act. The corporate body is organized anew, and does not retain those parts which are required for the execution of the Act of 1796. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body. It has been already said that we find no particular provision, and the general powers granted are so limited by the language of the grant, that they cannot be fairly construed to comprehend the subject of licenses to auctioneers.

It may be admitted that the ordinance of 1800 is not repealed by the act amending the charter. But that ordinance is not adapted to the new corporate body, and could not be carried into execution by the common council, till modified by some act of legislation.

The common council took up this subject in 1817, and passed the act recited in the declaration. We are relieved from inquiring whether this act removed or could remove the difficulties which have been stated, by the circumstance that the declaration changes the non-**409***[feasance, which is the *foundation of the action, as commencing in the year 1815. We do not think any law then existed which empowered the common council of Alexandria to license auctioneers, or to take bonds for the faithful performance of their duty. The injury alleged in the declaration, as the foundation of the action, is the omission to take the bond required by law. Now, if the common council was not required or enabled by law to take a bond, the action cannot be sustained.

If the declaration is to be considered as stating the cause of action to be the granting a license without previously requiring a bond, it will not, we think, help the case. The common council has granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern-keeper, or any other person who may carry on any business under a license from the corporate body.

Is a municipal corporation, established for the general purposes of government with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed.

That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case.

In permitting the defendant below to demur and plead to the whole declaration, [***410** the Circuit Court has construed the act on that subject as it has been construed by the courts of Virginia.

There is no error, and the judgment is affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia held in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Aff'g 3 Cranch, C. C., 77; See S. C., 11 Wheat., 320. Cited—20 How., 436; 5 Mason, 436, 437.

*JOHN CLAY, Plaintiff in Error, [***411** v.

ABRAHAM SMITH.

Receipt of dividend under Louisiana bankrupt law by resident of Kentucky—practice.

The plaintiff below, a citizen of the State of Kentucky, instituted a suit against the defendant, a citizen of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811; under which, according to the provisions of the law, "as well his person as his future effects" were forever discharged "from all the claims of his creditors." Under this law the plaintiff, whose debt was specified in the list of the defendant's creditors, received a dividend of ten per cent. on his debt, declared by the assignees of the defendant. Held, that the plaintiff, by voluntarily making himself a party to those proceedings, abandoned his extraterritorial immunity from the operation of the bankrupt law of Louisiana; and was bound by that law to the same extent to which the citizens of Louisiana were bound.

The plaintiff in error having died while the cause was held under advisement, the judgment was entered *nunc pro tunc*, as on the first day of this term.

ERROR to the District Court of the Eastern District of Louisiana.

This case was argued at January Term, 1828, by Mr. Livingston, and was held under advisement until this term; on the suggestion of counsel, and for information upon the law of the State of Louisiana, referred to in the opinion of the court.

Mr. Justice JOHNSON delivered the opinion of the court:

This case comes up from the Louisiana District, by writ of error, to reverse a judgment obtained there by *Smith v. Clay*.

Smith is a citizen of Kentucky, and Clay of Louisiana; and the action was brought to recover a debt incurred in the year 1808.

Clay's defense rests upon the validity of a discharge obtained in a court of the State, under a law of the State, in the year 1811. The plea sets out his petition to the court; his surrender of his effects; the schedule of his debts, in which Smith's debt is specified, as also the payment to him of ten per cent., the dividend **412*** declared by the assignees of *the bankrupt; and the judgment of the court, rendered in pursuance of the consent of more than a majority of his creditors in number and amount, that he be discharged, "as well his person as his future effects, from all the claims of his creditors." The language of the plea is, "upon which said petition, the usual proceedings being had thereon, the said plaintiff and other creditors and said defendant being parties thereto, the said Supreme Court by their final decree pronounced in the premises, on the 15th of June, 1811, declared the said defendant, as well his person as his subsequently acquired property and effects, forever released from all claims, debts, and demands," &c., previously due.

This plea is demurred to, and thus the question is raised whether Smith, by voluntarily making himself party to such proceedings, has not abandoned his extraterritorial immunity from the operation of the bankrupt laws of Louisiana.

We are of opinion that he did; and was bound by the decision of the State court to the same extent to which the citizens of that State were bound.

Judgment reversed.

Case remanded, with instructions to enter judgment for defendant there. And in consequence of the death of Clay, while the cause was held under advisement, that it be entered, *nunc pro tunc*, as on the first day of this term.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that the cause be, and the same is remanded to the said District Court, with instructions to the said court to enter judgment for John Clay, the defendant in said court. And it is further ordered by the court that in consequence of the death of the said Clay, while this cause was held under advisement, that judgment be entered, *nunc pro tunc*, as on the first day of this term.

Cited—13 Otto, 66; 1 Wood. & M., 127; Bald., 301; 1 Biss., 318; 5 Biss., 62; 5 Cranch, C. C., 492.

413* **WILLIAM PARSONS, Plaintiff in Error,*

v.

JAMES ARMOR AND T. W. OAKLEY, Syndics of the Creditors of JAMES ARMOR.

Practice—principal and agent—when principal bound by acts of agent—bills of exchange—protest.

Error from the District Court of Louisiana. The record consisted of the petition, the

answer, the whole testimony, as well depositions as documents, introduced by either party, and the fiat of the judge, that Armor the plaintiff below, recover the debt as demanded. The difficulty is to decide under what character we shall consider this reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which the court can treat this case but in the nature of a bill of exceptions. The court is not at liberty to treat this case as an appeal in a court of equity jurisdiction, under the Act of 1803; because the party has not brought up his cause by appeal, but by writ of error. [425]

F. at New Orleans, was the correspondent of P. at Boston, received goods from him on consignment, and was from time to time directed to purchase produce, and ship the same to P., and was instructed to draw on P. for the funds to pay for the same. When he made purchases, "the bills of parcels were made out in the name of F., and the accounts assured in the books of the different merchants in his name." The general course of the business was, that P. sent out, in his own vessels, merchandise to F. which was sold by F., and F., at the request of P., purchased from merchants in New Orleans produce, and shipped the same as ordered by P.; and to put himself in funds for the same when necessary, drew bills of exchange on P., who had always, until the presentation of the bills on which this suit was brought, accepted and paid the same; but he did not in his purchase, act under the idea that he was restricted in his purchases to the drawing of bills for the payment of the articles purchased for P. F. purchased a quantity of tobacco to be shipped to P., and payment for the same in bills on P. made a particular part of the contract for the purchase. At the time of the purchase, F. showed to the vendor of the tobacco the letters from P., ordering the purchase and shipment of the same. Some of the bills drawn by F. on P., and which were delivered to the vendor of the tobacco in payment for the same, were refused acceptance and payment, and this suit was instituted for the recovery of the amount of the bills from P. Held, that P. was not liable to pay the bills. [426]

The general rule is that a principal is bound by the act of his agent no further than he authorizes that agent to bind him; but the extent of the power given to an agent is decided as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule "that he who trusts must pay." So also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances, has been held to make the principal liable on the ground of immoral dealing. [426]

A bill of exchange is the substitute for the actual transmission of money by sea or land. Power, therefore, to draw on a house in good credit, and to throw the bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least tittle of evidence in this cause to show that P. meant to use the credit of the drawer of the bills on which the suit is brought, or to authorize him to pledge his credit in anything but the negotiation of the bills. This depended on the confidence which merchants of New Orleans who wished to remit would place in the solvency and integrity of the drawer and drawee; and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorized to go no further than to apply the funds deposited with him. [428]

Of the general power to protest the bills of one who has overdrawn there can be no question, for it is the only security which one who gives a power to draw bills and throw them on the market has against the bad faith of his correspondent. He takes the risk of paying the damages, if in fault, or of throwing them on the other if he has actually abused his trust. It is a question between him and his correspondent. [429]

The currency which a merchant may give to bills drawn on him by a correspondent, by payment of such bills, does not deprive him of the security he has a right to by refusing his acceptance of other bills so drawn. [430]

It does not affect the merits of this cause that the original contract was made for a payment in

Peters 3.

bills. Such was not the negotiation to which P. had limited F.; it was no more between P. and the vendor of the tobacco than a purchase of bills with the cash received for the tobacco. [430]

THIS was a writ of error to the Circuit Court for the Eastern District of Louisiana.

James Armor, a merchant of New Orleans, sued William Parsons, a merchant of Boston, in the Parish Court of New Orleans, by petition, setting forth that in June, 1825, he sold to one Eben Fiske, acting as the agent of Parsons, tobacco to the amount of \$17,311.99, in consideration whereof Fiske drew sundry bills of exchange on Parsons, all which were honored and paid, except two, one for \$1,443.29, and the other for \$4,123.71, which were not accepted or paid, and charging that Parsons owes him the amount of the two bills, viz., \$5,567.00. Certain merchants of New Orleans were sued as garnishees of Parsons. The cause was duly removed into the Circuit Court of the United States; and James Armor having failed, he himself and Oakley were appointed syndics of his creditors.

Some objection to the jurisdiction was taken and overruled, and a general answer put in by Parsons denying his liability.

The bills of exchange were dated July 2, 415*] 1825; one was *for \$1,443.29, at 60 days; the other, for \$4,123.71. The drawing, presentment, and protest of these bills were proved.

When the cause came to be heard, both parties waived the trial by jury, and agreed that the court should decide whether the defendant was responsible to the plaintiffs, upon the facts

as they appear disclosed in writing and filed in the case.

The papers filed in the case and brought up with the record contained admissions that, by the laws of Massachusetts, the rate of interest is six per centum per annum, and ten per cent. damages on protested bills of exchange; and that, by the laws of Louisiana, the interest is five per cent. per annum on bills protested from the date of protest, and the like damages of ten per centum.

The depositions and the evidence in the cause were also in the record set out at large. The depositions proved the course and nature of the business carried on by Eben Fiske at New Orleans, and also the particulars of some of the transactions between Mr. Parsons and Mr. Fiske. The deposition of Mr. Fiske states these transactions and their character more fully. The deposition is as follows:

Eben Fiske, a commission merchant in New Orleans in 1825, a witness for plaintiffs, states that in the fall of the year 1821 he commenced transacting business for the defendant, Mr. Parsons, of Boston, in the city of New Orleans, and so continued up to the latter end of the summer of 1825. That during this period, between 1821 up to 1825, witness was the only person transacting business for said William Parsons in the city of New Orleans. That the general course of the transaction between them was, that the said Parsons sent out to New Orleans iron, steel, nails, brads, &c., consigned to witness, which he, witness, would sell as occasion offered, most frequently on credit. That the vessels of said Parsons visited New Orleans every year, when witness, on account

NOTE.—*Agency—agents' authority—how far principal bound.*

See note to Jones v. Le Tombe, 3 Dall., 385; and note to Bell v. Cunningham, 3 Pet., 69; and note to Clark v. Russell, 3 Dall., 415; and note to Leeds v. Marine Ins. Co., 2 Wheat., 380; and note to Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat., 326.

Instructions from a principal to his agent, which operate as private restrictions upon a general agency, do not affect persons dealing with the agent in ignorance of them. Joanson v. Jones, 4 Barb., 369; Bryant v. Moore, 26 Me., 84; Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa, 276; Cross v. Haskins, 13 Vt., 533; Hatch v. Taylor, 10 N. H., 538; Cruzau v. Smith, 41 Ind., 288; Cosgrove v. Ogden, 49 N. Y., 255; S. C. 10 Am. Rep., 361; Bradford v. Bush, 10 Ala., 385; Ezell v. Franklin, 2 Sneed, 236; Hunter v. Jameson, 6 Ired., 252.

Where a written authority is known to exist, it is the duty of a person dealing with an agent to ascertain the extent of the authority; but no such duty exists as to private instructions. Wittington v. Herring, 5 Bing., 442; Munn v. Commission Co., 15 John., 44.

If the written authority apparently authorizes the act, it is no answer to principal's liability that the agent has exceeded his real authority. Bridenbecker v. Lowell, 32 Barb., 9.

But whether the authority conferred upon the agent be verbal or written, the principal will be bound by acts within the apparent authority; and, if the authority is inferred from acts done by the agent, the principal will be bound by such acts as he permits to be done with his knowledge, and without objection on his part, so far as they affect the rights of innocent third persons. Louis & Memphis Packet Co. v. Parker, 59 Ills., 23; Fatman v. Leet, 41 Ind., 133; Kerslake v. Schoonmaker, 3 Thomp. & C. N. Y., 524; 1 Hun., 436; Tucker v. Woolsey, 64 Barb., 142; 6 Laus., 482; Philadelphia R. R. Co. v. Weaver, 34 Md., 431; Bronson & Chapell, 12 Wall., 681; Golding v. Merchant, 43 Ala., 705.

It is a universal rule, based on principles of policy, Peters 3.

propriety and justice, that if a principal puts his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, he shall be bound by his acts. Dunning v. Roberts, 35 Barb., 463, 467; Dodge v. McDonnell, 14 Wis., 553; Garrard v. Haddan, 67 Penn. St., 82; S. C. 5 Am. Rep., 412; VanDuzer v. Howe, 21 N. Y., 531; 31 Barb., 100.

When an agency arises by implication and presumption from the facts and circumstances of the case, the nature and extent of the authority of the agent will be ascertained and limited in the same manner and governed by the same considerations which control in the construction of an express authority which is conferred in general terms. If the agency arises by implication from several previous acts done by the agent, with the tacit consent, or acquiescence, of the principal, such agency will be limited to acts of a like nature. Cox v. Hoffman, 4 Dev. & Bat. (N. C.), 180; Childsey v. Porter, 21 Penn. St., 390; Stringham v. St. Nicholas Ins. Co., 4 Abb. Ct. App., N. Y., 315; 3 Keyes., 240; 1 Trans. App., 334; 5 Abb. N. S., 80; 37 How. Pr., N. Y., 365; Gilbraith v. Linenberger, 69 N. C., 145; Philadelphia R. R. Co. v. Weaver, 34 Md., 431; Commercial Bank of Lake Erie v. Norton, 1 Hill, 501.

If the agency arises from the employment of the agent, in a particular business, it will, in like manner, be limited to that particular business. Salem Bank v. Gloucester Bank, 17 Mass., 1; Kern v. Piper, 4 Warts., 222; Terry v. Fargo, 10 John., 114; Cooley v. Willard, 34 Ill., 69; Hardayne v. Bourne, 7 Mees. & W., 595; Burnmaster v. Norris, 6 Exch., 796.

An implied agency is never construed to extend beyond the obvious purposes for which it is apparently created. Aultman v. Jones, 1 Woolv., 99; Graham v. U. S. Savings Institution, 46 Mo., 186.

There may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers, which, if done in good faith, and with sound discretion, will bind the principal. Lawlor v. Keaquick, 1 Johns. Cas., 175, 179; Judson v. Sturges, 5 Day., 556, 560; Forrester v. Boardman, 1 Story, 43; Loitard v. Graves,

of said Parsons, purchased from the merchants of New Orleans tobacco, cotton, logwood, and such articles as Mr. Parsons would request, which were put on board the vessels of said Parsons, and on his account transported to different ports in Europe and America. To put **416*** himself in *funds for these purchases so made, witness drew his bills of exchange on said Parsons, of Boston, which had always been duly accepted, and paid up to the month of August, 1825, when the first bill, so drawn by witness on said Parsons, was protested. The purchases so made by witness each year in the business season for the articles required by Mr. Parsons were to a large amount, from fifty thousand to one hundred thousand dollars annually; that accounts current were kept between them, witness and said Parsons; that witness would charge said Parsons with purchases made for him, as well as for the disbursements of his vessels and other expenses and charges, and would credit said Parsons with bills drawn on him from time to time, and the proceeds of nails, iron, steel, &c., as sold. The nature of transactions between witness and said Parsons will appear from the accounts.

In June, 1825, witness purchased on account of said Parsons from James Armor, a merchant of New Orleans, one hundred and eighty hogsheads of tobacco, the net amount of which (after deducting, as customary, one-half of the expenses of cooperage) was \$17,311.92, for which witness drew bills of exchange at sixty days' sight on William Parsons at Boston, all of which were paid except two, to wit: one bill for \$1,443.29, and the other for \$4,13.71, which

said two last bills were protested for nonacceptance and nonpayment by the said Parsons. At the time witness went to said Armor to purchase said tobacco, he stated to said Armor that he was about to purchase the same on account of William Parsons, and that he would give bills on the said Parsons. Witness then showed said Armor the letters of said Parsons which refer to the order for purchasing tobacco for loading the Mary and Betsey; witness, on some occasions, would show letters of said Parsons to merchants in New Orleans from whom he was about making purchases, but did not show all said letters.

From the course of business between witness and said Parsons for the several years that he had been transacting business for said Parsons in New Orleans, their business had become generally known in said city; and from the great *number of bills which witness [***417**] had annually drawn on said Parsons, these bills had gained currency in the market of New Orleans, and he has no doubt that they were received by the several merchants who took them, under the firm conviction that Parsons would accept. At the time the purchase was made from Mr. Armor in 1825, two vessels, the Mary and Betsey, belonging to said Parsons, were lying in the port of New Orleans waiting for cargoes of tobacco which witness had been instructed by said Parsons to purchase for him; witness purchased, in 1824, tobacco from James Armor to William Parsons, and which was paid for by drawing bills on said Parsons by witness, all of which were duly paid by William Parsons. The one hundred and eighty

3 Caines; 226; Williams v. Shackelford, 16 Ala., 318; Gould v. Rich, 7 Met. Mass., 556; Greenleaf v. Moody, 13 Allen, 362.

Principal liable, who ratifies act of agent, with a full knowledge of the facts and circumstances. Kelsay v. National Bank of Crawford, 69 Penn. St., 426; Gulick v. Grover, 33 N. J. L. (4 Vr.), 463; Drakeley v. Gregg, 8 Wall., 242; Vincent v. Rather, 31 Tex., 77; Hawley v. Keeler, 53 N. Y., 114; Pittsburgh R. R. Co. v. Gazzam, 32 Penn. St., 340; Combs v. Scott, 12 Allen, 493; Manning v. Gasbaric, 27 Ind., 399; Humphreys v. Havens, 12 Minn., 298; Miller v. Board of Education, 44 Cal., 166; Smith v. Tracey, 36 N. Y., 79; Lester v. Kinne, 37 Conn., 9.

A principal, who is informed of an unauthorized act of his agent, must give notice of his dissent within a reasonable time, or his assent and ratification will be presumed. Cairnes v. Bleeker, 12 Johns., 300; Jervis v. Hoyt, 2 Hun., 367; S. C., 5 Thomp. & C., 199; Johnson v. Wingate, 29 Me., 404; Clay v. Pratt, 7 Bush. Ky., 334; Farwell v. Howard, 26 Iowa, 381; Law v. Cross, 1 Black, 533; Williams v. Merritt, 23 Ill., 623; Gold Mining Co. v. National Bank, 96 U. S., 6 Otto, 640.

If the principal puts it in the power of his agent to make contracts, or to do acts, apparently within his authority, which will result in injury to innocent third persons or to the principal, the law imposes the loss upon the latter. VanDuzer v. Howe, 21 N. Y., 531; Redick v. Doll, 54 N. Y., 234; Garrard v. Hadden, 67 Penn. St., 82; Hatch v. Taylor, 10 N. H., 538; Carmichael v. Buck, 10 Rich., 332.

Principal liable for torts or offenses of agent committed by or within the scope of the authority of the principal. Del Col v. Arnold, 3 Dail., 333; Am. Fur Co. v. United States, 2 Pet., 358; Cliquot's Champagne, 3 Wall., 114; Hewett v. Smith, 3 Allen, 420; Herring v. Hoppock, 15 N. Y., 409; U. S. v. Voss, 1 Cranch, C. C., 101; U. S. v. Conner, 1 Cranch, C. C., 102; Hynes v. Jungren, 8 Kans., 391; Jackson v. Second Av. R. R. Co., 47 N. Y., 274.

Principal liable for agent's carelessness or negligence in the performance of his duties and for an abuse of authority. Peck v. N. Y. C. & E. R. Co., 6 Thomp. & C., 436; Garretzen v. Duencel, 50 Mo., 104; Southwick v. Estes, 7 Cush., 385; Philadelphia,

&c., R. R. Co. v. Derby, 14 How., 468; Phila. R. R. Co. v. Phila. S. T. Co., 23 How., 209; Chapman v. N. Y. Central R. R. Co., 33 N. Y., 369; Maudeville v. Cockendofor, 3 Cranch, C. C., 397; Lowe v. Stockton, 4 Cranch, C. C., 537; 31 Barb., 399; May v. Bliss, 22 Vt., 477; Luttrell v. Hazen, 3 Sneed (Tenn.), 20; Brenuan v. Fairhaven, &c., R. R. Co., 45 Ct., 284.

Also for injuries arising from torts of the agent done by principal's directions, or adopted or ratified by him. Morehouse v. Northrop, 33 Conn., 389; Fitzsimmons v. Joslyn, 21 Vt., 129; Byram v. McGuire, 3 Head, 530; Hewett v. Swift, 3 Allen, 420; Herring v. Hoppock, 15 N. Y., 409; Moir v. Hopkins, 16 Ill., 313; Hynes v. Jungren, 8 Kans., 391; Jackson v. Second Avenue R. R. Co., 47 N. Y., 274; 7 Am. Rep., 448; Wallace v. Morgan, 23 Ind., 599; Maddux v. Bevan, 39 Md., 485.

Also, for frauds of agent, committed in the course of his employment. Hunter v. Hudson River Iron Co., 20 Barb., 493, 507; Udell v. Atherton, 7 Exch., 172; Jeffrey v. Bigelow, 13 Wend., 518; Durst v. Burton, 47 N. Y., 167; 7 Am. Rep., 428; Locke v. Stearns, 1 Met. Mass., 560; Madison R. R. v. Norwich, 24 Ind., 457; Tome v. Parkersburg R. R. Co., 39 Md., 36; Veazie v. Williams, 8 How., 134.

But not for willful tort of agent, not authorized or ratified by principal. VanDabitt v. Richmond Turnpike Co., 2 N. Y., 2 Comst., 479; 1 Hill, 480; Tuller v. Voght, 13 Ill., 277; Cantrell v. Colwell, 3 Head, 471.

But the fact that the agent acts illegally, or with force, does not exonerate the principal, where the authority is implied, or is incident to his position. Hoffman v. N. Y. C. & H. R. R. R. Co., 87 N. Y., 25.

In the absence of a finding or proof that the authority was exercised as a mere cover for accomplishing an independent and wrongful purpose of his own, the principal is liable, although the act was reckless and illegal, and a breach of duty. Hoffman v. N. Y. C. & H. R. R. R. Co., 87 N. Y., 25; Higgins v. Watervliet Turnpike Co., 46 N. Y., 23; Rounds v. Del. L. & W. R. R. Co., 64 N. Y., 129; Cohen v. Dry-Dock, &c., Co., 69 N. Y., 170; Limpus v. General Omnibus Co., 1 Hurl. & C., 528; Shea v. Sixth Av. R. Co., 62 N. Y., 180.

hogsheads of tobacco referred to were, after they were so purchased from James Armor, shipped on William Parsons' account on board his vessels aforesaid to Europe. At the time, in August, 1825, when William Parsons began to protest the bills of witness, he, witness, had on hand a quantity of steel belonging to said Parsons unsold, and had also sold iron, nails, &c., to a considerable amount, which was not then due, and which could not be applied to the purchases.

In the balance of \$11,631.23 against witness, as per account current in November, 1824, were included some of witness's exchange on Mr. Parsons, as witness had overdrawn the amount of purchases, having sustained a very heavy loss by the failure of A. Fiske in 1822.

In the season of 1825, the purchases of witness for Mr. Parsons, and the disbursements of his vessels, and the amount of drafts drawn after the rendition of accounts in November, 1824, up to the close of operations in purchasing and drawing in 1825, will appear from correspondence and accounts. The amount of bills drawn in 1825, and which were protested by Mr. Parsons, was about \$39,137.79; witness, from his declarations and the course of his business, must have been known as acting for Mr. Parsons in these purchases of the merchants of New Orleans. The vessels of Mr. Parsons had left the port of Orleans previous to any *intelligence having been received at New Orleans of his protesting witness's bills.

Witness states that when he made purchases, the bills of parcels were made out in witness's own name, and the accounts assured in the books of the different merchants in his name; that this is the usual manner in which bills of parcels are made out, and accounts kept in New Orleans, although it may be well known between the parties that the merchant who sells is selling the property of others on commission, and that he who buys is buying as the agent of another.

Witness had been instructed, as appears by the letters of Mr. Parsons, to resell any tobacco not suited to the market to which Mr. P. was shipping, when, in purchasing a lot, he, witness, should be obliged to take some of such quality; witness did accordingly resell a few hogsheads, which had been principally purchased from Bedford, Bredlove & Robeson. Captain Mayo was then here with the Mary. Witness, by his letters of the 1st of July, 1825, informed Mr. Parsons that he had purchased one hundred and forty hogsheads which were stowed on the 7th of the same month, previous to which the tobacco had been weighed, and found to be only one hundred and thirty-two hogsheads. No reference was made to that of the 1st of July, as witness wrote in haste, being about dispatching the Betsey and Mary. The information of Captain Mayo, as given to Mr. Parsons, as appears from Mr. Parsons' letters, that he, witness, was selling tobacco to the extent it was construed by Mr. Parsons, as he states in his letters, was incorrect, as witness had only resold as before stated.

Cross-examined: Fiske was a commission merchant in New Orleans, and was the correspondent of Parsons, from whom he received goods on consignment for sale, and transacted Peters 3.

his business exclusively in New Orleans, from the year 1821, to the month of July, 1825; and in all purchases made by Fiske for Parsons, he, Fiske, received the accounts and transacted the business in his own name, and never signed his name as agent for Parsons. EBEN FISKE.

*The whole correspondence between [*419 Mr. Parsons and Eben Fiske was set forth at large in the record, commencing on the 19th of October, 1821, and terminating on the 19th of November, 1825.

The first letter from the plaintiff in error to Eben Fiske was dated October 1, 1821; and the letter under the authority in which their transactions commenced, was dated October 19, 1821. Those letters were as follows:

BOSTON, October 1st, 1821.

MR. EBEN FISKE,

Sir: I am sorry at any time, especially at the commencement of a correspondence with you, to request a favor which you may think unpleasant, but hope you may be induced to comply with. My request is that you would call on Messrs. William and Nathaniel Wyer, for advice respecting a balance I have in their hands, but at my risk. - You have above a copy of part of their letter to me, dated 27th February, 1819; from that to the present day, I have not been able to get any reply from them to my letters on that subject. I wish you to call on them for an explanation; if they have received the money, please to receive it from them; if they have not, presuming you must know the person who purchased the steel, you can determine if it can ever be collected. I wish you to pursue such measures to have the debt collected as if it was your own.

I inclose you a letter for Messrs. Wyer: after reading, please to seal and hand it to them.

I am, very respectfully, your humble servant,
WILLIAM PARSONS.

BOSTON, October 19th, 1821.

MR. EBEN FISKE,

Sir: I am sorry I had not the pleasure of a personal interview with you when you were in Boston. I received your letter. I have concluded to send the brig Betsey, John Virgin, master, for New Orleans. She will probably sail next week; if you can purchase one hundred and fifty hogsheads of very good old tobacco, should there be any at market, one hundred *bales of clean white Tennessee or Ala- [*420 bama cotton, and to fill up with good Campeachy logwood; the tobacco not to cost more than 4 or 4½ dollars, the logwood from \$18 to \$22; if higher than that, take only as much as will stow in breakage, and fill up with tobacco and cotton, one-half each. If these articles can be procured, I wish it done at once; if the tobacco cannot be procured by the brig, I will give Captain Virgin instructions to communicate to you what to load the vessel with. You will please draw on me for the funds to pay for the cargo.

I am, &c.,

WILLIAM PARSONS.

October 20th. You will please to supply Captain Virgin with his adventure, and take his draft on me for the amount, say ten or twelve hundred dollars, which shall be duly honored, or charge me with the amount in ac-

count; also furnish Captain Virgin with the adventures for some others, and charge to account as above.

I am, respectfully, your humble servant,
WILLIAM PARSONS.

On the 9th of June and on the 8th of August, 1825, the plaintiff in error wrote to Eben Fiske, as follows:

BOSTON, June 9, 1825.

MR. EBEN FISKE,

Dear Sir: I have your favors of the 30th of April and 5th of May. I wish that your opinion may prove correct, and that tobacco may be at such a price that you may be able to load the Mary and Betsey. The Mary, from my letters to Captain Mayo and yourself, I think you will load, but fear the market in Gibraltar will not rise in proportion. From my last accounts, Mr. Spragne was selling at \$7.50 per cwt. The article in Gottenburg, late in April, was very dull, and had risen but a very trifle. If the Betsey cannot be loaded for Gottenburg, get a freight for her for New York or Boston, or any northern port. Apply all the funds you have, and which you say will be convenient **421***] for you to *invest, to load the Mary. It will not answer to purchase for the Gibraltar and Gottenburg markets for another voyage, to stand at a higher rate than my limits. You may possibly be able to purchase two hundred hogsheads of very fine, not to go higher than 6½ cents. By purchasing late, you will be able to apply the proceeds of nails sold, which will then be done. As you have given me assurances that you will apply all my funds in your hands at that period, I cannot have any doubt on the subject.

The Betsey is insured in this city. The papers must be clear and regular, to recover from the underwriters. I inclose a letter for Captain Wallis, should he be with you, in conformity with what I write you. Your draft of the 6th of April to John Clark, sixty days, for \$372.18, without advice, has been paid.

I am, respectfully, your humble servant,
WILLIAM PARSONS.

BOSTON, August 8, 1825.

MR. EBEN FISKE,

Dear Sir: I wrote you on the 26th of July and 4th instant. I now inclose you an abstract of my account with you. From my letters to you the past season, you will readily perceive my determination to have my account settled with you this season. The payment for the one hundred and thirty-two hogsheads of tobacco you purchased to ship to Boston I shall not accept for until I receive it myself, or by my agents. If, from any cause, it should not be shipped before you receive this, I request you to deliver it to Messrs. Howard & Merry; also any nails or steel you may have unsold, or the notes received for any nails or steel which are not paid for; also, Mrs. Richards' note, a bad debt, for \$673.23. Their receipt shall be evidence for me to pay any balance that may be done on settlement of the account. Your drafts not come to hand to a larger amount than the last of the one hundred and thirty-two hogsheads of tobacco, will give you time to comply with the foregoing requisition from me.

I am, respectfully, your humble servant,
WILLIAM PARSONS.

*The letter advising of the drafts, [***422** which were the subject of the suit, was this following:

NEW ORLEANS, 2d of July, 1825.

WILLIAM PARSONS, Esq.,

Sir: I have drawn on you this date for three drafts, as follows, favor John Clark:

No. 42, for \$4,123.71, 60 days, three per cent. discount, net \$4,000.

No. 43, for \$1,443.29, 60 days, three per cent. discount, net \$1,400.

No. 44, for \$1,631.75, 60 days, three per cent. discount, net \$1,583.

The above are in place of exchange, advised under dates of yesterday, of the same numbers, and which, by mistake, were drawn for the net amount, instead of the gross. The same are destroyed.

I am, respectfully, your obedient servant,

EBEN FISKE.

Judgment was given for the plaintiffs in the Circuit Court, whereupon the defendant brought this writ of error.

Such of the facts and correspondence as were considered important, and which have been omitted in this statement, are referred to in the opinion of the court.

The errors assigned were:

1. Fiske was not the agent of Parsons, nor was he authorized to purchase on Parsons' account.

2. The merchandise was not, in fact, sold on the credit of Parsons, but on the credit of Fiske, or on the belief that Parsons would accept his bills.

3. The facts and correspondence do not show that Parsons was bound to accept the bills.

Mr. Livingston and Mr. Webster, for the plaintiff in error, after an examination of the facts of the case, contended that the principle upon which the court below had proceeded, would make Parsons liable for all the bills drawn by Fiske in the course of his business in New Orleans. The *real nature of the [***423** transactions between Fiske and the plaintiff were fully shown by the testimony of Fiske. It was a dealing between a factor and his principal, the principal being abroad and not known. In such a case the factor alone is liable. (Paley on Agency, 257; 1 Bos. & Pnll., 363; 3 Bos. & Pnll., 489; Buller's *Nisi Prius*, 130; 4 Tannt. Rep., 574.)

It is agreed that Armor can only make Parsons liable as a purchaser of the property. (2 Livermore, 199.) If Fiske was the purchaser, Parsons was not liable.

Parsons could only be liable on one of two grounds: either that the original credit was given to him, or that Fiske was authorized to draw on him for the purchases specifically. These are not supported by the evidence.

An authority to draw gives a right to the holder of the bill as holder, not to the vendor of the goods as vendor, in payment of which the bill was given. Suppose Fiske had drawn two bills, one for the payment of the goods, the other for his own use. The refusal of Parsons to accept the bills would have made him liable to Fiske only.

The case of *Coolidge v. Payson* (2 Wheat., 66), decides that the drawer is liable to pay a bill after a particular promise to accept it. (Cited also, *Shimmelpennich v. Bayard*, 1 Peters, 264).

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The doctrine contended for, on the part of the plaintiff below, would render Parsons liable both to the vendor and to Fiske. To Fiske, by non-acceptance of the bill; to the vendor, for the goods. If both can recover there would be two concurrent creditors for the same debt, which is impossible, according to the cases cited. (15 East, 64.)

The case is, then, one of factor and principal abroad; and the case in Taunton shows that the situation of the foreign principal is not altered, whether or not the goods came to his hands.

There is nothing in the correspondence which will authorize the assertion that there was a general direction to buy the particular property on bills. It is said Fiske was the general agent; we say he was the factor.

Mr. Jones, for the defendant, argued that **424*** there was evidence *in the case sufficient to show that Fiske was the agent and Parsons the principal in the transactions out of which the claims arose, and that Fiske had power to draw the bills.

A commission merchant may not be an agent, but their characters are perfectly consistent; and in the case before the court, the articles were not purchased on account of the agent, but for Parsons. If one is in the habit of purchasing for another, as Fiske was in this case, and so acting for four years, this is evidence of agency in the absence of proof to show that it had ceased. Though the agent should exceed his private instructions, it would not affect those who deal with him as agent, or impair their claims on the principal.

In this case there is no complaint that the instructions were exceeded; the reason for not paying the bills was not this, but that a balance was due from the agent to the principal, and that he should have paid for the purchases out of funds in his own hands.

He had authorized Fiske to draw, without regard to the balance due to him.

Mr. Justice JOHNSON delivered the opinion of the court:

This cause is brought up by writ of error from the District Court of Louisiana District, exercising Circuit Court jurisdiction, in a suit in which the cause of action was in the nature of a *quantum valebat*, for a quantity of tobacco sold; but according to the practice of that court, the suit was prosecuted in the forms of the civil law, and the judgment rendered by the court, the parties having waived the trial by jury. The record consists of the petition, the answer, the whole testimony, as well depositions as documents, introduced by either party, and the fiat of the judge that Armor, the plaintiff below, recover the debt as demanded.

In the argument, counsel considered the cause as in nature of a case stated, that is, a substitute for a special verdict; but this court could not avoid noticing that the precedent might involve it in the necessity of exercising jurisdiction over cases of a very different character. This writ of error does not bring up a **425*** mere statement of facts, but a *mass of testimony, and however consistent and reconcilable the testimony may be in this case, it may be very different in future causes coming up from the same quarter, and by means of the same process.

Peters 3.

The difficulty is to decide under what character we shall consider the present reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which we could treat the case but in the nature of a bill of exceptions; that is, to confine ourselves entirely to the question, whether, giving the utmost force to the testimony in favor of the party in possession of the judgment below, he was legally entitled to a judgment. But this would often lead this court to decide upon a case widely different from that acted upon in the court below. There may be conflicting testimony and questions of credibility in the cause which this court would be compelled to pass by. This would be increasing appellate jurisdiction on principles very different from the received opinions and judicial habits of that state; and, it has been argued, equally inconsistent with the rights extended to them by Congress.

We feel no difficulty from the bearing of the seventh amendment of the Constitution in this case, because if this be a suit at common law in the sense of the amendment, the object was to secure a right to the individual, and that right has been tendered to him and declined. The words of the amendment are, "the right to the trial by jury shall be preserved." Nor are we at liberty to treat this as an appeal in a cause of equity jurisdiction under the Act of 1803, because the party has not brought up his cause by appeal, but by a writ of error.

The present case is one which may be treated as a bill of exceptions, or a case submitted; since, giving the utmost force to the testimony in favor of Armor, we are of opinion that the judgment must be reversed. We shall proceed, therefore, to examine the merits upon that principle, without *committing ourselves [**426** either upon the extent of the appellate power of this court over that of Louisiana, or the appropriate means of exercising it.

The merits of this case may be comprised within the following state of facts:

Parsons was a merchant and considerable ship owner, established in Boston, and in the habit of trading to New Orleans. Eben Fiske was a commission merchant, established in New Orleans, with whom Parsons opened a correspondence on the 1st of October, 1821, with a commission to call upon his previous correspondents, W. & N. Wyer, for a balance supposed to be in their hands. The transactions in the course of which the purchase was made which constitutes the present cause of action, commenced with the letter of the 19th of October, 1821, the tenor of which furnishes the true exposition of the nature and extent of the mandatory power under which Fiske acted for Parsons. The material passages are these:

"I have concluded to send the brig Betsey, John Virgin, master, for New Orleans. She will probably sail next week. If you can purchase one hundred and fifty hogsheds of very good tobacco, should there be any at market, &c. If these articles can be procured, I wish it done at once, &c. You will please draw on me for the funds to pay for the cargo."

The examination of Fiske furnishes these further explanations of the relation in which he acted with regard to Parsons. In the latter part of his deposition he says, "he was the correspondent of Parsons, from whom he received goods on consignment, and transacted his business exclusively in New Orleans from the year 1821 to July, 1825; and in all purchases by him for Parsons, received the accounts and transacted the business in his own name, and never signed his name as agent for Parsons;" and, further, "that when he made purchases, the bills of parcels were made out in his (Fiske's) name, and the accounts assured in the books of the different merchants in his name." And in the commencement of his deposition, he says "that the general course of the transactions between them was, that the said Parsons sent out to New Orleans, iron, steel, &c., consigned 427*] *to witness, which he would sell as occasion offered, most frequently on credit. That the vessels of the said Parsons visited New Orleans every year; when witness, on account of said Parsons, purchased from the merchants of New Orleans, tobacco, cotton, &c., and such articles as Parsons would request, which were put on board of Parsons' vessels, and on his account transported to different ports of Europe and America. To put himself in funds for these purchases so made, witness drew his bills of exchange on said Parsons, which had always been duly accepted and paid until August, 1825. That witness would charge said Parsons with purchases made for him, as well as for the disbursements of his vessels and other expenses and charges, and would credit said Parsons with bills drawn on him from time to time, and the proceeds of nails, iron, steel, &c., as sold," and then refers generally to the accounts annexed to the deposition for further explanations on the nature of their dealings.

By reference to these accounts, it appears that the bills were disposed of generally at market as opportunity offered; and that he never acted under the idea of being restricted to the drawing of bills to pay the vendor in that mode, specifically for each purchase.

With regard to the particular purchase under consideration, Fiske swears that the payment in bills made a part of the contract, and that the bills drawn were all paid except two, making up the balance here sued for. And it has been thought to have some influence upon the merits of plaintiff's demand, that at the time of this purchase, Fiske stated to Armor that he was about to purchase on account of Parsons, and showed him the letters of Parsons which refer to the order to purchase tobacco for loading the *Mary and Betsey*, for which object this purchase was made. How far the case of the plaintiffs below can be aided by those letters will presently be seen.

The simple question under this state of facts is, was Parsons chargeable to Armor as vendor of this parcel of tobacco? This must be decided either upon the general *powers vested in Fiske, or the particular circumstances of this purchase.

The general rule is, that a principal is bound by the act of his agent no farther than he authorizes that agent to bind him; but the extent

of the power given to an agent is deducible as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule, that "he who trusts must pay." So, also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances, has been held to make the principal chargeable on the ground of immoral dealing. To one or other of these heads all the cases are reducible; and into one or other of these classes it is necessary to bring the present case, or Parsons is not chargeable.

It has been argued that Fiske was the general agent of Parsons, for the purchase of cargoes to load his vessels, and as such had power to bind him as original vendee to this plaintiff. That he possessed a general power to draw bills in payment for such cargoes, and was either bound to accept such bills, or become bound by colluding to create a credit to Fiske, which exposed the community to imposition.

But all this argument turns upon a misapprehension of the nature of the transactions between Parsons and Fiske.

Everyone knows that a bill of exchange is the substitute for the actual transmission of money by sea or land. Power, therefore, to draw upon a house in good credit, and to throw those bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least tittle of evidence in the cause to show that Parsons meant to use the credit of Fiske, or to authorize him to pledge the credit of Parsons in anything but the negotiation of bills. This depended on the confidence which merchants who wished to remit from New Orleans would place in the solvency and integrity of the drawer and drawee, and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorized to go no farther than to *apply the funds deposited with him. [429 And the case is reduced to the plain and simple rule to be found everywhere, from the time of Shower and Lord Holt down, "that if I give my servant money to purchase for me, and he use it, and purchase on credit, I am not bound, though the article come in fact to my use."

There are few, if any cases, to be found in modern English books on this subject; for the plain reason that the nature and effects of such a commission or employment are too well understood in that country to have admitted of litigation. All the cases which have arisen there of a recent date, except where the ground of collusion has been resorted to, are cases of purchases on credit. Such are those of *Addison* and *Gandasequi*, and some others that have been quoted. The case of *Wilson v. Hart* (7 Taunt., 295) was a case of collusion.

If, in the present case, Parsons were chargeable with any unfair dealing, or the practice of uncandid or collusive means of saving the balance for which it appears Fiske had overdrawn, it cannot be questioned that he is chargeable. But on this part of the case two considerations are important, the first of which relates to the amount of the bills which Parsons refused to accept, and the second, the particular

notice communicated to Armor of the object and limits of Fiske's power to draw.

Of the general power to protest the bills of one who has overdrawn there can be no question, for it is the only security which one who gives a power to draw bills and throw them on the market, or perhaps to draw at all, has against the bad faith of his correspondent. On this subject he takes the risk of paying the damages, if in fault, or of throwing them on the other, if he has actually abused his trust. It is a question between him and his correspondent.

It is true that in this case the amount protested appears to have gone far beyond the balance acknowledged by Fiske. But then Fiske held a large quantity of tobacco in store, which Parsons might very well suppose would not be given up to his order after protest of the bills, and in refusing payment to such an amount may have had in view an indemnity **430*** against this further loss—a loss which actually was incurred, so that in this he is not chargeable with *mala fides*.

The second consideration is equally important in its bearing upon this part of the case.

Parsons, in his correspondence, alleges as his justification for refusing acceptance, that he had limited Fiske in his purchases for the Mary and Betsey; to the application of the funds in his hands. The balance due on general account by a correspondent is, in mercantile language, a fund in his hands; and so the correspondence shows that it was understood to be in this instance. Fiske swears that, at the time of the purchase from Armor, he showed Armor the letters from Parsons, on the subject of the purchase of the cargo for the Mary and Betsey, and by referring to the letters of the 9th of June and 5th of July, 1825, which must be here meant, we find both expressly referring to the application of "funds in hand," and the latter intimating that the whole purchase will scarcely absorb "all the funds in hand."

So direct an intimation that the purchase of these cargoes was to balance the accounts between them, removes all ground for imputing collusion to parties.

As to the currency given to these bills by the regular acceptance and payment of them up to the date of the bills: if this is to deprive a merchant of the only check he has for his security, by preventing him from ever refusing his acceptance, credit would become a misfortune.

Nor does it affect the merits of this cause that the original contract was made for a payment in bills. Such was not the negotiation to which Parsons had limited Fiske; it was no more, as between Parsons and Armor, than a purchase of bills with the cash received for the tobacco; and a purchase against which Armor was not without a warning, furnished by the letters which Fiske, his own witness, swears he submitted to Armor, prior to the negotiation. It was creating new funds for a purchase, not purchasing with the funds already created, or in the hands of Fiske.

Judgment reversed.

Cited—7 Pet., 423, 451; 16 Pet., 176; 5 How., 290; 7 How., 866; 12 Wall., 281; Gilp., 270; 1 Biss., 197; 2 McLean, 464.
Peters 3.

*THE BANK OF THE COMMON-WEALTH OF KENTUCKY,

v.

WISTAR, PRICE, AND WISTAR.

Interest on judgment—clerical error—practice.

Where the clerk of the court had omitted to enter the judgment of this court, allowing to the defendant in error, on the affirmance of the judgment of the Circuit Court, interest at the rate of six per centum per annum as damages, and the mandate of this court, although issued, had not been presented to the Circuit Court; the court ordered the judgment to be reformed, allowing interest at the rate of six per cent. The omission is a mere clerical error.

It is a rule of this court that where there are no special circumstances, six per cent. interest is allowed upon the amount of the judgment, in the court below. Under special circumstances, damages to the amount of ten per cent. are allowed. [432]

MR. VINTON moved to amend the judgment of this court rendered in this cause at the January Term of 1829 (2 Peters, 318); by giving to the defendants in error damages on the judgment at the rate of six per centum per annum, and that the judgment of the court be so reformed.

Mr. Vinton stated that the mandate, though issued, had never been presented to the Circuit Court, and it was now in this court. Under these circumstances, and as the omission was a mere clerical error, he hoped the motion would prevail.

Mr. Bibb, for the plaintiffs in error, objected to the amendment being made, as the whole subject was *res adjudicata* at the last term, and was not now to be opened. The mandate is a solemn act of the court; it passes under the view of the court, and is the proceeding of the court. The omission it is asked to correct was not a clerical misprision. If, in the course of adjudication in this court, an act of Congress should not have been adverted to, would the court, at a subsequent term, open their judgment to correct the error which existed from their disregard of the act? The rules of court are not of higher sanction, and if in the issuing of the mandate that rule which allows interest has not been applied, the court will not go back to reform what has passed into [*432] judgment. Such a proceeding would expose the court and suitors to great inconvenience, and be productive of frequent injustice.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

In the case of the motion to amend the mandate, the court directs the amendment to be made, and the judgment of the court to be reformed, allowing interest at the rate of six per cent. The reason is, that by a rule of this court, when there are no special circumstances, six per cent. interest is allowed upon the amount of the judgment in the court below; under special circumstances, damages to the amount of ten per cent. are awarded by the court. The omission is deemed by this court a mere clerical error.

On consideration of the motion made by Mr. Vinton, of counsel for the defendants in error, in this cause, on a prior day of this term, to amend the judgment of this court rendered in this cause at the January Term of this court in

the year of our Lord 1829, to wit: on the 14th day of February of the said last-mentioned year, by giving to the defendants in error in said cause on said judgment damages at the rate of six per centum per annum, it is ordered and adjudged by this court that the said judgment of this court of February 14, A. D. 1829, be reformed by the amendment of damages at the rate of six per centum per annum, so that the judgment read thus: "It is adjudged and ordered by this court that the judgment of the said Circuit Court in this case be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

See S. C., 2 Pet., 318.

433*] *WILLIAM PARSONS, Plaintiff in Error,
v.

BEDFORD, BREEDLOVE & ROBESON,
Defendants.

Practice in Louisiana courts—how far adopted in federal courts in that State—trial by jury—Constitution of United States—Act of Congress of 1824.

This action was instituted in the District Court of the United States for the Eastern District of Louisiana, according to the forms of proceedings adopted and practiced in the courts of that State. The cause was tried by a special jury, and a verdict was rendered for the plaintiff. On the trial, the counsel for the defendant moved the court to direct the clerk of the court to take down in writing the testimony of the witnesses examined in the cause, that the same might appear on record: such being the practice of the State courts of Louisiana; and which practice the counsel for the defendant insisted was to prevail in the courts of the United States, according to the Act of Congress of the 26th of May, 1824; which provides that the mode of proceeding in civil causes, in the courts of the United States established in Louisiana, shall be conformable to the laws directing the practice in the District Court of the State, subject to such alterations as the judges of the courts of the United States should establish by rules. The court refused to make the order, or to permit the testimony to be put down in writing; the judge expressing the opinion that the courts of the United States are not governed by the practice of the courts of the State of Louisiana. The defendant moved for a new trial, and the motion being overruled and judgment entered for the plaintiff on the verdict, the defendant brought a writ of error to this court.

Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing by the clerk, to be sent to the Supreme Court, to serve as a statement of facts in case of appeal; and the written evidence produced on the trial is to be filed with the proceedings. This is done to enable the appellate court to exercise the power of granting a new trial, and of revising the judgment of the inferior court. Held, that the refusal of the judge of the District Court of the United States to permit the evidence to be put in writing, could not be assigned for error in this court, the cause having been tried in the court below and a verdict given on the facts by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the Constitution of the United States and of the amendment thereto which declares, "no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law," is not competent to redress any error by granting a new trial.

The proviso in the Act of Congress of the 26th of May, 1824, ch. 181, demonstrates that it was not the intention of Congress to give an absolute and imperative force to the State modes of proceeding in civil causes in Louisiana in the courts of the

United States; for it authorizes the judge to modify them so as to adapt them to the organization of his own courts; and it further demonstrates that no absolute repeal was intended of the antecedent modes of proceeding authorized in the United States courts under former Acts of Congress; for it leaves the judge at liberty to make rules, by [*434] which discrepancy between the State laws and the laws of the United States may be avoided. [444]

The Act of Congress having made the practice of the State courts the rule for the courts of the United States in Louisiana, the District Court of the United States in that district is bound to follow the practice of the State, unless that court had adopted a rule superseding the practice. [445]

Generally speaking, matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate court. [445]

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every State constitution in the Union. [446]

By "common law," the framers of the Constitution of the United States meant what the Constitution denominated in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. [447]

The amendment to the Constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. [447]

It was not the intention of Congress, by the general language of the Act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by a jury; and to enable it, after trial by jury, to do that in respect to the courts of the United States sitting in Louisiana which is denied to such courts sitting in all the other States of the Union. [447]

No court ought, unless the terms of an Act of Congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the Constitution. The terms of the Act of 1824 may well be satisfied by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial. The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by a bill of exceptions. If there be any mistake of the facts, the court below is competent to redress it by granting a new trial. [447]

ERROR to the Eastern District of Louisiana.

This suit was originally brought in the Parish Court of New Orleans by the defendants in error, by a petition for an attachment against the property of the defendant in the suit; and was removed into the District Court of the United States for the Eastern District of Louisiana, the defendant being a citizen of the State of Massachusetts.

The object of the suit was the recovery of the amount of certain sales of tobacco made by the plaintiffs to a certain *Eben Fiske [*435] represented in the petition to be the agent and factor of the defendant; and for which he drew bills of exchange on the defendant, and which bills were refused acceptance and payment. After an answer had been filed, the case was submitted to a special jury, and a verdict was rendered for the plaintiffs for \$6,414.

Peters 3.

The proceedings in the case were instituted and conducted according to the laws of Louisiana, which conform in a great degree to the principles and practice of the civil law.

On the trial the plaintiffs produced the bills of exchange mentioned in the petition, and many letters written by the defendant to Fiske. The defendant introduced, as testimony, other letters written as above; and also the record of a suit brought by the plaintiffs against Fiske, on the same bills, in which they charge, on oath, that the sale was made to Fiske, and that he was their debtor; all which written testimony was, according to the practice of the State courts, filed in court, and forms part of the record.

The plaintiffs also produced Fiske as a witness, to prove that he acted only as agent for the defendant, and to make him a witness, gave a full release of all claims on him. He was objected to; but the court overruled the objection and a bill of exceptions was tendered and signed.

By the twelfth section of an Act of the General Assembly of Louisiana, passed the 20th of July, 1817, entitled, "An Act to amend the several acts passed to organize the Court of the State, and for other purposes," it is among other things enacted, "that when any cause shall be submitted to a jury to be tried, the verbal evidence shall, in all cases where an appeal lies to the Supreme Court, if either party require it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the Supreme Court, to serve as a statement of facts in case of appeal, and the written evidence produced by both parties shall be filed with the proceedings."

By a law of the United States, passed the 26th of May, 1824, the mode of practice pursued in the State courts is directed to be followed in the courts of the United States in Louisiana.

436*] Under the provisions of these laws, the defendant applied to the court to direct the clerk to take down the verbal proof offered in the cause, or to suffer his counsel, the counsel of the plaintiffs, or the witnesses, to take it down, which the judge refused to do; whereupon a bill of exceptions was tendered and signed.

A motion was made for a new trial, which was overruled, and a judgment was entered for the amount of the verdict. This writ of error was then prosecuted.

The plaintiff in error contended:

1. That from the facts apparent on the record, the plaintiffs had no right of action against the defendant, and that, therefore, this court will decree a judgment to be entered in favor of the defendant.

2. The court will, at least, reverse this judgment, and award a new trial, for one or all of the following reasons:

1. Because the court refused the evidence to be put upon the record.

2. Because the whole question was a question of law, and the decision was against law.

3. It is not, strictly, a common law proceeding, but a proceeding under the peculiar system of Louisiana; and, according to that system, the court has power to reverse the judgment.

ment, under circumstances which would not give it that power when the trial had been according to the common law.

The case was argued by *Mr. Livingston* and *Mr. Webster* for the plaintiff in error, and by *Mr. Jones* for the defendants.

Mr. Livingston and *Mr. Webster*, for the plaintiff in error:

The law of Louisiana of July, 1817, directs that in all jury trials the verbal evidence shall be reduced to writing and put on record. The law of Congress of the 6th of May, 1824, directs that the practice in the courts of the United States in the State of Louisiana shall be according to the rules of practice in the State courts. Before the law of the United States of 1803, all causes came up to this court by writ of error. Under the authority of this law, cases of admiralty and of equity jurisdiction came up by appeal, and *all cases not embraced by the provisions of the law are yet brought up by writ of error.

The Constitution of the United States says, "all controversies" between citizens of different States may come to this court; and by the provisions of the law of 1789, the removal of such cases is to take place when the matter in dispute amounts to two thousand dollars. That law requires a statement of the evidence in appeals and in matters of admiralty jurisdiction. It cannot be supposed that there was any intention to exclude cases such as the present from the jurisdiction of this court. It has been the practice for twenty years, ever since the organization of the courts of the United States in the State of Louisiana, to bring cases up from that district.

The proceedings in the courts of Louisiana, are by petition and answer. To introduce the practice of the common law into any of the courts established in that State, would be against the feelings and wishes of the whole people of the State. The judges of the courts of the United States have adopted the practice of the courts of the State. The position of anyone who should come from a State where the common law is not known, as from Louisiana, and who should be required to argue a cause on the common law alone, in this court, would be extraordinary.

The twenty-second section of the judiciary law of 1789 says the Supreme Court shall not reverse a judgment for error in fact. But it is claimed that the seventh amendment of the Constitution of the United States, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," was not intended to take away a remedy which was secured by a law of the State of Louisiana, and which law is in force in the courts of the United States, under the provisions of the Act of Congress of 1824.

This case cannot come within the amendment. It is a case not comprehended by it, nor can it have any application to it. The amendment was adopted when all the proceedings in the courts of the United States and in the courts of the different States, were under *the common law; and the plaintiff in this case has a complete remedy, independent of the amendment. It was intended to guard the rights of citizens, proceeding according to the

common law, and it only provides that the decisions of juries shall not be set aside except according to the common law. How did it apply or operate in a State where there is no common law, where the forms of proceeding under the common law are not known or permitted? Where terms are used which embrace the case, and justice requires it, the law must be construed to embrace it. A constitutional law of the United States gives the relief the plaintiff asks in this case: the amendment of the Constitution referred to does not take it away.

There is a rule of the common law, the effect of which gives the same remedy as to parties as that which is required here; and in this case the equivalent remedy would have been furnished, had the court directed the clerk to take down in writing the testimony given in this cause. By the common law practice, all evidence may be stated under a bill of exceptions, or the judge may be called upon to charge on the law and facts; the facts being stated from which the law is supposed to arise. The proceedings in the courts of Louisiana are substituted for these common law proceedings. They should have the same estimate, and be treated in the higher court in the same manner as a bill of exceptions. It is admitted that in the court below the case must proceed according to the State laws: those laws say the evidence shall be put in writing by the clerk. The refusal to permit the clerk to do this was certainly error.

If the laws of the State are not to be the guide, we had better have no right of appeal from the courts of Louisiana to this court. If those laws do not furnish rules of proceeding, we have no appeals in cases where appeals may come from other States. Because, in the courts of Louisiana there is no distinction between common law and equity, and there cannot be one rule in a State court, and another in a federal court. The principle that no relief shall be given in equity where there is a plain remedy **439*** at law, would interfere materially with proceedings in the courts of Louisiana. In every possible case relief is given by a court of law in Louisiana; and the distinction between law and equity is not there known. To insist on the establishment of the distinction in the courts of the United States there, would be productive of grievous injury. It would give a foreigner one rule of practice and a citizen another. If the forms of the common law must be pursued to secure writs of error and appeals from the courts of the United States in Louisiana to this court, all the system of practice now prevailing in those courts, under the authority of the law of 1824, must be changed. The forms of the common law, the distinction between proceedings at law and in equity, must be established there. This will be productive of great inconvenience, and will have other injurious effects.

Putting the evidence in writing was very important to the defendant below, as he could have demurred; and then this court would have had the whole of the evidence before them.

Mr. Jones, for the defendant in error.

Where a local practice, such as that of Louisiana, is adapted only to State courts, and not

to the courts of the United States, it will not extend to the latter courts. The Supreme Court of the State of Louisiana may know and examine the facts which have been reduced to writing on the trial of causes in the inferior courts, and decide whether a new trial should not have been granted. But no such power exists in this court. It has no power to look into the facts of the case tried by a jury only for the purpose of deciding on the law arising on the evidence, and this, when they are properly before the court, but not for the purpose of drawing a conclusion from the facts different from that of the jury. The judiciary law excludes matters of fact from this court, unless in equity and admiralty causes. This court will never decide on questions of fact; never on a question of new trial, or not; and the only possible use of putting the evidence in writing, in this case, would have been to present the question of a new trial. This court takes no cognizance of any fact, sitting as a court of common law. A compliance or non-compliance of the court below with the defendant's prayer, could neither affect the judgment of the court below or of this court; the judgment here must be the same, whether the evidence was recorded or not. There was, therefore, no error of which this court can take notice in the proceedings below. The proceedings are said not to be according to the common law, but to the law of Louisiana, which is said to differ from the common law; and yet we find the trial by jury established, which is the great foundation and first principle and essence of a common law trial, be the forms of the process what they may. Trial by jury carries with it all the incidents of a common law trial. The verdict of the jury upon the facts is conclusive in every court, unless set aside by the court before which the cause was tried.

This court will not reverse all its functions, because the courts of the United States in Louisiana adopt the State practice. The Judiciary Act says all trials in issues of fact shall be by jury; this court will not say, as a rule of practice, there shall be no trial by jury according to the principles of the common law in the courts of the United States, of Louisiana. As Louisiana has adopted the trial by jury, it must have all its attributes in that State.

The purpose and meaning of the twenty-second section of the Judiciary Act, was to exclude this court in all cases from deciding on a question of fact. Error in fact means an error in deciding on a question of fact. The difference between a writ of error and an appeal is very familiar. Appeals, *ex vi termini*, mean the bringing up of every matter pending in the court below. A writ of error only reaches errors of law, and has nothing to do with questions of fact.

If the law of 1824 imposed on the court the duty of recording the parol evidence, is it assignable for error? Could it by any possibility have varied the judgment of the court below, or of this court? If it could not, there can be no cause of reversal, as no injury has been done to the plaintiff in error. This court will not visit the party with a reversal of the judgment of the District Court when in the judgment there is no error, although they may compel the court below to record the evidence.

Peters 3.

441*] *Mr. Justice STORY delivered the opinion of the court:

This was a writ of error to the District Court of the United States for the Eastern District of Louisiana.

The facts disclosed on the record are substantially as follows:

The suit was originally commenced by an attachment, brought in the Parish Court of New Orleans, and removed, on the petition of defendant, into the District Court of the United States for the Eastern District of Louisiana, the plaintiffs being citizens of Louisiana, and the defendant a citizen of Massachusetts.

The petition of the plaintiffs set out the ground of their action to be certain sales of tobacco, made by them to one Eben Fiske, as the factor and agent of the defendant, and for his account, at New Orleans, in June and July, 1825; and certain bills of exchange drawn in their favor by Fiske at New Orleans, on the defendant at Boston, at several dates from the 2d to the 20th of July, 1825, for the amounts of such sales. The defendant's answer (filed in the District Court after the removal of the cause from the Parish Court) contains a general traverse of the allegations of the plaintiffs' petition, and tenders an issue, tantamount to the general issue of *nil debet*. The answer concludes with a petition of reconvention for ten thousand dollars damages. Upon this issue the cause was tried in the District Court, by consent of parties, before a special jury, in March, 1826, and a verdict passed against the defendant, who moved the court for a new trial; which motion was overruled by the court and final judgment rendered on the verdict against the defendant, who thereupon sued out this writ of error. The record presents two bills of exceptions on the part of the defendant, now plaintiff in error.

First bill of exceptions. Fiske, having first received from the plaintiffs a full and absolute release (which recites that the plaintiffs had dealt with him as the factor and agent of the defendant, and upon the credit and responsibility of the latter alone) from all liability to them on the contract of sale and as drawer of the bills, was produced as a witness on the part of the plaintiffs to prove that he had purchased **442*]** the tobacco as agent for the defendant. An objection on the part of the defendant to the competency of Fiske, on the ground of interest, was overruled by the court.

Second bill of exceptions. The defendant moved the court to direct the clerk of the court to take down in writing the testimony of the several witnesses examined by the respective parties, in order that the same might appear of record; such being the practice of the several courts of the State of Louisiana, according to the constitution and laws thereof, and such being the rule of practice, in the opinion of the counsel for defendant, to be pursued in this court, according to the Act of Congress of the 26th of May, 1824. But the clerk refused, &c., and the court refused to order the clerk to write down the same, or to permit the witnesses themselves, the counsel for either of the parties, or any other person, to write down such testimony; the court expressing the opinion that the Court of the United States is not governed by the practice of the courts of the State of Louisiana.

Peters 3.

No charge or advice whatever was given or asked from the court to the jury on any matter of law or fact in the case, nor was any question whatever raised of the competency or admissibility of such evidence, other than the specific exception before taken to the competency of Fiske, on the sole objection of interest, the substance of the facts proved by him being in no manner drawn in question before the court.

The record sets out all the documentary evidence, all of which appears to have been admitted by both parties. This consists of the protested bills above mentioned, with an admission upon the record by the defendant that they had been regularly returned under protest to the plaintiffs, and that plaintiffs were, at the time the suit was commenced, the holders and owners of the same; and of a series of defendant's letters to his agent, Fiske, from the 26th of March, 1823, to the 10th of August, 1825, containing evidence that Fiske, during all that time, was settled at New Orleans, and was the factor and agent of the defendant, there to receive shipments of cargoes from Boston for the New Orleans market, and to purchase and ship from the latter place to the defendant at Boston, cargoes of cotton and tobacco, for which he was authorized to draw bills on Parsons at Boston.

Upon the argument in this court the first bill of exceptions has been abandoned as untenable, and in our judgment upon sound reasons.

The second bill of exceptions is that upon which the court is now called upon to deliver its opinion.

By the Act of Louisiana of the 28th of January, 1817, sec. 10, it is provided, that in every case to be tried by a jury, if one of the parties demands that the facts set forth in the petition and answer should be submitted to the jury to have a special verdict thereon, both parties shall proceed, before the swearing of the jury, to make a written statement of the facts so alleged and denied, the pertinency of which statement shall be judged of by the court, and signed by the judge; and the jury shall be sworn to decide the question of fact or facts so alleged and denied, and their verdict or opinion thereof shall be unanimously given in open court, &c., and be conclusive between the parties as to the facts in said cause, as well in the court where the said cause is tried as on the appeal, and the court shall render judgment; provided, that the jury so sworn shall be prohibited to give any general verdict in the case, but only a special one on the facts submitted to them. This section points out the mode of obtaining a special verdict, in the sense of the common law. The twelfth section then provides that when any cause shall be submitted to the court or to a jury without statements of facts, as is provided in the tenth section of the act, the verbal evidence shall in all cases where an appeal lies to the Supreme Court of the State, if either party requires it, and at the time when the witnesses shall be examined, be taken down in writing by the clerk of the court, in order to be sent up to the Supreme Court, to serve as a statement of facts in case of appeal; and the written evidence produced on the trial shall be filed with the proceedings, &c. &c. The object of this section is asserted to

be to enable the appellate court in cases of general verdicts, as well as of submissions to the court, to exercise the power of granting a new trial, and revising the judgment of the inferior **444**]* court. *It seems to be a substitute for the report of the judge who sat at the trial, in the ordinary course of proceedings at the common law.

Of itself, the course of proceeding under the State law of Louisiana could not have any intrinsic force or obligation in the courts of the United States organized in that State; but by the Act of Congress of the 26th of May, 1824, ch. 181, it is provided that the mode of proceeding in civil causes in the courts of the United States that now are or hereafter may be established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said States; provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the State courts, and make by rule such other provisions as may be necessary to adapt the laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such should exist, between such State laws and the laws of the United States.

This proviso demonstrates that it was not the intention of Congress to give an absolute and imperative force to the modes of proceeding in civil causes in Louisiana in the Court of the United States; for it authorizes the judge to modify them, so as to adapt them to the organization of his own court. It further demonstrates that no absolute repeal was intended of the antecedent modes of proceeding authorized in the courts under the former Acts of Congress, for it leaves the judge at liberty to make rules by which to avoid any discrepancy between the State laws and the laws of the United States; and what is material to be observed, there is no clause in the act pointing in the slightest manner to any intentional change of the mode in which the Supreme Court of the United States is to exercise its appellate power in causes tried by jury, and coming from the courts of the United States in Louisiana; or giving it authority to revise the judgments thereof in any matters of fact, beyond what the existing laws of the United States authorized.

Whether the District Court in Louisiana had adopted any rules on this subject, so as to modify **445**]* ify or suspend the operation *of the Louisiana State practice, in relation to the taking down the verbal testimony of witnesses, does not appear upon this record. The court expressed an opinion "that the Court of the United States is not governed by the practice of the courts of the State of Louisiana;" and this would be correct, if, in the particular complained of, the court had adopted any rule superseding that practice. If no such rule had been adopted, the act of Congress made the practice of the State the rule for the Court of the United States. Unless, then, such a special rule existed, the court was bound to follow the general enactment of Congress on the subject, and pursue the State practice.

But, admitting that the decision of the court below was wrong, and that the party was entitled to have his testimony taken down in the

manner prayed for; still it is important to consider whether this is such an error as can be redressed by this court upon a writ of error.

Generally speaking, matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate court. And unless it shall appear that this court, if the omitted evidence had been before it on the record, would have been entitled to review that evidence, and might, if upon such review it had deemed the conclusion of the jury erroneous, have reversed the judgment and directed a new trial in the court below, there is no ground upon which the present writ of error can be sustained.

It was competent for the original defendant to have raised any points of law growing out of the evidence at the trial by a proper application to the court, and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review. The whole object, therefore, of the application to record the evidence, so far at least as this court can take cognizance of it, was to present the evidence here in order to establish the error of the verdict in matters of fact. Could such matters be properly cognizable in this court upon the present writ of error? It is very certain that they could not *upon any suit and proceedings in any [**446** court of the United States, sitting in any other State in the Union than Louisiana.

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." At this time there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no States were contemplated in which it would not exist. The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The Constitution had declared in the third article, "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c., and to all cases of ad-

miralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, **447*** the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided that "the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;" and in the twelfth section it is provided that "the trial of issues in fact in the circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury;" and again, in the thirteenth section, it is provided that "the trial of issues in fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury."

But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. "No fact tried by jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law." This is **448*** a prohibition to the *courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." And the appel-

late jurisdiction has also been amply given by the same act (sec. 22, 24) to this court to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.

Was it the intention of Congress, by the general language of the Act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury—to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other States in the Union? We think not. No general words purporting only to regulate the practice of a particular court to conform its modes of proceeding to those prescribed by the State to its own courts ought, in our judgment, to receive an interpretation which would create so important an alteration in the laws of the United States securing the trial by jury. Especially ought it not to receive such an interpretation when there is a power given to the inferior court itself to prevent any discrepancy between the State laws and the laws of the United States, so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to the verdict of the jury.

If, indeed, the construction contended for at the bar were to be given to the Act of Congress, we entertain the most serious doubts whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, *however [**449** unintentional, of the Constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it by granting a new trial.

Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error for which the judgment can be reversed. The judgment is therefore affirmed, with six per cent. damages and costs.

Mr. Justice M'LEAN, dissenting.

This cause was removed from the District Court of Louisiana by a writ of error, and a reversal of the judgment is prayed for on the errors assigned.

The suit was originally brought in the Parish Court of the Parish of New Orleans, and was removed to the District Court of the United States, which exercises the powers of a circuit court.

In their petition, the plaintiffs below state that one Eben Fiske, as agent at New Orleans for William Parsous, the defendant, residing at Boston, purchased from the plaintiffs large

quantities of tobacco, and drew bills on the defendant in payment, which he refused to honor. The plaintiffs claim \$10,000.

The defendant, in his answer, denies the material facts set forth in the petition. A jury was impaneled, and a verdict rendered for \$6,484. On the trial, the bills of exchange were produced, and a great number of business letters between Parsons and Fiske were read.

Fiske was sworn as a witness, though objected to on the *ground of interest; but a release removed the objection to his competency.

The first assignment of error relied on is that from the facts apparent on the record, the plaintiffs had no right of action against the defendant, and that, therefore, this court will decree a judgment to be entered in favor of the defendant.

2. That they will, at least, reverse this judgment, and award a new trial, for one of the following reasons:

1. Because the court refused to direct the evidence to be put upon the record.

2. Because the whole question was a question of law, and the decision was against law.

3. It is not strictly a common-law proceeding, but a proceeding under the peculiar system of Louisiana; and according to that system, the court has power to reverse the judgment under circumstances which would not give it that power where the trial had been according to the common law.

As this cause involves a constitutional question which has not been settled by this court, and as I am so unfortunate as to differ in opinion with a majority of the members of the court, I shall, with great deference, present my views of the case.

In the State of Louisiana the principles of the common law are not recognized, neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other States. This system may be called the civil law of Louisiana, and is peculiar to that State.

The modes of proceeding in their courts are more nearly assimilated to the forms of chancery than to those of the common law. The plaintiff files his petition, in which he sets forth the ground of complaint and the relief prayed for. Process issues against the defendant, and when he is in court, he is ruled to answer the bill. The answer is filed, in which he admits, denies, or avoids the facts set forth in the petition, *the same as in a suit in chancery; and he is permitted, in his answer, to set up a demand against the plaintiff, which he may recover if sustained.

When the cause is brought to a hearing, the court decides the facts and the law, if neither party requires a jury. The testimony is taken down at the trial, and either party may move for a new trial, or take an appeal to the Superior Court.

If an appeal be taken, the testimony forms a part of the record, and is re-examined by the appellate court. Either party has a right to require a jury in the inferior court, and also to

demand that the testimony be taken down at the trial; so that it may form a part of the record, and be considered by the appellate court should an appeal be taken.

If either party desires what is called in the statute a special verdict, each party makes a statement of facts which exhibit the grounds of controversy, and these statements are submitted to the jury with the testimony in the case. In this case, also, if either party requires it, the testimony must be taken down at the trial.

The facts found by the jury are examined by the appellate court, and its judgment is given on the facts without the intervention of a jury.

Such is the outline of the course of practice in the courts of Louisiana. A court of chancery there is as little known, and the rules of its proceedings as little regarded, as are those of a court of common law. Redress is sought in substantially the same manner for an injury done to the person, his property or character. Whether he seeks to recover a debt, or asks the specific execution of a contract, or to avoid a contract on the ground of fraud or accident, the mode of proceeding is the same; he files his petition, and the defendant must answer.

In thus repudiating the forms and principles of the common law, the State of Louisiana has pursued a course different from her sister States. This has resulted from the views of jurisprudence derived by the great mass of her citizens from the foreign governments with which they were recently connected.

It is no doubt a wise policy to adapt the principles of *government to the moral [*452 and social condition of the governed. This is no less true in a judicial than it is in a political point of view; and where an intelligent people possess the sovereign power, they will not fail to secure this first object of a good government.

By an Act of Congress of the 26th of May, 1824, it is provided that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be established in the State of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of the said State; provided, that the judge of any such court of the United States may alter the times limited or allowed for different proceedings in the State courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such exist, between such State laws and the laws of the United States.

There is no evidence before the court that the power given to the district judge in this proviso has been exercised: the first part of the section, which adopts in the District Court of the United States the same mode of proceeding in civil actions as is established in the courts of the State, must therefore be considered as in force. And until this power be exercised, this section is a virtual repeal of so much of the Judiciary Act of 1789, and all other acts prior to 1824, which came within its provisions. It is contended that whatever may be the rules of practice in the District Court of Louisiana, they do not confer jurisdiction on this court. The force of this objection is admitted.

Any law regulating the practice of an inferior court does not confer jurisdiction on an appellate court; but where such court has jurisdiction of the case, it must be governed in its decision by the rules of practice in the court below.

This court has jurisdiction by writ of error to revise the final judgment, in any civil action, of a circuit court of the United States where the matter in controversy exceeds two thousand dollars. Whether this judgment be obtained by the forms of the civil or the common law is **453*** immaterial. *The only essential requisites to give jurisdiction are, that it be a civil action, involving a matter in controversy exceeding two thousand dollars, and that the judgment be final.

The forms of proceeding adopted under the Louisiana practice in the District Court constitute no objection to a revision of its final judgments by writ of error.

In the case of *Parsons against Armor*, brought to this court by writ of error from Louisiana, and decided the present term, the court has sustained its jurisdiction. That case in no respect differs in principle from this, except that the amount due was ascertained by the court in that cause, and in this by a jury. Both causes were brought against Parsons to recover the price of certain quantities of tobacco sold to Fiske, the alleged agent of the defendant. The same testimony was used in both causes, with the exception of the bills of exchange.

In the case of *Armor*, the court looked into the testimony, which was certified as a part of the record. From this testimony it appeared that Fiske acted as the factor of Parsons, and in no other respect as his agent; that Parsons looked to Fiske for the faithful disbursement of the funds placed in his hands, and the purchases were made in his name, and the payments sometimes in drafts, and at others in cash; that the credit was given to Fiske and not to Parsons by the vendors of the articles purchased. The court therefore reversed the judgment obtained against Parsons in the District Court.

The testimony thus examined by the court was not made a part of the record by a bill of exceptions, but was taken down at the trial. Had this been done in a case at common law, the court would not have considered the testimony as a part of the record; and, consequently, they could not have looked into it in deciding the cause. But the practice of the District Court, under the sanctions of the Act of 1824, was considered as presenting the testimony in that cause as fully to the consideration of this court as in a case at common law, where it is embodied in a bill of exceptions. The facts being ascertained by the court, on weighing the testimony the law was pronounced in its judgment.

454* *The law of Louisiana requires the testimony to be taken down, if demanded by either party, as well where a jury is impaneled as where the cause is submitted to the court. But in the case under consideration, the court, at the trial, refused to order the testimony to be taken in writing, although a motion to that effect was made. This refusal is the principal ground on which the plaintiff in error relies for the reversal of this judgment. Peters 3.

He claimed a right secured to him by law, which was refused; and he seeks redress by writ of error.

This redress cannot be given, it is urged; because, if the testimony had been taken down, it could have been of no advantage to the plaintiff in error, as this court could not examine it. And why may not this testimony be examined by the court, the same as in the case of *Armor*? The facts are the same, and no difference exists in the merits of the claims.

The reply is that in this case a jury passed upon the claim, and in the other the court, exercising the functions of a jury, decided both the fact and the law. The difference then consists in this: that the jury found the facts in the one case, and the court in the other; and in both cases the law was pronounced by the court.

This difference in the mode of decision, it would seem, ought not to affect the judgment of this court, unless there be some positive provision of law which must control it.

The seventh article of the amendment of the Constitution is referred to as conclusive on the point. It reads, "in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

To this objection an answer may be given, which to me is satisfactory.

This is not a suit at common law, and therefore does not come strictly within the provision of the article.

In what respect can this action be compared to a suit at common law?

*It was commenced by petition, and **[*455]** in all the stages through which it has been carried, no step has been taken in conformity to the common law, unless it be that the matter in controversy was submitted to a jury, and a bill of exceptions taken. Does this make it a common-law proceeding? A jury is often called to try matters of fact in a chancery case, and in the admission of evidence the rules of the common law are observed. But does this make the principal proceeding an action of law? Surely not. And can the same mode of trial under the statute of Louisiana have that effect? The proceedings under this statute are as dissimilar to the common-law process as are the rules of chancery. The whole proceeding under the statute is in derogation of the common law. How then can it be called a common-law proceeding? If it contain one feature of the common law, that does not change the character of the suit. The mode of redress is, under the special provisions of the statute, a remedy created by the law of the State. Can this procedure be called a suit at common law?

The words in the latter clause of the seventh article, "and no fact tried by a jury shall be otherwise re-examined in any court of the United States," refer to the first clause of the sentence, which limits the trial to "suits at common law." If this were not the true construction of the sentence, facts found by a jury in an issue directed by a court of chancery would be conclusive on the chancellor. The verdict has never been so considered, and especially in

the appellate courts of chancery. If the intervention of a jury in this case do not change its character so as to make it a common-law proceeding, then there is no difference in principle between this case and that of *Armor*. As the court in that cause looked into the testimony to ascertain the facts so as to apply the principles of law, why not do the same in this. In that case the judgment of the Circuit Court was reversed, a reversal in this case would render it proper to send down the cause for trial.

But the Circuit Court in this case refused to order the testimony to be taken down at the trial. This is undoubtedly error, if this court could examine the testimony, as it did in *Armor's* 456*] case. Had that case been considered by the court as a suit at common law, it must have been dismissed, or the judgment affirmed. It was under the particular practice of the District Court that this court considered itself authorized to look into the testimony which formed a part of the record in that cause, and by this procedure established the fact that it was not strictly an action at common law. This appears to me to relieve the case under consideration from difficulty. For, if the suit of *Armor* was not a common-law proceeding, neither is this suit; and, consequently, it is free from any constitutional objection in this court.

The objection made that if Congress, by adopting the practice of the Louisiana courts may evade the provisions of the seventh amendment, and that they may abolish the trial by jury in the courts of the United States by creating special remedies not known to the common law, is answered by saying that Congress have the power to do much which is not probable they will do. Have they not power to repeal the acts which confer jurisdiction on the courts of the United States, and which regulate their practice? This would not only take away the right of trial by jury in such courts, but all trials of every description. Is it at all probable that this power will be exercised? The answer must be in the negative, and so must the answer to an inquiry whether Congress, by creating new remedies, will dispense with the trial by jury.

Is this article of the Constitution to be construed to mean by the words "suits at common law" all suits which are not properly called cases of equity, of admiralty and maritime jurisdiction? Under the practice of Louisiana how are such suits to be distinguished? The form of action is the same in equity as at law; and if in all cases where a legal right could be prosecuted in other States at the common law, they are to be denominated actions at law in Louisiana, the design of Congress in adopting the Louisiana practice is defeated. The Act of 1824 intended to relieve the parties to a suit in the District Court in Louisiana from the forms of the common law, or the special regulations of 457*] the Judiciary Act of 1789, because they were not adapted to the modes of proceeding in that court.

Suppose Congress had specially provided that in all trials before the District Court of Louisiana the testimony should be taken down, and that it should form a part of the record, so as to present the facts to the Supreme Court in the same manner as though they had been embodied in a prayer for special instructions to

the jury, and brought up by bill of exceptions; might not this court determine the questions of law arising in the case? This, it appears to me, is neither more nor less than has been done by the Act of 1824.

Are all the laws of the different States for the valuation of improvements by commissioners, where a recovery for land is had against a *bona fide* occupant who claimed title unconstitutional? If suit be brought in the State courts, these laws are enforced as constitutional; but if brought in the Circuit Court of the United States, they are unconstitutional. This would make the constitutionality of acts depend, not upon a construction of the Constitution, but upon the jurisdiction where the action is brought. It would give redress in the State courts, which in the United States courts would be unconstitutional.

This would be the inevitable consequence if the provision in the seventh article be restricted in its application to the courts of the United States, and be construed to embrace every species of action where a legal right is prosecuted. And, in to escape this consequence, the provision of the article be extended to embrace all cases which come within the above construction, without reference to the jurisdiction where the remedy is sought, then all laws extending the jurisdiction of justices of the peace above twenty dollars are unconstitutional, and also every arbitration system which does not require a jury. An appeal from the judgment of a justice of the peace will not evade the constitutional objection; for the judgment is final, and the question involves the right of the justice to give judgment in the case without the intervention of a jury.

Suppose Congress, for the purpose of adjusting land titles in a district of country, should establish a special court, *called [*458 commissioners, to examine and determine between the different claimants; would their proceedings be valid, under the seventh amendment of the Constitution? This mode has been adopted by Congress to settle claims to lands under the Louisiana Treaty, and the acts of the commissioners have been confirmed. If such a proceeding was to be denominated the prosecution of a legal right, and, consequently, a suit at common law because it was not a case in equity, the decision was void under the seventh article, and also any act of legislation confirming it.

From the foregoing considerations I am brought to the conclusion that this case is not strictly a suit at common law, and that this court may, under the Act of 1824, as it did in the case of *Armor*, look into the record, and, from the facts there set forth, determine the question at law; and as the court below refused to order the testimony to be taken down, I think the defendant has been deprived of a right secured to him by law; and that for this error, the judgment should be reserved, and the cause sent down for further proceedings, with instructions to the District Court to order the testimony to be taken down at the trial.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel; on

consideration whereof, it is ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

Cited—6 Pet., 192; 7 Pet., 423, 451; 9 Pet., 657; 10 Pet., 613; 11 Pet., 396, 399; 12 Pet., 376; 16 Pet., 454; 2 How., 393; 5 How., 289, 290, 481; 7 How., 805; 19 How., 278; 20 How., 665; 21 How., 167, 486; 6 Wall., 758; 9 Wall., 277; 12 Wall., 300; 16 Wall., 269; 18 Wall., 249; 4 Otto, 657; 5 Otto, 134; 8 Otto, 445; 10 Otto, 32; 11 Otto, 808; 3 Cliff., 25; 1 Wood. & M., 459; 1 Abb. U. S., 305; Bald., 405, 554, 561, 562; 1 Blatchf., 486; 4 Ben., 35, 243; 1 Bond, 590; 5 Bank. Reg., 317; 8 Bank. Reg., 150; 3 Cranch, C. C., 352; Pat. Off. Gaz., 1882, p. 1117.

459*] *FARRAR AND BROWN
v.
THE UNITED STATES.

Practice—entry of appearance of Attorney-General of the United States by the clerk—cure of defects in process.

The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the Attorney-General of the United States. This practice has never been objected to. The practice would not be conclusive against the Attorney-General if he should at the first term withdraw his appearance, or move to strike it off. But if he lets it pass for one term, it is conclusive upon him, as to an appearance.

The decisions of this court have uniformly been, that an appearance cures any defects in the form of process.

MR. BENTON moved the court for leave to re-instate this case, which had been dismissed on a former day of the term for want of an appearance of the plaintiffs in error.

At the first term, when the writ of error was filed, the clerk of the court had entered the appearance of the Attorney-General of the United States, according to the usual practice in such cases.

The Attorney-General now said he should not object to the re-instatement if the court thought it proper under the circumstances; but he had intended to take an objection at the time when the suit was dismissed if any person had then appeared. It was that the citation for the writ of error was returnable to a day out of term, to wit: on the first Monday of January, 1828, instead of the second Monday of that year.

Mr. Chief Justice MARSHALL delivered the opinion of the court as follows:

The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the Attorney-General in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every Attorney-General, and has never been
460*] objected to. *It might be considered, therefore, as having an implied acquiescence on the part of the Attorney-General, although Peters 3.

it is admitted that there is no evidence of any express assent. We do not say that this practice would be conclusive against the Attorney-General if he should at the first term with draw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.

The decisions of this court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause therefore is ordered to be re-instated.

On consideration of the motion made by the Attorney-General on the part of the defendants in error in this cause, to dismiss the writ of error in this cause on the ground that the citation is made returnable to a day during the vacation, to wit, on the first Monday in January, A. D. 1828, whereas the return day should have been the second Monday in January, A. D. 1828, it is ordered by the court, that inasmuch as the said defect is cured by the appearance of the Attorney-General on the part of the defendant, said motion be, and the same is hereby overruled.

***THE STATE OF NEW JERSEY, [*461**
Complainants,

v.
THE PEOPLE OF THE STATE OF NEW YORK, Defendants.

Service of subpoena on State—practice.

The subpoena issued on the filing of a bill in which the State of New Jersey were complainants, and the State of New York were defendants, was served upon the Governor and Attorney-General of New York sixty days before the return day, the day of the service and return inclusive. A second subpoena issued, which was served on the Governor of New York only, the Attorney-General being absent. There was no appearance by the State of New York.

BY THE COURT: This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the Governor, and on the Attorney-General. A service on one is not sufficient to entitle the court to proceed.

Upon an application by the counsel for the State of New Jersey that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the State of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely *ex-parte*, the court could not feel bound by its decision if the State of New York desired to have the question again argued.

A notice was given by the solicitors for the State of New Jersey to the Governor of the State of New York, dated the 12th of January, 1830, stating that a bill had been filed on the equity side of the Supreme Court by the State of New Jersey against the people of the State of New York, and that on the 13th of February following the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the State of New York, on the motion of the counsel for the State of New Jersey for a subpoena to be served on the Governor and Attorney-General of the State of New York the court said, as no counsel appears to argue the motion on the part of the State of New York, and the precedent for granting it has been established upon very grave and solemn argument, the court do not require an *ex-*

parte argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established. The State of New York will be at liberty to contest the proceeding at a future time in the course of the cause if they shall choose so to do.

A BILL was filed on the equity side of the court by the State of New Jersey on the 20th of February, 1829, against the people of the State of New York; and on motion of *Mr. Wirt*, for the complainants, a subpoena was awarded by the court on the 16th of March, 1829. The writ issued on the 26th of May, 1829. A copy of the subpoena and of the **462*** bill was served on the Attorney-General of New York personally, on the 5th day of June, 1829, by the marshal of the Southern District of New York, and on the acting governor of the State, by transmitting the same to him by letter. The acting governor acknowledged "due service of the same," by an indorsement on the subpoena, signed by him on the 5th day of June, 1829.

The subpoena was returnable on the first Monday in August, 1829, being the third day of that month, and fifty-nine days after the service. And no appearance having been entered for the defendants, on the 6th of October, 1829, an alias subpoena was issued, returnable to January Term, 1830. This writ was served on the acting governor of New York on the 9th of November, 1829, sixty-one days before the term, by delivering a true copy of the same to him. The marshal of the Southern District of New York returned, as to the Attorney-General of New York, "the Attorney-General of New York, Green C. Bronson, Esq., not found, being absent, and not within my district."

Together with the alias subpoena, there was served on the acting governor of the State of New York, in the manner before stated, a notice signed by the solicitor for the complainants, in the following terms:

"To Enos T. Throop, Esquire, Governor of the State of New York.

"By virtue of a writ of subpoena to you directed and herewith shown, you are required to be and appear, on behalf of the people of the State of New York, before the Supreme Court of the United States holding pleas in equity, on the second Monday in January next, at the city of Washington, in the District of Columbia, being the present seat of the national government of the United States, to answer concerning those things which shall be objected to the said State in a bill in equity now depending in the said court, wherein the State of New Jersey is complainant, and the people of the State of New York are defendants, to do and receive, on behalf of the said State of New York, what further the said court shall have **463*** considered in this behalf. *And this you may in no wise omit, under the penalty of five hundred dollars, dated the first Monday of August, in the year of our Lord 1829."

A similar notice was issued, directed to the Attorney-General of New York, but was not served upon him.

No appearance having been filed on the 12th of January, 1830, *Mr. Southard*, Attorney-General of New Jersey, and *Mr. Wirt*, solicitors for the complainants, addressed to the Gov-

ernor of the State and the Attorney-General of New York the following letter:

"A bill having been filed on the equity side of the Supreme Court of the United States by the State of New Jersey against the people of the State of New York, a process whereof, with the usual and regular copy of subpoena to appear and answer the said bill having been duly served upon you, and you having failed to appear on the return day of the said process, notice is hereby respectfully given to you that we, as solicitors for the State of New Jersey, complainant in the said bill, will move the said Supreme Court of the United States, on Saturday, the 13th of February next, to proceed *ex-parte* in the said cause, and to take the said bill *pro confesso*, and render a decree in conformity with the prayer thereof, according to the rules of practice established in the said court, or for such other order as to the said court may seem meet; unless, on or before the said 13th of February next, you shall have appeared and answered the said bill, or shall show sufficient cause to the contrary."

This letter was delivered to the Attorney-General of New York, then in the city of Washington, on the 13th of January, 1830, and to the governor of the State on the 21st of January, 1830.

The motion of the solicitors for the plaintiffs coming on for argument, on the 13th of February, 1830, *Mr. Wirt* said, that there are two questions to be presented: the first, whether there had been a sufficient service of the subpoena, supposing the court to have jurisdiction to issue it without an Act of Congress. The second was, whether such jurisdiction existed.

*The first subpoena was served upon **[*464]** the governor and Attorney-General sixty days before the return day, the day of the service and of the return inclusive. Whether this was sufficient, according to the course of the court, he was desirous to know. The second subpoena was served on the governor only, the Attorney-General being absent. Was it necessary, to make the service good, that it should be served upon both? *Mr. Wirt* referred to the rules of the court on this subject, particularly the rule adopted in August Term, 1796.

Mr. Chief Justice MARSHALL said that this was not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule was to be upon the governor and upon the Attorney-General. A service on one was not sufficient to entitle the court to proceed against the State.

Mr. Wirt then said that he should be glad to have a day assigned to argue the point of jurisdiction, if the court chose, before another subpoena issued; as it might, if decided against the plaintiffs, prevent unnecessary expenses. He would be willing that it should be at so distant a day as to enable the State of New York to appear and employ counsel. He mentioned three weeks from the day of the application.

Mr. Chief Justice MARSHALL said the court had no difficulty in assigning that day for the motion. It might be as well to give notice to the State of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely *ex-parte*, the court would not feel bound by its decision, if the State of

New York afterward desired to have the question again argued.¹

Motion granted, and notice directed.

465*] *In conformity with the direction of the court, notice of the day appointed for hearing the motion for a subpoena was forthwith **466*]** *served on the Governor and on the Attorney-General of the State of New York; and on the day assigned by the court, the 6th of March, 1830, *Mr. Southard*, Attorney-General of the State of New Jersey, and *Mr. Wirt*, attended as counsel for the complainants. No counsel appeared for the State of New York.

The counsel for the State of New Jersey inquired of the court if they would hear an argument on a motion that a subpoena might issue to be served on the Governor and Attorney-General of the State of New York, stating that they were willing and prepared to go into the same.

Mr. Chief Justice MARSHALL said as no one appears to argue the motion on the part of the State of New York, and the precedent for granting the process has been established upon very grave and solemn argument in the case of *Chisholm v. The State of Georgia* (2 Dall. Rep., 419), and *Grayson v. The State of Virginia* (3 Dall., 320), the court do not think it proper to require an *ex-parte* argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established.

The court are the more disposed to adopt this course, as the State of New York will still **467*]** be at liberty to contest the *proceeding at a future time in the course of the cause, if it shall choose to insist upon the objection.

On consideration of the motion made by *Messrs. Southard and Wirt*, solicitors for the complainant in this cause, on Saturday, the 13th day of February of the present term of this court, praying the court to postpone the consideration of this cause until Saturday, the 6th of March of the present term of this court, with leave to the counsel for the said complainant on that day either to argue the point of jurisdiction or to move the court for a decree in pursuance of the notice therein recited, or for new process in case the court should determine that the service of the process in this case was not sufficient to entitle the court to proceed against the State of New York, or for such other order as to the court may seem meet, it is considered by the court that as no one appears to argue this motion on the part of the State of New York, and the precedent has been established in the case of *Chisholm's Executors against The State of Georgia*, the court do not consider it proper to require an *ex-parte* argument, but will follow the precedent so established after grave and solemn argument. The court is the more disposed to adopt this course, as the State of New York will be at liberty to contest this proceeding at any time in the course of the cause.

Whereupon, it is ordered by the court that, as the service of the former process in this cause was defective, inasmuch as it was not served sixty days before the return day thereof as required by the rules of this court, process of subpoena be, and the same is hereby awarded as prayed for by the complainant.²

1.—The following letters, addressed by the Attorney-General of New York to the clerk of the court, dated July 27, 1829, and to the Chief Justice and the Associate Justices, dated January 8, 1830, were read during the discussion.

UTICA, N. Y., July 27, 1829.

William Thomas Carroll, Esquire, Clerk of the Supreme Court of the United States.

Sir—The Governor and Attorney-General of the State of New York were recently served with the copy of a bill in equity, said to have been exhibited in the Supreme Court of the United States by "The State of New Jersey v. The People of the State of New York," and with a subpoena in that cause to appear on the first Monday of August next.

I beg leave respectfully to say that such service is regarded on the part of the State of New York as utterly void, because the mode adopted is unknown to the common law, is not authorized by any statute of the United States, nor warranted by any existing rule or order of the court out of which the process issued. A rule on the subject of the service of process was adopted in August Term, 1796 (3 Dall. Rep., 320, 335); but this rule, so far as I have observed, has been omitted in every subsequent publication of the rules of the Supreme Court, and is no doubt obsolete.

Entertaining this view of the subject, it is supposed that no proceeding will be had in the cause, either in vacation or at term, until the court shall have directed the mode of serving such process, and the prescribed course shall have been pursued.

Whether the court has been clothed with power to compel the appearance of a State as defendant in an original suit or proceeding, is a question, among others, which will no doubt receive from that high tribunal all the consideration that its importance demands before any order shall be made in the premises.

I will thank you to hand this to the court, if the subject shall ever be presented to their consideration, and should any rule or order be made in, or affecting this cause, please send a certified copy, addressed to me at Albany.

I am, Sir, with great respect,

Your obedient servant,

GREEN C. BRONSON,

Attorney-General of New York.

Peters 3.

WASHINGTON CITY, January 8, 1830.

To the Honorable the Chief Justice and his Associate Justices of the Supreme Court of the United States.

A bill has been exhibited in this court by the State of New Jersey against the people of the State of New York, concerning the boundary line between the two States, and a subpoena to appear and answer, with a copy of the bill, has been served upon the Governor of the State of New York. A notice has recently been served that on the 18th instant the court would be moved to take the bill *pro confesso*, and proceed to a decree for the want of an appearance.

I beg leave respectfully to say that the opinion is entertained on the part of the State of New York that this court cannot exercise jurisdiction in such a case without the authority of an Act of Congress for carrying into execution that part of the judicial power of the United States which extends to controversies between two or more States.

The Governor of the State of New York has made a communication upon the subject of this suit to the Legislature now in session, but it has not yet been acted upon, so far as I have been advised. Whether the Legislature will authorize any person to appear and discuss the question of jurisdiction, or whether, for the purpose of obtaining a judicial decision upon the merits of an unfortunate controversy, they will order an appearance, waiving the question of jurisdiction, I am, at this time, unable to determine.

I have deemed it proper to make this communication to explain what might otherwise be supposed a want of respect for this honorable court, on the part of the executive of New York.

GREEN C. BRONSON,

Attorney-General of New York.

2.—The following is a copy of the subpoena awarded by the court:

The President of the United States to the Governor and the Attorney-General of the State of New York, greeting:—For certain causes offered before the Supreme Court of the United States, holding jurisdiction in equity, you are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse,

469*]

*JOHN SMITH T.

v.

JOHN W. HONEY.

Jurisdiction—amount in controversy.

Where the verdict for the plaintiff in the Circuit Court is for a less amount than two thousand dollars, and the defendant prosecutes a writ of error, this court has not jurisdiction; although the demand of the plaintiff in the suit exceeded two thousand dollars.

ERROR from the District Court of Missouri.

In the District Court of Missouri, John W. Honey instituted an action of trespass on the case for the recovery of damages from John Smith T., the defendant in the action, for the use of a "new and useful improvement in screening tables for discriminating, selecting and separating perfect from imperfect shot," for which letters patent had been granted to the plaintiff by the United States. The damages were laid in the declaration at two thousand dollars; and at September Term, 1827, the cause was tried, and a verdict rendered for the plaintiff for one hundred dollars, upon which judgment was entered for the plaintiff below.

On the trial, the counsel for the defendant filed several bills of exceptions to the opinion of the court, and prosecuted this writ of error.

After the case was opened for the plaintiff in error, the court ordered the writ of error to be dismissed, the same having been sued out by the defendant in the District Court, and the sum in controversy, as to him, being no more than one hundred dollars, the amount of the verdict in that court. (See the case of *Gordon v. Ogden*, at this term, *ante* p. 33.)

Benton and Hempstead for the plaintiff in error, *Lawless* for the defendant.

Afterwards, *Mr. McGinness*, for the plaintiff in error, on affidavit stating that the plaintiff in the District Court estimated the damages which had accrued to him by the use of his machine by the defendant at two thousand dollars, and had sought to recover the same in the action, moved to re-instate the cause.

The court overruled the motion.

Cited—15 How., 203; 4 Wall., 164; 1 Otto, 366.

you personally be and appear, on behalf of the people of the said State of New York, before the said Supreme Court, holding jurisdiction in equity, on the first Monday in August next, at the city of 468*] Washington, in the *District of Columbia, being the present seat of the national government of the United States, to answer concerning the things which shall then and there be objected to the said State, and to do further and receive on behalf of the said State, what the said Supreme Court, hold-

*JOHN G. McDONALD, Plaintiff in [470
Error,

v.

GEORGE B. MAGRUDER, Defendant. (a)

Promissory note—accommodation indorser—liability of co-sureties.

A note was discounted at the office of discount and deposit of The Bank of the United States, in the city of Washington, for the accommodation of the drawer, indorsed by Magruder and by M'Donald; neither of the indorsers receiving any value for his indorsement, but indorsing the note at the request of the drawer, without any communication with each other. The note was renewed from time to time, under the same circumstances, and was at length protested for nonpayment; and separate suits having been brought by the bank against the indorsers, the drawer being insolvent, judgments in favor of the bank were obtained against both the indorsers. The bank issued an execution against Magruder, the first indorser, and he having paid the whole debt and costs, instituted this suit against M'Donald, the second indorser, for a contribution, claiming one-half of the sum so paid by him in satisfaction of the judgment obtained by the bank. Held, that he was not entitled to recover.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount. [474]

The indorser of a promissory note who receives no value for his indorsement from a subsequent indorser, or from the drawer, cannot set up the want of consideration received by himself; he is not permitted to say that the promise is made without consideration, because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself. [476]

Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. [477]

ERROR to the Circuit Court of the County of Washington in the District of Columbia.

This was an action of *assumpsit*, instituted in the Circuit Court by the defendant in error against the plaintiff in this court. The matters in controversy were submitted to the jury by a case agreed, which stated that the plaintiff

ing jurisdiction in equity, shall have considered in this behalf; and this you may in no wise omit, under the penalty of five hundred dollars. Witness, the Honorable John Marshall, Esquire, Chief Justice of the said Supreme Court at Washington City, the second Monday in January, being the 11th day of said month, in the year of our Lord 1830, and of the independence of the United States the fifty-fourth.

WILLIAM THOMAS CARROLL,

Clerk of the Supreme Court of the United States

(a) NOTE.—That bills and notes import a consideration. See note to *Mandeville v. Welch*, 5 Wheat., 277.

Indorser, when he can allege want of consideration for his contract—other defenses.

Between parties to negotiable paper between whom there is a privity, or between indorser and immediate indorsee, inquiry is admitted into the consideration of such paper, in a suit between them. *Easton v. Pratchett*, 1 Crompt. Mees. & R., 798; 2 Crompt. Mees. & R., 542; *Holiday v. Atkinson*, 5 Barn. & C., 501; *Abbott v. Hendricks*, 1 Man. & G., 791; *Klein v. Keyes*, 17 Mo., 326; *Barnet v. Offerman*, 7 Watts., 180; *Cleurent v. Reppard*, 15 Penn.

St., 111; *Shurgin v. McPheters*, 42 Ind., 527; 1 Daniel Neg. Instruments, sec 174.

But the want of consideration, or the failure thereof, cannot be pleaded in a suit brought by an indorsee against a prior but not his immediate indorser. 1 Parsons N. & B., 176. They are regarded as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defense against the holder: (1) The consideration which the defendant received for his liability; and (2) That which the plaintiff gave for his title. *Hoffman v. Bank of Milwaukee*, 12 Wall., 181; *Craig v. Sibbett*, 15 Penn., 240; *Daniel Neg. Instr.*, sec. 174; *United States v. Peters* 3.

produced in evidence a promissory note drawn by Samuel Turner, Jun., in favor of George B. Magruder, or order, at sixty days, for \$900, payable at the office of discount and deposit at Washington, for value received; which note **471*** was signed by *Samuel Turner, and indorsed by George B. Magruder and by John G. M'Donald.

The note was so drawn and indorsed, with the understanding of all the parties thereto, that it should be discounted in the office of discount and deposit, for the sole use and accommodation of the maker, Samuel Turner; no value being received by either of the indorsers. It was so discounted, and the proceeds thereof applied to the credit of Turner, in the office. Long before the making of the note, viz., in the year 1819, Turner had two notes discounted for his use and accommodation in the office, viz., one for \$270, indorsed by George B. Magruder and by G. M'Donald, and one for \$710, indorsed by George B. Magruder and one Samuel Hambleton; which last-mentioned note was continued, by renewal, with the indorsement of Magruder and Hambleton, until September, 1820, when, in consequence of Hambleton's absence, it was protested; after which the office permitted the accommodation to be renewed, upon condition that Turner would get another good indorser in the place of Hambleton. Whereupon, John G. M'Donald, upon the solicitation of Turner, indorsed a note for the sum of \$710, which was brought to him already indorsed by George B. Magruder. That in March, 1821, a small part of the money having been paid, the two notes were consolidated and renewed by one note for \$950, drawn by Turner and indorsed by Magruder and by M'Donald, which was from time to time renewed by notes similarly drawn and indorsed, the last of which is this note, so produced in evidence by the plaintiff. Neither at the time of indorsing the notes respectively, nor at any other time, was there any communication between Magruder and M'Donald upon the subject of such indorsement. Both of them, however, knew at the time of indorsement the notes were intended to be discounted for the accommodation of Turner; and in every instance Magruder was the first indorser. The note, so produced in evidence by the plaintiff, not having been paid when due, was duly protested; and the payment thereof having been duly demanded and due notice given of such demand, and of nonpayment having been given **472*** en *to the indorsers, judgments at law were recovered against both by the Bank of the United States, and the whole amount having been paid by Magruder, he brought this

suit to recover from M'Donald one-half of the amount so paid by him.

By consent of the parties, a verdict was rendered for the plaintiff for one-half of the amount so paid by the said Magruder in satisfaction of the judgment against him, subject to the opinion of the court upon the case agreed.

Upon the case stated, the court below gave judgment for the plaintiff, and the defendant sued out this writ of error.

Mr. Jones, for the plaintiff in error, contended,

1. That by the showing of the plaintiff himself, in the case stated, there never was any contract between the parties but what their several indorsements on the note import.

2. That the import and effect of the contract of indorsement, the only contract between the parties, and that not attempted to be explained or modified by any collateral agreement or understanding whatever, were that the plaintiff himself, as first indorser and payee of the note, should pay and satisfy the whole amount of the note, in default of the maker, and should completely indemnify and save harmless the defendant, as last indorser, against all recourse from the holder. Consequently, if the bank had chosen to enforce the separate judgment which they had recovered against the last, instead of the first indorser, the former would have been entitled to recover of the latter, not a moiety, but the whole of the amount.

3. That this, the legal effect of the only contract subsisting between the parties, so far from being changed or impaired, is confirmed and strengthened by the origin and circumstances of the debt, as explained in the case stated; from which it appears that near three-fourths of the amount consisted of a prior debt due from the plaintiff to the bank, for which M'Donald never was liable till he made himself so as indorser of the plaintiff below, and as second indorser.

This action was brought by the first indorser against the second indorser of a promissory note for contribution, he *having paid the [***473** note to the holder. There never was any contract between the parties but that which appears on the face of the note. In the true sense of this agreement, Magruder promises to pay the note in case of the failure of the drawer to do so, and to save the subsequent indorser, the plaintiff in error, harmless. There is nothing collateral to this agreement; were it necessary or proper to go into any inquiry as to the real circumstances of the parties, three-fourths of the sum received on the discount of the note were for Magruder's use.

The only circumstance upon which the claim

Bank of Metropolis, 15 Pet., 393; *Swift v. Tyson*, 16 Pet., 1; *Robinson v. Reynolds*, 2 Q. B. (42 E. C. L. R.), 196; *Thiedemann v. Goldsmith*, 1 DeGex F. & J., 4; *Hunter v. Wilson*, 19 L. J. Exch., 8; 4 Exch., 489; *Spurgin v. McPheeter*, 42 Ind., 527.

And if any intermediate holder gave value for the instrument, that intervening consideration will sustain the plaintiff's title. *Byles on Bills* (Sherwood's ed.), 236; 1 *Parson N. & B.*, 192; *Hunter v. Wilson*, 4 Exch., 489; *Boyd v. McCann*, 10 Ma., 118; *Howell v. Crane*, 12 La. Ann., 126; *Watson v. Flannagan*, 14 Tex., 354; *Roscoe on Bills*, 111; *Kyd on Bills*, 277; *Story on Bills*, sec. 188; *Johnson on Bills*, 80; 1 *Daniel Neg. Instr.*, sec. 165.

That the bill or note has been lost or stolen, or *Peters 3.*

was executed under duress, or under fraudulent misrepresentations, or for fraudulent consideration, or for illegal consideration, or has been fraudulently obtained from an intermediate holder, or been in any way the subject of fraud or felony, is a good defense as between the parties privy to it. *Mills v. Barber*, 1 Mees. & W., 425; *Clark v. Peace*, 41 N. Hamp.; *Vathir v. Zane*, 6 Grat., 246; *Hutchinson v. Bogg*, 28 Penn. St., 294; *Morton v. Rogers*, 12 Ward., 484; *Edmunds v. Groves*, 2 Mees. & W., 642; *Bingham v. Stanley*, 2 Q. B., 117; 1 *Daniel Neg. Instr.*, sec. 177; *Shirley v. Howard*, 53 Ill., 455; *Holden v. Cosgrove*, 12 Gray, 216; 1 *Parsons N. & B.*, 188; *Western Bank v. Mills*, 7 Cush., 546.

of the defendant in error can be supposed to rest, is, that the note was to go into bank for the benefit of the drawer; and this will not raise a contract, either express or by implication, different from that which is the known and established construction of such instruments. This is well known, and all who become parties to such contracts are bound by the well-established principles of law, operating upon them under such relations.

Mr. Key, for the defendant, said the question presented in this case is not novel. It has been frequently discussed in courts, and the position assumed for the defendant in error is founded in equity. It is claimed to divide the loss sustained by the failure of the drawer of the note between the indorsers. The bank had judgment against the indorsers. Magruder paid the whole amount of the execution against him, and proceedings on the execution against M'Donald were stayed until this suit shall determine the rights of the parties.

In this case the note was made for the sole purpose of discount for the drawer, and the indorsers put their names upon it for that purpose only. As between the bank, there is no doubt the obligation of each was for the whole amount of the note, but between themselves it was not so. They united for the drawer, and they made no contract with each other for indemnity. The only contract was, that each should become one of two indorsers for the benefit of the drawer, and that they would become mutual and equal sureties.

474*] *In other commercial contracts, the circumstances under which they arise are gone into. A bill of exchange drawn without funds in the hands of the drawer, is not subject to the strict rules of notice. So, also, where a note has been discounted for the use of the indorser. (*The Bank of Columbia v. French*, 4 Cranch, 141.) These cases show that in actions on negotiable paper you may go beyond the form of the contract.

In the present case the note was drawn, and after it was indorsed by Magruder, was handed back to Turner; it was then, at the request of Turner, indorsed by M'Donald, and was delivered to the bank by the drawer. Between the indorsers there was no contract, no consideration passed from the first to the second, and they stood as sureties between each other. (Cited, 13 Johns., 52; 3 Harris & Johns., 125.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered by the Circuit Court of the United States for the County of Washington in the District of Columbia, in an action of *indebitatus assumpsit* brought by the first indorser of a promissory note against the second indorser, to recover half of its amount. The note was made by Samuel Turner, Jun., and indorsed George B. Magruder, John G. M'Donald. At the trial of the cause a case was agreed by the parties, and the judgment of the Circuit Court was rendered in favor of the plaintiff on a verdict given by the jury, subject to the opinion of the court.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the

same note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note; or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount.

*This is the regular course of business [***475** where notes are indorsed for value; but it is contended that where less than the amount is received, the indorser is responsible to his immediate indorsee only for the sum actually paid; consequently, if nothing is paid, the mere indorsement does not bind the indorser to pay his immediate indorsee anything. If B indorses to C the note of A without value, and A fails to take it up, it is as between B and C a contract without consideration, on which no action arises. This is undoubtedly true if C retains the note in his own possession, and may be equally true if he indorses it for value. When he repays the money he has received, he is replaced in the situation in which he would have been had he never parted with the note. If he puts it into circulation on his own account, new relations may be created between himself and his immediate indorsee, which may be affected by circumstances. In the case under consideration, the note took the direction intended by all the parties. It was indorsed by Magruder for the purpose of enabling Turner to discount it at the bank. To insure this object, Turner applied to M'Donald, who placed his name also on the paper. No intercourse took place between the indorsers. No contract express or implied existed between them other than is created by their respective liabilities, produced by the act of indorsement. What are these liabilities? The first indorser gave his name to the maker of the note for the purpose of using it in order to raise the money mentioned on its face. He made himself responsible for the whole sum upon the sole credit of the maker. His undertaking is undivided. He does not understand that any person is to share this responsibility with him.

But either the bank is unwilling to discount the note on the credit of the maker and his single indorser, or the maker supposes his object will be insured by the additional credit given by another name. He presents the note, therefore, to M'Donald, and asks his name also. M'Donald accedes to his request, and puts his name on the instrument. If the maker passes the note for value, the liability of M'Donald to the holder is the same as if that value had been received *by M'Donald himself. Why [***476** is this? No consideration is received by M'Donald, and this fact is known to the holder and discounter of the note. But a consideration is paid by the holder to the maker, and paid on the credit of M'Donald's name. He cannot set up the want of a consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promisee to another is as valid a consideration as if paid to the promisor himself.

In what does the claim of the second on the
Peters 3.

first indorser differ from that of the holder on the second indorser? Neither has paid value to his immediate indorser, but the holder has paid value to the maker on the credit of all the names to the instrument. The second indorser, if he takes up the note, has paid value to the holder in virtue of the liability created by his indorsement. If this liability was founded equally on the credit of the maker and of the first indorser; if his undertaking on the credit of both subjects him to the loss consequent on the payment of the note, how can the contract between him and his immediate indorser be said to be without consideration?

If it be true, as we think it is, that Magruder, when he indorsed the note and returned it to the maker to be discounted made himself responsible for its amount on the failure of the maker, if this responsibility was, then, complete, how can it be diminished by the circumstance that M'Donald became a subsequent indorser? How can the legal liability of a first indorser to the second, who has been compelled to take up the note, be changed otherwise than by an express or implied contract between the parties?

This question has arisen and been decided in the courts of several States. *Wood v. Repold* (3 Harris & Johns., 125) was a bill drawn by A. Brown, Jun., at Baltimore, on Messrs. Goold & Son of New York, in favor of G. Wood & Co., and indorsed by G. Wood & Co., and afterwards by Repold, the plaintiff. The bill was drawn and indorsed for the purpose of raising money for the drawer, and was discounted at the Bank of Baltimore. On being protested for nonpayment, it was taken up by Repold, and this suit brought against the first [477*] indorser. Payment was resisted because the indorsement was, without consideration, for the accommodation of the drawer; but the court sustained the action. The same question arose in *Brown v. Mott* (7 Johns., 361), on a promissory note, and was decided in the same manner. In that case the court said that if he had taken it up at a reduced price, it would seem that he could only recover the amount paid. Undoubtedly, if M'Donald had been compelled to pay a moiety of this note, he could have recovered only that moiety from Magruder.

The case of *Douglass v. Waddle* (1 Hammond, 413) was determined differently. This case was undoubtedly decided on general principles; but the custom of the country and a statute of the State are referred to by the court as entitled to considerable influence. The weight of authority as well as of usage is, we think, in favor of the liability of the first indorser.

The claim of Magruder has also been maintained on the principle that they are co-sureties, and that he who has paid the whole note may demand contribution from the other.

The principle is unquestionably sound if the case can be brought within it. Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. Magruder and M'Donald might have become joint indorsers. Their promise might

have been a joint promise. In that event, each would have been liable to the other for a moiety. But their promise is not joint. They have indorsed separately and successively, in the usual mode. No contract, no communication, has taken place between them which might vary the legal liabilities these indorsements are known to create. Those legal liabilities, therefore, remain in full force.

Upon this question of contribution, the counsel for the defendants in error rely on two cases, reported in 2 Bos. & Pull., 268 and 270. The first, *Cowell v. Edwards*, was a suit by one surety on a bond against his co-surety for contribution. *It was intimated by the [*478 court that each surety was liable for his aliquot part, but not liable at law to any contribution on account of the insolvency of some of the sureties. The party who had paid more than his just proportion of the debt could obtain relief in equity only.

The second case, *Sir Edward Deering v. The Earl of Winchelsea, Sir John Rous, and the Attorney-General*, was a suit in chancery, in the Exchequer. Thomas Deering had been appointed receiver of fines, &c., and had given three bonds conditioned for faithful accounting, &c. In one of these the plaintiff was surety, in another Lord Winchelsea, and in the third, Sir John Rous. Judgment was obtained on the bond in which the plaintiff was surety, and this suit was brought against the sureties to the two other bonds for contribution. It was resisted on the ground that there was no contract between the parties, they having entered into special obligations. The Lord Chief Baron was disposed to consider the right to contribution as founded rather on the equity of the parties than on contract, and the court decreed contribution.

In this case the parties were equally bound, were equally sureties for the same purpose, and were equally liable for the same debt. Neither had any claim upon the other superior to what that other had on him. The parties stood in the same relation, not only to the crown, to whom they were all responsible, and to the person for whom they were sureties, but to each other. Under these circumstances contribution may well be decreed *ex equali jure*. But, in the case at bar, the parties do not stand in the same relation to each other. The second indorser gives his name on the faith of the first indorser as well as of the maker. The first indorser gives his name on the faith of the maker only. Unquestionably these liabilities may be changed by contract, but no contract existing between these parties, it is not a case to which the principle of contribution applies.

No notice has been taken of the form of the action. It is admitted that Magruder, having paid the whole note, *may recover a [*479 moiety from M'Donald, if their undertaking is to be considered as joint; if he, as first indorser, is not responsible to M'Donald for any part of it which M'Donald may have paid.

The judgment is to be reversed and the cause remanded, with directions to set aside the verdict and enter judgment as on a nonsuit.

Cited—5 How., 292; 21 How., 437; 4 McLean, 9.

APPENDIX.

481*] *The following opinion was prepared by *Mr. Justice Story* at February Term, 1819, and was not delivered; *Mr. Chief Justice Marshall* having delivered the opinion of the court in the case. By his permission it is inserted here, as the principles discussed in the opinion are the same with some of those involved in the case of *Inglis v. The Trustees of the Sailor's Snug Harbor*, ante, p. 99.

THE TRUSTEES OF THE PHILADELPHIA BAPTIST ASSOCIATION v. SMITH AND ROBERTSON, 4 Wheat, 1.

STORY J. Charitable donations were of great consideration in the civil law, and bequests to pious uses were deemed privileged testaments.¹ There can be little doubt that the authority of the Roman code, combining with the religious notions of former times, contributed in no small degree to engraft the principles of that law respecting charities into the common law. This was manifestly the opinion of Lord Thurlow,² and Lord Eldon, in assenting to it, has added that, as at an early period the ordinary had authority to apply a portion of every man's estate to charity, when afterwards the statute compelled a distribution, it is not impossible that the same favor should have been extended to charity in the construction of wills, by their own force purporting to authorize such a distribution.³ Be this as *it may, it cannot be denied that many of the privileges given to the charitable testaments by the civil law have been for ages incorporated into the common law. For instance, one privilege was that no such testament was void for uncertainty either as to persons or objects. Hence, if a testator gave his goods to be distributed among the poor, or made the poor his executors, the legacy was not void; although it would have been otherwise if charity had not been the legatee.⁴ And the same rule has been adopted into the common law, at least ever since the statute of charitable uses.⁵ Indeed, at one period, the constructions in respect to charitable bequests were pushed to a most extravagant length; and the good sense of succeeding times has lament-

ed, and, as far as it consistently could, has endeavored to abridge the ancient doctrine, to something like a rational system.⁶ It is now too late to contend that a disposition in favor of charity can be construed according to the rules which are applicable to individuals. In the first place, the same words in a will, when applied to individuals, may require a very different construction if applied to the case of a charity. If a testator give his property to such persons as he shall hereafter name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in his lifetime, and no other is appointed in his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favor of charity, chancery will, in both instances, supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether.⁷ Again, in the case *of an individual, if an estate [***483** is devised to such person as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime and no one is appointed in his place, the bequest amounts to nothing. Yet such a bequest to charity would be good, and the Court of Chancery would in such case assume the office of executor.⁸ So if a legacy be given to trustees to distribute in charity, and they die in the testator's lifetime, although the legacy is lapsed at law (and if they had taken to their own use it would have been gone forever), yet, in equity, it will be enforced.⁹ Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet where charity is the legatee the court will consider it as the whole substance of the bequest; and in such cases only, if the mode fail, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take.¹⁰ A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there the

1.—Swinburne, pl. 1, s. 16, p., 103; Id., pl. 7, s. 8, pl., 908; 2 Domat., 160, 161, 163.

2.—White v. White, 1 Bro. Ch. Cas., 12.

3.—Moggridge v. Thackwell, 7 Ves., 36, 69; Mills v. Farmer, 1 Merivale, 55, 94.

4.—Swinburne, pl. 1, s. 16, p. 104, 59; 2 Domat., lib. 4, tit., 2, s. 6, p. 161, 162, 163.

5.—43 Eliz., ch. 4.

6.—See what is said on this subject in Moggridge v. Thackwell, 1 Ves., Jun., 464; S. C., 7 Ves., 36; Mills v. Farmer, 1 Merivale, 55; Corbyn v. French, 4 Ves., 418; Attorney-General v. Minshull, 4 Ves., Jun., 11; Attorney-General v. Boultree, 2 Ves., Jun., 380; Attorney-General v. Whitehurch, 3 Ves., Jun., 141; Peters 3.

Carey v. Abbot, 7 Ves., 490; Attorney-General v. Baynes, Prec. Ch., 270.

7.—Mills v. Farmer, 1 Merivale, 55, 94; Moggridge v. Thackwell, 7 Ves., 36; Attorney-General v. Jackson, 11 Ves., Jun., 365, 367.

8.—Mills v. Farmer, 1 Merivale, 55, 96; Moggridge v. Thackwell, 7 Ves., 36.

9.—Attorney-General v. Hickman, 2 Eq. Cas. Abridg., 193; Moggridge v. Thackwell, 3 Bro. Ch., 517; S. C., 1 Ves., Jun., 464; 7 Ves., 36; Mills v. Farmer, 1 Merivale, 55, 100; White v. White, 1 Bro. Ch., 12.

10.—Mills v. Farmer, 1 Merivale, 55, 100; Moggridge v. Thackwell, 7 Ves., 36; Attorney-General v. Berryman, 1 Diek. R., 168; 2 Roper on Legacies, 130.

Court of Chancery, if no mode is pointed out, will of itself supply the defect and enforce the charity.¹ Therefore, it has been held that if a man devises a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the Court of Chancery hath power to dispose of it to such charitable uses as it shall think fit.² So if a testator bequeath a sum for such a [484*] school as he should appoint, and he appoints none, the court may apply it for what school it pleases.³ The doctrine has gone yet farther, and established that if the bequest denote a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some charity agreeable to the law, in the room of that contrary to it.⁴ Thus, a sum of money bequeathed to found a Jew's synagogue has been taken by the court, according to this principle, and transferred to the benefit of a foundling hospital.⁵ And a bequest for the education of poor children in the Roman Catholic faith has been decreed to be disposed of according to the pleasure of the king, under his sign-manual.⁶ Another principle equally well established is, that if the bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not, or whether the persons who are to take be *in esse* or not, or whether the legatee be a corporation capable in law to take or not, in all these and the like cases the court will sustain the legacy and give it effect according to its own principles; and where a literal execution becomes inexpedient or impracticable, will execute it *cy pres*. (*Attorney-General v. Oglander*, 3 Bro. Ch., 166; *Attorney-General v. Green*, 3 Bro. Ch., 492; *Freer v. Peacock*, Rep. temp., Finch, 245; *Attorney-General v. Bartree*, 2 Ves., Jun., 380; *Duke*, 108 to 113.) Thus, a devise of lands to the church-wardens of a parish (who are not a corporation capable of taking lands) for a charitable purpose, though void at law, will be sustained in equity.⁷ So if the corporation for whose use it is designed is not *in esse*, and can-

not come into existence *but by some [485 future act of the crown, as, for instance, a gift to found a new college, which requires an incorporation, the gift is valid, and the court will execute it.⁸ So if a devise be to an existing corporation by a misnomer, which makes it void at law.⁹ So where a devise was to the poor generally, the court decreed it to be executed in favor of three public hospitals in London.¹⁰ So a legacy towards establishing a bishop in America was held good, though none was yet appointed.¹¹ And where a charity is so given that there can be no objects, the court will order a different scheme of the charity; but it is otherwise if objects may, though they do not at present exist,¹² and when objects cease to exist the court will new-model the charity.¹³ And in aid of these principles the court will, in all cases of charities, supply all defects in the conveyances where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute.¹⁴

Some of these doctrines may seem strange to us, as they have also seemed to Lord Eldon; but he considered the cases too stubborn to be shaken without doing that in effect which no judge will in terms take upon himself, to reverse decisions that have been acted upon for centuries.¹⁵

If, therefore, the present case had arisen in England since the statute of charitable uses, 43 Elizabeth, ch. 4, there can be no doubt that it would have been established as a valid bequest, notwithstanding *it is given to an unin- [486 corporated society.¹⁶ The only question would have been, whether it ought to be administered by a scheme under the direction of the Court of Chancery, or by the king himself, as *parens patriæ*, under his sign-manual. As to this, the rule which has been drawn by Lord Eldon, from a most learned and critical examination of all the authorities is, that where there is a bequest to trustees for charitable purposes, the disposition must be in chancery, under a scheme to be approved by a master; but where the object is charity, and no trust is interposed, it must be by the king, under his sign-manual; for in such cases the king, as *parens patriæ*, is deemed the constitutional trustee.¹⁷

1.—*Mills v. Farmer*, 1 Merivale, 55, 95; *Moggridge v. Thackwell*, 7 Ves., 36; *White v. White*, 1 Bro. Ch., 12.

2.—*Attorney-General v. Syderfin*, 1 Vern., 224; S. C., 2 Freeman, 261, recognized as law in *Mills v. Farmer*, 1 Merivale, 55, and *Moggridge v. Thackwell*, 7 Ves., 36, 70, &c.

3.—2 Freeman, 261; *Moggridge v. Thackwell*, 7 Ves., 36, 73, 74.

4.—*Da Costa v. De Pas*, 1 Vern. R., 248; *Moggridge v. Thackwell*, 7 Ves., 36, 75; *Carey v. Abbot*, 7 Ves., 490; *Attorney-General v. Guire*, 2 Vern., 266.

5.—*Id.* and *Mills v. Farmer*, 1 Merivale, 55, 100.

6.—*Carey v. Abbot*, 7 Ves., 490.

7.—1 Burn's Eccl. Law., 226; *Duke*, 33, 115; Com. Dig., Chancery, 2, N. 2; *Rivett's case*, Moore, 890; *Mills v. Farmer*, 1 Mer., 55; *Attorney-General v. Bowyer*, 3 Ves., 714; *Wort v. Knight*, 1 Ch. Cas., 135; *Moggridge v. Thackwell*, 7 Ves., 36.

8.—*White v. White*, 1 Bro. Ch., 12; *Attorney-General v. Downing*, Ambler, 550, 571; *Attorney-General v. Bowyer*, 3 Ves., 714, 727.

9.—*Anon.*, 1 Ch. Cas., 267; *Attorney-General v. Platt*, Rep. temp., Finch, 221.

10.—*Attorney-General v. Peacock*, Rep. temp., Finch, 45; *Owens v. Beau*, Rep. temp., Finch, 395;

Attorney-General v. Syderfin, 1 Vern., 224; *Clifford v. Francis*, 1 Freeman, 330.

11.—*Attorney-General v. Bishop of Chester*, 1 Bro. Ch., 444.

12.—*Attorney-General v. Oglander*, 3 Bro. Ch., 166.

13.—*Attorney-General v. City of London*, 3 Bro. Ch., 171; S. C., 1 Ves., Jun., 243.

14.—*Case of Christ's College*, 1 W. Bl., 90; S. C., Ambler, 351; *Attorney-General v. Rye*, 2 Vern., 453; *Rivett's case*, Moore, 890; *Attorney-General v. Burdet*, 2 Vern., 755; *Attorney-General v. Bowyer*, 3 Ves., Jun., 714; *Mills v. Farmer*, 15 Merivale, 55; *Collinson's Case*, Hob., 136; *Moore*, 822.

15.—*Moggridge v. Thackwell*, 7 Ves., 36, 87.

16.—See also *Bayley and Church v. Attorney-General*, 2 Atk., 239; *Owen v. Bean*, Rep. temp., Finch, 395; S. C., 2 Ventris, 349; *Anon.*, 1 Ch. Cas., 267; *West v. Knight*, 1 Ch. Cas., 155; *Mayor, &c., of Reading v. Lane*, *Duke*, 81, and see *Bridgman's Duke*, 361, 486.

17.—*Moggridge v. Thackwell*, 7 Ves., 36, 86; *Paice v. Archbishop of Canterbury*, 14 Ves., 372; *Attorney-General v. Herrich*, Ambler, 712; *Morice v. Bishop of Durham*, 9 Ves., 399; S. C., 10 Ves., 522, 541; *Clifford v. Francis*, 1 Freeman, 330; *Attorney-General v. Syderfin*, 2 Freeman, 261; S. C., 1 Vern., 224; S. C., 7 Ves., 69, 70; 2 *Maddock's Ch.*, 63; *Highmore on Mortm.*, 250; 1 *Bac. Abr. Charitable Uses*, (E); *Attorney-General v. Mathews*, 2 Lev., 167.

But the statute of Elizabeth not being in force in Virginia at the time when the present will took effect (it having been repealed by the Legislature between the making of the will and the death of the testator), it becomes a material inquiry how far the jurisdiction and doctrines of the Court of Chancery respecting charitable uses depends upon that statute, and whether, independent of it, the present donation can be upheld.

It is not easy to arrive at any satisfactory conclusion on this head. Few traces remain of the exercise of this jurisdiction in any shape prior to the statute of Elizabeth. The principal, if not the only cases now to be found, were decided in the courts of common law, and turned upon the question, whether the uses were void or not within the statutes against superstitious uses. One of the earliest cases is *Porter's case*,¹ which [487*] was a devise of lands devisable by custom to the testator's wife in fee, upon condition that she should assure the lands devised for the maintenance and continuance of a free school and certain alms-men and alms-women; and it appeared that the heir had entered for condition broken, and conveyed the same lands to the queen. It was held that the use being for charity, was a good and lawful use, and not void by the statutes against superstitious uses, and that the queen might well hold the land for the charitable uses. Lord Eldon in commenting on this case has observed, "it does not appear that this court (*i. e.*, chancery) at that period had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere,² as far as the tradition of times immediately following goes, there were no such informations as that upon which I am now sitting (*i. e.*, an information to establish a charity); but they made out their case as well as they could by law."³ So that the result of Lord Eldon's researches on this point is, that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities; and it is remarkable that Sir Thomas Egerton and Lord Coke, who argued *Porter's case* for the queen, though they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by *Porter's case* is, that if a feoffment is made to a general legal use, not superstitious, though indefinite, though no person is *in esse* who could be the *cestui que use*, yet the feoffment is good; and if the use was bad, the heir of the feoffor would be entitled to enter, the legal estate remaining in him.⁴ The absence, therefore, of all authority derived from equity decisions, on an occasion when they would probably have been used, if existing, certainly does very much favor the conclusion

of Lord Eldon; and if we might hazard a conjecture, *it would be, that *Porter's case* [*488 having established charitable uses, not superstitious, to be good at law, chancery, in analogy to other cases of trusts immediately held the feoffees to such uses accountable in equity for the due execution of them; and that the inconveniences felt in restoring to this new and anomalous proceeding from the indefinite nature of some of the uses, gave rise within a very few years to the statute of 43 Elizabeth.⁵ This view would have a great tendency to reconcile the language used on other occasions by other chancellors, in reference to the jurisdiction of chancery over charities, with that of Lord Eldon; as it would show that in cases of feoffments to charitable uses, bills to establish those uses might, in fact, have been introduced by Lord Ellesmere about five years before the statute of Elizabeth; which might be quite consistent with the fact that such bills were not sustained where the donation was to charity generally, and no trust was interposed or legal estate devised to support the uses. And it is very certain that at law a devise to charitable uses generally, without interposing a trustee, or a devise to a nonexistent corporation, or to an unincorporated society, would have been, and in fact was held, utterly void for want of a person having a sufficient capacity to take as devisee.⁶ The statute of Elizabeth in favor of charitable uses cured this defect,⁷ and provided (as we shall hereafter have occasion more immediately to consider) a new mode of enforcing such uses by a commission under the direction of the Court of Chancery. Shortly after this statute it became a matter of doubt whether the court could grant relief by original bill in cases within that statute, or was not confined to the remedy by commission. That doubt remained until the reign of Charles II., when it was settled in favor *of the jurisdiction by original bill.⁸ But on one occasion, in which this very question was argued before him, Lordkeeper Bridgman declared "that the king, as *pater patrie*, may inform for any public benefit for charitable uses, before the statute of 30 (43) of Elizabeth for charitable uses; but it was doubted the court could not by bill take notice of that statute, so as to grant a relief according to that statute upon a bill.⁹ On another occasion, soon afterwards, where the devise was to a college, and held void at law by the judges for a misnomer, and on a bill to establish the devise as a charity, the same question was argued; Lordkeeper Finch (afterwards Lord Nottingham) held the devise good as an appointment under the statute of Elizabeth, and "decreed the charity, though before the statute no such decree could have been made."¹⁰

1.—1 Co. 22, b. in 34 and 35 Elizabeth. See also a like decision in *Patridge v. Walker*, cited, 4 Co. 116, b.; *Martindale v. Martin*, Cro. Eliz., 288; *Thetford School*, 8 Co., 130.

2.—Sir Thomas Egerton was made Lord Chancellor in 39 Elizabeth, 1596, and was created Lord Ellesmere in 1 James I., 1603.

3.—Attorney-General v. Bowyer, 3 Ves., 714, 726.

4.—3 Ves., Jun., 726.

5.—There was, in fact, an act passed respecting charitable uses in 39 Elizabeth, ch. 9; but it was repealed by the Act of 43 Eliz., ch. 4; Com. Dig. Charitable Uses, N. 14.

Peters 3.

6.—Anon., 1 Ch. Cas., 207; *Attorney-General v. Tancred*, 1 W. Bl., 90; S. C., Ambler, 351; *Collinson's Case*, Hob., 136; S. C., Moore, 888; *Widmore v. Woodroffe*, Ambler, 636, 640; Com. Dig. Devise, K.

7.—Com. Dig. Charitable Uses, N. 11; Com. Dig. Chancery, 2, N. 10.

8.—*Attorney-General v. Newman*, 1 Ch. Cas., 157; S. C., 1 Lev., 284; *West v. Knight*, 1 Ch. Cas., 134; Anon., 1 Ch. Cas., 267; 2 Fonb. Eq., b. 3, pl. 2, ch. 1, s. 1; *Parish of St. Dunstan v. Beauchamp*, 1 Ch. Cas., 193.

9.—*Attorney-General v. Newman*, 1 Ch. Cas., 157.

10.—Anon., 1 Ch. Cas., 267.

It would seem, therefore, to have been the opinion of Lord Nottingham, that an original bill would not, before the statute of Elizabeth, lie to establish a charity where the estate did not pass at law to which the charitable uses attached. In *Eyre v. Shaftesbury*,¹ Sir Joseph Jekyll said, in the course of his reasoning on another point, "in like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery in the Attorney-General's name for the establishment of charities." In *The Bailiffs, &c., of Burford v. Lenthall*,² Lord Hardwicke is reported to have said, "the courts have mixed the jurisdiction of bringing informations in the name of the Attorney-General, with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion." In a subsequent case,³ which was an information filed by the Attorney-General against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial power, said, "consider the nature of the foundation; it is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate; but where there is a charter with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; that is, always with this distinction, where it is a charity at large, or in its nature before the statute of Elizabeth; but not in the case of charities incorporated and established by the king's charter, under the great seal, which are estab-

lished by proper authority allowed." And again, "it is true that an information in the name of the Attorney-General, as an officer of the crown, was not a head of the statute of charitable uses, because that original jurisdiction was exercised in this court before; [*491] but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

It was manifestly, therefore, the opinion of Lord Hardwicke that, independent of the statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter; but it does not appear that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect; and the same remark applies to the *dictum* by Sir Joseph Jekyll. In a still later case,⁴ which was an information to establish a charity and aid a conveyance in remainder to certain officers of Christ's College to certain charitable uses, Lord-keeper Henley (afterwards Lord Northington) is reported to have said, "the conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and, therefore, there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect for the benefit of the charity under the statute of Elizabeth. And I take the uniform rule of this court, before, at and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute of Henry VIII., yet they were always considered as good in equity if given to charitable uses." And he then proceeds to declare that he is obliged, by the uniform course of precedents, to assist this conveyance, and therefore establishes the conveyance expressly under the statute of Elizabeth.

There is some reason to question if the language here imputed to Lord Northington be minutely accurate. His lordship manifestly aids the conveyance, as a charity, in virtue of the statute of Elizabeth; and there is no doubt that it has been the constant practice of the court since that statute, to aid defects in conveyances to charitable uses. But there is no case in which such defects were aided before that statute. The old cases, though arising before, were deemed to be within the reach of that statute by its retrospective language, and expressly decided on that ground.⁵ And the very case put of devises to corporations, which are void under the statute of Henry VIII., and are held good solely by the

1.—2 P. Wms., 103, 118; cited, also, 7 Ves., Jun., 63, 87.

2.—2 Atk., 550, 1743.

3.—Attorney-General v. Middleton (1751), 2 Ves., 327.

4.—Attorney-General v. Tancred, 1 W. Bl., 90; S.

C., Ambler, 351; 1 Eden's R., 10.

5.—Collinson's case, Hob., 136; S. C., Moore, 888; Moore, 822; Sir Thomas Middleton's case, Moore, 889; Rivett's case, Moore, 890, and the cases cited in Raithby's note to Attorney-General v. Rye, 2 Vern., 453; Duke, 74, 77, 83, 84; Bridg. Charit., 366, 370, 379, 380; Duke, 105 to 113.

statute of Elizabeth, shows that his lordship was looking to that statute; for it is plain that a devise, void by statute, cannot be made good upon any principles of general law. What, therefore, is supposed to have been stated by him as being the practice before the statute, is probably founded in the mistake of the reporter. The same case is reported in Ambler, 351, where the language is, "the constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment; as in Jesus' College, *Collinson's* case in Hobart, 135." Now, *Collinson's* case was expressly held to be sustainable only as an appointment under the statute of Elizabeth, and this shows that the language is limited to cases governed by that statute.

In a very recent charity case, Sir Arthur Piggott in argument said, "the difference between the case of individuals and that of charities, is founded on a principle which has been established ever since the statute of charitable uses in the reign of Elizabeth, and has been constantly acted upon from those days to the present;" and Lord Eldon adopted the remark, and said, "I am fully satisfied as to all the principles laid down in the course of this argument, and accede to them all." His lordship then proceeds to discuss the most material of the principles and cases from the time of 493*] Elizabeth, and *builds his reasoning, as, indeed, he had built it before, upon the supposition that the doctrine in chancery, as now established, rested mainly on that statute.¹ And his lordship's opinion in the case alluded to,² when commenting on *Porter's* case, is entitled to the more weight, because it seems to have been given after a very careful examination of the whole judicial history of charities.

These are all the cases which the researches of the court and of counsel have enabled them to find, where the jurisdiction of chancery over charities antecedent to the statute of Elizabeth has been directly or incidentally discussed. The circumstance that no cases prior to that time can be found in equity; the tradition that has passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; and the fact that the cases immediately succeeding that statute, where devises, void at law, were held good as charities, might have been argued and sustained upon the general jurisdiction of the court if it existed, and yet were exclusively argued and decreed upon the footing of that statute, do certainly afford a very strong presumption that the jurisdiction of the court to enforce charities, where no trust was interposed and where no devisee was *in esse*, or where the charity was general and indefinite both as to persons and objects, mainly rests upon constructions (whether ill or well founded is now of no consequence) of that statute.

It is very certain, also, that since the statute of Elizabeth, no bequests are deemed within the authority of chancery to establish and regulate, except bequests for those purposes which that

statute enumerates as charitable, or which, by analogies, are deemed within its spirit and intendment. A bequest may be in an enlarged sense charitable, and yet not within the purview of the statute. Charity (as the master of the rolls has justly observed), in its widest sense, denotes all the good affection men ought to bear towards each other; in its more restricted and common sense, relief to the poor.

*In neither of these senses is it employed in the Court of Chancery.³ In that court it means such only as are within the letter and the spirit of the statute of Elizabeth; and, therefore, where a testatrix bequeathed the residue of her personal estate to the bishop of D. to dispose of the same "to such objects of benevolence and liberality as the bishop in his own discretion shall most approve of," and appointed the bishop her executor, on a bill to establish the will and declare the residuary bequest void, the court held the bequest void upon the ground that objects of benevolence and liberality were not necessarily charitable within the statute of Elizabeth, and were therefore too indefinite to be executed. The court further declared that no case had yet been decided in which the court had executed a charitable purpose, unless the will contained a description of that which the law acknowledges a charitable purpose, or devoted the property to purposes of charity in general, in the sense in which that word is used in the court. That the case was, therefore, the case of a trust of so indefinite a nature, that it could not be under the control of the court, so that the administration of it could be reviewed by the court, or if the trustee died, the court itself could execute the trust. That it fell, therefore, within the rule of the court that where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law; and the residue was accordingly decreed to the next of kin.

So that it appears since the statute of Elizabeth, the Court of Chancery will not establish any trusts for indefinite purposes of a benevolent nature, not charitable within the purview of that statute, although there be an existing trustee in whom it is vested; but will declare the trust void, and distribute the property among the next of kin; and yet, if there was an original jurisdiction in chancery over all bequests *charitable in their own nature, [*495 and not superstitious, to establish and regulate them, independent of the statute, it is not easy to perceive why an original bill might not be sustained in such court to establish such bequest, especially where a trustee is interposed to effectuate it, for the statute does not contain any prohibition of such bequests. An argument may, therefore, be fairly drawn from this source against a general jurisdiction in chancery over charities of an indefinite nature prior to the statute.

And the statute itself may be resorted to as affording an additional argument in corrobora-

1.—*Mills v. Farmer*, 1 Merivale, 55, 86, 94, 100; *Moggridge v. Thackwell*, 7 Ves., 36; *Attorney-General v. Bowyer*, 3 Ves., 714, 726.

2.—*Attorney-General v. Bowyer*, 3 Ves., 714, 726. Peters 3. U. S., Book 7.

3.—*Morice v. Bishop of Durham*, 9 Ves., 399; S. C., 10 Ves., 522; *Brown v. Yeall*, 7 Ves., 59 note a; *Moggridge v. Thackwell*, 7 Ves., 36; *Attorney-General v. Bowyer*, 3 Ves., 714, 726; *Cox v. Basset*, 3 Ves., 155.

tion of the opinion already expressed. It begins by a recital that lands, goods, money, &c., &c., had been given, &c., heretofore to certain purposes, which it enumerates in detail, which lands, &c., had not been employed according to the charitable intent of the givers and founders by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver, and employ the same. It then enacts that it shall be lawful for the Lord-Chancellor, &c., to award commissions under the great seal to proper persons to inquire, by juries, of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., "to or for any, the charitable and godly uses before rehearsed;" and upon such inquiry, to set down such orders, judgments and decrees, as the lands, &c., may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given; "which orders, judgments and decrees, not being contrary to the orders, statutes, or decrees of the donors or founders, shall stand firm and good according to the tenor and purpose thereof, and shall be executed accordingly, until the same shall be undone and altered by the Lord-Chancellor, &c., upon complaint by any party grieved, to be made to them." Then follow several provisions, excepting certain cases from the operation of the statute, which are not now material to be considered. The statute then directs the orders, &c., of the commissioners to be returned under seal into the Court of Chancery, &c., and declares that the Lord-Chancellor, &c., shall, and may "take such order for the due 496*] execution of all *or any of the said judgments, orders and decrees, as to them shall seem fit and convenient;" and, lastly, the statute enacts that any person aggrieved with any such orders, &c., may complain to the Lord-Chancellor, &c., for redress therein; and upon such complaint the Lord-Chancellor, &c., may, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; "and upon hearing thereof, shall and may annul, diminish, alter, or enlarge the said orders, judgments, and decrees of the said commissioners as to them shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof;" and may tax and award costs against the persons complaining with just and sufficient cause of the orders, judgments, and decrees before mentioned.¹

From this summary statement of the contents of the statute, it is apparent that the authority conferred on the Court of Chancery in relation to charitable uses is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to

say in some instances the most extravagant, interpretation. And it is very easy to perceive how it came to pass, that as power was given to the court in the most unlimited terms to annul, diminish, alter or enlarge the orders and decrees of the commissioners, and to sustain an original bill in favor of any party grieved by such order or decree, the court arrived at the conclusion that it might by original bill do that in the first instance which it certainly could do circuitously upon the commission.² And, as in some cases where the trust was for a definite object and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it by an original bill, independent *of the statute,³ we are at once [*497 let into the origin of the practice of mixing up the jurisdiction by original bill with the jurisdiction under the statute, which Lord Hardwicke alluded to in the passage already quoted,⁴ and which at that time was inveterately established. And this mixture of the jurisdictions serves also to illustrate the remark of Lord Nottingham in the case already cited;⁵ where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity as an appointment, though before the statute of Elizabeth no such decree could have been made.

Upon the whole, it seems to me that the jurisdiction of the Court of Chancery over charities, where no trust is interposed, or there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but sprung up after the statute of Elizabeth, and rests mainly on its provisions.⁶ This opinion is supported by the weight of authorities speaking to the point, and particularly by those of a very recent date, which appear to have been most thoroughly considered. The language, too, of the statute lends a confirmation to the opinion, and enables us to trace what would otherwise seem a strange anomaly to a legitimate origin. If so, there is no pretense that, by the law of Virginia at the period when this will took effect, the statute of Elizabeth was then in force, or that any court of equity of that State could sustain the bequest in equity as a charity, if it was void at law. And that it was void at law cannot be seriously doubted for the legatees were not then a corporate society capable of taking it;⁷ and it is a maxim that the legacy must take effect at the death of the testator, *or be void at [*498 that time, and the right vest in another.⁸ And if a court of chancery could not in virtue of its general jurisdiction take cognizance of, or sustain the bequest in this suit, neither can the Circuit Court of the United States.

If we could surmount the objection already considered, that this bequest is under the present law of Virginia deemed void both in law and equity, and therefore incapable of being decreed by this court, we might enter-

1.—See the statute 43 Eliz., ch. 4, at large, 2 Inst., 707; Bridg. on Duke, Char., ch. 1, pl. 1.

2.—See the Poor of St. Dunstan v. Beauchamp, 1 Ch. Cas., 193; 2 Inst., 711; Bailiffs, &c., of Burford v. Lenthall, 2 Atk., 551; 15 Ves., 305.

3.—Attorney-General v. Dixie, 13 Ves., 519; Kirby Ravensworth Hospital, 15 Ves., 305; Green v. Rutherford, 1 Ves., 462; Attorney-General v. Earl of Clarendon, 17 Ves., 491, 499; 2 Fonb. Eq., b. 63,

pl. 2, ch. 1, s. 1, note a Cooper's Eq. Pl., 292.

4.—Bailiffs, &c., of Burford v. Lenthall, 2 Atk., 550.

5.—Anon, 1 Ch. Cas., 267.

6.—See Cooper Eq. pl., 102, 103.

7.—Com. Dig. Devise, K; 1 Roll. Abridg., 609; Com. Dig. Chancery, 2, N. 1. &c.

8.—Per Lord Hardwicke, Widmore v. Woodroffe, Ambler, 636, 640.

tain the other questions which have been made in this court. One of these questions is, whether this court, as a court of equity, has a right to administer any charities, the administration of which would properly belong to the government of Virginia as *parens patriæ*. It is certainly stated in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities not regulated by charter,¹ which he exercises by the keeper of his conscience, the Chancellor; and, therefore, the Attorney-General, at the relation of some informant, when it is necessary files, *ex officio*, an information in the Court of Chancery to have the charity properly established. And it is added that the jurisdiction thus exercised does not belong to the Court of Chancery as a court of equity, but as administering the prerogative and duties of the crown.² It may be safely admitted that the government of a State, as *parens patriæ*, has a right to enforce all charities of a public nature by virtue of its general superintending authority over the public interests where no other person is entrusted with it; and it seems also to be held that the jurisdiction vested by the statute of Elizabeth over charitable uses is personal to the Lord Chancellor, and not in his ordinary or extraordinary jurisdiction in chancery, like that, in short, which he exercises as to lunatics and idiots.³

499*] *It may also be admitted that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, and may apply it as he pleases under his sign-manual, and not under a decree of chancery.⁴ Where, however, the execution is to be by a trustee with general or some objects pointed out, or to a trustee for indefinite and general charity, the Court of Chancery will take the administration of the trust.⁵ Whether in such a case upon an original bill to establish the charity, the Lord Chancellor acts as the personal delegate of the crown, administering its prerogative in analogy to the authority personally given to him by the statute of charitable uses under a commission, or whether as a court of equity in virtue of its general powers, may, perhaps, upon the authorities admit of some question; though my opinion is that it belongs to the court, as a court of equity, exercising jurisdiction to enforce a trust recognized and enforced by the law of the land; and I think this opinion is corroborated by the better authorities.⁶ Be this as it may, where there is a trust for a definite object, and the trust is in point of

law sustainable, there seems no reason why a court of equity, as such, may not take cognizance of such trust at the suit of any competent party, whether the Attorney-General or a private interested relator, as well as of any other trust whose execution is sought.⁷ If, therefore, by the law of Virginia the bequest in this case had been valid in law or equity, the trustees being marked out and the objects being definite, there does not seem any reason why, at their instance, it might not have been executed *in this as well as in any other [*500 court of equity. The court in such a case would carry into effect the intention of the testator; nothing would be left to its discretion, and it would therefore do precisely what a State court of chancery must do, acting as such, or administering the prerogative of the government as *parens patriæ*.

In respect to another question, whether the Attorney-General be not a necessary party to a bill in equity to establish a charity or carry it into effect, that must depend upon circumstances. If the charity be indefinite, or there be no trustees or no persons competent to take, or the objects be of a general and public nature, it would clearly be proper that the government to whom the superintendency of such charities belongs, should be made a party to the bill by their Attorney-General. This seems to have been the general course established by the authorities.⁸ But where the charity is definite in its nature, and trustees are appointed to take or execute it, it is not perceived why a suit at the instance of such trustees may not properly be maintained without the government being a party.⁹

Another question which has been discussed in the argument is, whether a court of equity sitting within one jurisdiction can execute any charitable bequests for foreign objects in another jurisdiction; and it is said, in a technical sense, to be against the public policy of Virginia to sustain or execute such bequests. There is no statute of Virginia making such bequests void, and, therefore, if against her policy, it can be only because it would be against the general policy of all States governed by the common law. The case of the *Attorney-General v. The City of London*¹⁰ is relied on to establish the general proposition. It was an information *to establish a new [*501 scheme for a charity of Mr. Boyle, who, by his will in 1691, gave the residue of his fortune to be laid out by his executors for charitable and other pious and good uses at their discretion, but recommended that the greater part should

1.—3 Bl. Comm., 427; 2 Fonb. Eq., b. 2, pl. 2, ch. 1, s. 1, and note a.

2.—Cooper's Eq. Pl. xxvii.; 2 Fonb. Eq., b. 2, pl. 2, ch. 1, s. 1; Lord Falkland v. Bertie, 2 Vern., 342; Mitf. Pl., 29; Bailiffs, &c., of Burford v. Lenthall, 2 Atk., 551.

3.—Bailiffs of Burford v. Lenthall, 2 Atk., 551; 2 Fonb. Eq., b. 3, pl. 2, ch. 1, s. 1, and note (a).

4.—Moggridge v. Thackwell, 7 Ves., 36, 83, 85, 86; Mills v. Farmer, 1 Merivale, 55; Paice v. Archbishop of Canterbury, 14 Ves., 364; Attorney-General v. Mathews, 2 Lev., 167.

5.—Moggridge v. Thackwell, 7 Ves., 36, 86; Mills v. Farmer, 1 Merivale, 55.

6.—Id. and Paice v. Archbishop of Canterbury, 14 Ves., 364; Attorney-General v. Wansay, 15 Ves., 231; Attorney-General v. Price, 17 Ves., 371; Waldo v. Caley, 16 Ves., 206.

Peters 3.

7.—2 Fonb. Eq., b. 3, pl. 2, ch. 1, s. 1, note (a), s. 2, s. 3, note (i); Moggridge v. Thackwell, 7 Ves., 36; Attorney-General v. Brewer's Company, 1 Merivale, 495; Attorney-General v. Bowyer, 3 Ves., 714; 2 Vern., 387; Attorney-General v. Newcomb, 14 Ves., 1, 7; White v. White, 7 Ves., 423.

8.—Cooper's Eq. Pleas., 21, 22, 102, 163; Monill v. Lawson, 2 Eq. Cas. Abr., 167, pl. 13; 4 Vin. 500, pl. 11; Attorney-General v. Pearce, 2 Atk., 87.

9.—Monill v. Lawson, 2 Eq. Cas. Abridg., 167, pl. 13; 4 Vin. 500, pl. 11; Bridg. Duke. Charit., 385, 386; Chitty v. Parker, 4 Bro. Ch. Cas., 38; Anon., 3 Atk., 276; Attorney-General v. Newcomb, 14 Ves., 1, 7; Waldo v. Caley, 16 Ves., 206.

10.—3 Bro. Ch. Cas., 171; S. C., 1 Ves., Jun., 243; Provost, &c., of Edinburgh v. Aubury, Ambler, 236; Oliphant v. Hendrie, 1 Bro. Ch. Cas., 571.

be laid out for the advancement of the Christian religion among infidels. The charity had been established under a decree of the court, and the property conveyed to the city of London, upon trust, to lay out the rents and profits in the advancement of the Christian religion, as the bishop of London, for the time being, and Lord Burlington should appoint. The trustees appointed the rents and profits to be paid to an agent in London for the College of William and Mary in Virginia for this purpose—that the college should maintain and educate in the Christian religion so many Indian children, as far as the fund would go, and that the president, &c., thereof should transmit accounts, and should be subject to rules given them until altered. This arrangement was ratified by the court. After the Revolution the present bill was filed for the purpose of taking away the charity from the college, because emancipated from the control of the court, and to have it disposed of by a new scheme. Upon hearing the cause a decree was made accordingly, upon the ground that the trusts to the college to convert neighboring infidels ceasing for want of objects (there being now, as the court said, no neighboring infidels), the charity must be applied anew.¹ There was also an intimation at the argument that the corporation was not now an existing corporation, and, at all events, was not within the control of the court. But the ground of the decision was as above stated. It is observable in this case that the charity of Mr. Boyle was not in terms or substance limited to foreign countries or objects, but the application to foreign objects was originally under the decree of the court. It certainly, then, furnishes no argument against, but an argument in favor of the power of a court of equity, to apply even a general charity to foreign objects.

But we need not rest here. There are other **502*** cases directly *in point, in which bequests for foreign charitable objects have been sustained in equity. In *The Provost, &c., of Edinburgh v. Aubury*,² there was a devise of three thousand five hundred pounds, South Sea annuities, to the plaintiffs, to be applied to the maintenance of poor laborers residing in Edinburgh and the towns adjacent. Lord Hard-

wicke was of opinion that he could not give any directions as to the distribution of the money that belonging to another jurisdiction, that is, to some of the courts in Scotland; and, therefore, directed that the annuities should be transferred to such person as the plaintiffs should appoint, to be applied to the trusts in the will. So in *Oliphant v. Hendrie*,³ where A., by will, gave three hundred pounds to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. That case approaches very near to the case now at bar. In *Campbell v. Radnor*,⁴ the court held a bequest of seven thousand pounds, to be laid out in the purchase of lands in Ireland, and the rents and profits distributed among poor persons in Ireland, &c., to be good and valid in law. In *Curtis v. Hutten*,⁵ the court held a bequest of personal estate for the maintenance of a charity (a college) in Scotland, to be a valid bequest. In a still more recent case, a bequest of ten thousand pounds in trust with the magistrates of Inverness in Scotland, to apply the interest and income for the education of certain boys, was held a valid bequest.⁶ There is also another case,⁷ in which it was held that a legacy given towards establishing a bishop in America was held good, notwithstanding none was yet appointed; and the court directed the money to remain in court, until it should be seen whether any appointment should take place. Nor is the uniformity of the current of the authorities broken in upon by the doctrine* in *De* **503** *Garcin v. Lawson*.⁸ There the bequests were to Roman Catholic establishments, or for the benefit of Roman Catholic priests, and were considered void because they were illegal and contrary to the policy of England, evinced by the express enactments of statutes on this subject.⁹ It does not strike me, therefore, that there is any solid objection to the bequest in the case at bar, founded on the persons or objects being foreign to the State of Virginia.

But for the reasons already stated, the bequest being void, I am of opinion that the court ought to certify that opinion to the Circuit Court of Virginia.

1.—3 Bro. Ch. Cas., 171, 177.

2.—Ambler, 238.

3.—1 Bro. Ch. Cas., 571.

4.—1 Bro. Ch. Cas., 171.

5.—14 Ves., 537.

6.—Mackintosh v. Townsend, 16 Ves., 330.

7.—Attorney-General v. Bishop of Chester, 1 Bro. Ch. Cas., 444.

8.—4 Ves., Jun., 433, note.

9.—Carey v. Abbot, 7 Ves., Jun., 490; Highmore on Mortmain, 1809, p. 34, &c.

NOTES

ON THE

UNITED STATES REPORTS.

III PETERS.

3 Pet. 1-11, 7 L. 581, KEENE v. MEADE.

Legal name.—Law knows but one Christian name, and omission of middle initial is not a misnomer nor a variance, pp. 6, 7.

Rule approved and applied in the following citing cases: Clealand v. Walker, 11 Ala. 1064, 46 Am. Dec. 240, holding note signed by agent, D. S. W., may be proved to be note of principal, D. W.; Edmundson v. State, 17 Ala. 181, 52 Am. Dec. 170, supporting criminal indictment improperly inserting middle initial; Kelley v. Matthews, 5 Ark. 227, admitting in evidence note of "J. F. J.," in action on note of "J. J.;" State v. Smith, 12 Ark. 622, 56 Am. Dec. 287, sustaining criminal indictment of J. S., under name of "J. B. S.;" Fincher v. Hanegan, 59 Ark. 159, 26 S. W. 823, 24 L. R. A. 547, and n., charging subsequent mortgagee of H. M. W. with notice of recorded mortgage by "H. N. W.;" Burroughs v. Florida, 17 Fla. 655, collecting cases, and sustaining indictment of R. B. under name of "R. H. B.;" Morgan v. Woods, 33 Ind. 28, holding proceedings under process in name of "J. M. M.," instead of J. H. M., are reversible not void; Choen v. State, 52 Ind. 348, 21 Am. Rep. 180, collecting cases, and admitting proof of assault on G. S., under allegation of assault on "G. W. S.;" Schofield v. Jennings, 68 Ind. 235, collecting cases, and holding error in grantee's middle initial does not invalidate tender of title; Hart v. Lindsey, 17 N. H. 240, 43 Am. Dec. 599, reviewing cases, and holding summons of J. H. L. as J. L., subjects him to military duty; Dalton v. Bethlehem, 20 N. H. 512, holding use of initial "A." for middle name Andrew, in notice of money expended for maintaining paupers, does not vitiate notice; King v. Hutchins, 28 N. H. 579, reviewing cases and applying rule to notice of taking deposition; Long v. Campbell, 37 W.

Va. 668, 17 S. E. 197, collecting cases, and holding note to J. L. may be sued on by J. W. L. Cited, but without particular application of the rule, in *Wiebold v. Hermann*, 2 Mont. 610, holding complaint is insufficient unless defendant's Christian name appears.

Distinguished in *McCall's Case*, 15 Fed. Cas. 1231, holding militia enrollment of *Cornellius McCall* as "Naylor McCall," is misnomer and, therefore, void.

Deposition — Execution of commission.— Clerical error in making out commission does not affect the execution of it, p. 6.

Cited and this rule applied in *Merrill v. Dawson*, Hemp. 591, F. C. 9,469, where caption of deposition omitted one defendant's name, but commission and interrogatories stated all; *Bibb v. Allen*, 149 U. S. 488, 37 L. 823, 13 S. Ct. 952, where surname of commissioner was misspelled in commission, but defendant was not misled.

Evidence.— It is not a universal rule that the existence of written evidence of a fact excludes all parol evidence of that fact, p. 7.

Rule cited with approval and applied in *People v. Royce*, 106 Cal. 182, 37 Pac. 632, reviewing cases and admitting parol description of draft to prove its identity in embezzlement charge; *Phinney v. Holt*, 50 Me. 577, reviewing cases, and holding vendor may testify to conveyance of property to disprove intent to defraud creditors.

Evidence.— Parol evidence is sometimes admissible to prove payment of money without production of receipt, pp. 7-8.

The following citing cases approve and apply this rule: *Administrator of Wiggins v. Pryor*, 3 Port. 435, reviewing cases and admitting evidence of payment of note without production of receipt; *Planters' Bank v. Borland*, 5 Ala. 544, reviewing cases, and admitting parol evidence of payment for property by party claiming against attaching creditor.

Bills and notes.— Promissory note sued upon must be produced at trial, not as only competent evidence of loan, but to be cancelled, p. 8.

Cited and rule applied in *Pipes v. Norton*, 47 Miss. 79, denying recovery on drafts, unless produced or their loss proved.

Depositions.— Commissioners to take, need not certify immaterial facts, such as the handwriting in which depositions were taken down, but merely send them in writing, under their hand and seal, to the court, p. 9.

Cited, approved and applied as follows: *Jones v. Oregon C. Ry.*, 3 Sawy. 528, F. C. 7,486, approving certificate that witness "testified in above case as is found above;" *Heirs of Clark v. Ellis*, 9 Or. 134, holding certificate conformed to State statute.

3 Pet. 12-32, 7 L. 585, UNITED STATES v. BUFORD.

Treasury department — Evidence.— Transcripts from treasury department are competent evidence only of transactions appearing on department's books and occurring in regular course of official business; as to other transactions, the evidence on which statement is founded must be produced, p. 29.

Rule approved and applied in the following citing cases: United States v. Jones, 8 Pet. 381, 8 L. 982, receiving statement as to official warrants, but rejecting it as to drafts and private orders; Hoyt v. United States, 10 How. 132, 13 L. 358, admitting transcript of treasury accounts to prove balance due from ex-official; United States v. Hodge, 13 How. 483, 485, 14 L. 233, 234, admitting treasury transcript to prove liability of postmaster on bond; United States v. Pinson, 102 U. S. 554, 26 L. 228, rejecting certified copy of account of ex-official adjusted by treasury official, but not taken from treasury books; United States v. Corwin, 129 U. S. 386, 32 L. 711, 9 S. Ct. 319, holding, in action on contractor's bond, letters between officials incompetent to prove demand and refusal to perform; United States v. Eggleston, 4 Sawy. 201, F. C. 15,027, applying rule to transcript from treasury books in action on paymaster's bond; United States v. Harrill, McAll. 248, F. C. 15,310, reviewing cases, and admitting transcript of post-office department books, in suit on postmaster's bond; United States v. Smith, 35 Fed. 492, rejecting transcript showing charge in gross against Indian agent for unspecified property; United States v. Case, 49 Fed. 271, rejecting transcripts from post-office department, in compiling which officials have acted judicially and not ministerially. Cited, but without particular application of the rule, in Shulman v. Brantly, 48 Ala. 194, holding law determines to what term appeal is taken, not certificate of clerk.

Distinguished in Bruce v. United States, 17 How. 440, 441, 15 L. 131, admitting statement of debits against Indian agent since such come to official knowledge in ordinary course; United States v. Smith, 35 Fed. 492, admitting transcript showing defendant's money transactions in suit on Indian agent's bond.

Statute of limitations does not bar causes of action in favor of sovereign State, p. 29.

Rule cited with approval and applied as follows: United States v. Thompson, 98 U. S. 488, 25 L. 195, applying rule to action by United States against Indian agent for conversion; United States v. Nashville Ry. Co., 118 U. S. 125, 30 L. 83, 6 S. Ct. 1008, applying rule to action by United States on railroad bonds bought before maturity; McNamee v. United States, 11 Ark. 150, holding suit by United States on ex-postmaster's bond is not barred by State statute; Levasser v. Washburn, 11 Gratt. 580, holding where adverse possession had commenced against owner it ceased upon forfeiture

of land to State; *United States v. White*, 2 Hill, 60, 61, 37 Am. Dec. 375, 376, holding statute does not run against United States on note indorsed to it before maturity; *Trustees v. Trenton*, 30 N. J. Eq. 684, holding statute preferring tax liens to prior mortgages not applicable to mortgages securing State moneys.

Statute of limitations.—Where action on an instrument is barred by the statute, its assignment to United States does not revive the cause of action, p. 30.

Approved in the following citing cases: *Martin v. Martin*, 35 Ala. 568, holding repeal of statute of limitations does not revive action barred before repeal; *Attorney-General v. Revere Copper Co.*, 152 Mass. 452, 25 N. E. 607, 9 L. R. A. 513, holding exemption of State from statute does not revive State's action previously barred.

Assignment to government.—Any instrument or claim, negotiable or otherwise, may be assigned to United States and sued on in its name, p. 30.

Cited with approval in *United States v. White*, 2 Hill, 62, 37 Am. Dec. 377, holding United States may sue on promissory note payable to order and indorsed to it.

Assignment of claim to the government gives it no greater validity than it possessed in hands of assignor, p. 30.

Rule approved and applied in *Perley v. County of Muskegon*, 32 Mich. 138, 20 Am. Rep. 641, holding that county cannot hold liable one who has paid borrowed county funds to defaulting county treasurer. Cited, but without particular application, in *In re Cooke*, 19 Fed. 94, holding absence of words of assignment in statute is proof of intent to gain a preference over other creditors.

Procedure.—Motions to amend pleadings and for new trials are addressed to court's discretion; the exercise of such discretion is not reviewable on appeal, p. 32.

Cited and rule applied as follows: *Pomeroy v. Bank of Indiana*, 1 Wall. 598, 17 L. 640, rejecting exceptions to overruling of motion for new trial; *Cook v. Burnley*, 11 Wall. 676, 20 L. 86, refusing to review order substituting copy for original lost pleading; *Chapman v. Barney*, 129 U. S. 681, 32 L. 801, 9 S. Ct. 427, refusing to review order substituting new plaintiff; *Stevens v. Nichols*, 157 U. S. 371, 39 L. 737, 15 S. Ct. 641, apply rule to State court's denial of motion to amend petition for removal of cause; *Merriam v. Langdon*, 10 Conn. 473, holding trial court's denial of amendment of criminal information not reversible error; *Doane v. Cummings*, 11 Conn. 158, extending rule to court's discretion to determine time and order of admitting evidence; *Husted v. Greenwich*, 11 Conn. 386, applying rule to allowance of amendment to petition; *Stewart v. Bennett*, 1 Fla. 443, holding right to amend pleadings rests in discretion of trial court; *Ferguson v. Porter*, 3 Fla. 32, refusing to review denial

of leave to file amended complaint; *Evans v. Rogers*, 1 Ga. 467, holding amendment of verdict to conform with declaration is discretionary and not reversible error; *Polhemus v. Ann Arbor Bank*, 27 Mich. 50, refusing to reverse because of court's disallowance of amendment to plea; *Henderson v. Hamer*, 5 How. (Miss.) 538, holding, where plea is filed for all defendants, court has discretion in allowing one to amend; *Coleman v. Bell*, 3 N. Mex. 497; S. C., 4 N. Mex. 47, 12 Pac. 658, refusing to consider on appeal denial of new trial by lower court; *Austin v. Clapp*, 5 Tex. 133, refusing to review order allowing amendment by changing date of filing petition; *Heye v. Lieman*, 12 Fed. Cas. 90, granting leave to amend plea as an exercise of court's discretion; *Poole v. Nixon*, 19 Fed. Cas. 995, holding application for order to amend proceedings is not reviewable, being a matter of discretion.

Limited in *Welch v. County Court*, 29 W. Va. 68, 1 S. E. 340, collecting cases, and refusing to apply rule to judicial discretion of court in issuing writ of certiorari; distinguished in *Avery v. Bowman*, 39 N. H. 395, holding denial of right to amend on ground that court has no power to grant it, is reversible error.

Pleading.—The replication must traverse the material allegations of the plea, unless matter in avoidance is set up; it is not sufficient that the allegations in the replication are inconsistent with the plea, p. 31.

Approved and applied in *Gross v. Disney*, 95 Tenn. 596, 32 S. W. 633, holding allegation of plaintiff's marriage during minority is insufficient to avoid defense under statute of limitations.

Miscellaneous.—Cited incidentally in *Lewis County v. Tate*, 10 Mo. 651.

3 Pet. 33-35, 7 L. 592, *GORDON v. OGDEN*.

Supreme Court has jurisdiction over appeals when the amount in dispute between the parties in that court exceeds the minimum of \$2,000, p. 34.

Approved and rule applied in the "*D. R. Martin*," 91 U. S. 366, 23 L. 440, where District Court gave libellant \$500, and on appeal by adverse party, Circuit Court dismissed libel, Supreme Court has no jurisdiction; *Hilton v. Dickinson*, 108 U. S. 171, 174, 175, 27 L. 690, 691, 2 S. Ct. 428, 430, 431, reviewing cases and holding, where lower court divides fund of \$3,000 equally between two claimants, dispute on appeal is for \$1,500, and court has no jurisdiction; *Quimby v. Hopping*, 52 N. J. L. 118, 19 Atl. 123, holding, under statute, that certiorari will not lie where minimum is \$200 and plaintiff waives all excess over that sum; *Levinski v. Middlesex Banking Co.*, 92 Fed. 457, holding, where case involved sufficient amount to authorize removal to Federal court, subsequent sustaining of exceptions reducing the amount would not oust the juris-

diction. Cited, but without application of the rule, in *Ill. C. Ry. v. Turrill*, 110 U. S. 304, 28 L. 155, 4 S. Ct. 6, answering objection to procedure by quoting "established practice" of court.

Distinguished in *Van Tyne v. Bunce*, 1 Edw. Ch. 585, holding requirement of jurisdiction is satisfied where judgment increased by costs exceeds minimum.

Appeal and error.—If plaintiff below brings writ of error, the sum originally claimed in the declaration is the sum in dispute and is the test of jurisdiction, p. 34.

Cited with approval and rule applied in *Kanouse v. Martin*, 15 How. 208, 14 L. 664, holding petition to remove cause to Circuit Court should be granted where sum sued for exceeds \$500; *Olney v. S. S. Falcon*, 17 How. 22, 15 L. 43, holding court has not jurisdiction where appellant has sued for "\$1,800 and upwards;" *Draper v. Clark*, 59 Ohio St. 338, 52 N. E. 833, holding, where plaintiff claims more than minimum and judgment for less is reversed, defendant may appeal from reversal; *M'Crowell v. Burson*, 79 Va. 301, reviewing cases, and holding plaintiff may appeal where suit is for \$1,000 and judgment for plaintiff is \$242, the minimum being \$500. Approved in *Batchelder v. Richardson*, 75 Va. 837, holding, however, where court distributes fund of \$556 to plaintiff and defendant, difference between entire fund and plaintiff's share, determines his right to appeal. Cited, *arguendo*, in *Levinski v. Middlesex Banking Co.*, 92 Fed. 457, reviewing cases.

Distinguished in *McGinnis v. Carlton*, Abb. Adm. 571, F. C. 8,799, holding libellant, whose claim exceeds required \$50, but who admits that less is due him, cannot appeal.

Appeal and error.—If defendant below brings writ of error, only the judgment of the Circuit Court is in dispute, and the amount of that judgment determines the jurisdiction, p. 34.

Rule approved and applied in the following citing cases: *Walker v. United States*, 4 Wall. 164, 18 L. 319, dismissing defendant's appeal from judgment for plaintiff for \$2,000; *Merrill v. Petty*, 16 Wall. 344, 21 L. 500, dismissing defendant's appeal from decree for \$1,292 in libel proceeding, notwithstanding other libels by same claimant; *Thompson v. Butler*, 95 U. S. 695, 24 L. 541, holding defendant cannot appeal from judgment for \$5,000, although verdict was \$5,066, and plaintiff remitted excess; *Henderson v. Wadsworth*, 115 U. S. 276, 29 L. 379, 6 S. Ct. 43, collecting cases, and dismissing appeals of four defendants, against each of whom are judgments less than required amount; *N. Y. Elevated R. R. v. Fifth National Bank*, 118 U. S. 609, 30 L. 260, 7 S. Ct. 24, holding court has jurisdiction over defendant's appeal from judgment of \$5,086, principal and interest, although plaintiff offers to remit excess; *Davie v. Heyward*, 33 Fed. 94, holding, where plaintiff had judgment for land and \$5 damages, defendant's appeal depends on

value of land; *Decker v. Williams*, 73 Fed. 309, 310, holding defendant may not appeal from judgment for \$171 where \$200 is the minimum and plaintiff sues for \$249; *Tipton v. Chambers*, 1 Met. (Ky.) 568, dismissing defendant's appeal from judgment for \$25 where minimum is \$50; *State v. St. Louis Court of Appeals*, 87 Mo. 572, reviewing cases, and holding, where plaintiff obtains judgment for \$2,200 on bond for \$2,700, the former sum determines defendant's right to appeal; *Draper v. Clark*, 59 Ohio St. 338, 52 N. E. 833, holding, where plaintiff claims more, but recovers less, than minimum, defendant cannot appeal.

Cited, but without particular application of the rule, in *United States v. Watkins*, 6 Fed. 157; S. C., 7 Sawy. 90; *arguendo* in *Levinski v. Middlesex Banking Co.*, 92 Fed. 457, reviewing cases.

Distinguished in *United States v. Eighty-four Boxes Sugar*, 7 Pet. 459, 8 L. 748, holding, where sugar is seized and sold for duties and net proceeds are less than \$2,000, gross value at time of seizure is value in dispute; *Gordon v. Ross*, 2 Cal. 157, holding, under wording of State Constitution, defendant may appeal when judgment added to costs exceeds the minimum sum; *Dashiell v. Slingerland*, 60 Cal. 661, in dissent from majority opinion, holding jurisdiction under State statute depends on amount sued for.

3 Pet. 36-42, 7 L. 594, *THORNTON v. BANK OF WASHINGTON*.

Demurrer to evidence.—Party who demurs to evidence admits the truth of the evidence, and every fact which it may legally conduce to prove in favor of the other party, p. 40.

Rule approved and applied in these citing cases: *J. A. & N. Ry. v. Velie*, 140 Ill. 62, 29 N. E. 707, holding, where defendant introduces evidence to contradict plaintiff, he waives his demurrer to evidence; *Stanchfield v. Palmer*, 4 G. Greene, 24, holding ambiguity and doubt in evidence as to partnership will cause court to find against demurring party. Cited with approval in *Higgs v. Shehee*, 4 Fla. 394, in dissent; *Galveston, H. & S. A. Ry. v. Templeton*, 87 Tex. 47, 26 S. W. 1067. Cited generally in note to *Pickell v. Isgrigg*, 10 Biss. 237.

Demurrer to evidence.—If the jury, upon any view of the facts, might have given verdict against party demurring to evidence, court may also give judgment against him, p. 40.

Cited with approval in note to *People v. Roe*, 1 Hill, 472; *G., H. & S. A. Ry. v. Templeton*, 87 Tex. 46, 26 S. W. 1067, sustaining trial court's instruction to jury to find for plaintiff upon overruling demurrer to evidence.

Usury.—It is not usury for a bank, in usual course of business, to take interest in advance upon discount of a note, p. 40.

Rule approved and applied in *Cole v. Lockhart*, 2 Ind. 634, collecting cases, and holding the discount in advance of promissory note

not usury; *Newell v. National Bank*, 12 Bush, 60, rejecting defense of usury to note discounted in advance by bank; *Duncan v. Maryland Savings Institution*, 10 Gill & J. 311, holding that State statute places all persons on same footing as banks in this regard; *Parker v. Cousins*, 2 Gratt. 386, 44 Am. Dec. 390, holding it not usury to discount sixty-day note by taking interest in advance. See valuable discussion in note to 46 Am. St. Rep. 189.

Distinguished in *Hogan v. Hensley*, 22 Ark. 414, holding it usury for internal improvement commissioner to receive interest in advance, thereby exceeding legal rate.

Usury.— It is not usury to take interest for sixty-four days upon a sixty-day note, if, according to custom and usage, the note is not due until sixty-fourth day, p. 41.

Cited with approval in *Parker v. Cousins*, 2 Gratt. 386, 44 Am. Dec. 390, applying rule to discount in advance of a sixty-day note.

Usury.— Banks are undoubtedly within the statute of usury, p. 42.

Cited with approval in *Grand Gulf Bank v. Archer*, 8 Smedes & M. 174, holding where charter of bank prescribed rate of interest, breach was controlled by usury law.

3 Pet. 43-56, 7 L. 596, *WILLISON v. WATKINS*.

Tenant cannot dispute his landlord's title during tenancy either by asserting title in himself or in third person, p. 47.

Approved and applied in the following citing cases: *Peyton v. Stith*, 5 Pet. 491, 8 L. 202, holding tenant cannot enjoin ejectment by landlord, although he has brought adverse title; *Henley v. Br. Bank*, 16 Ala. 558, holding tenant is estopped from denying title of purchaser of landlord's title at sheriff sale; *Heisen v. Heisen*, 145 Ill. 666, 34 N. E. 598, 21 L. R. A. 438, holding husband accepting lease of land from stranger may not assert right of dower in such land during lease; *Alderson v. Marshall*, 7 Mont. 297, 16 Pac. 579, holding, where plaintiff leased land to defendant with privilege to buy, defendant cannot dispute plaintiff's title whether lessee or vendee; *Mattis v. Robinson*, 1 Neb. 8, refusing to allow lessee to assert title under mortgage purchased during tenancy; *Hagar v. Wikoff*, 2 Okl. 584, 39 Pac. 282, holding lessee of public lands from claimant improving same cannot assert adverse claim growing out of occupancy; *Whaley v. Whaley*, 1 Spear L. 232, 40 Am. Dec. 595, holding where tenant holds as tenant at will he cannot assert title by adverse possession; *Duke v. Harper*, 6 Yerg. 285, 27 Am. Dec. 464, holding tenant, although holding adversely, cannot dispute landlord's title until statute has fully run; *Emerick v. Tavener*, 9 Gratt. 224, 58 Am. Dec. 220, holding in ejectment by landlord against lessee and sublessee, latter cannot dispute title of landlord; *Miller v. Williams*, 15 Gratt. 218, allowing landlord to recover in ejectment with-

out proving title, since tenants are estopped from denying same; *Voss v. King*, 33 W. Va. 239, 10 S. E. 403, holding, in unlawful detainer by landlord, attornment by tenant to third person is not admissible in evidence.

Distinguished in *Funk v. Kincaid*, 5 Md. 409, 410, holding, where landlord conveys reversion to third party, tenant may defend ejectment by disputing title of third party.

Estoppel.—Mortgagee, trustee, or any one who obtains possession of property by recognition of another's title thereto, is likewise estopped from violating his contract by controverting that title, p. 48.

This principle is affirmed and applied by the citing cases as follows: *Galloway v. Finley*, 12 Pet. 295, 9 L. 1092, holding purchaser under executory contract of sale cannot enter for himself and set up defect in vendor's title; *Bacon v. Robertson*, 18 How. 488, 15 L. 504, holding trustee to wind up bank's affairs is estopped to deny title of stockholders to distribution; *Herbert v. Hanrick*, 16 Ala. 594, holding one claiming under mortgagor does not hold adversely to the assignee of mortgagee; *Lewis v. Boskin*, 27 Ark. 64, holding one in possession under contract of purchase who buys better title cannot assert same against vendor; *Bramble v. Beidler*, 38 Ark. 202, holding, in action for price of forty acres, vendee cannot dispute vendor's title to six acres unless he avers he is not in possession of same; *Gulfoil v. Arthur*, 158 Ill. 607, 41 N. E. 1011, holding trustee who accepts deed of trust is estopped from denying title under which he enters; *Pepper v. Dunlap*, 5 La. Ann. 203, holding vendee who executes mortgage for purchase price cannot dispute vendor's title upon foreclosure of mortgage; *Ash v. Holder*, 36 Mo. 166, holding vendee in possession under contract of purchase may not dispute vendor's title but will be allowed cost of outstanding title; *Thorndike v. Norris*, 24 N. H. 461, holding mortgagor, executing mortgage with covenants of warranty, cannot set up title in third person; *Sanders v. Wagner*, 32 N. J. Eq. 510, and *Roller v. Effinger*, 88 Va. 645, 14 S. E. 339, holding vendor is entitled to benefit of outstanding title acquired by vendee upon reimbursing latter; *Peck v. Mallams*, 10 N. Y. 545, concurring opinion, holding purchasers of sheriff's deed may not dispute title thus conveyed; *Greeno v. Munson*, 9 Vt. 40, 31 Am. Dec. 606, holding vendee in possession under executory contract of sale does not hold adversely to vendor. Approved in dissenting opinion, *Ellege v. Cooke*, 5 Lea, 642, majority holding possession by vendee under contract of purchase is not possession of vendor such as will perfect latter's title. Cited generally in *Aurora v. West*, 22 Ind. 520, note.

Distinguished in *Foster v. Dwincl*, 49 Me. 49, holding in action of widow for dower, tenant may show landlord's seizin was not such as entitles widow to dower; *Lawton v. Howe*, 14 Wis. 247, holding rule that tenant may not purchase outstanding claim is not applicable to grantee who enters and holds in his own right.

Adverse possession.—Tenant cannot change character of his tenure by his mere act; his possession is that of his landlord until notice to latter that tenant holds adversely to him, p. 48.

Rule affirmed and applied in the following citing cases: Graydon v. Hurd, 55 Fed. 728, 6 U. S. App. 610, holding possession of tenant at sufferance is not adverse until owner has notice of hostile holding; Doe v. Reynolds, 27 Ala. 376, holding attornment of tenant to stranger does not affect landlord's possession; Emerson v. Goodwin, 9 Conn. 429, holding landlord who possesses through tenant is ousted within meaning of statute against selling pretended titles; Spalding v. Grigg, 4 Ga. 89, holding life tenant's possession of slaves not adverse where assertions of ownership did not come to knowledge of reversioner; Morgan v. Morgan, 10 Ga. 310, holding mortgagee claiming by adverse possession must prove that mortgagor had notice of hostile acts; Rigg v. Cook, 4 Gilm. 351, 46 Am. Dec. 473, where tenant admitted tenure by paying rent within statutory period, held no title by adverse possession; Byrne v. Beeson, 1 Doug. (Mich.) 181, holding where tenant attorns to third party without consent of landlord, either tenant or landlord may prevent eviction by showing its invalidity; Campau v. Lafferty, 50 Mich. 118, 15 N. W. 42, holding adverse possession will not avail in defense to ejectment by landlord, unless notice of adverse holding is brought home to latter; Tripe v. Marcy, 39 N. H. 445, holding possession of mortgagor who continues in possession after mortgage is not adverse until notice to mortgagee; Whaley v. Whaley, 1 Spear L. 233, 40 Am. Dec. 597, holding statute does not run in favor of one who enters by bare permission of owner in absence of proof of notice of adverse holding to such owner; Duke v. Harper, 6 Yerg. 286, 287, 27 Am. Dec. 464, 465, refusing to confirm tenant's adverse title in absence of proof of landlord's knowledge of hostile holding; Ross v. Blair, Meigs, 546, approving charge to jury that to constitute adverse possession, tenant's attornment to stranger must be known to landlord. Approved in Johnson v. Toulmin, 18 Ala. 54, 52 Am. Dec. 213, holding fact that one tenant in common receives all profits does not divest possession of co-tenant; Society Prop. of Gospel v. Sharon, 28 Vt. 614, holding statute does not run against landlord until notice of tenant's adverse holding.

Distinguished in Ashley v. Rector, 20 Ark. 375, holding notorious and unequivocal acts of ownership by one tenant in common causes statute to run in his favor; Sydnor v. Palmer, 29 Wis. 249, holding where one tenant in common in possession conveys fee to stranger, possession of such grantee is adverse without notice to landlord.

Landlord and tenant.—When tenant disclaims the tenure his possession becomes tortious and the relation of landlord and tenant is dissolved, pp. 49-50.

The citing cases affirm and apply this rule as follows: Woodward v. Brown, 13 Pet. 4, 10 L. 32, holding tenant, who attorns to third

party, is not entitled to notice to quit; *Walden v. Bodley*, 14 Pet. 162, 10 L. 401, where vendee of defendant buys and claims under adverse title, he is not estopped from denying defendant's title; *Merryman v. Bourne*, 9 Wall. 601, 19 L. 686, holding where landlord is sued in ejectment and tenant attorns to successful ejector, relation of tenant is extinguished; *Smythe v. Henry*, 41 Fed. Rep. 709, holding where Indian executes void deed and accepts lease from his grantee his possession is not that of the grantee; *Wells v. Sheerer*, 78 Ala. 146, holding tenant who asserts ownership in himself, disavows tenancy and may be ejected; *Dahm v. Barlow*, 93 Ala. 125, 9 So. 599, holding, however, that possession under deed conveying less than entire interest is not adverse and is not disclaimer; *Merrick v. Hutt*, 15 Ark. 342, holding, however, that purchaser after receiving conveyance holds adversely to vendor; *Hanford v. Fitch*, 41 Conn. 500, holding, where life tenant buys and enters under mortgage interest, tenancy ceases and statute begins to run; *Fortier v. Ballance*, 5 Gilm. 46, holding landlord may evict tenant before expiration of lease when tenant attorns to stranger; *Tobin v. Young*, 124 Ind. 511, 24 N. E. 122, holding notice to quit is unnecessary after tenant has denied lease by asserting ownership; *Goodman v. Malcolm*, 5 Kan. App. 297, 298, 48 Pac. 443, holding, where life tenant disclaims tenure and asserts claim to fee, remainderman may sue to determine question of title; *Richardson v. Richardson*, 72 Me. 408, holding assumpsit will not lie for rents after one tenant in common has disseized co-tenant; *Kunzie v. Wixom*, 39 Mich. 388, holding occupant of land who asserts title in himself forfeits right to notice to quit as tenant at sufferance; *Amick v. Brubaker*, 101 Mo. 477, 14 S. W. 628, holding tenant at will who asserts ownership is liable to ejectment without notice to quit; *Currier v. Perley*, 24 N. H. 227, holding lessee liable for rent where tenancy was not ended by notice to quit or disclaimer of tenancy; *Sumner v. Murphy*, 2 Hill (S. C.), 492, 27 Am. Dec. 399, holding occupant under parol gift may acquire title by adverse possession; *Emerick v. Tavener*, 9 Gratt. 226, 58 Am. Dec. 221, holding where tenant yields possession to stranger giving him deed to fee, stranger may be evicted without notice to quit from landlord; *Emerick v. Tavener*, 9 Gratt. 229, 232, 58 Am. Dec. 223, 226, holding where tenant attempts to convey fee, landlord may sue him in ejectment without notice to quit; *Campbell v. Fetterman*, 20 W. Va. 412, holding where tenant purchases from landlord, subsequent possession is not possession as tenant and may be relied on as part performance; *Swann v. Thayer*, 36 W. Va. 52, 14 S. E. 425, reviewing cases and holding tenant who buys outstanding title and sells fee to others is no longer estopped as tenant from denying landlord's title; *Evans v. Enloe*, 70 Wis. 349, 34 N. W. 920, holding landlord may eject tenant without notice to quit after tenant denies landlord's right to rent or possession. See also note, 15 Am. Dec. 461, and valuable note, 42 Am. Dec. 134, collecting cases; also note 89 Am.

Dec. 428, holding assumpsit will not lie against adverse tenant for rent. Cited but without particular application of rule in *Mattis v. Robinson*, 1 Neb. 8, holding tenant for year, purchasing outstanding mortgage, may not assert same against landlord.

Distinguished in *De Lancey v. Ganong*, 9 N. Y. 23, holding tenant for definite term does not forfeit lease by claiming to own fee; *Gale v. Oil Run Pet. Co.*, 6 W. Va. 209, 210, holding failure of tenant for years to pay rent does not forfeit unexpired term of lease.

Adverse possession.—Possession of property originally acquired by recognition of another's title becomes adverse by open known disclaimer of the tenure, and after lapse of statutory period, action by owner is barred, pp. 50-51.

Cited with approval and rule applied in the following cases: *Bradstreet v. Huntington*, 5 Pet. 440, 442, 8 L. 184, 185, holding one who enters and holds for himself under deed from third party having no title, may claim by adverse possession; *Zeller v. Eckert*, 4 How. 296, 11 L. 982, holding possession for benefit of heirs under will becomes adverse by explicit disavowal of such holding; *Bowman v. Wathen*, 2 McLean, 399, F. C. 1,740, barring right of cestui que trust to property in avowedly hostile possession of trustee; *Moore v. Greene*, 2 Curt. 210, F. C. 9,763, holding guardian of plaintiff, in possession under deed from third person, may set up statute of limitations; *Tillotson v. Doe*, 5 Ala. 410, 39 Am. Dec. 332, holding statute runs in favor of tenant from date of landlord's knowledge of disclaimer of tenure; *Abercrombie v. Baldwin*, 15 Ala. 370, holding where one tenant in common is in possession, improving and selling land, his co-tenant is ousted; *Fair v. Garthright*, 5 Ga. 14, holding possession of vendee under contract of purchase is adverse; *Ogden v. Walker*, 6 Dana, 422, holding statute of limitations protects quasi tenant who continues in possession twenty years after notifying landlord that he holds adversely; *Sabastian v. Ford*, 6 Dana, 437, holding tenant who has claimed land adversely for twenty years to knowledge of landlord, may set up statute of limitations; *Chiles v. Jones*, 7 Dana, 531, holding adverse possession under patent for twenty years is absolute bar to ejectment regardless of origin of such possession; *Morton v. Lawson*, 1 B. Mon. 48, holding statute runs in favor of tenant after such open acts of ownership that landlord's knowledge is presumed; *Dubois v. Campau*, 28 Mich. 318, concurring opinion, holding whether possession of one tenant in common who collects rents and gives leases is adverse, is question for jury; *Campau v. Dubois*, 39 Mich. 281, 286, collecting cases and holding statute protects title of one tenant in common after twenty-five years of known and undisputed possession; *Sands v. Davis*, 40 Mich. 19, holding tenant in common who enters under claim hostile to co-tenants, holds adverse possession; *Page v. Kinsman*, 43 N. H. 332, holding lessee may, after expiration of lease, assert pre-existing

title adverse to landlord; *Neher v. Armijo* (N. M.), 54 Pac. 240, holding where one tenant in common grants fee, statute runs in favor of grantee against other tenants; *Roseboom v. Van Vechten*, 5 Den. 426, holding life tenant who asserts ownership of fee is in adverse possession and may levy fine; *Williams v. First Presb. Soc.*, 1 Ohio St. 507, holding where trustee conveyed fee and cestui que trust suffered grantee to hold for fifty years, statute of limitations is bar; *Sumner v. Murphy*, 2 Hill (S. C.), 492, 27 Am. Dec. 399, holding occupant under parol gift acquires title by lapse of time; *Trustees v. Jennings*, 40 S. C. 181, 42 Am. St. Rep. 866, 18 S. E. 262, holding tenants attempt to convey fee makes possession adverse and after twenty years grant to lessee will be presumed; *Turner v. Smith*, 11 Tex. 629, holding statute runs against trust where cestui que trust is in open adverse possession to knowledge of owner; *Robertson v. Wood*, 15 Tex. 5, 65 Am. Dec. 143, holding vendee, holding as owner under executed conveyance to knowledge of vendor, is in adverse possession; *North v. Barnum*, 10 Vt. 223, 224, holding, where grantor claims his deed to be void and grantee with notice permits him to retain land, such possession is adverse; *Hall v. Dewey*, 10 Vt. 599, holding where tenant notifies his landlord of hostile holding, landlord is within statute prohibiting deeds from persons not in possession; *Voss v. King*, 33 W. Va. 245, 10 S. E. 405, holding tenant sued in unlawful detainer may prove that he holds adversely to knowledge of landlord; *Swann v. Young*, 36 W. Va. 67, 14 S. E. 430, holding possession of grantee of fee from tenant to landlord's knowledge constitutes adverse possession. See also note, 15 Am. Dec. 460, 461, also valuable note, 99 Am. Dec. 391, holding statute runs against express trust from time trustee disavows trust to the knowledge of cestui que trust.

Approved in the following: *Piatt v. Vattier*, 1 McLean, 166, F. C. 11,117, holding statute runs in favor of tenant who asserts exclusive ownership; *Chambers v. Pleak*, 6 Dana, 431, 32 Am. Dec. 83, holding quasi tenant purchasing outstanding title cannot claim by adverse possession without proving notice to landlord; *New Market v. Smart*, 45 N. H. 103, holding adverse possession of cestui que trust depends on whether trustee has notice of disavowal of trust; *Whitmire v. Wright*, 22 S. C. 453, 53 Am. Rep. 728, holding grantee of fee may show that grantor had only leasehold to defeat right of dower; *Duke v. Harper*, 6 Yerg. 286, 27 Am. Dec. 464, refusing to confirm tenant's adverse title, however, in absence of proof of notice to landlord of adverse holding; *Brown v. Storm*, 4 Vt. 44, holding purchaser from occupant of land under contract of sale may recover improvements from owner; *Emerick v. Tavener*, 9 Gratt. 237, 58 Am. Dec. 230, holding, however, tenant's holding is not adverse until notice to landlord. Cited generally in *Trustees v. Jennings*, 40 S. C. 178, 42 Am. St. Rep. 863, 18 S. E. 260, holding when tenant disclaims it is landlord's duty to protect his title by regaining possession.

Distinguished in *Sherman v. Champlain Trans. Co.*, 31 Vt. 178, holding lessee of patented article may not repudiate lease so as not to be liable for rent of article used.

Landlord and tenant.—Mortgagee or vendee of tenant, or purchaser of tenant's rights at sheriff sale, assumes tenant's relations to landlord and cannot deny tenancy, p. 51.

Cited with approval and applied in *Trustees v. Jennings*, 40 S. C. 177, 42 Am. St. Rep. 862, 18 S. E. 260, holding purchaser at sheriff's sale of tenant's interest is estopped from denying tenancy; *Lane's Lessee v. Osment*, 9 Yerg. 90, holding purchaser of lessee's interest cannot deny landlord's title whether he had notice of lease or not; *Emerick v. Taverner*, 9 Gratt. 239, 58 Am. Dec. 231, approving charge to jury that tenant's grantee in deed conveying fee, occupies same relation to landlord as tenant.

Statute of limitations receives same construction and application at law and in equity, p. 52.

Approved and applied in the following citing cases: *Piatt v. Vattier*, 9 Pet. 417, 9 L. 178, refusing to enforce in equity claim to land held adversely thirty years; *Boone v. Chiles*, 10 Pet. 221, 223, 9 L. 404, holding trust cannot be enforced against claimants who openly disavow trust and hold land adversely for many years; *Jenkins v. Pye*, 12 Pet. 262, 9 L. 1079, refusing to order an accounting after lapse of twenty years; *Speidel v. Henrici*, 120 U. S. 386, 30 L. 719, 7 S. Ct. 611, and *Naddo v. Bardon*, 47 Fed. 790, holding statute of limitations runs against express trust openly disavowed by trustee to knowledge of cestui que trust; *Bowman v. Wathen*, 2 McLean, 396, F. C. 1,740, barring defendant's rights to franchise in equity after lapse of time although statute of limitations did not apply to him as non-resident; *Baker v. Biddle*, 1 Bald. 419, F. C. 764, refusing to order an accounting where plaintiff's claim is barred at law, and no cause appears for equitable relief; *Perkins v. Cartmell*, 4 Harr. 277, 42 Am. Dec. 758, refusing to enforce, in equity, legacy charged upon land after lapse of thirty years without demand; *Atkins v. Hill*, 7 Ga. 579, collecting cases and denying recovery by distributees against administrator on account returned nineteen years before; *Keaton v. Greenwood*, 8 Ga. 103, holding statute runs against express trust only from the time when trustee's disavowal is known; *Clark v. Clark*, 21 Neb. 412, 32 N. W. 162, holding statute does not run against cestui que trust in possession until trustee disavows trust; *Clark v. Potter*, 32 Ohio St. 59, collecting cases and refusing to allow mortgagor to redeem in equity after long acquiescence in mortgagee's ownership; *Yorks's Appeal*, 110 Pa. St. 82, 2 Atl. 69, collecting cases, and holding claim of creditor against executor of estate is barred in equity by lapse of twelve years. See also valuable note, 12 Am. Dec. 371, collecting cases.

Presumption.—Where mortgagor is permitted to remain in possession, mortgage, after lapse of time, will be presumed to have been discharged by payment or release, pp. 52-53.

Approved in dissenting opinion in *Wright v. Eaves*, 10 Rich. Eq. 598, majority holding no presumption arises from twenty years' possession by vendee of mortgagor.

Landlord and tenant.—By setting up, or attorning to, a title adverse to his landlord, tenant commits a fraud as much as by breach of any other trust, p. 53.

Cited with approval and applied in *Byrne v. Beeson*, 1 Doug. (Mich.) 183, holding it fraud for third party to whom tenant attorns, to use such attornment to oust landlord.

Estoppel.—The rule that tenant shall not dispute landlord's title does not apply to vendor and vendee, p. 54.

The following citing cases affirm and apply this rule: *Watkins v. Holman*, 16 Pet. 54, 10 L. 885, holding vendee after receiving conveyance may dispute vendor's title; *Croxall v. Shererd*, 5 Wall. 287, 18 L. 579, holding possession by bona fide purchaser is adverse to all the world; *Robertson v. Pickrell*, 109 U. S. 615, 27 L. 1051, 3 S. Ct. 412, holding grantee of life estate granted without reference to a reversion may dispute title of grantor; *Elder v. McClaskey*, 70 Fed. 547, 37 U. S. App. 1, holding claimants in possession, who purchase outstanding titles similar to plaintiff's are not estopped from denying plaintiff's title; *Merrick v. Hutt*, 15 Ark. 342, holding purchaser at tax sale stands in position of vendee and is not estopped; *King v. Carmichael*, 136 Ind. 27, 43 Am. St. Rep. 309, 35 N. E. 512, holding where one tenant in common executes deed conveying entire fee, his grantee holds adversely; *Macklot v. Dubreuil*, 9 Mo. 485 (481), 43 Am. Dec. 553, holding successors in interest of vendee may dispute title of vendor in ejectment; *Gardner v. Greene*, 5 R. I. 110, holding vendee is not estopped from denying right of vendor's widow to dower; *Gray v. Bates*, 3 Strob. L. 507, holding vendee who purchases from one tenant in common without reference to co-tenants, may assert adverse possession; *Robertson v. Wood*, 15 Tex. 5, 65 Am. Dec. 143, holding possession of vendee claiming under executed conveyance to vendor's knowledge, is adverse to vendor's title; *Howard v. McKenzie*, 54 Tex. 187, holding possession of vendee under executory contract of sale is adverse when obtained from vendor by suit.

Distinguished in *Clarke v. McClure*, 10 Gratt. 311, 313, holding possession open and notorious, for twenty years under parol gift, not a bar to ejectment.

Statute of limitations should be so construed as to effectuate its intended objects — the security of titles and quieting of possessions, p. 54.

3 Pet. 57-67, 7 L. 601, UNITED STATES v. PRESTON.

Slave trade.—Persons of color seized under acts prohibiting slave traffic are subject to orders of the president under act of March 3, 1819, p. 66.

Cited with approval in *Isabella v. Pecot*, 2 La. Ann. 392, holding State court has no jurisdiction to award freedom to illegally imported slave; *Gedney v. L'Amistad*, 10 Fed. Cas. 150, holding Spain not entitled to surrender of slaves found in possession of Spanish vessel.

Admiralty.—Decree is not final, pending an appeal in Federal Supreme Court, p. 66.

Approved and applied in *The Lillie*, 42 Fed. 180, holding that there can be but one docket fee allowed on final hearing. Citation of 3 Pet. 675, in *The Panama*, Olc. 354, F. C. 10,703, on point that court of admiralty will adjust all claims upon a fund in its possession, probably refers to this case.

Distinguished in *Braithwaite v. Jordan*, 5 N. Dak. 252, 65 N. W. 720, 31 L. R. A. 259, holding stay bond on appeal in admiralty is not without consideration.

Repeal of statute.—A statute will not govern a case on appeal in admiralty unless it is an existing valid statute when the decree of the lower court is affirmed, p. 67.

This holding is approved and applied in the following citing cases: *U. S. v. Van Vliet*, 22 Fed. 643, holding where penal statute is repealed after conviction of defendant, judgment will be arrested; *Pope v. Lewis*, 4 Ala. 489, 491, and *Saco v. Gurney*, 34 Me. 14, collecting cases and refusing to award penalty allowed by statute where penal law was repealed pending conviction; *First Nat. Bank v. Henderson*, 101 Cal. 310, 35 Pac. 900, reviewing cases and affirming judgment of lower court for plaintiff when statute prohibiting action by plaintiff is repealed pending appeal; *Bank v. State*, 12 Ga. 492, reviewing cases, and denying penalty where penal statute was repealed before judgment; *Keller v. State*, 12 Md. 326, 71 Am. Dec. 597, holding where penal statute is repealed before judgment for penalty is affirmed, judgment must be reversed; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 150, holding repeal of statute imposing tax and penalty, reserving right to tax, ends all suits for penalty. Approved in *Folger v. The Robert G. Shaw*, 2 Wood. & M. 540, F. C. 4,899, holding after appeal in admiralty, if appeal is abandoned, in absence of other record before court, judgment below will be affirmed.

Distinguished in *Hargroves v. Chambers*, 30 Ga. 602, holding that liability of directors for corporation's debt is not extinguished by expiration of company's charter.

Miscellaneous.—Cited in *Sharon v. Sharon*, 79 Cal. 647, 22 Pac. 30, as an instance where court went outside of record to do justice between the parties.

3 Pet. 68, 7 L. 605, UNITED STATES BANK v. SWAN.

Practice.— When an appeal is dismissed for failure to file transcript in required time, appellant has whole term in which to file it and reinstate case, and an official certificate of such dismissal may not be given by clerk during the term, p. 68.

Cited with approval in Trevino v. Stillman, 48 Tex. 565, holding mandate of appellate court will not issue until end of term in absence of special order.

3 Pet. 69-86, 7 L. 606, BELL v. CUNNINGHAM.

Agency.— Where principal has no knowledge of agent's deviation from orders, his approval of agent's acts does not amount to a ratification of agent's deviation, pp. 76, 82.

The following citing cases affirm and apply this rule: Wheeler v. N. W. Sleigh Co., 39 Fed. 351, holding no ratification where agent, ordered to sell stock, sells stock and dividend, and principal retains proceeds, not knowing facts; Starr v. Galgate Ship Co., 68 Fed. 243, 29 U. S. App. 599, holding no ratification where agent changes charter without authority and principal confirms charter without notice of change; Nichols v. Bruns, 5 Dak. Ter. 34, 37 N. W. 755, collecting cases, and holding principal not liable for deceit of unauthorized agent by accepting benefits without knowledge of deceit; Croom v. Swan, 1 Fla. 216, holding principal not liable for agent's false warranty, of which former is unaware; Oxford Lake Line v. First National Bank (Fla.), 24 So. 483, holding agent cannot defend principal's action on ground of ratification where latter had knowledge of former's acts; Penn., etc., Co. v. Dandridge, 8 Gill & J. 324, 29 Am. Dec. 558, holding corporation does not adopt contract made by agent by retaining contract price, unless terms of contract were fully known; Adams Express Co. v. Trego, 35 Md. 69, holding unauthorized permission of agent to sub-agent to engage in competition is not ratified by principal where latter had no knowledge of facts; Bannon v. Warfield, 42 Md. 42, holding agent employed to lend money may not rely on ratification of principal when latter did not know facts concerning property pledged; Taliaferro v. First National Bank, 71 Md. 214, 17 Atl. 1039, holding principal's indorsement of securities in ignorance of wrongful sale by agent does not ratify sale; Hyde v. Larkin, 35 Mo. App. 373, holding corporation does not ratify assignment of cause of action in its favor by receiving money therefor, unless it knew terms of the contract; Smith v. Tracy, 36 N. Y. 86, holding receipt by principal of proceeds of sale, in ignorance of agent's unauthorized warranty, is not ratification.

Agency.— An agent is bound to follow such instructions as principal gives him and is liable in damages for any injury resulting from a departure from his orders, p. 79.

Approved and rule applied in *Ferguson v. Porter*, 3 Fla. 39, holding gratuitous factor liable for loss of goods shipped to Charleston, instead of New Orleans as ordered.

Agency.— If principal, with full knowledge of facts, receives and sells goods purchased for him contrary to his orders, without signifying intent to disavow agent's acts, jury may fairly infer a ratification, p. 81.

Approved and applied in the following citing cases: *Perkins v. Currier*, 3 Wood. & M. 86, F. C. 10,985, holding where lessee of business makes unauthorized change, and lessor, knowing all facts, acquiesces for long time, there is ratification; *Hitchcock v. McGehee*, 7 Port. 562, holding silence of principal does not amount to ratification of acts of which he is not informed until lapse of great length of time; *Lee v. Fontaine*, 10 Ala. 771, 44 Am. Dec. 513, holding principal ratifies agent's deviation by his silence when he does not object to same in reasonable time; *Minnesota L. O. Co. v. Montague*, 65 Iowa, 73, 21 N. W. 187, holding principal's silence for more than reasonable time after he ought to have learned the facts of agent's transaction, amounts to ratification; *Low v. Railroad Co.*, 45 N. H. 379, holding corporation liable for services rendered in perfecting its organization, where company takes benefit of services with full knowledge of facts; *East Tenn. R. R. v. Nelson*, 1 Cold. 279, holding ratification of principal is question of fact for jury where principal received and sold goods without objection.

Measure of damages for breach of agent's orders is the positive and direct loss from such breach; speculative damages, dependent on possible successive schemes, should not be allowed, p. 85.

Cited with approval and rule applied in *McAlpin v. Lee*, 12 Conn. 133, 30 Am. Dec. 610, holding, in action for price of goods sold, damages will not be reduced, because superior goods contracted for were of greater value than contract price; *Tide Water, etc., Co. v. Archer*, 9 Gill & J. 535, holding, in condemning land for canal, only damages for direct loss resulting immediately from canal may be allowed; *McWhirter v. Douglas*, 1 Cold. 603, refusing to award damages for breach of promise to pay difference in profits of two businesses; *Stell v. Paschal*, 41 Tex. 644, holding, in action for breach of contract for sale of cotton gin, speculative profits as ginner not proper element of damages; dissenting opinion, *Moses v. Old Dominion, etc., Co.*, 82 Va. 29, holding, in action by lessor against lessee for damages to building, actual compensation is measure of damage. Cited, but without particular application, in *Tremain v. Cohoes Co.*, 2 N. Y. 165, 51 Am. Dec. 285, holding, in action for damages to property by blasting, evidence of defendant's care is inadmissible.

Damages.—Actual loss of profits from sale of article which agent has failed to purchase for principal may be allowed, but not vindictive damages, pp. 85-86.

Approved and rule applied in *Ryder v. Thayer*, 3 La. Ann. 150, holding damages for agent's failure to ship goods as directed is their value at port of destination, without exemplary damages; *Farwell v. Price*, 30 Mo. 593, holding, in action by principal against agent for conversion of goods at New Orleans, consigned to Boston, measure of damages is value of goods at Boston; *Heineman v. Heard*, 2 Hun, 332, holding, in action against agent for failure to buy silk as ordered, measure of damages is profit at place of consignment. Approved in *Heineman v. Heard*, 50 N. Y. 37, holding loss of profits is element of damages in action against agent for failure to buy silk as ordered. Cited, but without particular application of the rule, in *Barbour Co. v. Horn*, 48 Ala. 577, holding, in action for damages for personal injuries, jury may not consider wealth of parties; *Frink v. Coe*, 4 G. Greene, 559, 61 Am. Dec. 144, holding exemplary damages may be given for gross negligence of stage company in employing known drunken driver; *Warwick v. Chase*, 23 Md. 161, holding, in action for damages for agent's breach of orders, measure of damages is too uncertain to permit attachment.

Distinguished in *Ex parte Becker*, 3 Fed. Cas. 19, holding, where goods are to be delivered at Boston for sale abroad, measure of damages is market price at Boston.

3 Pet. 87-91, 7 L. 612, *MAGRUDER v. UNION BANK*.

Bills and notes.—Payment must be demanded from maker of promissory note and notice of non-payment forwarded to indorser in due time to render indorser liable, p. 90.

Cited and applied in *Thorn v. Rice*, 15 Me. 266, holding no sufficient notice to indorser where holder of note gave letter of notice to neighbor of indorser to give to latter. Cited, but without particular application of the rule, in *Cox v. National Bank*, 100 U. S. 712, 25 L. 741, holding, where notary could not with due diligence find acceptors of bill of exchange, demand at customary haunts and notice to indorsers at best-known address is sufficient.

Bills and notes.—Where maker of promissory note dies before its maturity and letters of administration are taken out by the indorser, demand and notice of non-payment must nevertheless be made before indorser becomes liable, p. 91.

Cited, affirmed and applied as follows: *United States Bank v. Tyler*, 4 Pet. 384, 7 L. 894, holding indorser is not liable on note when maker has been allowed to escape from jail and holder has not sued jailer; *Toby v. Maurian*, 7 La. 495, holding, where maker

dies on last day of grace and notary thereupon protests note and notifies indorser, no demand sufficient to bind indorser; *Union Ins. Co. v. Rodd*, 26 La. Ann. 715, holding action will not lie against indorser of note in absence of demand on maker, unless impossibility of demand is proved; *Carolina Bank v. Wallace*, 13 S. C. 353, 36 Am. Rep. 698, holding, where maker of note is also executor of indorser, he is nevertheless entitled to notice of non-payment; *Hutchison v. Crutcher*, 98 Tenn. 436, 39 S. W. 729, 37 L. R. A. 93, holding, where note is payable at certain bank and said bank is closed by insolvency, holder of note must present same to receiver to hold indorser. Approved in *Barriere v. Samory*, 10 La. Ann. 103, holding three or four hours' search and many inquiries by notary constitute due diligence to find maker.

Executors and administrators.—Where the same person is administrator of the maker of a note and also indorser of the note, the two characters are as entirely distinct as if the persons had been different, p. 90.

Approved and applied in *Smith v. Hurd*, 7 How. (Miss.) 200, holding, in action against defendant as executor, no decree can be made affecting his rights as guardian.

Miscellaneous.—*Union Bank v. Magruder*, 7 Pet. 287, 291, 8 L. 688, 689, a second appeal of principal case affirming court's previous decision.

3 Pet. 92-98, 7 L. 614, **CHINOWETH v. HASKELL.**

Demurrer to evidence.—Where defendants withdraw their case from the jury by demurrer to evidence or submit to verdict for plaintiff, subject to such demurrer, judgment for plaintiff will not be reversed unless the verdict cannot be sustained by any fair construction of evidence, p. 96.

Approved and applied in *Pickel v. Isgrigg*, 6 Fed. 679; S. C., 10 Biss. 233, holding plaintiff, on whom rests burden of proof, may not demur to defendant's evidence; *Higgs v. Shehee*, 4 Fla. 394, holding court will order new trial when evidence demurred to is so uncertain that a jury could not render verdict upon it. Approved in note to *People v. Roe*, 1 Hill, 472, collecting cases.

Public land grants.—Courses and distances are less certain and permanent guides than natural fixed objects on the land; but, in absence of distinguishable natural objects in description, courses and distances must be followed, p. 96.

Cited approvingly and followed in *Doe v. Cullum*, 4 Ala. 582, holding dispute as to starting point of description must be settled by measuring back from another corner by course and distance; *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.) 28, reviewing cases, holding courses and distances in patent are not disputable by parol

evidence of monuments not called for in patent; *Opdyke v. Stephens*, 28 N. J. L. 86, sustaining charge to jury that, in construing deed, they should award according to course and distance when no monument is mentioned; *Negbauer v. Smith*, 44 N. J. L. 674, applying rule in action for breach of covenant where grantor did not own entire lot as described by course and distance; *Booth v. Strippelman*, 26 Tex. 443, holding course and distance cannot be controlled by call for "stake" where such call would include 3,000 acres more than required; *Robinson v. Doss*, 53 Tex. 507, locating survey by course and distance where natural object is mentioned by mistake.

Distinguished in *Alshire v. Hulse*, *Wright*, 171; S. C., 5 Ohio, 534, holding "posts" called for in description in improved country are distinguishable, natural objects and control course and distance.

Public land grants.—The law directs a survey of land granted by United States to be made by sworn officers, and the description thus made by survey is transferred into the grant, p. 96.

Cited generally in *McManus v. Carmichael*, 3 Iowa, 38, collecting cases on point that United States grants have relation to the surveys, plats and field-notes.

Public land grants — Deeds.—Grant of land must so describe land conveyed that subject granted can be identified by description in instrument itself, p. 96.

Cited and followed in *Kennedy v. Townsley*, 16 Ala. 245, holding donation by Congress is not invested until land is surveyed and location ascertained; *Booth v. Upshur*, 26 Tex. 67, holding, where a discrepancy exists between two descriptive objects in survey, evidence to show which is correct is admissible; *Norris v. Hunt*, 51 Tex. 614, applying rule to deed of United States marshal void for failure to describe land by metes and bounds.

Surveys.—An office survey, not actually made, cannot be made to conform to surveyor's intention when such intention is not indicated on the survey, p. 97.

Distinguished in *Robinson v. Doss*, 53 Tex. 507, correcting erroneous call in survey when surveyor's intention was apparently thwarted by error; dissenting opinion in *Sanborn v. Gunter*, 84 Tex. 297, 20 S. W. 78, holding survey should be controlled by intent of surveyor as shown by calls in field-notes.

Public land grants — Deeds.—In grant, courses and distances may be controlled and corrected by other objects of description showing that survey covered ground other than called for by line of grant, p. 98.

Cited to this point, *Urquhart v. Burleson*, 6 Tex. 511, correcting mistake of "east" for "south" in patent so as to include land actually surveyed.

3 Pet. 99-192, 7 L. 617, *INGLIS v. SAILORS' SNUG HARBOR*.

Wills.—In construction of will, intention of testator is to be sought after and given effect; if effect cannot lawfully be given to such intention in mode specified, an alternative provided in will must be carried out if lawful, p. 113.

Cited approvingly and rule applied in the following: *Elyton Co. v. M'Elrath*, 53 Fed. 766, 2 U. S. App. 584, construing devise to wife of property to be "hers and at her disposal during natural life," to carry fee-simple; *Fowler v. Duhme*, 143 Ind. 259, 42 N. E. 626, reviewing cases, and holding devise to children and to others in case of their death refers to death in testator's lifetime; *Miller v. Chittenden*, 2 Iowa, 368, collecting cases, applying rule to a grant to trustees for a charitable use; *Sewall v. Cargill*, 15 Me. 420, sustaining devise to inhabitants of unincorporated town for charitable use, according to evident intent; *Wade v. American Col. Soc.*, 7 Smedes & M. 696, 45 Am. Dec. 329, holding, where apparent intent is that executor shall deliver slaves to trustees for transportation, latter may compel former to act; *Magill v. Brown*, 16 Fed. Cas. 431.

Wills.—Designation of trustees in a will by their official character is valid and equivalent to naming them by their proper names, p. 114.

Cited approvingly and relied upon in *Dunbar v. Soule*, 129 Mass. 286, holding devise to "mayor of the city" as trustee appoints mayor at time of testator's death and not the mayor at time of appointment. Cited, but without particular application of the rule, in *In re John's Will*, 30 Or. 516, 517, 518, 519, 47 Pac. 348, 349, 36 L. R. A. 249, 250, reviewing cases, and holding devise to trustees to be appointed by certain officers will not fail because such officers neglect to appoint.

Distinguished in *People v. Ashburner*, 55 Cal. 523, holding persons designated by statute to care for public lands are officers whose terms expire by limitation.

Wills — Executory devise.—If testator bequeaths property to an association upon its becoming incorporated within reasonable time, the subsequent incorporation confers on the association the capacity to take and manage the property, p. 114.

The citations collect a great many authorities affirming and applying this principle: *Trustees v. State*, 14 How. 274, 14 L. 418, holding reservation of land by Congress for seminary of learning vests in corporation formed later to establish such seminary; *Ould v. Washington Hospital*, 95 U. S. 313, 24 L. 452, reviewing cases, and holding devise to trustees to be conveyed to corporation for foundlings when Congress should create one is valid devise; *Russell v. Allen*, 107 U. S. 168, 171, 27 L. 399, 400, 2 S. Ct. 331, 334, reviewing cases, and holding devise of property to use of an educational institute not yet in existence is valid gift as against donee's heirs; *Jones*

v. Habersham, 107 U. S. 191, 27 L. 408, 2 S. Ct. 350, holding devise to establish hospital and requiring act of incorporation to be obtained is valid charitable devise; Jones v. Habersham, 3 Woods, 480, F. C. 7,465, sustaining devise to trustees with direction to incorporate and establish hospital, although no time for such acts is set; Carter v. Balfour's Admr., 19 Ala. 829, reviewing cases, and sustaining devise to certain charitable societies, regardless of whether they are incorporated or not; Coit v. Comstock, 51 Conn. 385, 50 Am. Rep. 37, collecting cases, and sustaining bequest to executors in trust for charitable organization to be thereafter incorporated; Storrs, etc., School v. Whitney, 54 Conn. 346, 350, 8 Atl. 143, 145, sustaining devise to charitable corporation to be used in certain way, and if use abandoned, then certain sum to be paid other charities, Griffith v. State, 2 Del. Ch. 461, holding devise of property to be rented and proceeds devoted to certain charity not within rule against perpetuities; Universalist Society v. Kimball, 34 Me. 427, sustaining conditional bequest to religious society to be thereafter formed in two years; Milne's Heirs v. Milne's Exrs., 17 La. 58, sustaining legacies to orphan asylums not in esse, but subsequently incorporated; Tappan v. Deblois, 45 Me. 130, reviewing cases, and sustaining devise to trustees for use of American Peace Society, unincorporated at time of devise; Swasey v. American Bible Soc., 57 Me. 525, sustaining devise to first Baptist society that may be organized in certain locality; Going v. Emery, 16 Pick. 118, 26 Am. Dec. 652, sustaining devise to trustees for cause of religion; Odell v. Odell, 10 Allen, 8, 10, sustaining devise to trustees to invest funds and establish charity with accumulations; Taylor v. Trustees, 34 N. J. Eq. 106, sustaining gift to trustees to establish and maintain a school not existing at testator's death; Baptist Church v. Witherell, 3 Paige, 300, 24 Am. Dec. 225, holding where deed is made to unincorporated church society, subsequent incorporation vests legal title; Potter v. Chapin, 6 Paige, 650, sustaining gifts to unincorporated village for erection of schoolhouse; Williams v. Williams, 8 N. Y. 541, 552, sustaining bequest for education of poor children, although no definite cestuis que trust are named; P. E. Public School v. Davis, 31 N. Y. 592, holding, where land is devised to trustees for benefit of school, fee vested in school upon its subsequent incorporation; Burrill v. Boardman, 43 N. Y. 261, 3 Am. Rep. 699, sustaining devise to corporation to be created in two years should two certain lives continue so long; Keith v. Scales (N. C.), 32 S. E. 811, upholding devise in trust for religious use, the trustee being an unincorporated church which had to become incorporated; Williams v. First Presbyterian Society, 1 Ohio St. 500, holding grant to trustees for benefit of unincorporated church is not void for uncertainty; McIntire v. Zanesville, etc., Co., 9 Ohio, 289, 34 Am. Dec. 439, sustaining devise of contingent remainder to company incorporated during existence of

particular estate; *Trustees v. Adams*, 4 Or. 87, holding grant of property may be made to use of company to be subsequently created; *Pennoyer v. Wadhams*, 20 Or. 284, 25 Pac. 723, 11 L. R. A. 213, sustaining devise to trustees for benefit of church to be thereafter created and maintained; *In re John's Will*, 30 Or. 519, 47 Pac. 349, 36 L. R. A. 250, collecting cases, and sustaining devise to trustees to create and maintain free schools; *Almy v. Jones*, 17 R. I. 267, 21 Atl. 617, 12 L. R. A. 416, holding bequest for an art institute after one shall be created and in meantime income to be used for prizes is not void for remoteness; *Paschal v. Acklin*, 27 Tex. 201, sustaining bequest to trustees to establish seminary of learning not existing at testator's death; *Literary Fund v. Dawsons*, 10 Leigh, 153, holding devise of property to trustees to procure statute, making it part of public fund, is valid; *Kinnaird v. Miller's Exr.*, 25 Gratt. 121, 123, sustaining devise to trustees for benefit of poor white children, providing legislature did not inhibit; *Dodge v. Williams*, 46 Wis. 102, 103, 50 N. W. 1108, sustaining bequest to corporation for education of females to be created in five years; *Gould v. Taylor Orphan Asylum*, 46 Wis. 116, 50 N. W. 423, sustaining devise to trustees for creation of orphan asylum as soon as one is incorporated; *Magill v. Brown*, 16 Fed. Cas. 413, 414, 446, reviewing cases; *Wentworth v. Fernald*, 92 Me. 291, 42 Atl. 553, holding valid a devise in trust, after the termination of life interests in certain beneficiaries, to procure appointment of additional trustees and devote the fund forever to an educational use; *Urmey v. Wooden*, 1 Ohlo St. 164, 59 Am. Dec. 617, sustaining charitable trust for the poor and needy fatherless of two designated townships.

Approved in dissenting opinions in the following: *Henderson v. Post*, 5 La. Ann. 472, majority holding will providing for laying out city to remain part of testator's succession is void; *Post v. Pearsall*, 22 Wend. 455, majority holding dedication to public of landing place cannot be presumed from user for want of grantee; *Tilden v. Green*, 130 N. Y. 72, 28 N. E. 892, 14 L. R. A. 47, 27 Am. St. Rep. 509, note, majority holding devise invalid because of discretion to convey vested in trustees; *Green v. Allen*, 5 Humph. 229, majority holding invalid a devise to two unincorporated societies. Cited with approval in *Johnson v. Johnson*, 92 Tenn. 565, 36 Am. St. Rep. 108, 23 S. W. 116, 22 L. R. A. 181, sustaining devise for charitable use naming wife and daughter as trustees with power to name successors; *Laird v. Bass*, 50 Tex. 416, holding conveyance to trustees for benefit of church is effectual although not made according to terms of State statute; see also note, 9 Am. Dec. 585. Cited generally in *Penny v. Croul*, 76 Mich. 480, 43 N. W. 652, 5 L. R. A. 863, sustaining bequest to public water works to maintain and improve grounds and library, also *Magill v. Brown*, 16 Fed. Cas. 433. Cited but without particular application of the rule in *Blair v. Odin*, 3

Tex. 299, holding, in action by church to recover land on ground of dedication to church use, complete legal title must be shown.

Distinguished in *White v. Fisk*, 22 Conn. 54, rejecting bequest to "indigent pious young men preparing for ministry in New Haven" as too uncertain; *Fink v. Fink*, 12 La. Ann. 321, holding subject of chancery's jurisdiction over charities and testamentary trusts has no application in Louisiana; *Church Extension v. Smith*, 56 Md. 393, holding, where devise is to corporation under legal disability to inherit, property goes to heir subject to later act of legislature; *Pearsall v. Post*, 20 Wend. 118, holding public cannot acquire use of site for public landing by user for want of definite grantee; *Booth v. Baptist Church*, 126 N. Y. 241, 28 N. E. 240, declaring invalid a bequest to trustees for benefit of corporation to be created without limiting time; *Tilden v. Green*, 130 N. Y. 47, 48, 27 Am. St. Rep. 492, 28 N. E. 882, 883, 14 L. R. A. 39, declaring invalid a bequest to trustees giving them discretion to convey, or not, to corporation to be created; *Stonestreet v. Doyle*, 75 Va. 364, 40 Am. Rep. 732, declaring void a devise for creation of free school without provision for subsequent incorporation; *P. E. E. Society v. Churchman*, 80 Va. 765, sustaining bequest to corporation in existence at testator's death.

Criticised in *Burr v. Smith*, 7 Vt. 303, 29 Am. Dec. 184, sustaining devise to American Bible Society as gift to charitable use not as executory devise. And see *Owens v. Missionary Society*, 14 N. Y. 384, 67 Am. Dec. 161, holding subsequent incorporation of legatee association does not affect its disability to inherit.

Executory devise.—By an executory devise, a freehold may be made to commence in futuro, and needs no particular estate to support it, p. 115.

Cited and followed in *Miller v. Chittenden*, 4 Iowa, 270, 274, reviewing cases and sustaining grant of property to trustees for use of a church not then in existence; *Goodell v. Union Assn.*, 29 N. J. Eq. 35, sustaining gift of \$1,000 yearly to Young Men's Christian Association incorporated after testator's death. In *re John's Will*, 30 Or. 514, 47 Pac. 348, 36 L. R. A. 249, sustaining devise to charitable use, trustees to be appointed fifteen years after testator's death. Approved in dissenting opinion in *Succession of Franklin*, 7 La. Ann. 429, 430, majority rejecting devise to trustees to establish and maintain academy.

Executory devise.—A present devise to a devisee not in esse is not good, but a devise to take effect upon happening of some future event is valid as an executory devise, p. 116.

Cited approvingly and applied in *Bristol v. Atwater*, 50 Conn. 407, holding under devise to S., remainder to C. if S. die without issue, C.'s interest vested only on death of S. without issue; *Succession of Franklin*, 7 La. Ann. 415, holding devise to trustees to establish and maintain academy is devise in presenti and invalid; *Farrington v.*

Putnam, 90 Me. 431, 37 Atl. 661, 38 L. R. A. 349, and *De Camp v. Dobbins*, 29 N. J. Eq. 41, holding where property is left to charitable institute in excess of capital allowed by law, legislature may later amend law. Approved in *Literary Fund v. Dawsons*, 1 Rob. (Va.) 418, holding devise to unincorporated society falls for omission to provide in will for subsequent corporation.

Executory devises are not to be governed by rules of law applicable to common-law conveyances; the only question is whether contingencies are to happen in reasonable time or not, p. 117.

Cited approvingly in *Miller v. Chittenden*, 2 Iowa, 376, reviewing cases and sustaining grant to trustees to hold for charitable use without naming specific beneficiary.

Wills.— Courts will seek and enforce any general intent of testator consistent with rules of law; and if testator has prescribed modes of carrying it into effect which law does not permit, court must give effect to general intention although the mode fail, p. 117.

Cited and principle affirmed and applied as follows: *Jackson v. Phillips*, 14 Allen, 556, where devise was to trustees to create public sentiment against slavery, to act without bonds, held trust valid but waiver of bonds void; *Den v. McMurtrie*, 15 N.J.L. 280, gathering and enforcing apparent intent from unintelligible devise of lands; *Moore v. Lyons*, 25 Wend. 124, holding in devise of remainder to B and C, or survivor, survivor at time of testator's death was intended; *Shotwell v. Mott*, 2 Sandf. Ch. 59, holding devises to poor of certain town and to certain society are not void for uncertainty; *Pell v. Mercer*, 14 R. I. 430, holding where will directs purchase of certain bonds, clause does not fail because such bonds cannot be had; *Literary Fund v. Dawsons*, 1 Rob. (Va.) 421, 423, holding where devise depends on legislative action, testator intended it to act in reasonable time; *Literary Fund v. Dawsons*, 1 Rob. (Va.) 427, holding where will provides trustees shall apply for statute, intent is complied with if act is passed without application; *Dunlop v. Harrison*, 14 Gratt. 257, 260, collecting cases and holding illegal provision for holding slaves in trust for free negroes does not defeat alternative that slaves be sold for their use. Approved in *Lepage v. McNamara*, 5 Iowa, 145, holding where devise is void for uncertainty court cannot give effect to will by modelling new provisions; *Virginia v. Levy*, 23 Gratt. 40, holding gift of land for benefit of children of United States navy warrant officers void for uncertainty; *Magill v. Brown*, 16 Fed. Cas. 433.

Trusts.— Whenever a person, by will, gives property and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly that his expressed desire shall be controlled by the trustee, p. 119.

Cited with approval and applied in *Johnson v. Mayne*, 4 Iowa, 195, reviewing cases and holding property left to church incapable of tak-

ing legal title, is charged with trust in favor of church; *Moore v. Moore*, 4 Dana, 357, 29 Am. Dec. 420, holding equity will enforce devise directing sale of estate and application of proceeds to education of poor orphans of county; *Wade v. American Col. Soc.*, 7 Smedes & M. 695, 45 Am. Dec. 328, holding will providing for transportation of slaves imposes a trust which equity will enforce; *McIntire v. Zanesville, etc., Co.*, 9 Ohio, 288, 34 Am. Dec. 438, holding devise of land for benefit of poor of Zanesville, upon death of daughter without issue, creates valid trust; *In re John's Will*, 30 Or. 531, 47 Pac. 353, 36 L. R. A. 254, holding where devise in trust for charity does not provide for conveyance to trustees, it is still charged with trust, and equity will remedy omission; *Bell Co. v. Alexander*, 22 Tex. 362, 73 Am. Dec. 274, holding devise of land to county for benefit of school children vests title in county in trust. Cited but without particular application in *White v. Keller*, 68 Fed. 802, 30 U. S. App. 275, holding that devise of land in Mississippi should be controlled by law of that State.

Repeal of statute.—Where act is passed incorporating certain persons to enable them to take and manage property according to terms of a will, such act is repeal pro tanto of statute prohibiting devise to corporation, p. 119.

Cited with approval in *San Antonio v. Odin*, 15 Tex. 545, holding where Texan congress declared lands to belong to bishop in trust for congregations, such declaration may be construed as legislative grant.

Citizenship.—All persons born within the colonies of North America, whilst subject to crown of Great Britain, were natural-born British subjects, p. 120.

Cited and relied upon in *United States v. Wong Kim Ark*, 169 U. S. 659, 42 L. 894, 18 S. Ct. 460, reviewing cases and holding Chinese, born in United States of alien parents having permanent residence here, are citizens of United States; *McKay v. Campbell*, 2 Saw. 122, F. C. 8,840, holding person born in Oregon of British parents during joint occupation is British subject.

Alienage.—According to American rule, American ante-nati ceased to be British subjects from date of declaration of independence; according to English rule, from date of treaty of peace in 1783, p. 121.

Cited with approval and rule applied in *United States v. Ritchie*, 17 How. 540, 15 L. 240, and *United States v. Lucero*, 1 N. Mex. 455, holding declarations of civil equality by Mexican independent government invested Indians with privilege of citizenship; *McKinney v. Sayiego*, 18 How. 238, 15 L. 367, holding person moving from Texas to Mexico prior to former's declaration of independence is an alien; *State v. Adams*, 45 Iowa, 101, 24 Am. Rep. 762, holding person remain-

ing in America after independence, acquires citizenship not lost by removal to Canada; *Trimbles v. Harrison*, 1 B. Mon. 143, 144, holding residence in Boston until long after peace is prima facie evidence of election to become American citizen; *Kilpatrick v. Sisneros*, 23 Tex. 126, holding persons removing from Texas shortly after independence did not forfeit citizenship. Approved in *Boyd v. Thayer*, 143 U. S. 163, 36 L. 110, 12 S. Ct. 382, holding Congress effected a collective naturalization of inhabitants upon admitting Nebraska into Union, *Lynch v. Clarke*, 1 Sandf. Ch. 680. Cited with approval in dissenting opinion, *Dred Scott v. Sandford*, 19 How. 577, 15 L. 772, majority holding that free negroes whose ancestors were slaves are not citizens of United States.

Alienage.—The right to inherit depends upon the existing state of allegiance at time of descent cast, p. 121.

Alienage.—The British rule is that American ante-nati by remaining in America after peace lost their character of British subjects; American rule is that by withdrawing from this country and adhering to British government they never acquired character of American citizens, p. 122.

Cited and followed in *Orser v. Hoag*, 3 Hill, 81, 82, 83, reviewing cases and holding A. and all his family who joined British forces and moved to Nova Scotia in 1782 were aliens. Cited generally in *Shanks v. Dupont*, 3 Pet. 245, 7 L. 667, holding removal of American woman with British husband to England in 1781, fixed her allegiance to British crown; *United States v. One Hundred Barrels of Cement*, 27 Fed. Cas. 294, holding citizens of rebellious States cannot sue in United States courts.

Allegiance.—In all revolutions like ours, inhabitants must have right of election as to their allegiance; and a minor owes allegiance to the country chosen by his father subject to his dissent at majority, pp. 121, 122.

Cited and relied upon in *Crane v. Reeder*, 25 Mich. 307, holding person residing in Detroit after peace and not declaring intent to remain British, became American; *McVeigh v. Bank*, 26 Gratt. 844, holding indorser of note did not waive right to notice by joining Confederate army; *Walker v. Beauchler*, 27 Gratt. 523, holding where creditor sold debtor's land during war, debtor being in Confederate lines could redeem at conclusion of hostilities; *Haymond v. Camden*, 22 W. Va. 196, holding void a proceeding by northern creditor against Confederate debtor pending the civil war.

Denied in *Calais v. Marshfield*, 30 Me. 518, holding child residing in United States with father after peace and removing to Canada at majority was still American citizen.

Citizenship.—Persons in United States at time of declaration of independence are presumed prima facie to have become citizens of

United States, but evidence is admissible to show their election was exercised otherwise, p. 123.

Cited with approval in *Tobin v. Walkinshaw*, McAll. 189, 190, F. C. 14,070, holding testimony is admissible to rebut presumption that citizen of Mexico remaining in California after cession is American citizen.

Citizenship.—A minor taken from this country before treaty of peace and continuing to live in British dominion after majority without dissent from election thus made for him, is a British subject, pp. 123-124.

Cited with approval and applied in *Jones v. McMasters*, 20 How. 20, 15 L. 810, holding woman taken as a child from Texas to Mexico before independence of former, is *prima facie* an alien; *Trimbles v. Harrison*, 1 B. Mon. 146, holding minor, taken to England in 1798 and there married to Briton, dissents from parents' election to be American; *Munro v. Merchant*, 28 N. Y. 34, holding minor child living at New York during war and moving to Canada before peace to join British father is an alien; *Hardy v. De Leon*, 5 Tex. 237, holding infant child of person residing in Texas at time of independence is entitled to rights of citizen. Approved in *Lynch v. Clarke*, 1 Sandf. Ch. 682.

Citizenship.—Allegiance may be dissolved by mutual consent of government and its citizens; government may release governed from allegiance, p. 125.

Approved and applied in *White v. Burnley*, 20 How. 250, 15 L. 890, holding recital in deed that grantor is citizen of Mexico does not establish alienage. Cited generally in *Comitis v. Parkerson*, 56 Fed. 558, 22 L. R. A. 150, and n., collecting cases.

Citizenship.—Person born in New York during British occupation of 1783, of royalist father, is born a British subject under protection of British government, and owing no allegiance to State of New York, p. 126.

Approved and applied in *McKay v. Campbell*, 2 Sawy. 128, F. C. 8,840, holding person born of British parents in Oregon during joint occupation, is not born under obedience to United States, and, therefore, not a citizen.

Statutes.—In cases depending upon State statutes, and more especially those respecting title to real property, Federal courts apply the construction applied by the State courts in like cases, pp. 127, 130.

Cited and followed in *Loring v. Marsh*, 2 Cliff. 492, F. C. 8,515, sustaining devise to charitable uses in consonance with practice of State court; *In re Wyllie*, 2 Hughes, 459, F. C. 18,112, collecting cases and deciding case under State bankruptcy law according to decision of highest State court.

Wills.— A right of entry to lands in adverse possession of another is devisable under New York statute, p. 128.

In writ of right, tenant can, under mise joined, set up title out of himself and in third person; writ of right brings into controversy the mere right of the parties to the suit and tenant may show that the other's right is inferior to that set up against him, p. 133.

Cited and followed, *Lyon's Heirs v. Mottuse*, 19 Ala. 465, holding plaintiff having superior title may recover without proving disseizin of ancestor; see also valuable note, 50 Am. Dec. 175, classifying States where writ of right is in use.

Writ of right.— On mise joined on the mere right, demandant, under count for entire right, may recover less quantity than the entirety, pp. 134, 135.

Wills.— Devise to chancellor of State of New York, the mayor and recorder, the president of chamber of commerce, etc., is not a devise to individuals but to the persons successively holding these offices, p. 146, per Story, J., dissenting.

Cited and approved, *Magill v. Brown*, 16 Fed. Cas. 423, holding "successors" is not always indispensable to vest interest by grant in successor of sole corporation.

Retrospective statutes.— State legislatures have no power to pass law divesting vested legal rights p. 154, per Story, J., dissenting.

Cited with approval in note, 5 Am. Dec. 315.

Citizenship.— Two things must concur to create citizenship — first, birth within dominions of sovereign, and second, birth within protection or obedience of sovereign, p. 155, per Story, J., dissenting.

Cited and followed, *Lynch v. Clarke*, 1 Sandf. Ch. 670, holding person born in New York in 1819, of alien persons, during temporary visit, is citizen of United States; *United States v. Wong Kim Ark*, 169 U. S. 660, 682, 42 L. 895, 902, 18 S. Ct. 461, 470, holding Chinese child born in United States of alien parents having permanent residence here is citizen of United States. Approved in opinion of Hathaway, J., 44 Me. 523, appendix.

Citizenship.— Children of enemies born in a place within dominions of another sovereign then occupied by them by conquest are still aliens, p. 156, per Story, J., dissenting.

Approved in *United States v. Wong Kim Ark*, 169 U. S. 660, 42 L. 895, 18 S. Ct. 461.

Citizenship.— Persons in United States at time of treaty of 1783, whether here or not at time of declaration of independence, are citizens of United States, p. 161, per Story, J., dissenting.

Approved in opinion of Davis, J., 44 Me. 579, appendix.

Citizenship.—Children, even of aliens, born in a country while parents are resident there under protection of the government, and owing temporary allegiance thereto, are subjects by birth at common law, p. 164, per Story, J., dissenting.

Cited approvingly, *United States v. Wong Kim Ark*, 169 U. S. 660, 42 L. 895, 18 S. Ct. 461, holding Chinese child born in United States of alien parents during permanent residence here is citizen.

Real property.—Party having mere right of entry upon lands of which he has been disseized could not, at common law, grant or assign the same, p. 176, per Story, J., dissenting.

Approved in *Campbell v. Point St. Works*, 12 R. I. 453, holding sheriff's sale of A.'s interest in property in adverse possession of B. is void.

Miscellaneous.—*Baring v. Erdman*, 2 Fed. Cas. 788, and *Magill v. Brown*, 16 Fed. Cas. 416, holding statutes in favor of public institutions and charities are to be liberally construed; *Tinker v. Van Dyke*, 1 Flip. 527, F. C. 14,058, erroneous.

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Federal Supreme Court has no jurisdiction in criminal cases to revise, reverse or affirm judgments of lower courts, p. 201.

Cited and followed in *In re Callicot*, 8 Blatchf. 91, F. C. 2,323, holding circuit judge has no power to review on habeas corpus judgment of conviction by Circuit Court; *United States v. Plumer*, 3 Cliff. 27, F. C. 16,055, denying application for writ of error from Circuit Court to Supreme Court in murder case. Approved in *United States v. McElroy*, 2 Mont. 496, interpreting statute giving appeal from District Court of territory. Approved in *Forsyth v. United States*, 9 How. 572, 13 L. 263, holding, however, under act of Congress, Supreme Court has appellate jurisdiction, civil and criminal, over territorial courts of Florida. Approved in dissenting

opinions in *Ex parte Lange*, 18 Wall. 185, 21 L. 882, majority discharging prisoner on ground that Circuit Court exceeded its authority in sentencing him twice; *Tennessee v. Davis*, 100 U. S. 283, 25 L. 657, majority holding, on division of Circuit Court, that trial of revenue official for murder may be transferred to Federal courts.

Habeas corpus.—Power to award writ is conferred on Federal Supreme Court by fourteenth section of judiciary act, p. 201.

Cited and holding affirmed and relied upon in *Ex parte Lange*, 18 Wall. 166, 21 L. 875, collecting cases, and holding writ will issue to determine whether Circuit Court has exceeded its authority; *Ex parte Siebold*, 100 U. S. 375, 25 L. 718, issuing writ to test constitutionality of election law under which prisoner was convicted; *Ex parte Des Rochers*, McAll. 73, F. C. 3,824, issuing writ at instance of litigant to determine legality of imprisonment of judge; *In re Kaine*, 14 Fed. Cas. 87. Cited generally in *In re Barry*, 136 U. S. 607, 34 L. 507, 42 Fed. 120, F. C. 1,059, note, on point that Federal courts have no powers other than those expressly conferred; *Electoral College of South Carolina*, 1 Hughes, 588, F. C. 4,336, issuing writ and discharging prisoners because acting in Federal capacity as election officers; *Seavey v. Seymour*, 3 Cliff. 443, F. C. 12,596, releasing minors enlisted in army from custody of military authorities; *State v. Neel*, 48 Ark. 288, 3 S. W. 633; *In re McDonald*, 16 Fed. Cas. 23. Cited, but without particular application of the rule, in *United States v. New Bedford, etc., Co.*, 1 Wood. & M. 408, F. C. 15,867, holding States may punish crimes jurisdiction over which has not been delegated to general government.

Habeas corpus.—Where court is satisfied, upon application for writ, that prisoner would be remanded upon the return, writ ought not to be awarded, p. 201.

This holding is affirmed and relied upon by the following citing cases: *Ex parte Milligan*, 4 Wall. 110, 18 L. 292, holding Circuit Court was justified in refusing writ when satisfied from prisoner's showing that he was rightfully detained; *Ex parte Royall*, 117 U. S. 250, 29 L. 871, 6 S. Ct. 739, and *In re Hacker*, 73 Fed. 467, affirming denial of writ by Circuit Court on ground that prisoner would be remanded on return of writ; *Ex parte Terry*, 128 U. S. 301, 32 L. 408, 9 S. Ct. 78, denying writ where it appears from petition that prisoner is rightfully held; *Iasigi v. Van de Carr*, 166 U. S. 394, 41 L. 1049, 17 S. Ct. 596, holding where prisoner is dismissed from consular service pending return to writ, it is not error to dismiss writ; *In re Barry*, 136 U. S. 601, 34 L. 505, 42 Fed. 116, F. C. 1,059, denying writ because petition shows prisoner would be remanded upon return of writ; *Ex parte Hill*, 38 Ala. 443, holding writ should be refused where petition itself shows judge applied to has not jurisdiction; *Bethuram v. Black*, 11 Bush, 632, sustaining demurrer to petition for writ; *Sims' Case*, 7 Cush. 292, refusing writ

upon consideration of petition; *State v. Dobson*, 135 Mo. 11, 36 S. W. 240, holding writ will not issue as of course where petition is insufficient; *Williamson's Case*, 26 Pa. St. 17, 67 Am. Dec. 379, considering legality of commitment upon application for writ. See also valuable note, 67 Am. Dec. 396; *Ex parte Vallandigham*, 2S Fed. Cas. 920, refusing writ to military prisoner where court knows it will not be obeyed. Cited generally in *In re Terry Contempt*, 13 Sawy. 460, quoting from opinion of Supreme Court in *In re Terry*, 128 U. S. 301, 32 L. 408, 9 S. Ct. 78; *In re Kaine*, 14 Fed. Cas. 87.

Habeas corpus.—In absence of laws prescribing use of this writ, inquiries as to its use at common law are pertinent, p. 201.

Cited approvingly, *Ex parte Kaine*, 3 Blatchf. 5, F. C. 7,597, holding New York decision under statute of that State regulating habeas corpus proceedings is no authority in Federal court; *Ex parte Randolph*, 2 Brock. 476, F. C. 11,558, discharging upon habeas corpus person detained under civil process as at common law; *Ex parte Des Rochers*, McAll. 74, F. C. 3,824, issuing writ at instance of litigant to determine legality of imprisonment of judge; *In re Barry*, 136 U. S. 620, 34 L. 511, 42 Fed. 129, F. C. 1,059, holding Circuit Court will pass on application for writ to determine custody of child according to common-law principles; *Peltier v. Pennington*, 14 N. J. L. 318, refusing the writ as unwarranted by the authorities; *In re Kaine*, 14 Fed. Cas. 88, and *In re Reynolds*, 20 Fed. Cas. 608, holding proceedings on habeas corpus are not controlled by State statutes, but by rules of common law. Cited generally in *In re Keeler*, Hemp. 308, F. C. 7,637; *King v. McLean Asylum*, 64 Fed. 347, 348, 21 U. S. App. 481, 26 L. R. A. 792, 793, and *United States v. Williamson*, 28 Fed. Cas. 689, on point that no law of United States prescribes cases in which writ shall issue; *In re McDonald*, 16 Fed. Cas. 25.

Judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case; it ends inquiry respecting the fact by deciding it, p. 202.

Approved in *Darden v. Lines*, 2 Fla. 571, holding pro forma decree by consent of parties is not a decision and no appeal lies; *Decatur v. Paulding*, 14 Pet. 600, 10 L. 610, concurring opinion, holding Supreme Court cannot review judgment of Circuit Court refusing mandate to secretary of navy. Cited, but without particular application of rule, in *Fraser v. Willey*, 2 Fla. 119, dissenting opinion.

Habeas corpus.—Court issuing writ can inquire into sufficiency of cause of commitment; but if it be judgment of court of competent jurisdiction, that in itself is sufficient cause, and court may not look beyond judgment, p. 202.

Cited with approval and rule applied in *Grignon v. Astor*, 2 How. 339, 11 L. 291, holding judgment cannot be attacked collaterally,

although it does not recite jurisdictional facts; *In re Metzger*, 5 How. 190, 12 L. 110, reviewing cases, and refusing writ to prisoner held by district judge for extradition; *In re Wilson*, 140 U. S. 583, 35 L. 516, 11 S. Ct. 873, denying writ to review proceedings resulting in indictment of prisoner after his conviction by Arizona District Court; *In re Martin*, 5 Blatchf. 310, F. C. 9,151, holding Circuit Court may require, in habeas corpus proceeding, evidence taken by commissioner to decide legality of detention; *In re Davison*, 22 Blatchf. 476, 21 Fed. 621, holding, in habeas corpus by person convicted by court-martial, only question is jurisdiction of that court-martial; *Ex parte Jenkins*, 2 Wall. Jr. 528, F. C. 7,259, discharging United States marshals illegally arrested and detained on warrants of justice of peace; *In re Jordan*, 49 Fed. 241, holding prisoner convicted by State court of competent jurisdiction cannot have errors of such court reviewed in Federal court on habeas corpus; *Ex parte Hill*, 38 Ala. 503, holding State court must reject application for writ when it appears prisoner is held by authority of Confederate States; *Ex parte Hubbard*, 65 Ala. 474, refusing writ to prisoner detained under judgment of city court of competent jurisdiction; *Cooper v. People*, 13 Colo. 371, 22 Pac. 801, 6 L. R. A. 442, concurring opinion, holding court has no authority to release prisoner committed by another court of concurrent jurisdiction; *Smith v. Hess*, 91 Ind. 429, collecting cases, and refusing on habeas corpus to review trial of prisoner held by conviction of court of competent jurisdiction; *Ex parte Holman*, 28 Iowa, 97, 98, 4 Am. Rep. 163, refusing in State court to release prisoners held by authority of Federal court; *Bell v. State*, 4 Gill, 305, 45 Am. Dec. 132, and *State v. Glenn*, 54 Md. 608, refusing to discharge prisoner held by judgment of competent court, although it be erroneous; *Fleming v. Clark*, 12 Allen, 195, refusing writ to prisoner convicted by Massachusetts Superior Court; *In re Ream*, 54 Neb. 669, 75 N. W. 24, denying writ to prisoner after trial and conviction in court of competent jurisdiction; *Ex parte Winston*, 9 Nev. 75, refusing to discharge prisoner convicted by justice of peace having jurisdiction of his offense; *State v. Towle*, 42 N. H. 542, reviewing cases and refusing to pass upon regularity of commitment for contempt by justice of peace; *Ex parte Bushnell*, 9 Ohio St. 183, remanding prisoner held by conviction in United States District Court; *Ex parte Ball*, 2 Gratt. 590, refusing to discharge slave after conviction as free man by competent court; *Ex parte Marx*, 86 Va. 44, 9 S. E. 477, refusing to consider insufficiency of evidence at trial of prisoner after conviction in competent court; *In re Osterhaus*, 18 Fed. Cas. 897, refusing writ to prisoner after conviction in territorial court.

Cited generally in *In re Barry*, 136 U. S. 604, 34 L. 506, 42 Fed. 118, F. C. 1,059, describing writ as one bringing in body of prisoner to be discharged if restraint is illegal; *In re Barry*, 136 U. S.

612, 34 L. 508, 42 Fed. 124, F. C. 1,059, holding, under habeas corpus act, Circuit Court has no power to determine between parents' right to infant child; *Yarbrough v. State*, 2 Tex. 521, holding in Texas appeal does not lie in habeas corpus proceedings from District to Supreme Court; *People v. Liscomb*, 60 N. Y. 566, 19 Am. Rep. 215; *Ex parte Davis*, 7 Fed. Cas. 47, *In re McDonald*, 16 Fed. Cas. 26, holding Federal courts may grant writ where prisoner is not held upon any formal commitment. Approved in dissenting opinion, *Hammond v. People*, 32 Ill. 472, majority holding appeal does not lie from decision of lower court in habeas corpus proceeding. Cited obiter in *Southworth v. United States*, 151 U. S. 185, 38 L. 121, 14 S. Ct. 276, holding, in action for services in drawing up warrants, it is immaterial whether persons arrested may be discharged on habeas corpus.

Judgments of court of record, whose jurisdiction is final, is conclusive on all the world, and cannot be reviewed by habeas corpus proceedings, pp. 202-203.

Cited and followed in *Grignon v. Astor*, 2 How. 339, 11 L. 291, holding where power of court to make order depends on certain facts, making of order is conclusive of facts; *In re Wilson*, 140 U. S. 583, 35 L. 516, 11 S. Ct. 873, refusing to review proceedings of grand jury indicting prisoner after his conviction by Arizona District Court; *In re Debs*, 158 U. S. 600, 39 L. 1108, 15 S. Ct. 912, refusing to review finding of Circuit Court as to fact of prisoner's disobedience of court's order; *In re Lennon*, 166 U. S. 553, 41 L. 1112, 17 S. Ct. 660, holding prisoner cannot show on habeas corpus that he is citizen of Michigan to release himself from injunction against him as citizen of Ohio; *Holmes v. Oregon*, etc., R. R., 9 Fed. 233, 7 Sawy. 386, holding finding of Probate Court, that it has jurisdiction by reason of intestate's residence, is conclusive; *Borden v. State*, 11 Ark. 540, 54 Am. Dec. 232, holding sheriff liable for failure to enforce order of court of competent jurisdiction; *In re Lybarger*, 2 Wash. 135, 25 Pac. 1077, denying writ to prisoner convicted by competent court.

Distinguished in *In re Wong Yung Quy*, 6 Sawy. 239, 47 Fed. 718, reviewing cases, and reviewing decision of State court claimed by prisoner to be in violation of Constitution and treaties of United States. See also discussion in note, 23 Am. St. Rep. 109.

Habeas corpus.—Imprisonment under judgment cannot be unlawful unless that judgment be absolute nullity; and it is not nullity if court has general jurisdiction of subject although it be erroneous, p. 203.

A number of citing cases affirm and apply this principle as follows: *In re Wilson*, 140 U. S. 583, 35 L. 516, 11 S. Ct. 873, refusing to grant writ to prisoner convicted by District Court of Arizona; *In re Delgado*, 140 U. S. 588, 35 L. 580, 11 S. Ct. 875, refusing on appeal

from order denying writ to consider any point save jurisdiction of imprisoning court; *In re Chapman*, 156 U. S. 215, 39 L. 402, 15 S. Ct. 332, refusing to issue writ to prisoner held by District of Columbia Supreme Court for failure to answer questions to United States Senate; *In re Bogart*, 2 Saw. 401, F. C. 1596, holding prisoner will not be discharged on habeas corpus unless court-martial holding him is acting outside of its jurisdiction; *Ex parte Ulrich*, 43 Fed. 663, holding Federal District Court has no authority to discharge prisoner convicted in State court of general jurisdiction; *Ex parte Hardy*, 68 Ala. 332, refusing to review on habeas corpus any question save jurisdiction of court committing prisoner; *Dover v. State*, 75 Ala. 41, denying writ where court committing had jurisdiction although reversible error appeared; *Borden v. State*, 11 Ark. 537, 54 Am. Dec. 228, holding sheriff liable for failure to enforce order of court of competent jurisdiction, regardless of error; *Ex parte Brandon*, 49 Ark. 144, 4 S. W. 452, refusing writ applied for, for purpose of reviewing conviction of prisoner by City Court of competent jurisdiction; *Ex parte Gibson*, 31 Cal. 627, remanding prisoner where judgment of conviction was erroneous but not void; *Kelly v. People*, 115 Ill. 589, 56 Am. Rep. 186, 4 N. E. 646, holding where prior conviction increases punishment of prisoner he cannot attack same for error; *Lowery v. Howard*, 103 Ind. 442, 3 N. E. 126, holding judgment erroneous for failure to call jury to decide penalty, cannot be assailed on habeas corpus; *Willis v. Bayles*, 105 Ind. 368, 5 N. E. 11, sustaining return to writ showing conviction by competent court not absolutely void; *McLaughlin v. Etchison*, 127 Ind. 476, 22 Am. St. Rep. 659, 27 N. E. 152, quashing writ where judgment of commitment is not shown to be void; *Platt v. Harrison*, 6 Iowa, 81, 71 Am. Dec. 391, refusing on habeas corpus to pass upon authority of city council to pass ordinance under which prisoner is held; *Elsner v. Shrigley*, 80 Iowa, 36, 45 N. W. 394, collecting cases, refusing to discharge prisoner although sentence is excessive; *Bell v. State*, 4 Gill. 305, 306, 45 Am. Dec. 132, 133, and *State v. Glenn*, 54 Md. 608, refusing to regard on habeas corpus, error of committing court; *Senott's Case*, 146 Mass. 492, 4 Am. St. Rep. 345, 16 N. E. 450, reviewing cases and refusing on habeas corpus to consider irregularities in sentence or trial; *State v. Dobson*, 135 Mo. 14, 36 S. W. 241, refusing on habeas corpus to permit attack upon conviction because of perjured testimony, etc.; *Ex parte Renshaw*, 6 Mo. App. 475, refusing to discharge prisoner held by competent court for contempt; *In re Thompson*, 9 Mont. 389, 23 Pac. 934, collecting cases and refusing to discharge prisoner on habeas corpus because of insufficiency of evidence at trial; *Ex parte Shaw*, 7 Ohio St. 82, 70 Am. Dec. 56, refusing to discharge prisoner on habeas corpus although sentence is excessive; *Ex parte Bond*, 9 S. C. 80, 81, 30 Am. Rep. 21, refusing to discharge convicted prisoner because sentence is erroneous; *Ex parte Hays*, 15 Utah, 80, 47 Pac. 613, refusing to discharge person con-

victed by competent court of record; *Ex parte Williams*, 1 Wash. Ter. 240, and *Ex parte Mooney*, 26 W. Va. 41, 53 Am. Rep. 63, refusing on habeas corpus to review trial of defendant in lower court.

Cited also in note, 23 Am. St. Rep. 108. Approved in *Ex parte Rollins*, 80 Va. 317, holding, however, judgment of conviction under unconstitutional statute is void; *State v. Mace*, 5 Md. 348, citing generally. Approved in dissenting opinion, *Ex parte Holman*, 28 Iowa, 177, majority holding writ will not issue because committing court had jurisdiction.

Habeas corpus.—Circuit Court of District of Columbia being court of record having general criminal jurisdiction, it has power to decide conclusively whether offense charged in indictment is legally punishable or not, and this constitutes exercise of jurisdiction, and its judgment will not be reviewed on habeas corpus, p. 203.

Cited approvingly to this point and principle applied as follows: *Rhode Island v. Massachusetts*, 12 Pet. 722, 9 L. 1259, holding decision of Supreme Court whether it has cognizance of action between two States is exercise of jurisdiction; *Decatur v. Paulding*, 14 Pet. 602, 10 L. 611, concurring opinion, refusing to review judgment of Circuit Court refusing to issue mandate to secretary of navy; *Ex parte Parks*, 93 U. S. 23, 23 L. 788, holding writ will not issue in favor of prisoner convicted of forgery by District Court; *Ex parte Yarbrough*, 110 U. S. 654, 28 L. 275, 4 S. Ct. 153, refusing to consider decision of Circuit Court that indictment conforms to criminal statute; *Ex parte Bigelow*, 113 U. S. 331, 28 L. 1007, 5 S. Ct. 544, refusing to review decision of District Supreme Court that certain proceedings did not constitute a putting in jeopardy; *In re Coy*, 127 U. S. 757, 758, 759, 32 L. 280, 281, 8 S. Ct. 1272, 1273, refusing to review conviction for election fraud by District Court having general jurisdiction over such offenses; *In re Wilson*, 140 U. S. 583, 35 L. 516, 11 S. Ct. 873, refusing to review proceedings of grand jury indicting prisoner after his conviction by District Court; *Noble v. Union, etc., R. R.*, 147 U. S. 174, 37 L. 127, 13 S. Ct. 274, holding decision of secretary of interior that defendant is not a railroad capable of taking grant is conclusive and cannot be attacked collaterally; *Holmes v. Oregon, etc., R. R.*, 7 Sawy. 387, 9 Fed. 233, holding decision of court that it has probate jurisdiction by reason of intestate's residence is conclusive; *Ex parte Perkins*, 29 Fed. 911, holding finding of commissioner that charge is sufficient to justify arrest is exercise of jurisdiction and is conclusive; *Evansville, etc., R. R. v. Evansville*, 15 Ind. 421, holding decision of council making subscription to railroad that petition is signed by requisite number of freeholders is conclusive; *English v. Smock*, 34 Ind. 134, holding where county commissioners may issue bonds when taxes are insufficient, finding of such officials as to such fact is conclusive on court; *Arnold v. Shields*, 5 Dana, 25, 30 Am. Dec. 675, holding, where law gives court jurisdic-

tion over suits for penalties, that court has power to decide legality of claim for such penalty; *State v. Sheriff*, 15 N. J. L. 71, refusing to release prisoner for debt after competent court has declared that he cannot be discharged as insolvent.

Approved in *Rhode Island v. Massachusetts*, 12 Pet. 718, 9 L. 1258, defining jurisdiction to be power to hear and determine subject-matter in controversy between parties to suit; *Grignon v. Astor*, 2 How. 338, 11 L. 291, defining jurisdiction; *In re Bogart*, 2 Sawy. 401, F. C. 1,596, refusing to discharge prisoner held by court-martial acting within its jurisdiction; *Le Roy v. Clayton*, 2 Sawy. 499, F. C. 8,268, defining jurisdiction as power to hear and determine; *Holmes v. Oregon, etc., R. R.*, 7 Sawy. 386, 9 Fed. 233, approving definition of jurisdiction; *Bush v. Glover*, 47 Ala. 174, enforcing default judgment of rebel court as exercise of jurisdiction; *Weston v. Lumley*, 33 Ind. 495, defining jurisdiction and holding it perjury to swear falsely as to user of road before county road commissioners; *In re McKibben*, 16 Fed. Cas. 212, 12 Bank Reg. 101, citing generally as example of allegation of quasi jurisdictional facts. Cited, *arguendo*, in *Cooper v. Sunderland*, 3 Iowa, 132, 66 Am. Dec. 63.

Distinguished in *Koehler v. Hill*, 60 Iowa, 566, 14 N. W. 750, holding finding of one session of legislature that prior session had approved constitutional amendment is not conclusive exercise of jurisdiction. Criticised in *Ex parte Degener*, 30 Tex. App. 574, 17 S. W. 1113, holding where court had jurisdiction of cause and parties, but had no jurisdiction to render the particular judgment, prisoners will be discharged.

Judgments of court of record having general jurisdiction are binding and of full force unless reversed regularly by superior court capable of reversing it, pp. 203-206.

A number of citing cases affirm and apply this doctrine, as follows: *Decatur v. Paulding*, 14 Pet. 604, 10 L. 612, concurring opinion refusing to review judgment of Circuit Court, refusing mandate to secretary of navy; *Galpin v. Page*, 1 Sawy. 319, F. C. 5,205, holding sale of lands under judgment of court cannot be collaterally attacked where same does not affirmatively show lack of jurisdiction; *Galpin v. Page*, 1 Sawy. 340, F. C. 5,205, holding judgment reversed as to one party only is law of case as to all others; *Reinach v. Atlantic, etc., Co.*, 58 Fed. 43, holding Circuit Court is bound by decree of State court in foreclosure of mortgage; *United States v. Debs*, 64 Fed. 739, holding error of Circuit Court does not justify disobedience of its injunction; *Berry v. State*, 65 Ala. 122, holding verdict of acquittal by court of competent jurisdiction bars further trial for same offense; *Cunningham v. Ashley*, 13 Ark. 672, and *Ashley v. Cunningham*, 16 Ark. 174, holding State court must proceed under mandate of Federal Supreme Court regardless of death of party pending appeal; *United States v. Burdick*, 1 Dak. Ter. 147, 46 N. W. 573, holding court will refuse habeas corpus where prisoner is de-

tained by conviction of another court of concurrent jurisdiction; Sessions v. Stevens, 1 Fla. 240, 46 Am. Dec. 340, holding judgment against garnishee cannot be collaterally attacked; Wilson v. Hayward, 6 Fla. 197, holding judgment of foreclosure cannot be attacked in collateral suit by second lien-holder by showing error; Anderson v. Wilson, 100 Ind. 407, refusing in collateral proceeding to look behind decree to see if complaint properly named parties; Webster v. Reid, Morris, 480, holding judgment obtained through unconstitutional law cannot be attacked collaterally; Wright v. Marsh, 2 G. Greene, 114, and Brace v. Reid, 3 G. Greene, 427, refusing to impeach, collaterally, judgment of partition by competent court; Hampson v. Weare, 4 Iowa, 16, 66 Am. Dec. 118, holding, judgment awarding execution cannot be reviewed by bill for injunction against such execution; Ex parte Holman, 28 Iowa, 103, 4 Am. Rep. 167, refusing to consider, on habeas corpus, irregularity of mandamus proceedings after judgment; McConologue's Case, 107 Mass. 171, holding person is not subject to military trial after adjudication by court of competent jurisdiction that he is not a soldier; Wales v. Lyon, 2 Mich. 281, holding discharge of defendant in bankruptcy is conclusive bar to plaintiff's action for debt; Laine v. Francis, 15 Mo. App. 108, holding judgment on promissory note subjecting certain property to sale is bar to further action against other property; Rolf v. Timmermeister, 15 Mo. App. 252, holding judgment of competent court directing sale of homestead cannot be collaterally attacked; Vantilburg v. Black, 3 Mont. 468, holding judgment against party failing to plead good defense is erroneous but not void; Young v. Rathbone, 16 N. J. Eq. 227, 84 Am. Dec. 153, refusing to allow sale confirmed by order of competent court to be assailed collaterally; Una v. Dodd, 39 N. J. Eq. 180, and People v. Sturtevant, 9 N. Y. 275, 59 Am. Dec. 544, collecting cases and holding party accused of contempt cannot defend by showing judgment he has violated is erroneous; Quesenberry v. Barbour, 31 Gratt. 500, refusing to allow judicial sale of trust estate to be assailed in collateral proceeding; Ferguson v. Tobey, 1 Wash. Ter. 277, holding, in action for malicious arrest, plaintiff must show judgment in criminal proceeding in his favor.

Approved in Lessee of Adams v. Jeffries, 12 Ohio, 271, 40 Am. Dec. 478, holding, however, record of court of special and limited jurisdiction must show jurisdiction affirmatively. Approved in dissenting opinion in May v. May, 7 Fla. 244. Cited, but without particular application of the rule, in Yates v. Houston, 3 Tex. 447; Holmes v. Jennison, 14 Pet. 628, 10 L. 627.

Distinguished in James v. Smith, 2 S. C. 187, holding attempt by superior court to punish, as contempt, disobedience of process of inferior court, is not binding. Criticised in Horan v. Wahrenberger, 9 Tex. 320, 58 Am. Dec. 147, holding decision of court of general jurisdiction may be shown to be void for lack of authority, in collateral proceeding.

Inferior courts defined.—All courts from which appeal lies are inferior courts in relation to the appellate courts before which their judgment may be carried, but they are not, therefore, inferior courts in technical sense, p. 205.

Cited approvingly in *Nugent v. State*, 18 Ala. 524, holding City Court, from whose judgments appeal lies to Supreme Court, is "inferior court" within meaning of Alabama Constitution; *La Croix v. County Comm.*, 49 Conn. 596, holding act creating board for revocation of liquor licenses is not inferior court within meaning of Constitution.

Courts inferior in the special and not the technical sense are courts of special, limited jurisdiction, whose judgments, taken alone, are disregarded and whose proceedings must show jurisdiction; United States courts are of limited jurisdiction and judgments are erroneous and reversible, if jurisdiction be not shown, but are not nullities, p. 205.

Cited with approval and doctrine followed in *Grignon v. Astor*, 2 How. 341, 11 L. 292, holding order of Michigan court of record need not recite facts conferring jurisdiction; *Harvey v. Tyler*, 2 Wall. 342, 17 L. 873, holding judgment of Virginia court of record declaring lands redeemed cannot be questioned collaterally; *Mosely v. Tuthill*, 45 Ala. 654, 6 Am. Rep. 720, holding sale under order of inferior court, void where record shows jurisdictional facts did not exist; *Busteed v. Parsons*, 54 Ala. 401, 25 Am. Rep. 693, holding jurisdiction of judge of superior court of general jurisdiction cannot be attacked in action against him for damages; *Ex parte Kearny*, 55 Cal. 215, holding Police Court is inferior court of limited jurisdiction and proceedings must show jurisdiction; *Hahn v. Kelly*, 34 Cal. 413, 94 Am. Dec. 755, holding presumption in favor of jurisdiction exists where record shows service of summons by publication; *Fox v. Hoyt*, 12 Conn. 497, 31 Am. Dec. 763, holding Justices' Court of Connecticut is court of general jurisdiction, whose proceedings import verity; *Chemung Canal Bank v. Judson*, 8 N. Y. 261, holding decree of Federal Circuit Court in bankruptcy is not void for failure to show jurisdiction upon record; *Lange v. Benedict*, 73 N. Y. 35, 29 Am. Rep. 94, holding judge of Federal Circuit Court is not liable for false imprisonment to party erroneously sentenced by him; *Vaughn v. Congdon*, 56 Vt. 124, holding Justice's Court is court of record whose judgment imports verity.

Approved in *Werz v. Werz*, 11 Mo. App. 35, holding judgment of divorce in State court is binding, although record fails to show jurisdiction; *In re Booth*, 3 Wis. 181, holding, however, prisoners must be discharged when record of Federal court affirmatively shows lack of jurisdiction. Cited in *Cooper v. Sunderland*, 3 Iowa, 129, 66 Am. Dec. 61, erroneously including principal case in enumeration of cases which do not distinguish between inferior and superior courts.

Judgments of courts of United States, although jurisdiction be not shown in pleadings, are yet binding on all the world, and apparent want of jurisdiction can avail party only on writ of error, p. 207.

Approved and applied by the citing cases, as follows: *Harvey v. Tyler*, 2 Wall. 342, 17 L. 873, holding judgment declaring land redeemed from forfeiture by Virginia court, given jurisdiction by statute, cannot be questioned collaterally; *Dowell v. Applegate*, 152 U. S. 339, 38 L. 468, 14 S. Ct. 616, reviewing cases and holding in suit to determine title to lands, a former decree of sale by Circuit Court, not appealed from, is conclusive and cannot be attacked collaterally; *Evers v. Watson*, 156 U. S. 533, 36 L. 523, 15 S. Ct. 433, refusing to set aside in collateral proceeding decree of Circuit Court not appealed from; *In re Lennon*, 166 U. S. 553, 41 L. 1112, 17 S. Ct. 660, where prisoner is confined for violation of injunction in action against him as citizen of Ohio, he cannot show on habeas corpus that he is citizen of Michigan; *Ex parte Lennon*, 64 Fed. 322, 22 U. S. App. 561, holding petitioner may not disregard injunction of Circuit Court although allegations of citizenship are defective. Cited generally in *Grignon v. Astor*, 2 How. 342, 11 L. 292.

Habeas corpus.—The Supreme Court having no power to revise decisions in criminal cases, by appeal or error, that power cannot be usurped by means of habeas corpus proceedings, p. 207.

This holding is affirmed and applied by the citing cases as follows: *In re Kaine*, 14 How. 119, 14 L. 351 (dismissing S. C., 14 Fed. Cas. 83), concurring opinion, holding court will issue writ only to revise decisions over which it has appellate control; *In re Kaine*, 14 How. 129, 14 L. 355 (dismissing S. C., 14 Fed. Cas. 83), concurring opinion, refusing to issue writ in favor of prisoner held by Federal commissioner for extradition; *Ex parte Parks*, 93 U. S. 23, 23 L. 788, denying writ to prisoner convicted of forgery by District Court from which error does not lie; *Ex parte Reed*, 100 U. S. 23, 25 L. 539, denying writ to naval officer convicted by court-martial; *Ex parte Crouch*, 112 U. S. 180, 28 L. 691, 5 S. Ct. 97, denying writ to prisoner detained by Virginia courts for violation of State statute, even though his defense is based on Constitution; *In re Callicot*, 8 Blatchf. 91, F. C. 2,323, holding circuit judge will not issue writ to review conviction of Circuit Court; *United States v. Shaw*, 39 Fed. 433, 3 L. R. A. 232, holding Federal courts have no power not expressly granted; *In re Barry*, 136 U. S. 607, 34 L. 507, 42 Fed. 120, F. C. 1,059, holding Federal courts have only powers specially conferred with necessary incidents; *In re Rowe*, 77 Fed. 166, 40 U. S. App. 516, collecting cases and denying writ applied for on ground of error of State court convicting prisoner; *People v. District Court*, 22 Colo. 428, 45 Pac. 404, refusing to review judgment upon

which prisoner is detained; *Ex parte Holman*, 28 Iowa, 97, 98, 4 Am. Rep. 163, refusing writ to prisoners held by authority of Federal court; see also valuable discussion in note, 26 Am. Dec. 47.

Approved in *Ex parte Wilson*, 114 U. S. 421, 29 L. 90, 5 S. Ct. 937, collecting cases and holding writ will issue where District Court exceeded its authority by convicting of infamous crime without indictment; *In re Coy*, 127 U. S. 756, 32 L. 280, 8 S. Ct. 1271, denying writ where prisoner was convicted of election fraud by court having jurisdiction over such crimes; *Ex parte Buskirk*, 72 Fed. 22, 25 U. S. App. 613, holding, however, prisoner detained by void judgment may be released on habeas corpus; *People v. Bradley*, 60 Ill. 400, holding authority to issue writ depends on nature of court's criminal jurisdiction; *In re Macdonald*, 16 Fed. Cas. 23, holding, however, Federal courts have jurisdiction where prisoner is not held by any formal commitment. Cited generally in *Grignon v. Astor*, 2 How. 342, 11 L. 292; *In re Barry*, 136 U. S. 613, 34 L. 509, 42 Fed. 125, F. C. 1,059, indicating that all cases of habeas corpus in Federal courts have been for relief against arrest under Federal authority. Cited also in the following dissenting opinions: *In re Kaine*, 14 How. 130, 14 L. 356 (dismissing S. C., 14 Fed. Cas. 83), majority holding writ will issue only in exercise of appellate jurisdiction; *Ex parte Wells*, 18 How. 329, 15 L. 431, majority affirming re-sentence of prisoner by Circuit Court after conditional pardon; *Ex parte Bradley*, 7 Wall. 382, 19 L. 220, majority issuing mandate to District Supreme Court to restore attorney illegally disbarred; *Ex parte Lange*, 18 Wall. 205, 21 L. 888, collecting cases, majority holding Circuit Court exceeded its authority in sentencing prisoner twice; *In re Neagle*, 135 U. S. 77, 34 L. 76, 10 S. Ct. 673, majority affirming decision of Circuit Court discharging prisoner charged with violation of Federal law from custody of State officers.

Limited in *In re Coy*, 127 U. S. 761, 32 L. 282, 8 S. Ct. 1274, dissenting opinion, majority refusing writ to prisoner convicted of election frauds by court having general jurisdiction over such offenses; *Van Buren v. United States*, 36 Fed. 80, citing in quotation from *In re Coy* and holding election fraud is offense against Federal law.

Court-martial is an inferior court of limited jurisdiction whose judgments may be questioned collaterally, p. 207.

Approved in *Runkle v. United States*, 122 U. S. 556, 30 L. 1170, 7 S. Ct. 1146; *Tyler v. Pomeroy*, 8 Allen, 485, holding person may recover damages against military authorities for unlawful impressment; also in note, 42 Am. Dec. 55.

Miscellaneous.—Erroneously cited in *Lampert v. Laclede, etc., Co.*, 14 Mo. App. 387, on point that military authorities are not liable for official acts. Cited also in *Ex parte Watkins*, 7 Pet. 568, 8 L. 786, a second application for writ by same prisoner; *In re*

Kaine, 14 How. 132, 14 L. 357, approving the interpretation of other cases on subject of habeas corpus. Miscited in Orser v. Hoag, 3 Hill, 83; Poole v. Nixon, 19 Fed. Cas. 995.

3 Pet. 210-221, 7 L. 655, **BOYCE v. GRUNDY**.

Equity jurisdiction.—The sixteenth section of Judiciary Act of 1789 prohibiting equity suits where there is remedy at law, is merely declaratory and makes no alteration in rules of equity on subject of legal remedy, p. 215.

Cited and this holding relied upon in Wehrman v. Conklin, 155 U. S. 323, 39 L. 172, 15 S. Ct. 132, holding State statute enlarging equity jurisdiction can be enforced in Federal courts provided there is no complete and adequate remedy at law; Baker v. Biddle, 1 Bald. 403, F. C. 764; Pittsburgh, etc., Co. v. Keokuk, etc., Co., 68 Fed. 20, 46 U. S. App. 530; Hempstead v. Watkins, 6 Ark. 357, 42 Am. Dec. 702, holding, under similar State statute, courts of law and chancery have a concurrent jurisdiction; Woodman v. Freeman, 25 Me. 541, dismissing bill under State statute denying jurisdiction when legal remedy exists. Approved in Whittlesey v. H., P. & F. R. R., 23 Conn. 431, holding, however, State statute conferring equity jurisdiction must be construed otherwise.

Equity.—In order to bar jurisdiction of Federal courts in equity, there must not only be a remedy at law, but it must also be plain and adequate, and as practical and efficient to the ends of justice as the remedy in equity; where an agreement procured by fraud is of a continuing nature, equity will decree its rescission to prevent a multiplicity of suits, though there is a remedy at law, p. 215.

A large number of citing cases affirm and rely upon this ruling. Those in the Supreme Court are: Barber v. Barber, 21 How. 591, 16 L. 229, holding District Court has jurisdiction over suit to enforce decree for alimony; Parker v. Winnipiseogee, etc., Co., 2 Black, 551, 17 L. 337, dismissing bill to enjoin nuisance where plaintiff had not established his right by action at law; Watson v. Sutherland, 5 Wall. 78, 18 L. 582, enjoining wrongful levy upon plaintiff's property to his irreparable injury; Payne v. Hook, 7 Wall. 430, 19 L. 262, enjoining fraudulent administration of estate where legal action on bond is inadequate; Morgan v. Beloit, 7 Wall. 618, 19 L. 205, entertaining bill by bondholder to enforce payment of bond by city and town where mandamus is inadequate; Insurance Co. v. Bailey, 13 Wall. 621, 20 L. 503, refusing to cancel insurance policy for fraud where latter is good defense at law; Oelrichs v. Spain, 15 Wall. 228, 21 L. 44, entertaining bill for damages on injunction bonds to save time, expense and multiplicity of suits; Lewis v. Cocks, 23 Wall. 470, 23 L. 71, dismissing bill for recovery of land where there is no proof of fraud to make legal remedy inadequate; Buzard

v. Houston, 119 U. S. 352, 30 L. 454, 7 S. Ct. 252, dismissing bill for damages where like amount might be recovered at law for deceit, and remarking that in principal case the ground of jurisdiction was multiplicity of suits; Drexel v. Berney, 122 U. S. 252, 30 L. 1222, 7 S. Ct. 1204, holding in suit for enforcement of equitable estoppel, where it is uncertain if defense will be available at law, bill should not be dismissed; Allen v. Hanks, 136 U. S. 311, 34 L. 418, 10 S. Ct. 965, granting relief to married woman to free her separate property from levy for husband's debts; Tyler v. Savage, 143 U. S. 95, 36 L. 89, 12 S. Ct. 345, entertaining suit in equity against directors of corporation where discovery, account, etc., is necessary to relief; Davis v. Wakelee, 156 U. S. 688, 39 L. 584, 15 S. Ct. 558, entertaining bill to enforce equitable estoppel where it is uncertain whether such defense is available at law; Rich v. Braxton, 158 U. S. 406, 39 L. 1032, 15 S. Ct. 1017, annulling deeds to real estate which are not void on their face; United States v. Union Pac. Ry., 160 U. S. 51, 40 L. 337, 16 S. Ct. 209, entertaining bill to enforce rights of government where mandamus would not afford complete relief; Walla Walla v. Walla Walla W. Co., 172 U. S. 12, entertaining bill to enjoin city from erecting water works in violation of contract.

Those in the inferior Federal courts are as follows: Hay v. Alexandria, etc., Co., 1 Hughes, 172, F. C. 6,254, entertaining bill to enforce judgments satisfied by mistake, legal remedies being inadequate; Plummer v. Conn, etc., Co., 1 Holmes, 270, F. C. 11,232, enjoining prosecution of actions at law, defenses to which are only available in large number of actions; Baker v. Biddle, 1 Bald. 408-420, F. C. 764, dismissing bill for account where account was already received and might be enforced at law; Bunce v. Gallagher, 5 Blatchf. 487, F. C. 2,133, declaring void a forged deed; Bischoffsheim v. Baltzer, 22 Blatchf. 283, S. C. 20 Fed. 891, entertaining bill to set aside sale, rectify accounts and recover amount due; Colgate v. Companie, etc., 23 Blatchf. 91, S. C., 23 Fed. 85, applying rule to bill of discovery in aid of action at law; Crane v. McCoy, 1 Bond, 427, F. C. 3,354, refusing to dissolve injunction where law officers were in conflict over possession of copyrighted book; Pierpont v. Fowle, 2 Wood. & M. 29, 31, F. C. 11,152, applying rule to bill for disclosure and account of sales of copyrighted book; Foster v. Swasey, 2 Wood. & M. 221, F. C. 4,984, entertaining bill for relief against fraud where discovery of facts is asked for; United States v. Myers, 2 Brock. 525, F. C. 15,844, refusing to dismiss bill by United States to subject trust funds to payment of debts due; Hunt v. Danforth, 2 Curt. 603, F. C. 6,887, applying rule to bill by feme covert to enforce trust in her favor for her sole use; U. S. v. Parrott, 1 McAll, 288, F. C. 15,998, holding Circuit Court has jurisdiction over bill for injunction to restrain working of mine until title thereto is finally determined;

Spring v. Domestic S. M. Co., 13 Fed. 449, dismissing bill where no ground for equitable relief is shown save naked account for profits and damages; Barthet v. New Orleans, 24 Fed. 567, granting injunction pendente lite against municipality threatening to enforce void ordinance to plaintiff's irreparable injury; Mann v. Appel, 31 Fed. 381, applying rule where A. fraudulently transfers to B. to avoid debts and remedy by garnishment is not full; Smythe v. Henry, 41 Fed. 715, enjoining ejectment and cancelling void deeds regular upon their face; Preteca v. Maxwell L. G. Co., 50 Fed. 676, 4 U. S. App. 326, quieting title and restraining trespasses to plaintiff's irreparable injury; Leighton v. Young, 52 Fed. 443, 10 U. S. App. 298, 18 L. R. A. 271, and n., enjoining execution of writ of possession until accounting of rents, profits and improvements; Foltz v. St Louis, etc., Ry., 60 Fed. 322, 19 U. S. App. 576, enjoining ejectment where defense to same is not complete remedy against ejector's claims; Arthur v. Oakes, 63 Fed. 328, 24 U. S. App. 239, 25 L. R. A. 433, and note, enjoining railroad strikes threatening irreparable injury to property; Gunn v. Brinkley Car, etc., Co., 66 Fed. 384, 27 U. S. App. 779, entertaining bill in equity for an account too long, confused, and complicated for action at law; Lasher v. McCreery, 66 Fed. 843, entertaining bill to remove cloud from title where remedy at law was only by multiplicity of suits; Society of Shakers v. Watson, 68 Fed. 738, 37 U. S. App. 141, holding equity has jurisdiction over suit on note executed on behalf of unincorporated society of one hundred members; Hayden v. Thompson, 71 Fed. 63, 36 U. S. App. 361, entertaining bill by receiver of insolvent national bank to recover from shareholders sixteen illegal dividends; Waite v. O'Neil, 72 Fed. 355, 356, entertaining bill for specific performance of lease; Western Assur. Co. v. Ward, 75 Fed. 342, 41 U. S. App. 443, entertaining bill to reform insurance policy in accord with agreement between parties; Springfield M. Co. v. Barnard, etc., Co., 81 Fed. 265, 49 U. S. App. 447, entertaining cross bill to cancel lien and for damages where legal remedy is not efficient; Nashville, etc., Ry. v. M'Connell, 82 Fed. 70, enjoining brokers from selling railroad tickets, the legal remedy being only by large number of suits; Cockrill v. Cooper, 86 Fed. 14, 57 U. S. App. 590, entertaining bill by receiver against sixteen directors of bank for excessive loans; Bank of Kentucky v. Stone, 88 Fed. 391, entertaining bill to enjoin collection of tax where legal remedy is inadequate; Alger v. Anderson, 92 Fed. 709, affirming rule in elaborate review of authorities.

In the State courts the following indorse and rely upon the syllabus rule: Waldron v. Simmons, 28 Ala. 632, holding statute enlarging jurisdiction of law courts without restrictive words, confers concurrent but not exclusive jurisdiction; Lide v. Hadley, 36 Ala. 635, 76 Am. Dec. 342, entertaining bill to establish right-of-way over defendant's land since recovery at law gave no security for

future; *Smith v. Cockrell*, 66 Ala. 75, entertaining bill to set aside fraudulent conveyances of judgment debtor because of inadequacy of legal remedy; *Hempstead v. Watkins*, 6 Ark. 361, 42 Am. Dec. 706, enjoining judgment at law where legal defense was rendered inadequate by loss of paper by sheriff; *New London Bank v. Lee*, 11 Conn. 121, 27 Am. Dec. 717, applying rule to bill to subject property to payment of debts where legal remedy is execution on uncertain equity of redemption; *Ferguson v. Fisk*, 28 Conn. 511, enjoining action at law on draft valid on its face; *Riddle v. Kellum*, 8 Ga. 379, compelling life tenant and assigns to give bond for delivery of property to reversioner, the legal remedy existing only in future; *Hollingshead v. McKenzie*, 8 Ga. 459, cancelling deed given for surrender of three notes, said notes not having been surrendered but sued upon; *English v. Smock*, 34 Ind. 124, 7 Am. Rep. 222, enjoining issuance of illegal county bonds at suit of taxpayer of county; *Lockwood Co. v. Lawrence*, 77 Me. 312, 52 Am. Rep. 772, enjoining nuisance since law affords no preventive remedy; *Refining Co. v. Campbell Co.*, 83 Md. 56, 34 Atl. 372, applying rule to bill to cancel contracts procured by fraud; *Holden v. Hoyt*, 134 Mass. 185, enjoining sale of mortgaged property by holder of note and mortgage under fraudulent transfer; *Mack v. Doty*, Har. Ch. (Mich.) 369, relieving against judgment at law where defense was lost by death of witness after plaintiff's delay; *McKinney v. Curtiss*, 60 Mich. 621, 27 N. W. 696, applying rule where defendant has stolen note from plaintiff and has had her claim allowed by payor's administrator; *Irwin v. Lewis*, 50 Miss. 368, restraining sale of homestead under legal process; *Richardson v. Brooks*, 52 Miss. 124, applying rule to bill to cancel deeds fraudulently procured by administrator in probate proceedings; *Iron Co. v. McDonald*, 61 Mo. App. 570, entertaining creditor's bill to subject funds in hands of trustee to payment of claim; *Merchants' Bank v. Greenhood*, 16 Mont. 436, 41 Pac. 262, setting aside transfer of property in fraud of attaching creditor; *Culver v. Rodgers*, 33 Ohio St. 545, enjoining permanent trespasses on land of plaintiff; *Schwan v. Kelly*, 173 Pa. St. 73, 33 Atl. 1108, entertaining bill to rescind sale of land and obtain reimbursement of money paid therefor; *Kerr v. Woolley*, 3 Utah, 464, 24 Pac. 854, restraining collection of taxes under void levy; *Cattle Co. v. Chipman*, 13 Utah, 471, 45 Pac. 352, restraining continuing trespasser to plaintiff's irreparable injury; *Penn v. Ingles*, 82 Va. 72, restraining action at law to which defendants have purely equitable defense; *Byron v. May*, 2 Pinn. 446, holding equity affords more adequate remedy for foreclosure of mortgage; *Gullickson v. Madsen*, 87 Wis. 23, 57 N. W. 966, applying rule to creditor's bill to subject funds held by trustee to payment of debt; *Ruggles v. Southern, etc., Co.*, 20 Fed. Cas. 1330, holding where mortgagor holds legal title and agrees upon default to surrender possession, equity will enforce such covenant; In re

Sabin, 21 Fed. Cas. 124, holding bankruptcy court will detain fund pending suit between adverse claimants.

Approved in *Sullivan v. Portland, etc., R. R.*, 94 U. S. 811, 24 L. 326, holding remedy at law is not adequate where plaintiffs are entitled to discovery and account; *Yeatman v. Bradford*, 44 Fed. 538, dismissing bill to remedy errors in decree of partition since remedy at law is complete; *Walker v. Brown*, 58 Fed. 27, dismissing bill to enforce alleged lien on bonds, there being no grounds for equity jurisdiction; *Smith v. American Nat. Bank*, 89 Fed. 838, holding owner of mere equitable interest cannot sue at law for conversion; *McGowen v. Young*, 2 Stew. & P. 178, note; *Turner v. Althaus*, 6 Neb. 67, holding, however, remedy at law is adequate to recover back taxes illegally levied. Cited generally in *Pierpont v. Fowle*, 2 Wood. & M. 32, F. C. 11,152; *Gowdy v. Green*, 69 Fed. 866, collecting cases. Cited, arguendo, in *Brown v. Kalamazoo Cir. Judge*, 75 Mich. 278, 13 Am. St. Rep. 441, 42 N. W. 828, 5 L. R. A. 228, and n. Approved in dissenting opinion, *Coulson v. Harris*, 43 Miss. 772, majority holding taxpayer has remedy at law if excessive taxes are collected.

Fraud.—Party seeking to rescind contract on ground of fraud must be prompt in communicating the fraud when discovered and consistent in notice to opposite party of the use he intends to make of the discovery, p. 215.

Cited and principle applied as follows: *Elminger v. Drew*, 4 McLean, 394, F. C. 4,416, holding party defending action on note on ground of fraud must aver offer to rescind contract in which note was given; *Ferson v. Sanger*, 1 Wood. & M. 148, F. C. 4,752, refusing relief to grantee of land after six years of enjoyment without complaint; *Foster v. Gressett*, 29 Ala. 395, holding bringing suit for relief against fraud one year after discovery and four years after sale is reasonably prompt; *Pierce v. Wilson*, 34 Ala. 604, holding efforts to sell patented article by purchaser of territorial rights for two years after discovery is not waiver of right to rescind for fraud of patentee; *Edmunds v. Myers*, 16 Ill. 212, and *Edmunds v. Hildreth*, 16 Ill. 216, where the court in both cases refused to rescind sale of patent rights where bill did not show that vendee acted promptly on discovery of fraud; *Cain v. Guthrie*, 8 Blackf. 410, denying rescission after delay of four years from date of contract; *Jones v. Disbrow*, Harr. Ch. (Mich.) 104, dismissing vendee's bill to rescind after several months delay after notice of fraud; *Street v. Dow*, Harr. Ch. (Mich.) 429, holding where vendor negotiated notes given for purchase price he cannot refuse to convey land although notes are not properly indorsed; *Carroll v. Rice*, Walk. Ch. (Mich.) 378, refusing to rescind contract of sale where several years have elapsed after notice of fraud.

Distinguished in *Coe v. Lindley*, 32 Iowa, 443, holding where

fraud is pleaded in defense to action for purchase price, vendee need not give notice of fraud.

Rescission.—Quære whether in action to rescind contract for fraud concerning title, if vendor is able to make title when bill is filed and so answers, rescission will be granted for failure to make title at time agreed, there being no proof of loss from want of title meanwhile, p. 216.

Approved and applied in *Travelers' Ins. Co. v. Redfield*, 6 Colo. App. 197, 40 Pac. 198, refusing rescission where vendor tenders good deed before final decree; *Davidson v. Moss*, 5 How. (Miss.) 687, denying rescission where vendor clears title by procuring discharge of incumbrances.

Denied in *Kiefer v. Rogers*, 19 Minn. 41, rescinding sale for fraud although vendor offers to discharge mortgage which incumbers title.

Fraudulent representation.—A promise to convey title in four years amounts to representation that promisor would be able to make title at that time, p. 217.

Approved and applied in *Liddell v. Sims*, 9 Smedes & M. 610, rescinding contract for failure of vendor to make title although answer denied making of false representations.

Fraud — Notice of facts sufficient to put upon inquiry.—Vendee has a right to rely upon positive assurances of vendor and is not put upon inquiry by information from another which is not so full and decided as to amount to communication of knowledge, p. 218.

Cited and followed, *Sellar v. Clelland*, 2 Colo. 545, holding, in action for deceit, plaintiff is entitled to rely on positive assertions concerning trail in uninhabited country; *Sears v. Hicklin*, 13 Colo. 153, 21 Pac. 1025, rescinding sale where vendor relied on false representations of vendee, not knowing of falsity.

Fraud — False representations.—Reducing an agreement to writing does not preclude recurrence to prior representations; it is an argument against fraud but is not conclusive; a written agreement may be relieved against on ground of false suggestions, p. 219.

Cited and followed in *Kennedy v. Kennedy*, 2 Ala. 589, holding written contract may not be varied by parol evidence unless foundation is laid by proof of fraud; *Foss v. Newbury*, 20 Or. 265, 25 Pac. 672, holding vendee may plead damages from fraud as set-off although contract of sale was written; *Day v. New England Co.*, 7 Fed. Cas. 255, 257, holding, in suit for infringement of patent, patentee may show assignment of patent to be void for fraud. Approved in *Farrar v. Churchill*, 135 U. S. 621, 34 L. 251, 10 S. Ct. 775, refusing, however, to set aside deed, where fraud was not clearly proved.

Distinguished in *Hair v. La Brouse*, 10 Ala. 555, refusing to vary written contract where misrepresentations relied on do not relate to article sold, but to medium of payment.

Fraud.— Although misrepresentation be of personal character, not such as to necessitate the avoidance of a contract, and susceptible of compensation by jury, still the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation or absolution, p. 220.

This proposition is affirmed and rule applied in *Kennedy v. Kennedy*, 2 Ala. 603, setting aside deed for fraud in preference to allowing damages; *Coffee v. Newsom*, 2 Ga. 460, setting aside sale of lands for fraud in preference to awarding damages; *Kiefer v. Rogers*, 19 Minn. 43, granting rescission of sale for fraud although vendor offers to discharge existing incumbrances on title; *McKensie v. Hamilton*, Dall. (Tex.) 463, holding bill for rescission of contract is not demurrable because facts show fraud is susceptible of compensation; *Bunne v. Stoddard*, 4 Fed. Cas. 679, setting aside deeds of land from heirs to administrator, procured by latter's fraud.

Fraud — Rescission.— Where vendor's misrepresentations add one-third or one-half to cost of land it is not a case for mere compensation, and there is no controlling necessity to leave party to his remedy at law, p. 221.

Approved and applied in *Allen v. Bratton*, 47 Miss. 130, rescinding sale of lands for vendor's fraudulent representations. Cited generally in *Baker v. Biddle*, 1 Bald. 409, F. C. 764.

Miscellaneous.— *Holmes v. Jennison*, 14 Pet. 628, 10 L. 628, citing as example of form of judgment on appeal; *Baker v. Biddle*, 1 Bald. 416, F. C. 764, cited as example where objection to jurisdiction is made after decree pro confesso, reference and report of master; *Bailey v. Jordan*, 32 Ala. 53, erroneously citing case on point that sale will be rescinded although vendor made misrepresentations under honest mistake.

3 Pet. 222-241, 7 L. 659, *PATAPSCO INS. CO. v. COULTER*.

Barratry.— Fraud upon the owners, including departure from instructions and violation of law, constitutes barratry, p. 232.

This definition is approved and followed in *Compania La Flecha v. Brauer*, 168 U. S. 124, 42 L. 407, 18 S. Ct. 17, holding wrongful jet-tison of sound cattle by master of steamboat is not barratry; *Atkinson v. Great Western Co.*, 65 N. Y. 550, 551, holding question whether wrongful stowage of cargo on deck constitutes barratry is for jury; *Lawton v. Sun Ins. Co.*, 2 Cush. 512, holding insurer liable for loss produced by master's fraudulent acts; *Williams v. Sylph*, 29 Fed. Cas. 1408, holding carrying off vessel to port of foreign State after owner's death is barratry. Cited generally in *Joy v. Allen*, 2 Wood-

& M. 320, F. C. 7,552, on point that owners may insure against barratry. See also 4 Am. Dec. 487, note.

Barratry.—Gross negligence of master in failing to protect his vessel from peril is evidence of barratry, p. 234.

Cited approvingly in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 426, 12 L. 500, holding carrier liable for loss of freight through negligence of master and crew; *Atkinson v. Great Western Co.*, 65 N. Y. 538, 540, holding jury must decide whether wrongful stowage of cargo on deck constitutes barratry.

Marine insurance.—Many instances of non-feasance by master involve misfeasance and discharge insurer because they violate implied duties and produce increase of risk, p. 235.

Cited and relied upon in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 429, 12 L. 502, holding carrier liable for loss of freight though no force or direct injury occur; *McDowell v. General, etc., Co.*, 7 La. Ann. 685, 56 Am. Dec. 621, denying recovery for loss due to master's neglect to employ a pilot.

Marine Insurance.—Where policy covers risk of barratry and fire, and the latter is the proximate cause of loss, it is no defense that negligence of master was remote cause, p. 236.

This holding is affirmed and applied in the following citing cases: *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517, 9 L. 517, holding insurers liable for loss by fire regardless of negligence of insured; *Sherwood v. General, etc., Ins. Co.*, 1 Blatchf. 255, F. C. 12,776, holding insurers liable for loss by collision through master's neglect; *Williams v. Suffolk Ins. Co.*, 3 Sumn. 276, F. C. 17,738, holding insurer liable for loss by capture by foreign country regardless of master's neglect; *Levi v. New Orleans Ins. Assn.*, 2 Woods, 66, F. C. 8,290, allowing recovery for collision caused by pilot's carelessness; *Phoenix Ins. Co. v. Erie, etc., Co.*, 10 Biss. 34, F. C. 11,112, holding where cargo is lost by carrier's negligence, and insurer pays loss, latter cannot recover from carrier; *Stephens v. Southern Pac. Co.*, 109 Cal. 94, 50 Am. St. Rep. 23, 41 Pac. 786, 29 L. R. A. 755, sustaining clause in lease that lessor shall not be liable for fires caused by negligence of lessor's servants; *Schultz v. Pac. Ins. Co.*, 14 Fla. 107, holding insurer liable for loss by stranding although caused by master's neglect; *Henderson v. Western, etc., Co.*, 10 Rob. (La.) 166, 43 Am. Dec. 178, holding evidence of negligence of insured is irrelevant in action on fire policy; *Copeland v. New England, etc., Co.*, 2 Met. 450, holding insurers are not discharged by neglect of mate to assume charge upon master's incapacity; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 496, 54 Am. Dec. 779, collecting cases, and allowing recovery for loss by collision occasioned by negligence of master and crew; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 716, 717, 720, 41 Am. Dec. 665, 666, 671, reviewing cases and allowing recovery for loss by fire caused by

carelessness of workmen repairing boat; *Gates v. Madison Co.*, 5 N. Y. 478, 55 Am. Dec. 368, collecting cases and holding negligence of assured no defense to action for loss from fire; *American Ins. Co. v. Bryan*, 26 Wend. 583, 37 Am. Dec. 283, holding, in action on policy for loss by theft, assured need not prove diligence of master; *Admr. of Perrin v. Protection Ins. Co.*, 11 Ohio, 170, 38 Am. Dec. 730, holding negligence of assured is no defense to action for loss by explosion of steamboat's boilers; *Street v. Augusta Ins. Co.*, 12 Rich. L. 18, 75 Am. Dec. 716, holding insurer liable for loss by collision although caused by negligence of master of insured vessel. See also collection of cases in note, 45 Am. Dec. 661, and valuable discussion in note, 36 Am. St. Rep. 852. Rule extended in *Waters v. Merchants, etc., Co.*, 11 Pet. 224, 9 L. 696, S. C., 1 McLean, 280, F. C. 17,266, holding negligence of master is no defense, although barratry is not insured against; *Orient Ins. Co. v. Adams*, 123 U. S. 73, 31 L. 66, 8 S. Ct. 71, granting recovery for loss by negligence of master although there was no insurance against barratry.

Approved in *Williams v. New England, etc., Co.*, 3 Cliff. 248, F. C. 17,731, holding, however, where loss is direct result of wrongful act of insurer's agent, recovery is barred; *Mathews v. Howard Ins. Co.*, 11 N. Y. 21, concurring opinion, holding, however, insurers are not liable for damages assessed upon insured vessel because of collision with another; *Hillier v. Allegheny Co.*, 3 Pa. St. 473, 45 Am. Dec. 656, holding, however, insurer against fire is not liable for loss by removal of goods under reasonable fear of fire; dissenting opinion, *McDowell v. General, etc., Co.*, 7 La. Ann. 691, 56 Am. Dec. 629, majority holding neglect of master to employ pilot excused insurer from payment of loss. Cited, but without particular application of the rule, in *Potter v. Suffolk Ins. Co.*, 2 Sumn. 200, F. C. 11,339.

Distinguished in *Augusta, etc., Co. v. Abbott*, 12 Md. 378, holding deviation by master of vessel avoids policy of insurance on cargo; *Natchez Ins. Co. v. Stanton, etc., Co.*, 2 Smedes & M. 379, 41 Am. Dec. 598, denying recovery where master was guilty of voluntary deviation.

Marine insurance.—Loss of profits is insurable interest, and where profits as well as cargo are insured, no proof of loss of profits is necessary otherwise than by loss of cargo, pp. 239-241.

Cited to this point in *Alsop v. Commercial Ins. Co.*, 1 Sumn. 469, 474, F. C. 262, granting recovery for full amount of insurance of profits without proof of quantum of loss; *Insurance Co. v. Canada Sugar, etc., Co.*, 87 Fed. 492, holding where total loss of profits is insured against, there can be no recovery if any part of cargo is saved.

Miscellaneous.—*Holmes v. Jennison*, 14 Pet. 628, 10 L. 628, citing as example of form of judgment, note, 2 Am. Dec. 143.

3 Pet. 242-268, 7 L. 666, SHANKS v. DUPONT.

Citizenship.— Birth in South Carolina before Revolution, and residence there until 1782, constitute a woman a citizen of that State by election, p. 245.

Cited to this point in *Boyd v. Thayer*, 143 U. S. 163, 36 L. 110, 12 S. Ct. 382, holding Congress may effect collective naturalization by treaty or statute; *Miller v. Gould*, 38 Ga. 477, holding persons in Georgia adhering to Federal government during war are entitled to its protection.

Citizenship.— Children born in a country, continuing while under age in father's family, partake of his national character as citizen of that country, p. 245.

Ruling approved and relied upon in *United States v. Ward*, 14 Sawy. 475, S. C., 42 Fed. 322, holding son of negro father and Indian mother follows father's condition and is not an Indian; *Ex parte Reynolds*, 5 Dill. 403, F. C. 11,719, where paternal grandfather of Indian woman was United States citizen, held woman and her father are also. Approved in *Campbell v. Wallace*, 12 N. H. 371, 37 Am. Dec. 224, collecting cases.

Allegiance.— The capture and possession of Charleston by British did not effect a permanent change of allegiance of inhabitants; that could only be done by treaty of peace or permanent conquest, p. 246.

Rule approved and applied in *United States v. Huckabee*, 16 Wall. 434, 21 L. 464, holding title to iron works captured by United States from Confederacy vested in former only at end of war.

Alienage.— Feme citizen does not become an alien by marriage with an alien, although the latter be an enemy of this country, p. 246.

See discussion in valuable note on "Who are Aliens," 84 Am. Dec. 212.

Denied in *Pequignot v. Detroit*, 16 Fed. 213, 216, holding above rule is changed by act of Congress of February 10, 1855, an American woman marrying French citizen becomes herself French citizen.

Allegiance.— Where feme citizen moves to England with her alien husband in 1782, and lived there till death, her allegiance was fixed to England, her election, and by treaty of peace of 1783, p. 247.

Cited with approval and applied, *Alsberry v. Hawkins*, 9 Dana, 180, 33 Am. Dec. 549, holding removal from United States of both husband and wife and his expatriation are at least prima facie evidence of her alienage; *Trimbles v. Harrison*, 1 B. Mon. 146, holding daughter of American citizen, born a British subject, who moves to England and marries, is an alien. Cited generally in *United States v. Rhodes*, 1 Abb. (U. S.) 39, F. C. 16,151, formulating definition of "citizens;" *United States v. One Hundred Barrels of Cement*, 27 Fed. Cas. 294, holding residents of rebellious States are quasi

enemies and cannot sue in Federal courts. Approved in dissenting opinion, *Dred Scott v. Sandford*, 19 How. 577, 15 L. 772, majority holding free negro whose ancestors were slaves is not a "citizen."

Distinguished in *Lynch v. Clarke*, 1 Sandf. Ch. 682, holding foreign resident born in United States of alien parents during temporary sojourn in time of peace is United States citizen.

Allegiance.—Treaty of peace of 1783 released England's claim to allegiance of American people, whether native-born or otherwise, p. 247.

Cited and followed in *Trimbles v. Harrison*, 1 B. Mon. 143, 144, holding native of England residing in Boston from 1772 until after treaty of peace, is United States citizen.

Married women.—The common-law incapacities of married women apply to their civil rights, not their political rights, p. 248.

Approved and applied in *Comitis v. Parkerson*, 56 Fed. 558, 562, 22 L. R. A. 150, 152, and note, holding American feme citizen does not become alien by marriage to resident alien; *Priest v. Cummings*, 16 Wend. 626, holding alien feme covert may be naturalized without husband's concurrence.

Political rights do not stand upon mere doctrines of municipal law, but upon the more general principles of the law of nations, p. 248.

Cited and approved, *Jones v. McMasters*, 20 How. 20, 15 L. 810, deciding case without passing upon domicile of minor; dissenting opinion, *United States v. Wong Kim Ark*, 169 U. S. 707, 42 L. 911, 18 S. Ct. 479, majority holding law of a country determines questions of citizenship in that country.

Distinguished in *United States v. Wong Kim Ark*, 169 U. S. 660, 42 L. 895, 18 S. Ct. 461, affirming S. C., 71 Fed. 385, holding question whether person is citizen of a country is to be determined by law of that country.

Aliens.—Children of woman becoming British subject by treaty of peace are aliens within treaty of 1794, and may inherit American lands from mother, p. 249.

Cited and followed, *Munro v. Merchant*, 28 N. Y. 37, holding son of person adhering to British government after Revolution inherits American lands of father.

Treaty.—Where treaty admits of two interpretations, one limited, the other liberal; one excluding, the other furthering private rights, the more liberal should be adopted, p. 249.

Cited and relied upon in *Hauenstein v. Lynham*, 100 U. S. 487, 25 L. 629, applying rule to Swiss treaty of 1850, giving right to citizens to sell inherited lands in America.

Miscellaneous.—Holmes v. Jennison, 14 Pet. 628, 10 L. 628, as example of form of judgment on appeal; Hauenstein v. Lynham, 100 U. S. 490, 25 L. 631, and Parrott's Chinese Case, 6 Sawy. 371, S. C., 1 Fed. 503, on point that Federal Constitution, laws and treaties are binding upon the States; Sasportas v. De la Motta, 10 Rich. Eq. 45, on point that principal case reversed case of Dupont v. Pepper, Harp. Eq. 15; United States v. Jackson, 26 Fed. Cas. 562, erroneous.

3 Pet. 269, 7 L. 675, WOLF v. USHER.

Certificate of division.—Court refuses to take jurisdiction where point on which circuit judges divided is not certified but left to be ascertained from the whole record, p. 269.

Approved and applied, practice followed in United States v. Waddell, 112 U. S. 81, 28 L. 674, 5 S. Ct. 37, remanding case for further proceedings with answers to two questions, where third was uncertain; Bagg v. Detroit, 5 Mich. 70, holding in similar practice in State court, questions must be presented directly and definitely.

3 Pet. 270-279, 7 L. 676, McCLUNY v. SILLIMAN.

Statute of limitations.—Law of the forum as to, operates upon all who submit themselves to its jurisdiction, p. 277.

Cited and this rule affirmed and followed in Townsend v. Jemison, 9 How. 414, 13 L. 197, allowing suit in Alabama upon a Mississippi contract, though barred by statute of Mississippi; Crawford v. Childress, 1 Ala. 489, a suit upon a promissory note executed in another State; Perkins v. Guy, 55 Miss. 176, 30 Am. Rep. 512, where both parties to an action of assumpsit resided in Tennessee during the period of limitation; Paine v. Drew, 44 N. H. 320, an action upon a bill of exchange between non-resident parties, where the court applied the *lex fori*.

Statutes of limitations.—Where no special provision is made by Congress, the same effect is given to them by the courts of the United States as is given in the State courts, p. 277.

The following cases affirm and follow this rule: Leffingwell v. Warren, 2 Black, 603, 17 L. 262, upholding the interpretation of the Wisconsin statute by its highest tribunal, protecting titles acquired under tax deeds; Hanger v. Abbott, 6 Wall. 537, 18 L. 942, affirming decision of State court holding that the running of the statute is suspended during time of war; Tioga R. R. v. Blossburg & C. R. R., 20 Wall. 150, 22 L. 337, concurring opinion, following New York decisions which construe the statute in regard to foreign corporations; Michigan Ins. Bank v. Eldred, 130 U. S. 696, 32 L. 1081, 9 S. Ct. 691, holding that a provision as to the time of commencement of an action is a part of the State statute of limitations, and applicable to actions in the Federal courts; In re Eldridge, 2 Hughes, 257, F. C. 4,331, following the Virginia statute respecting proof of claim

in bankruptcy; *In re Noesen*, 6 Biss. 447, F. C. 10,288, holding with State court that demands upon a bankrupt, barred by the statute, are extinguished; *Rich v. Ricketts*, 7 Blatchf. 231, F. C. 11,762, where State statute was held to bar an action for the infringement of a patent; *In re Cornwall*, 9 Blatchf. 127, F. C. 3,250, where claim of creditor against a bankrupt was held to be barred, following Connecticut statute; *Brown v. Hiatt*, 1 Dill. 377, F. C. 2,011, deciding an action in foreclosure under Kansas statute; *Marsh v. Burroughs*, 16 Fed. Cas. 799, construing Georgia statutes in suits against administrator; *Parker v. Hawk*, 18 Fed. Cas. 1134, in a suit for infringement of patent; *Butler v. Poole*, 44 Fed. 586, where an action by receiver of national bank against stockholder was held subject to State statute of limitation; *Fearing v. Glenn*, 73 Fed. 117, 38 U. S. App. 424, following rule of State court as to limitation in suit against non-resident stockholder. Cited approvingly without applying the rule in *Brickill v. Baltimore*, 52 Fed. 739, where suit was brought for infringement of patent. Cited generally in dissenting opinion to *Gelpcke v. City of Dubuque*, 1 Wall. 210, 17 L. 527, majority following the decisions of State court, afterwards overruled by same court, as to bonds issued during time of earlier decisions; *Derby v. Jacques*, 1 Cliff. 439, F. C. 3,817, holding that a final judgment in a writ of entry in State court is a bar to an action in Circuit Court under a writ of right; *New Hampshire v. Grand Trunk R. R.* 3 Fed. 889, adopting the construction given to a penal statute by State court; *Youley v. Lavender*, 27 Ark. 263, holding that a judgment creditor in a suit in Federal court against administrator must file his demand in State Probate Court.

Distinguished in *Read v. Miller*, 2 Biss. 15, F. C. 11,610, holding that no State statute of limitation can be pleaded in bar to an action on the case for an infringement of a patent; *Blanchard v. Sprague*, 1 Cliff. 290, F. C. 1,516, suppressing the depositions of the parties to a suit in equity in the Circuit Court, under the existing legislation of Congress; *Hall v. Russell*, 3 Sawy. 515, F. C. 5,943, holding that the court was not bound by State statute, which, in its terms, was applicable only to suits in equity in the State courts; *Anthony v. Carroll*, 1 Fed. Cas. 1049, holding that State statute of limitations had no application to an action for the infringement of a patent; *Hartman v. Fishbeck*, 18 Fed. 294, holding that a non-resident in an action in Federal court is not affected by a limitation of a State statute inseparable from special statutory mode of procedure.

Statute of limitations.—Where the statute is not restricted to particular causes of action but provides that the action, by its technical denomination, shall be barred, every cause for which the action may be prosecuted is within the statute, p. 278.

Cited and rule applied in *Metropolitan Road v. District of Columbia*, 132 U. S. 13, 33 L. 236, 10 S. Ct. 24, where an action in assumpsit for breach of duty imposed by statute was held to be within

statute of limitations of Maryland; *Copp v. Louisville, etc., Co.*, 50 Fed. 165, following State statute in an action for damages resulting from a "quasi offense." Approved in *Cockrill v. Cooper*, 86 Fed. 11, 57 U. S. App. 584, where action under reformed procedure against bank directors for excessive loans was held not barred.

Statute of limitations.—Where the action is barred by its denomination, the court cannot look into the cause of action, p. 278.

Approved and rule applied in *Campbell v. Haverhill*, 155 U. S. 619, 39 L. 283, 15 S. Ct. 221, and *Parker v. Hawk*, 18 Fed. Cas. 1135, holding that a State statute of limitation applies to actions at law for the infringement of letters-patent.

Statute of limitations.—Courts do not now give a strained construction to evade the effect of statutes of limitation, p. 278.

Cited and doctrine followed in *United States v. Wilder*, 13 Wall. 256, 20 L. 683, the court refusing to take claim out of statute by reason of part payment; *Merrill v. Monticello*, 66 Fed. 166, a suit in equity to charge town as trustee; *Bennett v. Herring*, 1 Fla. 392, barring plaintiff, indorsee of a note, alleging that "when cause of action accrued to him, he was beyond seas;" *Bishop v. Sanford*, 15 Ga. 11, a suit upon foreign judgment; *Bedell v. Janney*, 4 Gilm. 208, but allowing plaintiff form of action most favorable to his cause; *Davis v. Minor*, 1 How. (Miss.) 191, 28 Am. Dec. 329, holding that repeal of statute could not revive claim previously barred by it; *Savings Bank v. Ladd*, 40 N. H. 472, reviewing authorities and holding one who signed a note but not the mortgage relieved by virtue of the statute. Cited generally in *Fain v. Garthright*, 5 Ga. 13, holding that one entering upon land under executory contract acquires an adverse possession.

Miscellaneous.—Cited erroneously in *Brown v. State Bank*, 10 Ark. 137.

3 Pet. 280-291, 7 L. 679, *JACKSON v. LAMPHIRE*.

Constitutional law.—Supreme Court has no authority, on writ of error from State court, to declare State law void, on account of its conflict with State Constitution, p. 289.

Cited and rule applied in *Withers v. Buckley*, 20 How. 89, 15 L. 818, affirming a decision of State court which held a certain State statute not in violation of its own Constitution; *American Print Works v. Lawrence*, 23 N. J. L. 596, 57 Am. Dec. 422, upholding the validity of a New York statute declared constitutional by its own Supreme Court. Cited generally with approval, dissenting opinion, *Charles River Bridge v. Warren Bridge*, 11 Pet. 646, 9 L. 863, where State court had held public grant to bridge company a valid contract to the extent of the exclusive franchise granted; *Holmes v. Jennison*, 14 Pet. 594, 10 L. 606, where the governor of Vermont retained a

fugitive from Canada, and was supported by the State Supreme Court; *West River Bridge Co. v. Dix*, 6 How. 549, 12 L. 552.

Distinguished in *Indianapolis v. Central Trust Co.*, 83 Fed. 532, 53 U. S. App. 663, where constitutional provision against impairment of contracts was involved.

Constitutional law — Public land patents.— Where State land patent contains no covenants the court will not create one by implication, and a subsequent statute respecting conflicting claims under patentee does not impair the force of the original grant, p. 289.

Cited and this doctrine followed in *Charles River Bridge v. Warren Bridge*, 11 Pet. 546, 9 L. 823, extending the rule and construing strictly a public grant to a bridge company, not conferring exclusive privileges in terms; *West River Bridge v. Dix*, 6 How. 542, 12 L. 549, reviewing authorities and holding that the exercise of the right of eminent domain was not in violation of the terms of plaintiff's charter; *East Hartford v. Bridge Co.*, 10 How. 539, 13 L. 530, holding that an act discontinuing a ferry belonging to East Hartford did not impair any supposed contract; *Missionary Society v. Dalles*, 107 U. S. 342, 27 L. 547, 2 S. Ct. 677, holding that the society had not strictly complied with the terms of a public grant; *McLeod v. Burroughs*, 9 Ga. 222, applying rule of strict construction to exclusive privilege granted in a bridge charter; *Shorter v. Smith*, 9 Ga. 524, where there was no express grant of exclusive privilege; *Mayor v. Central R. R.*, 50 Ga. 621, refusing to allow corporation exemption from taxation where terms of grant did not clearly confer it; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 69, protecting an exclusive privilege to maintain a bridge; *United States v. San Pedro, etc., Co.*, 4 N. Mex. 601, 17 Pac. 425, holding that under strict construction mines of gold and silver did not pass by United States patent; *Janesville Bridge Co. v. Stoughton*, 1 Pinn. 672, refusing to find any exclusive privileges where not expressly granted. Cited generally in *Planters' Bank v. Sharp*, 6 How. 319, 12 L. 455, construing the contractual rights of a bank by the terms of its charter. Rule approved in dissenting opinion, *Minn. & Pac. R. R. v. Sibley*, 2 Minn. 26, the majority construing an act by its language and history unfavorably to the State. See also 50 Am. Dec. 391, note.

Distinguished in dissenting opinion, *Charles River Bridge v. Warren Bridge*, 11 Pet. 640, 9 L. 861, majority applying the rule to public grant of franchise to a bridge company.

Constitutional law.— State legislatures have power to pass recording acts although they make prior unrecorded deeds fraudulent and void as against subsequent purchaser, and if reasonable such acts do not impair the obligation of contract, p. 290.

Cited and the doctrine applied and followed in *Vance v. Vance*, 108 U. S. 520, 27 L. 811, 2 S. Ct. 858, and *Succession of Nelson*, 24 La. Ann. 26, upholding a provision in State Constitution requiring exist-

ing tacit mortgages to be recorded; *Gilfillan v. Union Canal Co.*, 109 U. S. 407, 27 L. 979, 3 S. Ct. 308, holding a statute valid requiring bondholders to signify their assent to or dissent from a plan proposed for compromise; *Rosenplaenter v. Provident Sav. Life Ass. Co.*, 91 Fed. 735, holding valid, acts providing that policies shall not be declared forfeited without prescribed notice to insured; *Stafford v. Lick*, 7 Cal. 487, upholding the validity of a recording act as to prior deeds; *Woodbury v. Grimes*, 1 Colo. 104, applying the rule to an act of the legislature relating to mechanics' liens; *Tucker v. Harris*, 13 Ga. 6, 58 Am. Dec. 490, where prior deed was held void for want of recordation as required by a subsequent statute; *Connecticut Mut. Life v. Talbot*, 113 Ind. 380, 3 Am. St. Rep. 661, 14 N. E. 590, applying the rule and defeating the claim of the assignee of a prior mortgage; *Moline Plow Co. v. Witham*, 52 Kan. 190, 34 Pac. 752, where three days was held an unreasonable time in which to record an instrument evidencing a conditional sale; *National Bank v. Clark*, 55 Kan. 224, 40 Pac. 272, holding that four months was ample time for compliance with State statute requiring docket of judgment entry to create a lien; *Tarpley v. Hamer*, 9 Smedes & M. 313, as to recording prior judgments; *Miles v. King*, 5 S. C. 151, 155, upholding a recording act requiring a re-registration of mortgages; and in *Salmon v. Huff*, 9 Tex. Civ. App. 168, 28 S. W. 1045, as to an act requiring re-registration of deeds. Cited generally without applying rule in *Planters' Bank v. Sharp*, 6 How. 331, 332, 12 L. 460, reviewing authorities as to what laws impair the obligation of contract; *McCormick v. Rusch*, 15 Iowa, 136, 83 Am. Dec. 408, holding an act valid which allowed an action against one in military service to be continued during period of actual service.

Distinguished in *Gaston v. Merriam*, 33 Minn. 280, holding a particular recording act in that State to be purely prospective; dissenting opinion, *Stafford v. Lick*, 7 Cal. 501, majority quoting principal case at length.

Constitutional law.—State legislatures have power to pass acts of limitation, by which the elder grantee shall be postponed to the younger, unless certain acts are performed within the limited time, p. 290.

Cited and rule applied in *Strothen v. Lucas*, 12 Pet. 448, 9 L. 1152, affirming title acquired by prescription under the laws of Spain, unabrogated by any law of the district of Missouri; *Curtis v. Whitney*, 13 Wall. 71, 20 L. 514, where holder of tax certificate failed to give notice to occupant as required by a retrospective act.

Statute of limitations.—Time and manner of operation, and the exceptions to them, generally depend on the sound discretion of legislature, unless so unreasonable as to amount to a denial of a right, p. 290.

Cited and doctrine followed in *McCracken v. Hayward*, 2 How. 613, 11 L. 399, declaring a State law prohibiting an execution sale for

less than a certain value void as to existing judgments; *Terry v. Anderson*, 95 U. S. 633, 634, 24 L. 366, upholding validity of a Georgia statute of limitations shortening time in a case of suit against stockholder; *Edwards v. Kearzey*, 96 U. S. 608, 24 L. 799, concurring opinion, holding that certain exemption laws amounted to a denial of rights under pre-existing contract; *Koshkonong v. Burton*, 104 U. S. 675, 26 L. 889, where time in which to bring suit upon bond was shortened, and validity of statute upheld; *Antoni v. Greenhow*, 107 U. S. 775, 27 L. 471, 2 S. Ct. 96, sustaining the validity of an act changing the remedy to enforce payment of State bonds; *Vance v. Vance*, 108 U. S. 521, 27 L. 811, 2 S. Ct. 859, the State Constitution giving a limited time in which to record tacit mortgages; *In re Brown*, 135 U. S. 705, 34 L. 317, 10 S. Ct. 985, declaring statute unconstitutional giving holders of State bonds but one year to present coupons in payment of taxes; *Cleveland Ins. Co. v. Reed*, 1 Biss. 186, F. C. 2,889, where foreclosure was held barred by statute, passed subsequent to the time when the cause of action accrued; *Ex parte Pollard*, 40 Ala. 88, applying the rule to the enactment of a "stay-law" affecting a pre-existing contract; *Pope v. Ashley*, 13 Ark. 268, declaring statute of limitation unconstitutional which cut off plaintiff's remedy instanter; *Bishop v. Wilds*, 1 Harr. 102, where a statute enlarged the time as to suit on guardian's bond; *Wilder v. Lumpkin*, 4 Ga. 220, holding an act as to securities on appeal bond not applicable to a case occurring before its passage; *Griffin v. McKenzie*, 7 Ga. 166, 50 Am. Dec. 391, holding that an act fixing seven years as a time within which an existing judgment should be enforced was constitutional; *Cutts v. Hardel*, 38 Ga. 355, applying the rule and sustaining an act for the relief of debtors and adjustment of debts; *Blackford v. Peltier*, 1 Blackf. 35, n., where statute affected only the remedy; *State v. Swope*, 7 Ind. 96, holding that the time allowed by the statute in suit on sheriff's bond was unreasonable; *Taylor v. Stockwell*, 66 Ind. 511, reviewing authorities and sustaining the validity of an act which affected judgments rendered on pre-existing as well as subsequent contracts; *Auld v. Butcher*, 2 Kan. 156, where an act was held not to apply so as to bar the remedy instanter to recover on pre-existing contract; *Wahlgren v. Kansas City*, 42 Kan. 246, 21 Pac. 1069, holding an act constitutional which allowed thirty days in which to bring suit on street assessment; *Lewis v. Harbin*, 5 B. Mon. 568, sustaining a retrospective statute of limitation; *Berry v. Ransdall*, 4 Met. (Ky.) 294, declaring an act void allowing only thirty days after its passage to commence suits on existing contracts; *Louisville & N. R. Co. v. Williams* (Ky.), 45 S. W. 230 (reversing S. C., 41 S. W. 287, on other grounds), holding that the repeal of provisions in charter of railway company limiting time in which actions may be brought does not impair obligation of contract; *Scott v. Duke*, 3 La. Ann. 253, giving effect to an act modifying the remedy to enforce foreign judgment; *State v. Jones*, 21 Md.

437, applying rule where plaintiff had thirteen months after passage of an act in which to commence action; *Briscoe v. Anketell*, 28 Miss. 371, 61 Am. Dec. 555, the court applying the rule to an act changing a rule of evidence affecting past right of action; *Stephens v. St. Louis Nat. Bank*, 43 Mo. 389, 390, holding two years a reasonable time allowed note-holders to present notes for payment; *Smith v. Tucker*, 17 N. J. L. 85, sustaining validity of statute of limitations extending the time as against non-residents; *Rexford v. Knight*, 11 N. Y. 313, applying the rule where claims against the State were required by statute to be made within one year; *Parmenter v. State*, 135 N. Y. 168, 31 N. E. 1039, reviewing authorities and holding that an act allowing complainant three months to file claim did not provide a reasonable time; *Strickland v. Draughan*, 91 N. C. 104, dismissing a petition for rehearing not filed within time limited by a new rule of the court; *Chadwick v. Moore*, 8 Watts & S. 51, 42 Am. Dec. 269, holding that a statute prohibiting, for a time, execution sales for less than a certain value was valid and constitutional; *Kenyon v. Stewart*, 44 Pa. St. 192, where statute limiting time within which to contest will was held valid though retroactive; *Breitenbach v. Bush*, 44 Pa. St. 318, 84 Am. Dec. 444, allowing stay of execution under an act suspending process during a term of military service; *Story v. Runkle*, 32 Tex. 404, holding an act, changing the statute of limitations so as to revive a right under a judgment already barred, pro tanto void; *Bender v. Crawford*, 33 Tex. 755, 7 Am. Rep. 275, the court coming to a contrary conclusion under a similar provision in the Constitution; *Caperton v. Martin*, 4 W. Va. 151, 6 Am. Rep. 279, holding that an act reviving an action for false imprisonment was not unconstitutional.

Cited approvingly without particular application of the rule in *Griswold v. Bragg*, 18 Blatchf. 207, 208, 48 Fed. 522, 48 Conn. 582, as to a statute providing equitable relief for value of improvements in ejectment suits; *Ex parte Newman*, 9 Cal. 517, declaring a Sunday law unconstitutional; *Conn. Mut. Life v. Talbot*, 113 Ind. 379, 3 Am. St. Rep. 659, 14 N. E. 589; *Stephenson v. Osborne*, 41 Miss. 130, 90 Am. Dec. 366, holding that exemption laws affect the remedy, and not the right as to pre-existing contracts; *McLure v. Melton*, 24 S. C. 570, 58 Am. Rep. 278, where court followed a decision of State court changing the order of payment of claims against an estate; *Ex parte Hunter*, 2 W. Va. 159, holding that an act was constitutional requiring an attorney-at-law to take an oath that he had never borne arms against the United States. See note to 50 Am. Dec. 391. Cited with approval in the following dissenting opinions: *Lewis v. Lewis*, 7 How. 782, 12 L. 912, where the court construed a State statute as affecting the rights of a non-resident; *Aycock v. Martin*, 37 Ga. 177, 179, reviewing authorities, majority holding a stay-law unconstitutional; *Scobey v. Gibson*, 17 Ind. 584, court holding an act extending period of redemption unconstitutional so far as it applied to judg-

ments existing at the time of its passage; *Fitzpatrick v. Boylan*, 57 N. Y. 443, 444, majority holding that an act continuing mechanics' liens for a limited time had no retroactive operation; *Bettman v. Cowley*, 19 Wash. 223, 53 Pac. 59, 40 L. R. A. 822, majority holding an act shortening duration of judgment liens void as to existing judgments.

Distinguished in *Harding v. Butts*, 18 Ill. 509, holding an act conferring on one having color of title a right of property was in no sense an act of limitation, but transferred the land and was unconstitutional.

Miscellaneous.—Cited, the court being equally divided, in *Holmes v. Jennison*, 14 Pet. 628, 10 L. 628, as to the wording of the order affirming decree of lower court.

3 Pet. 292-306, 7 L. 683, **HARRIS v. DENNIE.**

Appeal and error.—It is sufficient that it appear from facts stated upon the record that any question within purview of section 25 of the judiciary act arose in State court; the record need not so state in terms, p. 301.

Cited and rule followed in *Craig v. Missouri*, 4 Pet. 429, 7 L. 910, where the record showed, though not in terms, that a constitutional question existed; *Fisher v. Cockerell*, 5 Pet. 255, 256, 8 L. 117, where no fact necessary to give jurisdiction appeared of record; *Davis v. Packard*, 6 Pet. 48, 8 L. 315, where highest State court decided against a privilege set up under act of Congress giving Federal jurisdiction; *Crowell v. Randell*, 10 Pet. 396, 397, 9 L. 469, reviewing authorities, and denying jurisdiction on account of totally insufficient record; *Williams v. Oliver*, 12 How. 124, 13 L. 920, holding that no question arose upon the record involving validity of treaty with Mexico or award of commissioners; *Water Power Co. v. Street Ry. Co.*, 172 U. S. 488, taking jurisdiction where it appeared from record and opinion of the court that constitutional question arose; *Florida v. Gleason*, 12 Fla. 271, denying jurisdiction in suit to remove State officer; *Frost v. Ilsley*, 55 Me. 380, where it did not appear that a decision of constitutional question was indispensable to the judgment.

Duties.—United States has no lien upon dutiable goods for duties antecedently due from importer, p. 303.

Duties.—United States has a lien on goods for the payment of duties accruing thereon, and the right of custody until lien is discharged, p. 304.

Cited with approval in *Guesnard v. Louisville & N. R. R.*, 76 Ala. 457, preserving the lien for a carrier who had advanced the charges for duties.

Duties.—No creditor can by attachment take goods out of the possession of United States until lien of United States for duties

accruing thereon is discharged by payment or by giving security, p. 304.

Approved and rule applied in *Providence & S. S. Co. v. Virginia Ins. Co.*, 20 Blatchf. 409, 11 Fed. 287, holding public officer as trustee not liable under an attachment in favor of one not claiming under trust; *Taylor v. Carryl*, 20 How. 596, 598, 15 L. 1032, 1033; *The Oliver Jordan*, 2 Curt. 415, F. C. 10,503, and *Lewis v. Ship Orpheus*, 3 Ware, 143, F. C. 8,330, refusing to take property out of the custody of State courts to enforce liens of seamen and materialmen; *In re Clifford*, 2 Sawy. 432, F. C. 2,893, holding assignee of bankrupt under invalid contract of sale not entitled to possession of dutiable goods in custody of government; *McCullough, Jr. v. Large*, 20 Fed. 312, holding whisky in custody of internal revenue collector not liable to seizure by creditor; *Peabody v. Maguire*, 79 Me. 584, 12 Atl. 631, approving the rule, but holding property in custom-house subject to trustee process; *Whitwell v. Wells*, 24 Pick. 29, allowing government lien for storage, and holding its possession to be exclusive. Cited, *arguendo*, with approval in *In re Peebles*, 2 Hughes, 401, F. C. 10,902, giving bankrupt benefit of homestead exemption over execution lien; *May v. Hoaglan*, 9 Bush, 173, where whisky was attached after lien of government was discharged; *Souhegan Factory v. McConihe*, 7 N. H. 323, in concurring opinion, holding a collector retaining goods overtime as a distress not a trespasser. Cited, without particular application of the rule, in *Andrews v. Smith*, 19 Blatchf. 103, 5 Fed. 836, as to jurisdiction of State and Federal courts having possession of property; *Briggs v. Light Boats*, 11 Allen, 178, refusing to enforce lien for labor and materials used in constructing United States lightboat.

Limited in *Two Hundred and Fifty Tons Salt*, 5 Fed. 219, allowing sale under lien for freight charges of goods held for payment of duties. Distinguished in *Conard v. Pac. Ins. Co.*, 6 Pet. 281, 8 L. 399, where levy by Federal officer for duties was to satisfy execution against one who had no interest; *Thomas v. Mahone*, 9 Bush, 121, allowing seizure of land by State court temporarily occupied by Federal troops; *Bruen v. Ogden*, 11 N. J. L. 384, 20 Am. Dec. 605, where it is held that a State court may replevy goods unlawfully seized by Federal officer.

Duties.—Owner or consignee, or in his absence, his agent or factor is alone entitled to enter goods or pay the duties, p. 304.

Cited to this point in *Harris v. De Wolf*, 4 Pet. 151, 7 L. 813, allowing assignee to recover goods, although attached by United States for duties antecedently due; *Pacific Ins. Co. v. Conard*, 1 Bald. 140, F. C. 10,647.

Distinguished in *United States v. Fawcett*, 86 Fed. 901, where, under later act of Congress, consignee was required to make a declaration different from that of owner.

3 Pet. 307-319, 7 L. 688, *CANTER v. AMERICAN INS. CO.*

Admiralty.—Where parties litigate in admiralty in rem, and there is probable cause for the suit or defense, the court consider that the only compensation which the successful party is entitled to is compensation in costs and expenses and not damages, p. 318.

Cited in *The Malaga*, 16 Fed. Cas. 538, applying the rule where a ship was seized under probable cause.

Appeals.—It is the manifest intention of the legislature, in giving appellate jurisdiction to Federal Supreme Court upon final decrees only, that causes should not come up in fragments upon successive appeals, p. 318.

Approved in *Ringgold's Case*, 1 Bland, 21, the court reviewing generally the subject of appeal at common law and in equity; *Barkley v. Logan*, 2 Mont. 299, holding that court had no jurisdiction to hear an appeal from part of a final judgment.

Admiralty appeals.—Wherever damages are claimed in original proceedings, if a decree for restitution and costs only passes, it is a virtual denial of damages, and the claim will be deemed waived unless the party then interposes an appeal or cross-appeal to sustain that claim, p. 318.

Approved and rule applied in the following citing cases: *The William Bagaley*, 5 Wall. 412, 18 L. 591, refusing to allow claimants, who had not appeared below, to intervene in Supreme Court; *Mail Co. v. Flanders*, 12 Wall. 135, 20 L. 250, and the *Stephen Morgan*, 94 U. S. 599, 24 L. 266, denying appellees the right to be heard for a reversal of decree; *Loudon v. Taxing District*, 104 U. S. 774, 26 L. 924, refusing party right to be heard against decree where his appeal had been dismissed for want of prosecution; *Bush v. Schooner Alonzo*, 2 Cliff. 551, F. C. 2,223; *Airey v. Merrill*, 2 Curt. 12, F. C. 115; *The Peytona*, 2 Curt. 27, F. C. 11,058, and *Allen v. Hitch*, 2 Curt. 148, F. C. 224, applying the rule where appellee insisted upon greater damages than were allowed in court below; *The Quickstep*, 2 Biss. 292, F. C. 11,509, holding that the question of appellee's negligence was not open to inquiry on the appeal. Cited generally in *Sanderson v. Sanderson*, 20 Fla. 299, treating the agreement of parties as rule determining extent of questions to be reviewed on appeal.

Costs are not positively limited by law, but allowed in the exercise of a sound discretion of the court, p. 319.

Cited and rule affirmed and applied in *United States v. Waters*, 133 U. S. 213, 33 L. 595, 10 S. Ct. 250, allowing counsel fees as fixed by Court of Claims; *Du Bois v. Kirk*, 158 U. S. 67, 39 L. 899, 15 S. Ct. 732, refusing to disturb decree as to costs in an equity suit; *The Columbus*, Abb. Adm. 390, F. C. 3,043, dividing the costs in

a suit in admiralty; *Simpson v. Caulkins*, Abb. Adm. 544, F. C. 12,880; *Craig v. Steamer Hartford*, McAll. 93, F. C. 3,333, holding that costs not being subject to rescission formed no part of decree of court below; *The Ship Moslem*, Olcott, 378, F. C. 9,876, departing from general rule of awarding costs to successful party; *Hathaway v. Roach*, 2 Wood. & M. 70, F. C. 6,213, applying rule in absence of statutory direction; *Elliott v. The Leah H. Miller*, 8 Fed. Cas. 543, granting a rehearing on question of costs awarded to unsuccessful party; *Winne v. Carroll*, 30 Fed. Cas. 306; *Tefft v. Stern*, 73 Fed. 597, 43 U. S. App. 148, where costs were not controlled by statute; *Blanks v. Klein*, 78 Fed. 395, 41 U. S. App. 621, giving effect to decision of Circuit Court in an equity cause.

Rule limited in *Sturgis v. Johnson*, 23 Fed. Cas. 327, where the court held that provisions of act of February 26, 1853, were controlling.

No appeal lies to Supreme Court from a mere decree respecting costs and expenses, p. 319.

Cited to this point and rule approved and applied in *Elastic Fabrics Co. v. Smith*, 100 U. S. 112, 25 L. 547, where the appeal was ineffectual as to all else; *Wood v. Weimar*, 104 U. S. 792, 26 L. 781; *Russell v. Farley*, 105 U. S. 437, 26 L. 1061, the court entertaining the appeal on the subject of damages; *Paper Bag Cases*, 105 U. S. 772, 26 L. 961, as to one party of the suit; *City Bank v. Hunter*, 152 U. S. 516, 38 L. 536, 14 S. Ct. 676; *Tyler Mining Co. v. Sweeney*, 79 Fed. 282, 48 U. S. App. 213, refusing to review the action of clerk of Circuit Court; *Fraser v. District of Columbia*, 18 D. C. 152, refusing to review question of attorney's fee.

Rule limited in *The City of Augusta*, 80 Fed. 303, holding that there may be an appeal concerning only costs, when the force of some statute or positive rule of law is involved.

3 Pet. 320-345, 7 L. 693, *STRINGER v. YOUNG'S LESSEE*.

Evidence.— Entries made on public lands subsequent to patent, whatever might be impression under which they were made, cannot affect the title, and are inadmissible to prove general opinion as to state of title, p. 337.

Evidence.— A party cannot repel testimony improperly admitted by other evidence, which is clearly inadmissible, p. 337.

Rule approved and followed in *Balto. & S. R. R. Co. v. Woodruff*, 4 Md. 255, 59 Am. Dec. 76, rejecting improper evidence to prove negligence, offered to rebut irrelevant testimony; *Gorsuch v. Rutledge*, 70 Md. 276, 17 Atl. 77, applying rule and rejecting oral testimony; *McDowell v. Crawford*, 11 Gratt. 386, dissenting opinion. Cited generally with approval in *Sand's Case*, 21 Gratt. 903, where the testimony offered was held admissible on other grounds.

Distinguished in *McDowell v. Crawford*, 11 Gratt. 409, holding that certain testimony offered was not irrelevant, and rule did not apply.

Public lands—Evidence.—The validity of survey or patent is not affected by surveyor's neglect of duty in recording plat and certificate, nor by the fact that he was not a deputy surveyor of a particular county, and evidence of those facts is inadmissible, p. 338.

Cited to this point and rule applied in *Oats v. Walls*, 28 Ark. 248, protecting grantee of a mortgage which was not recorded through fault of clerk; *Howard v. Perry*, 7 Tex. 268, holding survey valid, although certificate of recommendation was not presented to surveyor; *Horton v. Pace*, 9 Tex. 83, holding that neglect of surveyor to make an entry did not impair right of locator; *Fannin Co. v. Riddle*, 51 Tex. 366, holding that failure of surveyor to make return to clerk of court did not prejudice county's rights in school lands.

Public land patents.—A patent is a completion of title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures can be made in a trial at law, p. 340.

Cited and rule followed in *Boardman v. Reed*, 6 Pet. 346, 8 L. 422, the court not allowing defendants to show irregularity in the entry or survey; *Knabe v. Burden*, 88 Ala. 440, 7 So. 94, holding that the issue of patent raised presumption that prerequisite election was legally held; *Cohas v. Raisin*, 3 Cal. 448, where it was presumed that Mexican court did its duty in marking boundaries; *Hagar v. Lucas*, 29 Cal. 311, the court not allowing patent to be attacked collaterally; *Arnold v. Grimes*, 2 G. Greene, 83, holding further that evidence tending to show fraud in procuring patent was inadmissible; *Klein v. Argenbright*, 26 Iowa, 496, holding that patent related back to date of certificate of location and cut off duplicate; *Scudy v. Shaffer*, 10 La. Ann. 136, refusing to go behind patent granted by State in conformity to law; *Bruckner's Lessee v. Lawrence*, 1 Doug. (Mich.) 32, 37, reviewing authorities, and holding that patent could not be impeached for fraud or mistake in an action at law; *Clark v. Hall*, 19 Mich. 372, holding that a person, not in privity with the title, could not attack a patent issued to an assignee; *Burleson v. McGehee*, 15 Tex. 377, holding that, in the absence of fraud, a commissioner's grant was complete. See notes, 2 Am. Dec. 569, 570, 12 Am. Dec. 565, 566, and 4 Am. Dec. 549.

Patents.—May possibly be impeached at law for fraud not legal and technical, but actual and positive fraud in fact, committed by person who obtained it, but this is questionable, p. 341.

Cited to this point with approval in *Johnston v. Smith*, 21 Tex. 726,

holding that failure to bring family was not such fraud as to annul grant; *Maxey v. O'Connor*, 23 Tex. 238, holding that an excessive grant was not evidence of fraud. Cited generally in *Giddings v. Steele*, 28 Tex. 758, 91 Am. Dec. 347, holding that purchase by attorney at public sale to pay claim in his hands was not evidence of fraud.

Public land patents.—It is competent to contradict the call for a county in a patent and survey, and explain a misnomer; and such misnomer will not avoid patent, p. 344.

Cited and rule applied in *Boardman v. Reed*, 6 Pet. 344, 345, 346, 8 L. 421, 422, refusing instructions asked that a patent be declared void for misnomer of county; *Perry v. Clark*, 157 Mass. 332, 32 N. E. 226, where land was wrongly described as within the limits of a certain town; *Ives v. Kimball*, 1 Mich. 312, admitting evidence to prove misnomer of township in deeds; *Slater v. Breese*, 36 Mich. 82, allowing inconsistent descriptions in mortgage to be rejected; *Hubermann v. Evans*, 46 Neb. 807, 65 N. W. 1053, collecting authorities, and holding that description of lot as being in block W instead of block U, did not avoid deed; *Burr v. Broadway Ins. Co.*, 16 N. Y. 271, admitting evidence to explain meaning of the word No. in policy.

Bills of exceptions.—The appellate court is not at liberty to consider points on which exception is not taken, p. 345.

Cited to this point and rule applied in *Ludlam v. Broderick*, 15 N. J. L. 275, refusing to sustain objection to depositions as a whole, where part of testimony was proper.

3 Pet. 346-396, 7 L. 701, *FINLAY v. KING*.

Wills.—Whether a condition is precedent or subsequent is a question of intention. If language shows that act must be performed before estate can vest, the condition is precedent; if from whole will, act may accompany or follow vesting of estate, the condition is subsequent, p. 374.

The citations collect a number of cases affirming and following this rule: *Ward v. New England Screw Co.*, 1 Cliff. 577, F. C. 17, 157, holding that the words "for use aforesaid" in deed did not create condition subsequent; the following cases holding provisions to be conditions subsequent, *Webster v. Cooper*, 14 How. 501, 14 L. 516, that one should use surname "Vassall;" *Conway et al., Ex parte*, 4 Ark. 331, deed requiring trustees to give bonds; *Tappan's Appeal*, 52 Conn. 419, devise to a society on condition of building chapel within limited time; *Jenkins v. Merritt*, 17 Fla. 322, where legacy was conditioned upon co-residence of two parties; *Bowman v. Long*, 23 Ga. 245, devise to one should he live to be twenty-one years of age; *Chicago v. C. & W. I. R. R. Co.*, 105 Ill. 78, that tracks be con-

structed within one year from passage of ordinance; *Lindsey v. Lindsey*, 45 Ind. 562, where testator directed that devisee should remain on farm and perform certain duties; *Duncan v. Prentice*, 4 Met. (Ky.) 217, a devise of remainder upon condition that devisee pay a certain sum to another; *Decrow v. Moody*, 73 Me. 103, that legatee should remain with testator until twenty-one years of age; *Smith v. Rasin*, 84 Md. 646, 36 Atl. 262, holding that an agreement to arbitrate was not a condition precedent to the termination of a lease. The following citing cases hold conditions to be subsequent: In *re Stickney's Will*, 85 Md. 102, 60 Am. St. Rep. 312, 36 Atl. 656, 35 L. R. A. 696, where legacy was given upon condition of certain releases being made; *Burnett v. Strong*, 26 Miss. 123, where a devise was qualified by the words, "on his paying all that he owes me," etc.; *Nicoll v. New York & Erie R. R.*, 12 N. Y. 130, a grant upon condition that company construct road within limited time; *Den v. Messenger*, 33 N. J. L. 503, holding that a condition that devisee should remain with testator and his wife was a condition precedent to vesting of estate; *Livingston v. Gordon*, 84 N. Y. 143, where a direction to support another was held a condition subsequent; *Magee v. O'Neill*, 19 S. C. 182, 45 Am. Rep. 770, holding a bequest that one should take if "reared a Roman Catholic," with limitation over, to be a conditional limitation; *Cannon v. Apperson*, 14 Lea, 567, where bequests made upon condition of defending a lawsuit were held to be upon conditions precedent; *Bell County v. Alexander*, 22 Tex. 364, 73 Am. Dec. 276, holding direction to pay taxes a condition subsequent; *Jones v. C. & O. R. R. Co.*, 14 W. Va. 522, holding grantee of right of way discharged from the performance of condition precedent in deed; *Reuff v. Coleman*, 30 W. Va. 174, 3 S. E. 599, holding a provision in will as to conduct and place of residence of legatee to be a condition precedent. Cited in note, 78 Am. Dec. 235, holding that estate vested where legatee was directed to take care of his mother during her lifetime; dissenting opinion, *Towle v. Remsen*, 70 N. Y. 322, majority holding a provision in a grant upon property qualification to be a condition subsequent.

Distinguished in *Campau v. Chene*, 1 Mich. 415, holding that a reservation in a deed for personal support was a covenant and not a condition; *Henderson v. Beaton*, 1 Posey, 28, approving doctrines of principal case, but holding that provision in deed as to division of property was not a condition.

Wills.—Devise in words of present time imports, if no contrary intent appears, an immediate interest, which vests on death of testator, p. 376.

Approved and rule applied in the following citing cases: *Doe v. Considine*, 6 Wall. 475, 478, 18 L. 875, holding that a remainder vested at the death of testator; *Rogan v. Walker*, 1 Wis. 562, holding that a deed conveyed an estate in presenti, although upon condition.

Wills.— It is a general rule that if estate be given on condition, for the performance of which no time is limited, the devisee has his life for performance, p. 376.

Rule limited in *Conway et al. Ex parte*, 4 Ark. 333, allowing trustees under deed a reasonable time to execute bonds.

Wills.— The intent of testator is the cardinal rule in the construction of wills. In construing intent of testator from whole will words may be rejected, transposed or so modified as to change literal meaning, provided such intent is not contrary to some positive rule of law, pp. 377, 383.

Cited and rule followed in *McDonogh v. Murdoch*, 15 How. 412, 14 L. 752, holding that illegal conditions in a will did not divest the estate; *Patch v. White*, 117 U. S. 219, 29 L. 865, 6 S. Ct. 621, where testator described devise as lot 6, square 403, instead of lot 3, square 406; *Elyton Land Co. v. McElrath*, 53 Fed. 766, 2 U. S. App. 584, giving the words "during her natural life" a limited meaning; *Capel v. McMillan*, 8 Port. 204, construing intent of testator as to term of service of executrix; *Howze v. Davis*, 76 Ala. 383, where a bequest of forbearance of a debt was held to be qualified by a subsequent clause; *Elyton Land Co. v. South & North Ala. R. R. Co.*, 100 Ala. 405, 14 So. 208, construing a proviso in deed to be a limitation and not a condition; *Estate of Wood*, 36 Cal. 81, interpreting the words "dying intestate" to mean dying without making any other will; *Matthewson v. Saunders*, 11 Conn. 149, construing certain bequests to be a charge upon real estate; *Russ v. Russ*, 9 Fla. 148, construing from whole will the words "heirs of her body" to mean children; *Edmondson v. Dyson*, 2 Ga. 313, where, in an executory trust under will, the heirs-at-law of devisee were held to take as purchasers; *Decker v. Decker*, 121 Ill. 354, 12 N. E. 756, rejecting words of false description of land in will; *Whitcomb v. Rodman*, 156 Ill. 120, 47 Am. St. Rep. 181, 40 N. E. 554, 28 L. R. A. 151, explaining misdescription of lands; *Henderson v. Harness*, 176 Ill. 306, 52 N. E. 69, rejecting construction of will making its provisions contrary to positive rules of law; *Fox v. Phelps*, 17 Wend. 398, holding, with reference to whole will, that the devisees took a fee; *Prowitt v. Rodman*, 37 N. Y. 49, holding that a direction as to "all the rest and residue" of property precludes any idea of partial intestacy; *Duncan v. Harper*, 4 S. C. 83, construing "bodily issue" to mean "children," and the word "and" to mean "or;" *Clark v. Clark*, 19 S. C. 352, changing terms used by testator to accord with his evident intention; *McCamant v. Nuckolls*, 85 Va. 337, 12 S. E. 162.

Miscellaneous.— Cited in *King v. Mitchell*, 8 Pet. 348, 349, 8 L. 970, interpreting trust clause of the will construed in principal case, and in *Vint v. King*, 28 Fed. Cas. 1202, suits involving rights of heirs to the same property. Cited erroneously in *Tufts v. Tufts*, 3 Wood. & M. 493, F. C. 14,233; *Galloway v. Merchants' Bank*, 42 Neb. 267,

60 N. W. 572; *Barnard v. Roane Iron Co.*, 85 Tenn. 149, 2 S. W. 25; 4 Am. Dec. 549, note.

3 Pet. 397, 7 L. 719, ANONYMOUS.

Certified copies.— Reporter of the court; and not the clerk, is the proper person to give certified copies of the opinions of the Federal Supreme Court.

Not cited.

3 Pet. 398-410, 7 L. 719, *FOWLE v. COMMON COUNCIL OF ALEXANDRIA*.

Municipal corporations — Auctioneers.— Power of a corporation to license and to take bonds for their good behavior must be conferred by act of legislature, and corporation must conform to the act, p. 407.

Rule approved and applied in *Kyle v. Malin*, 8 Ind. 38, holding an order to grade and macadamize unauthorized and void; *Village of St. James v. Hingtgen*, 47 Minn. 524, 50 N. W. 700, holding that county attorney could not enforce bond in the name of the village; *Mayor v. President, etc., Steamboat Co., Charlt. (Ga.)* 348, holding that upon reorganization of corporation, in order to transfer particular powers, there must be an enabling clause.

Municipal corporations are not liable for losses consequent on their having misconstrued the extent of their powers in granting license without authority, p. 409.

Cited to this point in *Trescott v. Waterloo*, 26 Fed. 594, where plaintiff was wrongfully arrested for peddling without license. Cited in exhaustive note, 68 Am. Dec. 292.

Corporations.— Moneyed corporations, or those carrying on business for themselves, are liable for torts, and are bound by their contracts, p. 409.

Cited and rule applied in *Kielley v. Belcher S. M. Co.*, 3 Sawy. 438. F. C. 7,760, holding corporation liable for injury to servant caused by servant in distinct and different department of the business; *Edwards v. Union Bank*, 1 Fla. 148, allowing trespass against corporation for wrongful entry; *Rabassa v. Orleans Navigation Co.*, 5 La. 464, 25 Am. Dec. 202, holding company responsible for damage to toll road caused by act of its agents; *New York & W. P. T. Co. v. Dryburg*, 35 Pa. St. 302, 78 Am. Dec. 340, holding telegraph company liable for misfeasance of agent; *Main v. Railroad Co.*, 12 Rich. L. 85. 75 Am. Dec. 726, permitting trespass *quare clausum fregit*; *Mayor of Memphis v. Lasser*, 9 Humph. 760, holding a municipal corporation liable for a tort resulting from dangerous street; *Ohio Life Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. 30, 53 Am. Dec. 765, holding defendant company liable for fraud perpetrated by its agent.

Distinguished in *Whiteman v. Wilmington & Susquehanna R. R. Co.*, 2 Harr. 518, 520, 33 Am. Dec. 414, 416, holding that trespass would lie against corporation, but entry justified in this case.

Municipal corporations.—A legislative corporation is not liable for losses sustained by a non-feasance, by an omission to observe a law of its own, in which no penalty is provided, p. 409.

The citations collect the following authorities affirming and relying upon this principle: *Barbour Co. v. Horn*, 48 Ala. 575, an action for damages occasioned by a fall from insecure bridge; *Sherbourne v. Yuba Co.*, 21 Cal. 115, 81 Am. Dec. 152, holding county is not liable for damage sustained by reason of unskillful treatment by its physician; *Symonds v. Clay Co.*, 71 Ill. 357, an action for damage caused by negligence of defendant's servant; *Vigo Township v. Board of Commissioners*, 111 Ind. 175, 12 N. E. 307, holding county not liable for defalcations of treasurer; *Hill v. Boston*, 122 Mass. 369, 23 Am. Rep. 357, collecting authorities, and applying rule where a child was injured by reason of dangerous condition of schoolhouse; *Lyon v. Cambridge*, 136 Mass. 420, where plaintiff was injured by reason of darkness in street; *Detroit v. Blackeby*, 21 Mich. 114, 4 Am. Rep. 458, an action for injury occasioned by defective sidewalk; *Reock v. Mayor*, 33 N. J. L. 133, a suit for damage sustained by change of street grade; *Vail v. Amenia*, 4 N. Dak. 243, 59 N. W. 1093, where plaintiff was injured by reason of unsafe bridge; *Commissioners Hamilton Co. v. Mighels*, 7 Ohio St. 124, an action against county for personal injuries sustained in defective passage in courthouse; *Elliott v. Philadelphia*, 75 Penn. St. 352, 15 Am. Rep. 596, exonerating city for neglect of police officer; *White v. City Council*, 2 Hill L. 575, holding that there was no trespass where officers pulled down house to check a fire, and *Black v. City of Columbia*, 19 S. C. 421, 422, 45 Am. Rep. 790, 791, where there was further an inadequate supply of water; *Young v. City Council*, 20 S. C. 112, 47 Am. Rep. 828, holding that no action lay for injuries sustained by reason of defect in street; *Richmond v. Long*, 17 Gratt. 381, 94 Am. Dec. 465, where slave escaped from city hospital and was lost by neglect of proper custody; *Mendel v. Wheeling*, 28 W. Va. 257, 57 Am. Rep. 682, collecting authorities, and holding city not liable for loss by fire caused by defect in water supply. Cited in valuable note, 30 Am. St. Rep. 381. Approved, without applying rule, in *Coleman v. Chester*, 14 S. C. 291, holding that no tort was committed. Cited generally in *State v. Hayes*, 61 N. H. 332, holding that a New Hampshire town is a municipal corporation with limited legislative powers; *Wooster v. Plymouth*, 62 N. H. 209, holding that municipal corporations are subject to legislative control.

Distinguished in *Tallahassee v. Fortune*, 3 Fla. 20, 52 Am. Dec. 360, holding city liable for injury sustained by reason of a nuisance; *McGary v. Lafayette*, 4 La. Ann. 440, where city ratified tortious

act of its agents; *Mayor of New York v. Bailey*, 2 Den. 448, holding city liable for negligent construction of a dam erected for its benefit; *Petersburg v. Applegarth*, 28 Gratt. 344, 26 Am. Rep. 362, where it is held that the city as wharf-owner must respond in damages for tort.

Pleading.—Defendant may demur and plead to the whole declaration at the same time by virtue of the Virginia statute, p. 409.

Cited with approval in *Higgs v. Shehee*, 4 Fla. 392, allowing defendant to defend on the merits after demurrer to evidence overruled.

Miscellaneous.—Cited erroneously in *Dormady v. State Bank*, 2 Scam. 242, 245; *Trustees v. Burt*, 11 Vt. 642.

3 Pet. 411-412, 7 L. 723, *CLAY v. SMITH*.

Bankruptcy.—A person of one State, voluntarily making himself a party to bankruptcy proceedings in another State, abandons his extra-territorial immunity from the operation of its bankruptcy laws, p. 412.

This ruling is affirmed and relied upon by the citing cases, as follows: *Eustis v. Bolles*, 150 U. S. 369, 37 L. 1113, 14 S. Ct. 133 (affirming S. C., 146 Mass. 417, 4 Am. St. Rep. 330, 16 N. E. 297), holding that creditor waived any constitutional right by accepting dividends; *Electric Co. v. Dow*, 166 U. S. 490, 41 L. 1089, 17 S. Ct. 646, where party making an election under a statute was held to waive any objection to it; *Davidson v. Smith*, 1 Biss. 348, F. C. 3,608, relieving debtor of a judgment obtained by a non-resident before his discharge; *Brest v. Smith*, 5 Biss. 62, F. C. 1,843, and *Wilson v. Matthews*, 32 Ala. 351, 352, where creditor had joined in insolvency proceedings; *Greene v. Sprague Mfg. Co.*, 52 Conn. 372, holding creditor bound by acceptance of a deed of assignment; *Rosenheim v. Morrow*, 37 Fla. 188, 20 So. 245, where non-resident had accepted pro rata dividend; *Pugh v. Bussel*, 2 Blackf. 398, holding defendant previously discharged from arrest for debt; *Fogler v. Clark*, 80 Me. 240, 14 Atl. 10, where creditor voluntarily appeared and accepted dividends, and *Chafee v. Fourth National Bank*, 71 Me. 527, 36 Am. Rep. 350, reviewing some authorities on same point; *Evans v. Sprigg*, 2 Md. 483, reviewing authorities, and protecting non-resident creditor attaching before insolvent's application was filed; *Jones v. Horsey*, 4 Md. 312, 59 Am. Dec. 82, where foreign creditor joined in recommendation of trustee; *Brown v. Smart*, 69 Md. 327, 14 Atl. 470, holding a deed of assignment to preferred foreign creditors void; *Journeay v. Gardner*, 11 Cush. 357; *Bucklin v. Bucklin*, 97 Mass. 258, and *Burpee v. Sparhawk*, 108 Mass. 114, 11 Am. Rep. 323, all barring creditors voluntarily appearing in bankruptcy proceedings. So also in *Murray v. Roberts*, 150 Mass. 355, 15 Am. St. Rep. 210, 23 N. E. 209, 6 L. R. A. 347,

n.; and *Perley v. Mason*, 64 N. H. 8, 3 Atl. 631, ruling similarly; *Van Hook v. Whitlock*, 26 Wend. 54, 37 Am. Dec. 249 (affirming S. C., 7 Paige, 378, 379), holding that creditor waived constitutional rights by accepting dividend; *Phelps v. Borland*, 103 N. Y. 412, 57 Am. Rep. 758, 9 N. E. 310, holding drawer of bill discharged where holder voluntarily appeared in bankruptcy proceedings in England. See note, 7 Ohio, 197. See review of authorities in exhaustive note, 15 Am. St. Rep. 214, 216, 217, 218, 221. Approved in *Cole v. Cunningham*, 133 U. S. 115, 33 L. 542, 10 S. Ct. 271, preventing creditor of bankrupt from prosecuting suit in another State; *Marsh v. Putnam*, 3 Gray, 560, holding discharge barred action between residents on contract to be performed in another State; in dissenting opinion, *Brighton Market Bank v. Merick*, 11 Mich. 414, court holding non-resident holder of note bound by bankruptcy proceedings in like manner as residents. Cited generally in *Pierce v. Somerset Ry.*, 171 U. S. 649, holding that a person may, by his acts, waive rights which he might otherwise have under Federal Constitution; *Wilson v. Matthews*, 32 Ala. 343, 344, holding that Louisiana insolvent laws were constitutional; in dissenting opinion, *People v. Dawell*, 25 Mich. 271, majority holding decree of divorce obtained in sister State fraudulent and void; *Barry v. Iseman*, 14 Rich. L. 141, 91 Am. Dec. 268, holding that non-residence could not avail a party suing on a contract made and to be executed in same State; *Perry Mfg. Co. v. Brown*, 2 Wood. & M. 459, F. C. 11,015, as to petitioner's residence in the county in insolvency proceedings.

Distinguished in *Woodhull v. Wagner*, 1 Bald. 301, F. C. 17,975, where creditor was allowed to enforce debt against non-resident bankrupt; *Towne v. Smith*, 1 Wood. & M. 127, F. C. 14,115, allowing non-resident holder of a note to sue bankrupt debtor; *Brook v. Brown*, 5 Cr. C. O. 492, F. C. 1,931; *Donnelly v. Corbett*, 7 N. Y. 507, and *Soule v. Chase*, 39 N. Y. 344, holding that one does not become a resident creditor by suing in State of insolvent; *Babcock v. Weston*, 1 Gall. 169, F. C. 703, a non-resident not being a party to the proceedings; *Harrison's Admr. v. Harrison's Distributees*, 39 Ala. 505, holding that certain proceedings in chancery did not determine an election of remedies; *Norton v. Cook*, 9 Conn. 321, 23 Am. Dec. 345; *Collins v. Rodolph*, 3 G. Greene, 305, and *McCarty v. Gibson*, 5 Gratt. 326, holding non-resident creditor, who had appeared to oppose petition, not precluded. Rule criticised in *Agnew v. Platt*, 15 Pick. 422, holding that non-resident could not waive rights by assenting to proceedings void as to him. Distinguished in *Safford v. Slade*, 11 Cush. 30, where non-resident proved claim by mistake; *Fareira v. Keevil*, 18 Mo. 189, where foreign creditor was not a party; *Van Nest v. Yoe*, 1 Sandf. Ch. 16, holding creditor fraudulently induced to accept dividend under an assignment not bound by it; *Elton v. O'Connor*, 6 N. Dak. 18, 20, 68 N. W. 89, 90, 33 L. R. A. 530, 531, holding that creditor, whose claim accrued before pas-

sage of insolvency law, may treat as void the discharge provision of the law, despite his receipt of dividends; *Douglass v. Craig*, 13 S. C. 375, holding that one receiving a "pro rata" on basis of allowance of Homestead is not estopped to afterwards deny a right to such exemption; *Johns v. Brown*, 1 Tex. App. Civ. 569, holding that one did not release his claim upon a firm by accepting a payment from the corporation into which it was merged; *Blackman v. Green*, 24 Vt. 22, holding that a factor could not deprive his principal of extra-territorial immunity, without his consent.

Judgment may be entered *nunc pro tunc* as of the first day of the term, when party dies while the cause is held under advisement, p. 412.

Rule applied and case cited in *Blaisdell v. Harris*, 52 N. H. 195, where plaintiff died after verdict, and while cause was pending in law term; *Estate of Jarrett*, 42 Ohio St. 201, entering judgment *nunc pro tunc* as of the day when cause was submitted. Cited in notes to *Mitchell v. Overman*, 103 U. S. 66, 26 L. 371, sustaining the validity of a decree entered as of the term when the cause was submitted; and *Young v. Ridenbaugh*, 3 Dill. 245, F. C. 18,173, entering discharge of bankrupt after his death.

Cited, but held inapplicable, *Power v. Lenoir* (Mont.), 56 Pac. 111, where father defended suit respecting his children's property without due appointment as guardian, his appointment as such afterwards *nunc pro tunc*, without notice to them, is invalid.

3 Pet. 413-430, 7 L. 724, *PARSONS v. ARMOR*.

Writ of error.—Writ of error, according to common law, does not bring up testimony as well as law of case for revision of appellate court, p. 425.

Approved in *Farrelly v. Cross*, 10 Ark. 407, holding on writ of error court has power to correct errors of law, not of fact. Approved in dissenting opinion, *United States v. King*, 7 How. 866, 12 L. 948, majority reversing case for error upon face of record outside of bill of exceptions.

Appeal.—Where entire testimony as well as law of the case is submitted to appellate court, there is no way to treat the case, but in the nature of bill of exceptions, p. 425.

Constitutional law — Jury trial.—The seventh amendment to Constitution providing for trial by jury has no bearing in case where parties have expressly waived such trial, p. 425.

Approved and applied in *Kearney v. Case*, 12 Wall. 281, 20 L. 396, collecting cases and holding waiver of jury trial will be inferred where party is present by counsel and goes to trial before court.

Appeal and error — Bill of exceptions.—Where all testimony is submitted on writ of error, and giving utmost force to evidence in

favor of respondent, judgment must be reversed, case may be treated as bill of exceptions, p. 425.

Cited and rule followed in *Hyde v. Booraem*, 16 Pet. 176, 10 L. 928, reversing case where taking all facts in favor of respondent as true, judgment cannot be maintained; *Phillips v. Preston*, 5 How. 290, 12 L. 157, holding statute requiring testimony to be taken down in cases where appeal lies to Supreme Court does not include cases carried up by writ of error; *Farrelly v. Cross*, 10 Ark. 409, holding on writ of error court has power to correct errors of law, not of fact; *Kennon v. Shull*, 9 Ind. 156, note, holding where cause stands for trial de novo in Circuit Court and latter is then deprived of jurisdiction, appeal is dismissed. Approved in dissenting opinion in *Real Estate Bank v. Rawdon*, 5 Ark. 586, 589.

Agency.—Principal is bound by acts of agent only so far as he authorizes that agent to bind him; but extent of power given to agent is deducible from facts as well as express delegation, p. 428.

Cited approvingly to this point and followed in *The Joseph Grant*, 1 Biss. 197, F. C. 7,538, holding vessel is not bound where master signs blank bill of lading in excess of authority; *United States v. Halberstadt*, Gilp. 270, F. C. 15,276, holding merchant is not liable for penalty where his clerk buys empty spirit cask with stamps undestroyed; *United States v. Celluloid*, 82 Fed. 631, 54 U. S. App. 282, holding owner of goods is not liable for attempts of mere trespasser to smuggle the same.

Bills and notes.—Power to draw a bill of exchange and put same upon the market is equivalent to deposit of cash in drawer's hands, p. 428.

Cited approvingly in *Bayard v. Lathy*, 2 McLean, 464, F. C. 1,131, holding written authority to draw is an acceptance to person taking bill on credit of same.

Distinguished in *Bell v. Moss*, 5 Whart. 203, holding as between buyer and seller promise to accept draft does not amount to payment.

Agency.—If money is given to servant to purchase for principal, and agent uses it and purchases on credit, principal is not bound, although article come in fact to principal's use, p. 429.

Agency.—Where principal, who protests overdrafts of agent given in payment of purchases, is guilty of unfair dealing or collusion with agent, he is chargeable upon such bills, p. 429.

Bills and notes.—There can be no question of the general power of drawee to protest bills of one who has overdrawn, p. 429.

Bills and notes.—The fact that drawee of bill has been in habit of accepting bills of certain nature drawn by his agent, does not

put him under obligation to accept other bills of same nature, p. 430.

Approved in *Murdock v. Mills*, 11 Met. 15, applying rule where agent exceeded his instructions and some of his bills were paid and others protested; *Michigan Bank v. Leavenworth*, 28 Vt. 221, applying rule where bills were protested because payable at New York while previous bills so payable were accepted.

Agency.—Where agent, purchasing for principal, exhibits latter's letter stating limitations upon agent's authority, principal is not liable if agent exceeds such authority, p. 430.

Approved and applied in *Carrollton Bank v. Tayleur*, 16 La. 500, 35 Am. Dec. 222, applying rule where principal's letter limited amount to be drawn and agent exceeded the limit; *Mussey v. Beecher*, 3 Cush. 518, holding party selling to agent in excess of known instructions to expend \$2,000, cannot recover excess from principal.

Miscellaneous.—*Duncan v. United States*, 7 Pet. 451, 8 L. 745, and *Livingston v. Story*, 11 Pet. 396, 9 L. 764, dissenting opinion, referring to principal case in connection with opinion in *Parsons v. Bedford*, 3 Pet. 433, 7 L. 732, arising from same transaction.

3 Pet. 431-432, 7 L. 731. **BANK OF KENTUCKY v. WISTAR.**

Amendment of judgment.—Where, by clerical error, the judgment of Supreme Court, affirming that of Circuit Court, omits to allow interest as damages, the proper amendment will be ordered made, p. 432.

Approved and practice followed in *Gilman v. Libbey*, 4 Cliff. 460, F. C. 5,445, holding court has power to amend record where it falsely appears that defendant presided as judge; *Gibson v. Chouteau's Heirs*, 45 Mo. 173, 100 Am. Dec. 368, collecting cases, and granting motion to correct judgment faultily entered by clerk; *Evans v. Fisher*, 26 Mo. App. 545, granting motion to correct judgment which bears special rate of interest so as to show that rate; *Trammell v. Trammell*, 25 Tex. Sup. 271, reviewing cases, and amending judgment on appeal to include one of three sureties omitted by clerk's mistake. Approved in *Sibbald v. United States*, 12 Pet. 492, 9 L. 1169, ordering new mandate in conformity to opinion formerly rendered where clerk's mandate was not sufficiently specific; *Bank of United States v. Moss*, 6 How. 38, 12 L. 334, holding, however, where Circuit Court has rendered judgment, it may not at subsequent term strike it out for want of jurisdiction; *Phillips v. Negley*, 117 U. S. 674, 29 L. 1015, 6 S. Ct. 905, denying motion to set aside judgment rendered at previous term; *Gay v. Joplin*, 4 McCrary, 465, note; *Jenkins v. Eldredge*, 1 Wood. & M. 63, F. C. 7,269, refusing petition to extend time to redeem mortgaged property after final decree; *Chambers v. Hodges*, 3 Tex. 529, re-

fusing, however, to reconsider opinion rendered at previous term; *Ætna Ins. Co. v. McCormick*, 20 Wis. 269, holding, however, judgment rendered at prior term cannot be set aside on ground that sufficient notice was not given to adverse party. See also valuable discussion in note, 21 Am. Dec. 119; *United States v. Peralta*, 27 Fed. Cas. 497, holding, however, District Court may amend description of land in decree to conform with description in Supreme Court's opinion. Cited generally in *Bissell Co. v. Goshen Co.*, 72 Fed. 553, 43 U. S. App. 47, quoting from *Sibbald v. United States*, *supra*, on point that no appeal lies from Circuit Court of Appeals to same court.

Distinguished in *Rice v. Minn., etc., Ry. Co.*, 21 How. 85, 16 L. 32, denying motion to vacate judgment dismissing appeal for lack of jurisdiction.

Damages on appeal.—When there are no special circumstances, damages at rate of 6 per cent. are added to judgment of court below; under special circumstances 10 per cent. is awarded, p. 432.

3 Pet. 433-458, 7 L. 732, *PARSONS v. BEDFORD*.

Practice.—Congress did not intend by the act of May 26, 1824, to give an absolute and imperative force to the modes of proceedings in civil causes in Louisiana, in the court of the United States, nor to repeal antecedent modes of proceeding, p. 444.

Cited to this point in *Livingston v. Story*, 9 Pet. 657, 9 L. 264, holding that Federal court in Louisiana had same equity powers as any Federal Circuit Court; *Fenn v. Holme*, 21 How. 486, 16 L. 200, holding that adoption of State practice does not confound the proceedings in law and equity in Federal courts; *Sulzer v. Watson*, 39 Fed. 415, holding action of book account must be tried by jury notwithstanding Revised Statutes, section 914, adopting State practice; *United States v. National Lead Co.*, 75 Fed. 95, holding that legislation of Congress controlled practice in regard to production of books in Federal court.

Federal practice.—Where no rule superseding State practice was adopted by the Federal court in Louisiana, the act of Congress made the practice of the State the rule for the court of the United States, p. 445.

Cited, affirmed and followed on this point in *Duncan v. United States*, 7 Pet. 451, 8 L. 745, where the Federal court had followed the Louisiana practice; *Smith v. Cockrill*, 6 Wall. 758, 18 L. 974, where a sale on execution was held void as not made in conformity to State practice. Approved in dissenting opinion, *Livingston v. Story*, 11 Pet. 396, 399, 9 L. 764, 765, majority holding that rule of court did not allow defendant to insist on any special matter in his answer.

Appeal.—Generally speaking matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the

appellate court, and points of law are not cognizable unless raised by proper application, p. 445.

Cited, and rule followed in *Minor v. Tillotson*, 2 How. 393, 11 L. 313, refusing to try cause on its merits on a writ of error; *Phillips v. Preston*, 5 How. 289, 290, 12 L. 157, holding that court could not re-examine facts in a case at law, without a trial by jury, on writ of error; dissenting opinion in *United States v. King*, 7 How. 865, 12 L. 948, majority holding upon writ of error that decision of Federal court in Louisiana upon question of fact was conclusive; dissenting opinion, *Real Estate Bank v. Rawdon*, 5 Ark. 590, 594, majority holding that findings of law and fact by lower court sitting as jury might be reviewed under bill of exceptions.

Common law.—At the adoption of the Constitution the common law was essentially the basis of the jurisprudence of all the States, and the phrase “common law” is used in that instrument in contradistinction to equity, and admiralty and maritime jurisprudence, p. 446.

Cited as an authority for this proposition in *Irvine v. Marshall*, 20 How. 565, 15 L. 998, where the Federal court exercised its equity jurisdiction to enforce a trust; *The Steamboat Atlas*, 4 Ben. 35, F. C. 633, an action in admiralty for loss from collision, the court dividing the loss; *In re Oregon Bulletin Co.*, 3 Sawy. 531, F. C. 10,560, holding that proceeding by creditor to have debtor adjudged a bankrupt is a case at law; *Brisenden v. Chamberlain*, 53 Fed. 309, holding that phrase “common law” in Constitution includes statutory action for damages; *Klever v. Seawall*, 65 Fed. 395, 22 U. S. App. 715, directing proceeding for partition to be brought in equity by virtue of State statute; *Poole v. Nixon*, 19 Fed. Cas. 994, holding that bills of review form part of the law of equity adopted by the Constitution; *Tift v. Griffin*, 5 Ga. 192, holding that our usage must be according to common law in suit against receiver of public moneys; *Territory v. Flowers*, 2 Mont. 534, holding an act conferring “common-law jurisdiction” gave the court cognizance of statutory offenses; *Browning v. Estate of Browning*, 3 N. Mex. 465 (374), 9 Pac. 680, following the common-law statute of limitations in suit on promissory note; *Cast v. Cast*, 1 Utah, 123, holding that action for divorce was within chancery jurisdiction of State District Court. Cited, with approval, in dissenting opinion, *Waring v. Clarke*, 5 How. 481, 12 L. 245, majority sustaining admiralty jurisdiction in a case of collision occurring on waters slightly influenced by tide. Cited generally in *Shuford v. Cain*, 1 Abb. (U. S.) 305, F. C. 12,823, on the point that the United States courts preserve the distinction between suits at law and in equity; *Allen v. Blunt*, 1 Blatchf. 486, F. C. 215, holding that Federal courts have power in equity to grant injunctions, etc., for infringement of patent; *United States v. Power*, 14 Blatchf. 225, F. C. 16,080, holding that a certain City Court was a court of common-law juris-

diction; *United States v. New Bedford Bridge*, 1 Wood. & M. 459, F. C. 15,867, holding that the admiralty law as to crimes was never clearly adopted at any one time by our courts; *Ex parte Tweedy*, 22 Fed. 88, holding that Probate Court in Tennessee was not one having common-law jurisdiction; *Dean, Petitioner*, 83 Me. 496, 22 Atl. 387, 13 L. R. A. 231, n., holding that municipal court without a clerk had no jurisdiction over application for naturalization; *Wilcox v. Saunders*, 4 Neb. 580, holding that actions for specific performance and for damages were improperly joined; *Reubens v. Joel*, 13 N. Y. 496, where it was sought to combine equitable relief with a judgment for debt; *Stevens v. Baker*, 1 Wash. Ter. 319, adopting the Federal rules in equity in territorial courts.

Juries do not intervene in civil causes in courts of equity and admiralty, and are used in courts of equity in extraordinary cases only to inform the conscience of the court, p. 446.

Constitutional law.—The seventh amendment to the Constitution by the words “in suits of common law” embraces all suits not of equity and admiralty jurisdiction, whatever may be their form, p. 447.

The citations collect a variety of cases affirming this proposition and relying upon it for the following holdings: *Parish v. Ellis*, 16 Pet. 454, 10 L. 1029, holding an action in Florida for allotment of dower to be a case at law; *Hipp v. Babin*, 19 How. 278, 15 L. 635, denying equity jurisdiction in a suit for recovery of land and for an accounting; and similarly in *Fenn v. Holme*, 21 How. 486, 16 L. 200, a suit in ejectment; *Root v. Railway Co.*, 105 U. S. 206, 26 L. 981, reviewing authorities, and dismissing a bill in equity merely asking for damages for infringement of patent; *Baker v. Biddle*, 1 Bald. 405, F. C. 764, holding that plaintiff had a plain and adequate remedy at law, and, therefore, dismissing bill; *Bains v. Schooner James*, 1 Bald. 554, 561, 562, F. C. 756, holding that an account not cognizable in admiralty could not be set up by way of set-off to a libel for seamen’s wages; *Keith v. Rockingham*, 18 Blatchf. 247, 2 Fed. 835, holding that statutory action against town for special damage was an action at common law; *United States v. Steamship Queen*, 4 Ben. 243, F. C. 16,107, holding that action against master was at law, entitling him to jury trial; *Quantity of Manufactured Tobacco*, 10 Ben. 448, F. C. 11,499, where it is held that an action for forfeiture for violation of internal revenue laws is a common-law cause; *United States v. One Hundred and Thirty Barrels of Whiskey*, 1 Bond, 590, F. C. 15,938, allowing jury trial to claimant of property seized by the government; *United States v. Block*, 121, 3 Biss. 214, F. C. 14,610, holding that a condemnation proceeding was a suit of civil nature at common law within meaning of judiciary act; *Boyd v. Clark*, 13 Fed. 910, holding that an admiralty cause tried by jury might be reviewed on appeal; *Smith v. American Nat. Bank*, 89 Fed.

839, compelling cestui que trust to resort to equity to follow trust property and enforce the trust; *United States v. Inlotts*, 26 Fed. Cas. 487, holding condemnation proceeding a suit at common law; *Field v. Walker*, 17 Ala. 82, holding that issue freedom vel non should be tried by jury; *Ashley v. Little Rock*, 56 Ark. 396, 19 S. W. 1059, holding that one in possession claiming adverse title is entitled to have his claim tried at law by jury; *St. Paul & Sioux City R. R. v. Gardner*, 19 Minn. 141, 18 Am. Rep. 338, reserving right of jury trial in action to recover value of wheat converted; *Scott v. Billgerry*, 40 Miss. 143, granting jury trial in suit for specific performance; *Creighton v. Hershfield*, 1 Mont. 645, holding that it was error to try a suit in foreclosure as a common-law action with jury; *Chamberlain v. Warburton*, 1 Utah, 270, granting jury trial in mandamus proceeding; *Dacres v. O. R. & N. Co.*, 1 Wash. 529, 20 Pac. 603, declaring an act, in effect denying right of trial by jury in certain cases, unconstitutional; so, also, in *In re Sherman M. Booth*, 3 Wis. 40, an act conferring upon commissioners right to try claims to fugitive slaves.

Cited, with particular application of the ruling, in *Brent v. Bank of Washington*, 10 Pet. 613, 9 L. 554. Cited generally in *Clark v. Sohler*, 1 Wood. & M. 372, F. C. 2,835, which was a petition for new trial in common-law action; *Alger v. Anderson*, 92 Fed. 712, in discussing adequate remedy at law; *Magill v. Brown*, 16 Fed. Cas. 440, holding that English principles of common law and equity relative to charitable uses prevail unless contrary to section 16, judiciary act; *Lavey v. Doig*, 25 Fla. 617, 6 So. 261, holding that County Court had power to try validity of will without a jury; *State v. Gutierrez*, 15 La. Ann. 194, holding that any attempt to reduce number of jurors would be of no effect. Cited with approval in dissenting opinion, *Mackey v. Enzensperger*, 11 Utah, 159, 160, 164, 39 Pac. 543, 544, majority holding that an act permitting a verdict by nine out of twelve jurors is not in conflict with seventh amendment. Cited in note, 48 Am. Dec. 186, where authorities are reviewed.

Limited and criticised as too broad in *Commissioners v. Morrison*, 22 Minn. 179, holding that, among other exceptions, a jury could not be demanded in a suit for collection of taxes. So in *Schmidt v. Schmidt*, 47 Minn. 453, 50 N. W. 599, denying jury trial in contest of will; *Chumasero v. Potts*, 2 Mont. 259, concurring opinion, holding that in Montana the right of trial by jury in mandamus proceedings is not absolute; *Tribon v. Strowbridge*, 7 Or. 159, holding that under State statute court could refer an action at law involving examination of long accounts. Distinguished in dissenting opinion, *Scott v. Billgerry*, 40 Miss. 155, *supra*.

Seventh amendment and judiciary act were contemporaneous, p. 446.

Cited to this point, *arguendo*, *Alger v. Anderson*, 92 Fed. 700.

Appeal and error.—The only modes known to the common law and in the Federal courts to re-examine facts tried by a jury are the granting of new trial by the court where issue was tried, or the award of a new trial by an appellate court, for some error of law, p. 448.

The following citing cases affirm and rely upon this holding: *Hepburn v. Dubois*, 12 Pet. 376, 9 L. 1123, holding that the court was bound to consider a certain fact established by finding of the jury; *Barreda v. Silsbee*, 21 How. 167, 16 L. 93, holding that finding of jury was conclusive; *Justices v. Murray*, 9 Wall. 277, 19 L. 660, applying rule to criminal case of Federal cognizance, coming up from State court; *Miller v. Life Ins. Co.*, 12 Wall. 300, 20 L. 401, holding findings of fact by lower court to be conclusive; *Insurance Co. v. Comstock*, 16 Wall. 269, 21 L. 498, ordering the Federal Circuit Court to decide questions in bill of exceptions brought up from District Court; *Insurance Co. v. Folsom*, 18 Wall. 249, 21 L. 833, overruling an exception to ruling of lower court refusing to make any special finding as requested; *Crim v. Handley*, 94 U. S. 657, 24 L. 218, refusing to disturb judgment at law, there being no ground for equitable relief; *The Abbotsford*, 98 U. S. 445, 25 L. 170, the court in an admiralty cause considering only such rulings as were presented by bill of exceptions; *Railroad Co. v. Fraloff*, 100 U. S. 32, 25 L. 535, and *Trenier v. Stewart*, 101 U. S. 808, 25 L. 1023, affirming decision of lower court, no error appearing in the record; *Arkansas Cattle Co. v. Mann*, 130 U. S. 75, 32 L. 856, 9 S. Ct. 460, refusing on writ of error to review an order refusing new trial; *Blitz v. United States*, 153 U. S. 312, 38 L. 727, 14 S. Ct. 926, holding similarly; *Delaware R. R. v. Converse*, 139 U. S. 476, 35 L. 216, 11 S. Ct. 572, where jury had found plaintiff not guilty of contributory negligence, and there was no error. The principal case is relied upon in the following, sustaining verdicts where no error of law appeared: *Lincoln v. Power*, 151 U. S. 438, 38 L. 225, 14 S. Ct. 388; *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 246, 41 L. 988, 17 S. Ct. 588, reviewing authorities at length, and *United States v. Plumer*, 3 Cliff. 25, F. C. 16,055. Followed in *Grayson v. Lynch*, 163 U. S. 475, 41 L. 233, 16 S. Ct. 1067, where jury trial was waived, but rule applied; *Smith v. Chase*, 3 Cr. C. C. 352, F. C. 13,022, and *Fitzgerald v. Leisman*, 3 McA. 8, holding that no appeal lies from jury trial before justice of peace; *United States v. Haynes*, 26 Fed. 857, holding that indictment cannot be remitted to Circuit Court after conviction in District Court; *United States v. Haynes*, 29 Fed. 695, 697, approving rule, but criticising result in preceding decision involving same matter; *New York & T. S. S. Co. v. Anderson*, 50 Fed. 465, 1 U. S. App. 176, refusing to review decision refusing to grant new trial on ground that verdict was against evidence; *Northern Pac. R. Co. v. Charless*, 51 Fed. 579, 7 U. S. App. 359, and *Richmond, etc., Co. v. Dick*, 52 Fed. 380, 8 U. S. App. 99, applying rule similarly;

Singer Mfg. Co. v. Brill, 54 Fed. 382, 7 U. S. App. 601, the court refusing on writ of error to review verdict; Harper & Reynolds Co. v. Wilgus, 56 Fed. 588, 15 U. S. App. 143, appellate court having no concern with weight to be given evidence properly admitted; Dillingham v. Hawk, 60 Fed. 496, 23 U. S. App. 273, 23 L. R. A. 519, where verdict in State court against receiver appointed by Federal court was allowed to stand; Pacific Postal Telegraph v. Fleischner, 66 Fed. 903, 29 U. S. App. 227, refusing to disturb findings of fact by lower court; Hurd v. McClellan, 1 Colo. App. 330, 29 Pac. 183, where no valid appeal to a judgment in ejectment was taken; McCarthy v. Strait, 7 Colo. App. 63, 42 Pac. 190, and Pueblo Lumber Co. v. Danziger, 7 Colo. App. 151, 42 Pac. 684, holding parties concluded by judgments where no steps were taken to have them reviewed; Bryant v. Rich, 106 Mass. 193, 8 Am. Rep. 316, deuying petition made after verdict, for removal of cause to Federal court; Crane v. Reeder, 28 Mich. 532, 535, 15 Am. Rep. 228, 230, refusing to transfer cause to Federal court after several trials and judgments in State court; Goss v. McClaren, 17 Tex. 115, 67 Am. Dec. 647, holding it to be error for court to grant new trial after term in which judgment was entered; Barlow v. Daniels, 25 W. Va. 514, 515, 518, holding that a case tried by a jury of six could not be retried in appellate court.

Cited generally to this point in Bassick Min. Co. v. Schoolfield, 15 Colo. 380, 24 Pac. 1051, holding that court could not create a lien on property for receiver's fee after judicial sale; Allen v. Lewis, 38 Fla. 121, 20 So. 823; Ringgold's Case, 1 Bland. 9, discussing fully the subject of appeal; State v. Van Winkle, 6 Nev. 352; Fay v. Parker, 53 N. H. 387, 16 Am. Rep. 326, holding that vindictive damages could not be awarded in a civil action, punishable by the criminal law. Approved in dissenting opinion, Insurance Co. v. Boon, 95 U. S. 134, 24 L. 400, majority reviewing a judgment founded upon special finding by lower court without intervention of a jury.

Distiguished in Boyd v. Clark, 13 Fed. 910, holding admiralty causes tried by jury may be re-examined upon appeal; Knight v. Cheney, 14 Fed. Cas. 764, 5 Bank. Reg. 317, holding that Congress may provide for revision of equity causes by appellate court.

Constitutional law.—No court ought, unless unavoidable, to give a construction to a statute rendering it unconstitutional, p. 448.

Cited to this principle and followed in Presser v. Illinois, 116 U. S. 269, 29 L. 620, 6 S. Ct. 586, sustaining validity of sections of the Military Code of Illinois; Hooper v. California, 155 U. S. 657, 39 L. 301, 15 S. Ct. 211, upholding a penal statute on the ground that it did not attempt to regulate interstate commerce; Personal Liberty Laws, 46 Me. 587, Appleton and Kent, JJ., sustaining their constitutionality; State ex rel. Drake v. Doyle, 40 Wis. 191, 22 Am. Rep. 697, sustaining validity of a State act imposing conditions upon foreign insurance companies.

Miscellaneous.—Cited erroneously in Tufts v. Tufts, 3 Wood. & M. 483, F. C. 14,233.

3 Pet. 459-460, 7 L. 741, **FARRAR v. UNITED STATES.**

Supreme Court practice.—It has uniformly been the practice of the clerk of the Federal Supreme Court to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general, in every case to which the United States is a party, p. 459.

Supreme Court practice.—If the attorney-general lets the clerk's appearance for him pass for that term, it is conclusive upon him, otherwise not, p. 460.

An appearance cures any defect in the service of process, p. 460.

Rule approved and followed in *Platt v. Manning*, 34 Fed. 818, holding that a general appearance cured an unauthorized service; *Rundles v. Jones*, 3 Ind. 37, holding that any defect in an assignment of errors was waived by plea of no error; *Bank of Valley v. Bank of Berkeley*, 3 W. Va. 391, where errors in process were waived by motions to continue; *Mahany v. Kephart*, 15 W. Va. 618, where defendant appeared voluntarily; *Shepherd v. Brown*, 30 W. Va. 18, 3 S. E. 189, where defective notice was cured by appearance.

Distinguished in *Romaine v. Union Ins. Co.*, 28 Fed. 638, holding that special appearance did not subject parties to jurisdiction of court and cure defect in service; *Steele v. Harkness*, 9 W. Va. 24, holding that an appearance did not waive the exception to process properly reserved.

3 Pet. 461-467, 7 L. 741, **NEW JERSEY v. NEW YORK.**

Practice.—Where rule prescribes service of process upon both the governor and the attorney-general of a State, service on one of them is not sufficient to entitle court to proceed, p. 464.

Practice.—In an action between two States, court does not feel bound by its decision after *ex parte* argument on point of jurisdiction, if defendant State asks to have question reargued, p. 464.

Supreme Court will grant subpoena in equity to be served on governor and attorney-general of defendant State subject to right of said State to object in course of the cause, p. 466.

Miscellaneous.—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 288, 32 L. 242, 8 S. Ct. 1373, collecting instances of actions between two States concerning their boundaries.

3 Pet. 469, 7 L. 744, **SMITH v. HONEY.**

Appeal and error.—When verdict for plaintiff in Circuit Court is for less than \$2,000 and defendant prosecutes writ of error, Supreme Court has not jurisdiction, although plaintiff's demand exceeds \$2,000, p. 469.

Cited and doctrine followed in *Walker v. United States*, 4 Wall.

164, 18 L. 319, dismissing appeal where judgment for plaintiff was for \$2,000 and interest; The "D. R. Martin," 91 U. S. 366, 23 L. 440, holding where libellant obtained decree for \$500, which was reversed upon defendant's appeal, libellant cannot appeal to Supreme Court; Hilton v. Dickinson, 108 U. S. 172, 27 L. 690, 2 S. Ct. 429, reviewing cases, and dismissing appeal of plaintiff who has obtained judgment for \$1,500 out of fund of \$3,000; Decker v. Williams, 73 Fed. 311, collecting cases and dismissing appeal of defendant from judgment for less than amount fixed by statute; Richmond v. Brummie, 52 Kan. 248, 34 Pac. 784; Tipton v. Chambers, 1 Met. (Ky.) 568, and Draper v. Clark, 59 Ohio St. 339, 52 N. E. 833, dismissing appeal of defendant where plaintiff's judgment did not exceed minimum. Cited, *arguendo*, in Kanouse v. Martin, 15 How. 208, 14 L. 664, holding, upon filing of declaration, amount therein demanded is the "matter in dispute;" Batchelder v. Richardson, 75 Va. 837, dismissing appeal where difference between amount claimed and amount awarded did not exceed minimum.

Distinguished in Gordon v. Ross, 2 Cal. 157, holding under terms of State Constitution that defendant may appeal where judgment added to costs exceeds minimum.

3 Pet. 470-479, 7 L. 744, McDONALD v. MAGRUDER.

Bills and notes.—An indorser of a note is liable to his indorsee, and the latter, although he may in turn have indorsed the note over, may save his indorser upon taking up the note again, p. 474.

Approved and applied in McCrady v. Jones, 44 S. C. 409, 412, 22 S. E. 415, 416, holding statute of limitations runs against last indorser taking up note only from date of payment.

Bills and notes.—The first indorser of a note undertakes that the maker shall pay, or that he, if due diligence be used, will pay it for him; this promise makes him responsible to every subsequent holder or indorser, who has been compelled to pay, p. 474.

Cited and rule applied as follows: McCarty v. Roots, 21 How. 437, 16 L. 164, holding assignee of indorser who pays bill may sue original payee who is also indorser; Stiles v. Eastman, 1 Ga. 213, holding indorser who pays note and takes assignment of judgment against prior indorser, may enforce same; Coolidge v. Wiggin, 62 Me. 572, granting recovery by last indorser of accommodation note against payee and indorser; Johnson v. Crane, 16 N. H. 75, holding where accommodation indorsers each pay half of note, second indorser may recover his half from first; Marr v. Johnson, 9 Yerg. 4, holding second accommodation indorser may recover full amount paid from first indorser. See valuable note to 31 Am. St. Rep. 747. Cited generally, without applying the rule, in Farmers' Bank v. Rathbone, 26 Vt. 36, 58 Am. Dec. 208, granting recovery of indorsee for value of accommodation bill against acceptor.

Bills and notes.— The indorser of a note for accommodation cannot set up want of consideration for his promise, because value paid by promisee to another is as valid a consideration as if paid to promisor, p. 476.

Approved and applied in *Gillespie v. Campbell*, 39 Fed. 726, 727, 728, 5 L. R. A. 700, 701, and n., holding indorser paying bill of exchange may recover from accommodation acceptor; *Marr v. Johnson*, 9 Yerg. 6, allowing second indorser for accommodation to recover amount paid from first indorser; *Hopkins v. Richardson*, 9 Gratt. 495, holding where R. indorses bond of G. to K. to enable latter to buy goods, seller of goods may recover against R. Cited, but without particular application, in *Horn v. Thompson*, 31 N. H. 569, holding indorsement by payee of notes secured by mortgage is prima facie evidence of consideration.

Bills and notes.—Where two parties separately, and not jointly, indorse accommodation note and first is compelled to pay, he cannot enforce contribution from second indorser, p. 477.

Citing cases have affirmed and relied upon this ruling as follows: *McCarty v. Roots*, 21 How. 437, 16 L. 164, holding assignee of indorser who pays draft may sue payee who is also indorser; *Gillespie v. Campbell*, 39 Fed. 726, 727, 728, 5 L. R. A. 700, 701, collecting cases and holding indorser of bill of exchange taking up same may recover from accommodation acceptor; *Sherrod v. Rhodes*, 5 Ala. 691, refusing instruction that accommodation indorsers of bill are entitled to contribution as between themselves; *Stiles v. Eastman*, 1 Ga. 213, holding where subsequent indorser pays note and takes assignment of judgment against prior indorser, he may enforce same; *Harshman v. Armstrong*, 43 Ind. 131, holding as between accommodation indorsers, a contract to contribute may be shown; *Armstrong v. Harshman*, 61 Ind. 55, 28 Am. Rep. 668, denying contribution between successive accommodation indorsers; *McNeilly v. Patchin*, 23 Mo. 43, 44, 66 Am. Dec. 654, 655, holding successive accommodation indorsers of note are not co-sureties in absence of agreement; *Easterly v. Barber*, 66 N. Y. 437, holding, however, that agreement to contribute may be shown in action between indorsers; *Oldham v. Broom*, 28 Ohio St. 51, denying contribution between successive accommodation indorsers; *Montgomery v. Page*, 29 Or. 329, 44 Pac. 691, holding, however, agreement to contribute between indorsers may be shown by parol; *Aiken v. Barkley*, 2 Spear L. 751, 42 Am. Dec. 400, denying right of second accommodation indorser to recover moiety from first. See note to 11 Am. Dec. 792, collecting cases; also note to 42 Am. Dec. 492, and valuable discussion of right to contribution in note, 10 Am. St. Rep. 639. Cited, but without particular application of rule, in *Root v. Wallace*, 4 McLean, 9, F. C. 12,039, holding void note cannot be given in evidence to support action by indorsee against indorser.

Distinguished in *Phillips v. Preston*, 5 How. 292, 12 L. 158, allowing contribution between indorsers where, by separate contract, they agreed to bear loss equally; *Flint v. Day*, 9 Vt. 348, holding, where one not a party to note, merely writes name on back, his liability is same as other signers of note; *Pitkin v. Flanagan*, 23 Vt. 166, 56 Am. Dec. 65, holding where several indorse for accommodation without reference to order, that order raises no presumption of obligation from one to other.

3 Pet. 481-503, 7 L. 749, appendix, *TRUSTEES OF PHILADELPHIA BAPTIST ASSOCIATION v. SMITH*.

Opinion of Story, J.—Opinion of the court is reported in 4 Wheat. 1, 4 L. 499, sub nom. *Trustees, etc. v. Hart's Executors*, q. v.

Cited in *Mannix v. Purcell*, 46 Ohio St. 141, 15 Am. St. Rep. 574, 2 L. R. A. 762, holding church congregations sufficiently definite beneficiaries to support a charitable trust.

The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

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REPORTS

OF

CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN JANUARY TERM, 1830.

BY RICHARD PETERS,

Counselor at law and Reporter of the Decisions of the Supreme Court
of the United States.

VOL. IV.

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

JANUARY TERM, 1830.

1*] *JAMES CARVER, *Plaintiff in Error*,
v.

JAMES JACKSON, on the demise of JOHN JACOB ASTOR, THEODOSIUS FOWLER, CADWALLADER D. COLDEN, CORNELIUS J. BOGET, HENRY GAGE MORRIS, MARIA MORRIS, THOMAS HINKS and JOHN HINKS, *Defendants in Error*.

Practice—charge to jury—marriage settlement—sufficient evidence of execution of deed to go to jury—recital in leave—estoppel—leases, when presumed from possession—uses—remainders—shifting executory use—contingency, when ended—Act of New York Legislature as to purchasers of forfeited estates—improvements.

The practice of bringing the whole of the charge of the court delivered to the jury in the court below for review before this court, is unauthorized and extremely inconvenient, both to the inferior and to the appellate court. With the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are, nor are understood to be, binding on them as the true and conclusive exposition of the evidence. If, in summing up the evidence to the jury, the court should misstate the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment, would often enable the court to correct an erroneous expression, so as to explain or qualify it in such manner as to make it wholly unexceptionable, or perfectly distinct. [80]

The plaintiff claimed title under a marriage set-

tlement purporting to be executed the 13th of [2] January, 1758, by an indenture of release between Mary Philipse, of the first part, Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson, of the third part. Whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c., R. M. and M. P. granted, &c., to J. P. and B. R., "in their actual possession now being, by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possessions, and to their heirs, all those," &c., upon certain trusts therein mentioned. This indenture signed and sealed by the parties, and attested by the subscribing witnesses to the sealing and delivery thereof, with a certificate of William Livingston, one of the witnesses, and the execution thereof, before a judge of the Supreme Court of the State of New York, dated the 5th of April, 1787, and of the recording thereof in the secretary's office of New York, was offered in evidence by the plaintiff, and objected to, on the ground that the certificate of the execution was not legal and competent evidence, and did not entitle the plaintiff to read the deed without proof of its execution. A witness was sworn, who proved the handwriting of William Livingston, and of the other subscribing witness, both of whom were dead. The certificate of the judge of the Supreme Court of New York stated that William Livingston had sworn before him, that he saw the parties to the deed "sign and seal the indenture, and deliver it as their and each of their voluntary acts and deeds," &c. By the court. According to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture; not merely of the signing and sealing, but of the delivery, to justify the court in admitting the deed to be read to the jury; and that in the absence of all controlling evidence the jury would have been bound to find that the deed was duly executed. [82]

The plaintiff, in the ejectment, derived title under the deed of marriage settlement of the 15th of Jan., 1758, executed by Mary Philipse, who afterwards intermarried with Roger Morris, and by Roger Morris and certain trustees named in the same. The premises before the execution of the deed of marriage settlement, were the property of Mary Philipse, in fee simple. The defendant claimed title to the same

NOTE.—*Estoppel, by recital in deed, will, or other instrument.*

The parties to a deed are estopped to deny the truth of the recitals therein; and if the deeds are offered only to show the transmission of the legal title, the truth of the recitals need not be proved *abundante*. Bank of U. S. v. Benning, 4 Cranch C. C., 81.

Recitals in a deed are binding on the parties to it and those claiming under them, but not on strangers. West v. Pine, 4 Wash. C. C., 691.

A recital of one deed in another, or of a fact in a deed, binds the parties and those who claim under them. It is an estoppel which binds parties and privies, privies in blood, privies in estate, and privies Peters 4.

vies in law. But it does not bind strangers, claiming by title paramount to the deed, or claiming by adverse title, or persons claiming from the parties by title prior to the date of the reciting deed. Ford v. Grey, 1 Salk., 285; 6 Mod., 44; Trevivan v. Laurence, 1 Salk., 276; Denn v. Cornell, 3 Johns. Cas., 174; Crane v. Morris, 6 Pot., 598; 2 P. Wms., 432; Willes, 11; 4 Binn., 231, 314; Jackson v. Parkhurst, 9 Wend., 209; Torrey v. Bank of Orleans, 9 Paige, 649; Demeyer v. Legg, 18 Barb., 14; Jackson v. Wilson, 9 John., 92; Love v. Kidwell, 4 Blackf., 553; Stowe v. Wyse, 7 Conn., 214; McDonald v. King, Cox, 432; Trimble v. The State, 4 Blackf., 435; Wayman v. Taylor, 1 Dana, 257; Denn v. Brewer, Cox, 172; Whitehead v. The Governor, 6

premises under a sale made thereof, as the property of Roger Morris and wife, by certain commissioners acting under the authority of an Act of the Legislature of New York, passed the 22d of Oct., 1779, by which the premises were directed to be sold, as the property of Roger Morris and wife, as forfeited; Roger Morris and wife having been declared to be convicted and attainted of adhering to the enemies of the United States. Not only is the recital of the lease in the deed of marriage settlement evidence between the original parties to the same of the existence of the lease, but between the parties to this case the recital is conclusive evidence of the same, and superseded the necessity of introducing any other evidence to establish it. [83]

The recital of the lease in the deed of release in the present case was conclusive evidence upon all persons claiming under the parties in privity of estate, as those in this case claim. And, independently of authority, the court would have arrived at the same conclusion upon principle. [88]

As to the law of estoppels. [83]

Leases like other deeds and grants may be presumed from long possession, which cannot otherwise be explained; and under such circumstances a recital in an old deed of the fact of such a lease having been executed, is certainly presumptive 3*] proof or stronger in favor of such possession under title than the naked presumption arising from a mere unexplained possession. [84]

The uses declared in a deed of marriage settlement were, to and for the use of "Joanna Philipse and Beverly Robinson (the releasees) and their heirs, until the solemnization of the said intended marriage, and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the time of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever. But in case the said Roger Morris and Mary Philipse shall have no child or children, begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever. And in case the said

Roger should survive the said Mary Philipse, without any issue by her, or that such issue is then dead, without leaving issue, then after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form as the said Mary Philipse shall, at any time during the said intended marriage, desire the same by her last will and testament, &c., &c. The marriage took effect, children were born, all before the attainer of their parents in 1779. Mary Morris survived her husband, and died in 1825, leaving her children surviving her. This is a clear remainder in fee to the children of Roger Morris and wife, which ceased to be contingent on the birth of the first child, and opened to let in after-born children. [90]

It is perfectly consistent with this limitation that the estate in fee might be defeasible, and determinable upon a subsequent contingency; and upon the happening of such contingency, might pass by way of shifting executory use to other persons in fee, thus making a fee upon a fee. [90]

The general rule of law founded on public policy is that limitations of this nature shall be construed to be vested when, and as soon as they may vest. The present limitation in its terms purports to be contingent only until the birth of a child, and may then vest. The estate of the children was contingent only until their birth, and when the Confiscation Act of New York passed, they being all born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate. [92]

The Act of the Legislature of New York of May 1, 1786, gave to the purchasers of forfeited estates the like remedy in case of eviction for obtaining compensation for the value of their improvements as is directed in the Act of the 12th of May, 1784. The latter act declares that the person or persons having obtained judgment against such purchasers, shall not have any writ of possession, nor obtain possession of such lands, &c., until he shall have paid to the purchaser of such lands, or person holding title under him, the value of all improvements made thereon, after the passing of the act. Held, that claims of compensation for improvements made under the authority of these acts of the Legislature of New York are inconsistent with the provisions of the treaty of peace with Great Britain of 1783, and should be rejected. [101]

That in all cases a party is bound by natural justice to pay for improvements on land, made

Port., 335; Hart v. Johnson, 6 Ham., 87; Jackson v. Hasbrouck, 3 Johns., 331; Norris v. Norris, 9 Dana, 17; Norton v. Saunders, 7 J. J. Marsh., 12; Stewart v. Butler, 9 Serg. & R., 381; Blake v. Tucker, 12 Vt., 39; Campbell v. Knight, 11 Shep., 332.

Recitals in a lease operate as an estoppel. Hermitage v. Tompkins, 1 Ld. Raym., 729; Jackson v. Streeter, 5 Cow., 529; Fort v. Berkley, 1 Vent., 33; 8 Cow., 586.

A recital of a lease in a deed of release operates as an estoppel and is good evidence of the execution, and contents of the lease so far as stated therein. Crane v. Morris, 6 Pet., 598.

Persons claiming under a deed which recites the existence of a mortgage, are estopped from denying such mortgage. Holmes v. Ferguson, 1 Or., 220.

The grantor in a deed of trust is estopped from showing orally that the indebtedness to a party therein specified was for a much less sum than therein named. Kenny v. Aitken, 12 N. Y. Week. Dig., 127.

The execution of an administrator's bond precludes, by express recitals in the bond, both principal and sureties from denying the Surrogate's jurisdiction in any proceedings for the assets which the appointment and bond have enabled the principal to receive. Johnston v. Smith, 13 N. Y. Week. Dig., 99.

The defense of usury, however, a mortgagee is not estopped from setting up in an action to foreclose the mortgage, by a recital of the mortgage in a deed of trust as a valid lien and valid debt. Chapin v. Thompson, 23 Hun, 12.

A recital works no estoppel when the allegations in the instrument are immaterial to the contract therein contained, or when the action is not founded on the deed, but is wholly collateral to it; nor unless the recital is a direct and precise allegation. Champlain R. R. Co. v. Valentine, 19 Barb., 484; Dempsey v. Tyler, 3 Duer, 73.

A general recital in a deed does not conclude a party. Huntington v. Havens, 5 Johns. Ch., 23.

A recital originating in mistake, and untrue, cannot in equity be a bar to the admission of the truth. Stoughton v. Lynch, 2 Johns. Ch., 209.

A recital in a bond does not preclude the obligees from showing the instrument void. Caldwell v. Colgate, 7 Barb., 253.

A party claiming under deeds referring to a will as the source of title, is estopped from denying the validity and genuineness of the will. Jackson v. Thompson, 6 Cow., 178.

The sureties in a bond to indemnify one against the nonperformance of an agreement, which bond recites the execution of the agreement, are estopped from denying the due execution of the agreement. Lee v. Clark, 1 Hill N. Y., 56.

When a party is estopped by a deed, all persons claiming under or through him are estopped. Hill v. Hill, 4 Barb., 419.

Those who execute an undertaking are estopped from contradicting its recitals to defeat the instrument. Cole v. Bean, 14 Abb. Pr. N. Y., 38.

Recitals in an instrument are evidence against the party making them, but when immaterial to the instrument, or when the action is not founded on the instrument but is wholly collateral to it, such recitals work no estoppel. Reed v. McCourt, 41 N. Y., 435; Clinton v. Hope Ins. Co., 51 Barb., 647.

Where a deed containing covenants to be performed by the grantee, but signed by the grantor only and sealed with one seal, recites that it is sealed by both parties, such seal becomes the seal of the grantee, and he will be estopped from denying it, and from denying the covenants as well. Atlantic Dock Co. v. Leavitt, 54 N. Y., 35.

A grantee of lands under a deed, which, by its terms, is subject to a prior mortgage, is estopped from questioning the consideration or validity of such mortgage. Freeman v. Auld, 44 N. Y., 50; reversing 37 Barb., 587.

Nor when he assumes a mortgage, the amount of which is specified, can he dispute the amount due thereon, if not exceeding the amount specified, or

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against his will or without his consent, is a proposition which the court are not prepared to admit. [101]

4*] *THIS was a writ of error to the Circuit Court of the United States for the Southern District of New York.

In the Circuit Court for the Southern District of New York an action of ejectment was instituted by the defendant in error for the recovery of a tract of land in the town of Carmel, in the County of Putnam, in the State of New York. The plaintiff claimed title on the demise of John Jacob Astor and others, named in the case. The action was tried by a jury at October Term, 1829, in the Circuit Court in the city of New York, and a verdict and judgment rendered for the plaintiff in the same; a bill of exceptions was tendered by the defendant in the Circuit Court, who prosecuted this writ of error.

After judgment was rendered for the plaintiff in the Circuit Court, he prayed the court to order a writ of possession, to cause him to have possession of the premises. and thereupon James Carver suggested to the court that Roger Morris and Mary Morris, his wife, under whom the plaintiff in ejectment claimed, were for fifteen years and upwards next before the 22d of October, 1779, in possession of a large tract of land in the then County of Dutchess, in the State of New York, including the premises. That on the 22d of October, 1779, the Legislature of the State of New York, by "an Act for the forfeiture and sale of the estate of persons who have adhered to the enemies of the State," &c., declared Roger Morris and his wife to be convicted and attainted of adhering to the enemy; and all their estate, real and personal, severally and respectively, in possession, rever-

sion, or remainder, was forfeited and vested in the people of the State. That commissioners appointed under this act, on the 16th of November, 1782, sold, disposed of and conveyed the land in question in this suit, to Timothy Carver, his heirs and assigns, for the consideration of seventy-one pounds. That by an Act of the Legislature of the 12th of May, 1784, and an Act of the 1st of May, 1786, it was among other things provided, that where judgment in a due course of law should be obtained for any lands sold by the commissioners of forfeitures, against any person who derived title thereto under the people of the State, or the commissioners, *the person who obtained judgment should not have a writ of possession, or obtain possession of the land, until he or she should have paid to the person in possession under said title, the value of all improvements made thereon, to be estimated as provided in the acts. That he, the said Timothy Carver, purchased the property held by him in the full confidence that he obtained a perfect indefeasible title to the land in fee-simple, entered forthwith into possession of the same, made great, valuable and permanent improvements on the land, which are now in value upwards of two thousand dollars, by which the lands are enhanced in value to that sum and upwards. That Timothy Carver afterwards conveyed the premises to James Carver, the defendant in ejectment, who also made other valuable improvements on the land before the commencement of this suit, of the value of two thousand dollars and upwards. That this action has been commenced and prosecuted, and a recovery has been had on a ground of title, reciting the same; that the Act of the Legislature of New York, passed the

its existence or validity. *Ritter v. Phillips*, 53 N. Y., 586; *Haile v. Nichols*, 16 Hun, 37; *Thayer v. Marsh*, 11 Hun, 501; affirmed 19 Alb. L. J., 56; *Johnson v. Parmelee*, 14 Hun, 398.

A recital in a deed is not evidence against one, not privy in estate. *Whyland v. Weaver*, 67 Barb., 116.

A, by his last will devised as follows: "Whereas I have conveyed to my son D, my lands at F, I give and devise all my remaining lands to my sons C and D and my daughter." Held, that the recital in the will was evidence of a conveyance of the lands at F to D and that C as heir of the testator, was estopped by the recital, to deny that the lands at F were conveyed to D. *Denn v. Cornell*, 3 Johns. Cas., 174.

A party executing a deed is estopped by the recital of a particular fact in that deed to deny such fact. 7 Bac. Abr., 621; *Nash v. Turner*, 1 Esp., 217; *Rees v. Lloyd*, Wightwick, 123; *Jones v. Williams*, 2 Stark., 52; *Bowman v. Taylor*, 2 Ad. & Ell., 278; *Larrison v. Tremere*, 1 Ad. & Ell., 792; *Hill v. Manchester & Co.*, 2 B. & Adol., 244.

So where a party to a written agreement recites therein, as consideration, that the other party has made a certain conveyance, of even date with the agreement, he is estopped to show, in avoidance of the contract, that such conveyance was not made until afterwards, though dated subsequently. *Dyer v. Rich*, 1 Met., 180.

Where a grantor in a deed of warranty recites that a certain tract of land has been conveyed to him, he is estopped from denying that fact in a suit commenced against him by the grantee, or any person to whom his grantee has conveyed. *Green v. Clark*, 13 Verm., 158.

A recital in a deed procured by fraud can never be used as an estoppel. *Norton v. Sanders*, 7 J. J. Marsh., 12.

Nor, it seems, a recital in a deed which is defective and void. *Blake v. Tucker*, 12 Verm., 39; see *Norris v. Norris*, 9 Dana, 17.

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Where one deed recites another, no higher or other proof is necessary or required of the recited deed, than the recital itself, though the recited deed and the subscribing witness be both in court. This has been expressly held, not only by the Supreme Court of the United States, but by several of the State courts, not only as against the party reciting, but against all who claim under him as privies in blood, privies in estate, or privies in law. *Carver v. Jackson*, *supra*; *Crane v. Morris*, 6 Pet., 598; *West v. Pine*, 4 Wash. C. C., 691; *Jackson v. Halstead*, 5 Cow., 216; *Penrose v. Griffith*, 4 Binn., 231; *Per Mills, J.*, in *Mitchell v. Maupin*, 3 Mon., 186; *Bibb v. Pickett*, Litt. Sel. Cas., 309, 312, 313; *Kentucky Bank v. Vance*, 4 Litt. R., 172.

And such recital contained in a bond is evidence equally high, even against the obligee, and all claiming under him. *Jackson v. Carrington*, 9 Cow., 86.

But in such cases the bond must be traced to the possession of the obligee. *Jackson v. Brooks*, 8 Wend., 426.

And this class of recitals is received as primary proof of other instruments, even of records; a *ca. sa.* for instance. *Ransom v. Keyes*, 9 Cow., 138; *Burleigh v. Stibbs*, 5 Term R., 465; *Edwards v. Etherington*, Ry. & Mood. N. P. R., 268.

If the condition of an obligation hath reference to a particular thing to be done, or in which a generality is to be done, the obligor shall be estopped by it to say that there is no such particular thing. *Roll. Abr.*, 872, 873; 7 Bac. Abr., 621; *Dyer*, 3; *Savil*, 90; *Moor*, 23; *Paramour v. During*, *Moor*, 420, pl. 578; *Goddb.*, 177.

But if the condition of an obligation contains a generality, a man shall not be concluded to say, that there is no such thing; as in debt on an obligation, of which the condition is to perform all agreements now set down by J. S., the defendant may say, that no agreement was then set down by J. S., because this comprehends a generality.

For this diversity, see *Cro. Eliz.*, 362; *Owen*, 110;

22d of October, 1779, for the forfeiture of estates, &c., did not take from the plaintiff in the suit the title to the premises after the death of Roger Morris and wife, both of whom were deceased at the time of the institution of this suit. So that the plaintiffs were the owners of the land in fee, and entitled to recover the possession of the same. And the defendant insists that, under the provisions of the several Acts of the Legislature of New York, he ought to be paid the value of the improvements made on the lands; that no writ of possession should issue until the same was paid, and he prays the court to stay the plaintiff from the writ, or from having possession of the lands, until the value shall be paid, and that commissioners may be appointed to ascertain the said value.

The plaintiff did not deny the facts alleged by the defendant, but he denied the right of the defendant to be paid for the improvements, and insisted on his right at law to a writ of possession, and to the possession of the land without paying the value of the improvements. The court held that the matter suggested by the defendant and admitted by the plaintiff were not sufficient to bar or stay the plaintiff [*6] from having his writ of possession, or possession of the land without paying the whole or any part of the value of the improvements estimated or valued in any way whatever; and that the plaintiff should have a writ of possession to cause him to have possession of the land.

The bill of exceptions set forth the whole proceedings of the trial of the cause, and that an agreement had been entered into by the parties to it, that the plaintiff is not entitled to recovery of the property unless it should satisfactorily appear in the suit, in addition to whatever else may be necessary to authorize a recovery therein, that the whole title, both in

law or equity, which may or can have been vested in the children and heirs of Roger Morris and Mary his wife, of, in or to the premises or lands in question in the suit, has been, as between the grantors and grantees, legally transferred to John Jacob Astor, one of the lessors of the plaintiff, his heirs and assigns; nor unless a proper deed of conveyance in fee-simple from John Jacob Astor and all persons claiming under him to the people of the State of New York, would be valid and effectual to release, transfer, and extinguish all the right, title, and interest, which now is, or may have been vested in the children and heirs of Roger Morris and wife.

The plaintiff in the ejectment gave in evidence a patent from William III. to Adolphe Philipse, dated 17th June, 1692, for a large tract of land, including the premises, and proved the descent of the same to Frederick Philipse; and that Mary Philipse, who afterwards intermarried with Roger Morris, was a devisee in tail with other children of Frederick Philipse, and by subsequent proceedings in partition, and by a common recovery, Mary Philipse became seized in fee-simple of one equal undivided part of the land granted by the patent; and that afterwards, on the 7th of February, 1754, a deed of partition reciting the patent and the title of the heirs, was executed between the children and devisees and heirs of Frederick Philipse, by which the portions severally belonging to them were set apart and divided to each in severalty, one portion being allotted to Mary Philipse; the land in controversy being included in the land surveyed *and held under the patent and deed of [*7] partition. The part allotted to Mary Philipse in the partition was No. 5.

The plaintiff then offered to read in evidence a deed of marriage settlement, dated 13th of

Poph., 114; Moor, 405; Brownl., 117; Yelv., 226; 2 Bulst., 19; Latch, 125; Cro. J., 375; Dal., 28; Salter v. Kidney, 1 Show., 59; 7 Bac. Abr., 621; Strowd v. Willis, Cro. Eliz., 762; Shelby v. Wright, Willes, 9.

Lord Holt lays down the rule in Salter v. Kidney (1 Show., 59), that general recital is not estoppel, though recital of a particular fact is. See Com. Dig. Div. Estoppel, A, 2; Rainsford v. Smith, Dyer, 196, a, note; 2 Smith's L. C., 457; La Savage v. Prinan, 3 Mo., 529; Cow. & Hill's notes to Phil. Ev., 1235, 1236, 1237, 160, 161.

Therefore, if one be bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say, that there was no such indenture or recognizance. But if the bond be conditioned to pay all the agreements set down by A, or carry away all the marle in a certain close, he is not estopped by this general condition from saying that no agreement was set down by A, or that there was no marle in the close. Neither does this doctrine apply to that which is mere description in the deed, and not an essential averment; such as the quantity of land; its nature, whether arable or meadow; the number of tons, in a vessel chartered by the ton; or the like; for these are but incidental and collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties. 1 Greenl. Ev., 32; 4 Com. Dig. Estoppel, A, 2; Yelv., 227, by Metcalf, note 1; Doddington's case, 2 Co., 33; Skipworth v. Greene, 8 Mod., 311; S. C., 1 Stra., 610.

The recital of the payment of the consideration money in a deed of conveyance has been regarded, in England, as conclusive evidence of payment, binding the parties by estoppel. Shelley v. Wright, Willes, 9; Cossens v. Cossens, Willes, 25; Rowntree v. Jacob, 2 Taunt., 141; Lampam v. Clarke, 5 B. & Ald., 606; Baker v. Dewey, 1 B. & C., 704; Hill v. Manchester Salt-Works, 2 B. & Ad., 544.

But in the American courts the recital of the amount of the consideration money paid has been treated like other recitals of quantity and value to which the attention of the parties has been supposed to have been but slightly directed, and to which, therefore, the principle of estoppels does not apply. Hence, though the party is estopped from denying the conveyance and that it was for a valuable consideration, the recital is regarded as only *prima facie* evidence of the amount paid, in an action by the grantee to recover back the consideration, or in an action by the grantor to recover the consideration money. Wilkinson v. Scott, 17 Mass., 249; Clapp v. Tirrell, 20 Pick., 247; Schillenger v. McCan, 6 Greenl., 364; Tyler v. Carleton, 7 Greenl., 175; Emmons v. Littlefield, 1 Shepl., 233; Burbank v. Gould, 3 Shepl., 118; Morse v. Shattuck, 4 N. H., 229; Pritchard v. Brown, 4 N. H., 397; Belden v. Seymour, 8 Conn., 304; Shepherd v. Little, 14 Johns., 110; Bowen v. Bell, 20 Johns., 388; Whitbeck v. Whitbeck, 9 Cow., 266; McCrea v. Purmont, 16 Wend., 460; Weigley v. Weir, 2 Serg. & R., 311; Watson v. Blaine, 12 Serg. & R., 131; Jack v. Dougherty, 3 Watts, 151; Higdon v. Thomas, 1 Harr. & G., 139; Lingan v. Henderson, 1 Bland's Ch. 236; Duval v. Bibb, 4 Hen. & M., 113; Harvey v. Alexander, 1 Randolph, 219; Curry v. Lyles, 2 Hill. So. Car., 404; Garret v. Stuart, 1 McOrd, 514; Mead v. Steger, 5 Porter Ala., 498, 507; Jones v. Ward, 10 Yerg., 160, 166; Hutchinson v. Sinclair, 7 Mourne Ky., 291, 293; Gully v. Grubbs, 1 J. J. Marsh., 389. But see Bracket v. Foscoe, 1 Hawks, No. Car., 64; Spiers v. Clay, 4 Hawks, 22; Jones v. Sasser, 1 Dev. & Batt., 452.

In Louisiana the recital of payment is made conclusive. Civil Code of La., Art. 2234; Forest v. Shores., 11 Louis., 416; see also Cow. & Hill's notes to 1 Phil. Ev., p. 108, note 194, and p. 540, note 964; Steele v. Worthington, 2 Ohio R., 350; 1 Greene Ev., ed. 1842, p. 32, sec. 26, and note 1.

January, 1758, intended to convey all the land in No. 5 between Mary Philipse, of the first part, Roger Morris, of the second part, Joanna Philipse and Beverly Robinson, of the third part; on the back of which deed was indorsed a certificate in the following terms: "Be it remembered that on the 1st day of April, 1787, personally came and appeared before me John Sloss Hobart, one of the justices of the Supreme Court of the State of New York, William Livingston, Esq., Governor of the State of New Jersey, one of the subscribing witnesses to the within written indenture, who being by me duly sworn, did testify and declare that he was present at or about the day of the date of the within indenture, and did see the within named Joanna Philipse, Beverly Robinson, Roger Morris, and Mary Philipse, sign and seal the same indenture, and deliver it as their and each of their voluntary acts and deeds, for the uses and purposes therein mentioned, and I having carefully inspected the same, and finding no material erasures or interlineations therein, other than those noted to have been made before the execution thereof, do allow the same to be recorded. John Sloss Hobart." Upon the back of the deed was also indorsed a certificate of the recording thereof, in the following words: "Recorded in the secretary's office of the State of New York, in deed book commencing 25th November, 1774, page 550. Examined by me this 11th of April, 1787. Robert Harpur, D. Secretary." To which said evidence, so offered, the counsel for the defendant objected upon the ground that the certificate was not legal and competent evidence to be given to the jury, and did not entitle the plaintiff to read the deed in evidence without proof of its execution; and that the certificate was not sufficient, inasmuch as it did not state that William Livingston testified or swore that he was a subscribing witness to the deed. The parts of the deed of 13th January, 1758, material to the case, are the following:

"This indenture, made the 13th day of January, in the thirty-first *year of the reign of our sovereign lord, George II., by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c., and in the year of our Lord, 1758, between Mary Philipse, of the first part, Major Roger Morris, of the second part, and Joanna Philipse and Beverly Robinson, of the third part, witnesseth, that in consideration of a marriage intended to be had and solemnized between the said Roger Morris and Mary Philipse, and the settlement hereafter made by the said Roger Morris on the said Mary Philipse, and for and in consideration of the sum of five shillings, current money of the Province of New York, by the said Joanna Philipse and Beverly Robinson to her, the said Mary Philipse, at or before the enscaling and delivery of these presents, well and truly paid, the receipt whereof is hereby acknowledged; and for divers other good causes and considerations, her therunto moving, she, the said Mary Philipse, hath granted, bargained, sold, released and confirmed, and by these presents doth grant, bargain, sell, release and confirm, unto the said Joanna Philipse and Beverly Robinson (in their actual possession now being, by virtue of a bargain and sale to

them thereof made, for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring of uses into possession) and to their heirs, all those several lots or parcels of land, &c., describing the property, in which is included the land in controversy in this suit.

"To have and to hold all and singular the several lots of land, &c., and all and singular other the lands, tenements, hereditaments, and real estate, whatsoever of her, the said Mary Philipse, &c., unto the said Joanna Philipse and Beverly Robinson, and their heirs, to and for the several uses, intents, and purposes, hereinafter declared, expressed, limited and appointed, and to and for no other use, intent and purpose whatsoever; that is to say, to and for the use and behoof of them, the said Joanna Philipse and Beverly Robinson, and their heirs, until the solemnization of the intended marriage, and to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during *the term [*9 of their natural lives, without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever; but in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die, during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever; and in case the said Roger Morris should survive the said Mary Philipse without any issue by her, or that such issue is then dead without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form, as she, the said Mary Philipse, shall, at any time during the said intended marriage, devise the same by her last will and testament; which last will and testament, for that purpose, it is hereby agreed by all the parties to these presents, that it shall be lawful for her, at any time during the said marriage, to make, publish and declare, the said marriage, or anything herein contained, to the contrary thereof in anywise notwithstanding; provided, nevertheless, and it is the true intent and meaning of the parties to these presents, that it shall and may be lawful, to and for the said Roger Morris and Mary Philipse, jointly, at any time or times during the said marriage, to sell and dispose of any part of the said several lots or parcels of land, or of any other her lands, tenements, hereditaments and real estate whatsoever, to the value of three thousand pounds, current money of the Province of New York; and in case the said sum of three thousand pounds be not raised by such sale or sales during their joint lives, and they have issue between them, that then it shall be lawful for the survivor of them to raise the said sum, by the sale of any part of the said lands, or such deficiency thereof as shall not then have been already raised thereout, so as to make up the said full sum of

three thousand pounds, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

10*j *The court overruled the objection, and allowed the deed to be read in evidence, and the counsel for the defendant excepted to the same.

Evidence was then given, by the testimony of Mr. Hoffman, to prove the death of William Livingston and Sarah Williams, who were witnesses to the deed, and that the names of those persons were their proper handwriting. That Mary Philipse and Roger Morris intermarried, and had four children, all born before October, 1779; also the death of some of the children; the intermarriage of others; that Joanna Philipse was the mother of Mary Morris and Susanna Robinson, wife of Beverly Robinson; that Beverly Robinson died between 1790 and 1795; that Roger Morris died in 1794, and his wife Mary Morris died in 1825. Evidence was also given to show that Roger Morris was in possession of the premises from 1771 to 1774.

The plaintiff then gave in evidence a conveyance by lease and release of the premises, *inter alia*, by the heirs and legal representatives of Roger Morris and wife to John Jacob Astor.

The conveyance by the commissioners of forfeited estates to Timothy Carver, of the land, was then given in evidence by the plaintiffs, and by Timothy Carver and wife to the defendant.

Mr. Barclay proved that Roger Morris and his family left this country for England just before the evacuation of the city of New York by the British troops in 1782 or 1783, and that neither of them had since returned to the United States.

The plaintiff here rested his case.

And thereupon the counsel of the defendant objected, and insisted that (independent of any other questions that might arise upon the plaintiff's case) unless the deed, commonly called a marriage settlement deed, which had been given in evidence, was accompanied or preceded by a lease, the plaintiff could not recover in this action; that without such lease, the deed could only operate as a deed of bargain and sale, and the statute of uses would only execute the first use to the bargainees, Joanna Philipse and Beverly Robinson, who took the legal estate in **11***j the land; and that the children of *the said Roger Morris and his wife took only trust or equitable interests, and not the legal estate in the lands; and that the plaintiff could not recover, because such lease had not been produced, nor its absence accounted for, if one existed, and of this opinion was the court.

The counsel for the plaintiff then offered to give evidence to the court to prove the loss of the said lease, to lay the foundation for secondary evidence of its contents, by showing that diligent search for such lease had been made in various places without being able to find the same; to which evidence the counsel for the defendant objected, on the ground that such evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed; and that before the plaintiff could give such, or any other evidence of the loss of the lease, he must prove that a lease did once exist.

The counsel for the plaintiff then offered to

give evidence to show that diligent efforts had been made in England and in the United States to find the lease, without success; which was objected to by the defendant on the ground that such evidence did not go to prove the loss or destruction of the lease, but to show that none ever existed; and that before such evidence was given, it must be proved that a lease did once exist. The court overruled this objection, considering the recital in the release *prima facie* evidence for that purpose, and the plaintiff gave the evidence. To this decision, in overruling the objections and admitting the evidence, the counsel for the defendant excepted.

Testimony was then offered and admitted to prove that it was the almost universal practice not to record the lease when the conveyance was by way of lease and release. This evidence was given by the testimony of persons who had examined the offices of record, and not by that of those who kept the records. The counsel for the defendant objected to this evidence, alleging that the facts asserted could only be proved by the persons who had the custody of the records; but this objection was overruled, and the same was excepted to.

Here the plaintiff again rested the proofs as to the loss of *the lease, and offered to [***12** give secondary evidence to the jury of its previous existence and contents. The counsel for the defendant objected, and insisted that the plaintiff had not sufficiently proved the loss of the lease, and was not entitled to go into secondary evidence of its previous existence and contents.

But the court overruled the objections, and was of opinion that the plaintiff had, from the evidence, satisfied the court as to the loss and nonproduction of the lease, and was entitled to give secondary evidence of its contents; to which opinion and decision, the counsel for the defendant also excepted.

The counsel for the plaintiff, for the purpose of proving to the jury the existence and contents of the lease, offered to read in evidence to the court and jury the recital contained in the said release or marriage settlement deed, of a lease or bargain and sale for a year; to which evidence so offered as aforesaid, the counsel for the defendant objected, on the ground that the said recital was not evidence for those purposes against the defendant.

But the court overruled the objections, and permitted the recital to be read in evidence to the jury to prove the existence and contents of the lease, to which opinion and decision the counsel for the defendant also excepted.

The plaintiff then offered, and gave in evidence, by the testimony of Mr. Benson and Mr. Troup, that William Livingston, who had witnessed the deed of release, was an eminent lawyer in the city of New York, where the deed was executed, and that it was the practice at that time to employ lawyers to draw deeds; that it was usual to recite the lease in the deed of release; that it was a frequent practice in New York to convey lands by lease and release, until within four years of the Revolution. Evidence was also offered and admitted by the books of record to show what was the usual form and contents of a lease. To all this testimony the counsel for the defendant excepted.

The printed journal of the House of Assem-

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bly of New York, for the year 1787, was then admitted in evidence, under an exception by 13*] the counsel for the defendant. It *showed that on the 16th of February, 1787, a petition had been presented by Joanna Morris on behalf of herself, her brothers and sisters, children of Roger Morris and Mary, his wife, relative to the estate forfeited to the people of the State of New York by the attainder of their parents, and a report thereon to the Legislature, and here the plaintiff rested his case.

The defendant gave evidence to prove that Timothy Carver, and himself under him, had been in possession of the premises since the close of the Revolutionary War, claiming the same in fee. He also produced and read in evidence, conveyances by way of lease and release executed by Roger Morris and wife in 1765, 1771, 1773, and other deeds and leases for parts of the lot No. 5, in which no mention was made of the marriage settlement, and in which the property was described as held under the patent to Adolphe Philipse, and in which Roger Morris and wife covenant "that they had good right and full power and lawful authority to release and convey the same in fee." The defendant also gave in evidence the exemplification of a patent to Beverly Robinson, Roger Morris, and Philip Philipse, dated the 27th of March, 1761, in which is recited the surrender of part of the great tract granted to Adolphe Philipse on the 17th of June, 1696, the descent of the whole of the said tract to the children of Frederick Philipse; no mention being made in the recitals of the marriage settlement, and by which patent two tracts of land, as a compensation for part of the land held under the original patent, which was supposed to lie within the Connecticut line, was granted.

It was proved by the evidence of Mr. Watts that he had in his possession the marriage settlement deed which had been read in evidence, at and immediately before the time of its proof before Judge Hobart in 1787; that the witness wrote the body of the certificate of proof indorsed on the back; that the whole of the said certificate was written by the witness, except the name of Judge Hobart, written at the bottom, which was written by the said judge; that he believes he wrote the certificate in the presence of the judge at the time the proof was made, which was at the house of said judge, in the city of New York (Governor Livingston 14*) *was then staying at Judge Hobart's house on a visit). On being shown the said original certificate, the witness said that a blank was originally left in the body of the said certificate for the name of the judge or officer before whom the said proof was to be made, and from that circumstance he had no doubt that the said certificate was written before he knew what officer would take the said proof, and not in the presence of the judge; that the witness received the said deed early in the said year 1787, in an inclosure from the said Roger Morris, who was then in London, England.

The plaintiff then gave in evidence, the defendant's excepting thereto, the Act of the Legislature of the State of New York, passed April 16th, 1827, entitled "An Act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain

lands in the counties of Putnam and Dutchess;" the Act passed April 19th, 1828, entitled "An Act to revive and amend an act entitled 'an Act to extinguish the claim of John Jacob Astor and others, and to quiet the possession of certain lands in the counties of Putnam and Dutchess.'" Evidence was also given, the defendant's counsel excepting thereto, to show that this suit was defended for the State of New York by the Attorney-General of the State.

The counsel for the defendant then gave in evidence an exemplification of the proceedings of the Council of Safety of New York, on the 16th of July, 1776, in which it was resolved, unanimously, that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State; and that all persons passing through, visiting, or making a temporary stay in the said State, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto; that all persons, members of or owing allegiance to this State as before described, who shall levy war against the said State within the same, or be adherent to the King of Great Britain, or others, the enemies of said State, and being thereof convicted, shall suffer the pains and penalties of death.

*The counsel for the defendant also [*15 read in evidence an Act of the Legislature of the State of New York, entitled "An Act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this State, and for declaring the sovereignty of the people of this State, in respect to all property within the same," passed the 22d of October, 1779; it being admitted by the counsel for both parties that Roger Morris, Mary Morris, the wife of Roger Morris, and Beverly Robinson, mentioned in the first section of the act, are and were the same persons by those names therein before mentioned; Beverly Robinson being the person by that name who was one of the parties to the marriage settlement deed:

Also an Act entitled "An Act for the speedy sale of the confiscated and forfeited estates within this State, and for other purposes therein mentioned," passed the 12th of May, 1784:

Also, "An Act further to amend an Act entitled 'an Act for the speedy sale of the confiscated and forfeited estates within this State, and for other purposes therein mentioned,'" passed the 1st of May, 1786:

Also, "An Act limiting the period of bringing claims and prosecutions against forfeited estates," passed the 28th of March, 1797:

Also, "An Act for the limitation of criminal prosecutions, and of actions and suits at law," passed the 26th of February, 1788; and "An Act for the limitation of criminal prosecutions and of actions at law," passed the 8th of April, 1801.

The counsel for the plaintiff then made and submitted to the court in writing, the following points upon which they relied:

1. Mary Philipse, in January, 1758, was seized in fee-simple.

2. By the deed of settlement a contingent remainder was limited to the children of that marriage, which vested as soon as they were born, and no act of Morris or his wife, done after the

execution of that deed, can impair the estate of the children.

16*] *3. The recital of the lease in the release is an estoppel against the defendant, as to the fact so recited on the ground of privity of estate.

4. If the recital be not a technical estoppel, then it is an admission of a fact in solemn form by the parties to that deed, and is evidence of the fact recited, from which the jury are bound to believe the fact unless it be disproved.

5. The attainder and sale under it operated as a valid conveyance of all the estate of the attainted persons at the date of the attainder, and no more. The purchasers under this State acquired a title in these lands for the lives of Morris and his wife, and of the survivor of them, and in judgment of law must be considered as standing in the same relation to the children of that marriage as the original tenants for life, whose estates were confiscated.

6. As the purchasers under the State were tenants for life, and the children of Morris and his wife, or their assignees, are seized in remainder of the fee, it results from that relation that the possession of the purchasers could not be adverse to the title of the remaindermen. The persons entitled to the remainder have five years from the death of Mrs. Morris to commence their suits for the land; and the sale by the remaindermen to Mr. Astor, during the existence of the life estate, is in accordance with the rules of the common law, and in violation of no statute.

7. The principles of natural law, as well as the treaties of the 3d of September, 1783, and 19th of November, 1794, between the United States and Great Britain, confirm and protect the estate so required by Mr. Astor.

And the counsel for the defendant submitted in writing to the court the following points on which they relied:

1. That the plaintiff cannot recover in this action unless a lease preceded or accompanied the release which has been read in the case.

2. That the plaintiff, not having offered any evidence of the actual execution or contents of any particular paper, as such lease, cannot recover on the ground that a lease was executed and is lost.

17*] *3. That the testimony of Egbert Benson, Robert Troup, and the other witnesses, as to the custom or practice of conveying by lease and release; the professional character of William Livingston, and his connection with the Philipse family; although it might, under certain circumstances, be evidence to lay the foundation for a general presumption, according to the rules of law respecting presumptions of deeds and grants, that a proper lease or other writing, necessary to support the conveyance, had been executed; is not competent to prove either the actual execution, existence, in fact, or contents of the alleged lost lease.

4. That no legal presumption of a deed or lease, such as is necessary to enable the plaintiff to support this action, can fairly arise in this case; because the facts and circumstances of the case are not such as could not, according to the ordinary course of affairs, occur without supposing such a deed or lease to have existed, but are perfectly consistent with the nonexistence of such lease.

5. That no possession having been proved in this case, more consistent with the title of the plaintiff than with that of the defendant, any deed or lease necessary to support the plaintiff's action must be proved, and cannot be presumed.

6. That the recitals in the deed of release do not bind the defendant by way of estoppel; because he is a stranger to the deed, and claims nothing under it.

7. That inasmuch as the defendant is not only a stranger to the deed of release, and claims nothing under it, but as also it appears that the defendant's immediate grantor entered into possession of the premises as early as the year 1783 under a claim of title adverse to that supposed to be created by the said deed or release, and he and the defendant, after and under him, have continued so in possession, under such adverse claim of title, to the present time, the recitals in said deed of release are not evidence against the defendant.

8. Supposing the lease and release to have been duly executed, then the remainder, limited to the children of Roger Morris and Mary his wife, was a contingent, and not a vested *remainder, at the time of the attainder [***18** and banishment of Roger Morris and Mary his wife in 1779.

9. By the attainder and banishment of Roger Morris and Mary his wife in 1779 they became civilly dead, and their estate in the lands determined before the time when the contingent remainder to the children could vest, and thus the contingent remainder to the children was destroyed for the want of a particular estate to support it.

10. By the attainder and banishment of Beverly Robinson, the surviving trustee, in 1779, and the forfeiture of all his estate to the people of the State of New York, all seisin, possibility of entry, or *seintilla juris* in Beverly Robinson, to serve the contingent uses when they arose was divested; and inasmuch as the estate cannot be seized to uses, there was no seisin out of which the uses in remainder could be served when the contingency upon which they were to arise or vest happened; and the State took the estate discharged of all the subsequent limitations in remainder.

11. In consequence of the attainder and banishment of Beverly Robinson, the surviving trustee, and Roger Morris and Mary his wife, in 1779, and the forfeiture of all their, and each of their estate in the land to the people of the State of New York, the children of Roger Morris and Mary his wife never had any legal seisin in the land.

12. In consequence of the act of attainder, and the conveyance made by the people of the State of New York to Timothy Carver with warranty, the estate of the children of Roger Morris and Mary his wife, in the lands in question in this suit, was defeated and destroyed.

13. Roger Morris and Mary his wife, under the marriage settlement deed, had an interest in the land, and might convey in fee to the amount of three thousand pounds in value. They did convey to the amount of one thousand one hundred and ninety-five pounds in value, and the residue of that interest was forfeited to, and vested in the people of New York; and the power was well executed by the

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conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

14. The whole title, both in law and equity, **19*** which may *or can be vested in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns.

15. A proper deed of conveyance in fee-simple from the said John Jacob Astor, and all persons claiming under him, to the people of the State of New York, would not be valid and effectual to release, transfer, and extinguish all right, title and interest which now is, or may have been vested in the children and heirs of Roger Morris and Mary his wife.

16. The plaintiff's action is barred under the act limiting the period of bringing claims and prosecutions against forfeited estates.

17. The plaintiff's action is barred under the General Limitation Act of 1788, also under the General Limitation Act of 1801.

Upon which the court expressed the following opinion and instructions, to be given to the jury on the defendant's points, under the modifications stated in the same:

1. The court gave the instruction as prayed.

2. It having been satisfactorily proved to the court that the lease was lost, its execution and contents may be proved by secondary evidence.

3. That the testimony of Egbert Benson, Robert Troup, and other witnesses, as to the custom and practice of conveying by lease or release; the professional character of William Livingston, and his connection with the Philipse family, coupled with the recital in the release, were admissible in this case to go to the jury, for them to determine whether a proper lease, necessary to support the conveyance of release so as to pass the legal estate, had been executed.

4. That the jury might in this case presume, if the evidence satisfied them of the fact, that such lease was duly executed, if, in their opinion, the possession was held by Roger Morris and his wife, under this marriage settlement deed, embracing both the lease and release. And that it was for them to decide from the **20*** evidence whether the possession *was held under the marriage settlement or under the title of Mary Philipse, anterior to the marriage settlement.

5. The instruction on this point is embraced in the answer to the fourth.

6. That the recital in the release does not bind the defendant by way of estoppel, but is admissible evidence to the jury, connected with the other circumstances, for them to determine whether a proper lease was made and executed.

7. The instruction on this point is included in the answer to the sixth.

8. The remainder limited to the children of Roger Morris and Mary his wife, was a vested remainder at the time of the attainder and banishment of Roger Morris and Mary his wife, in the year 1779, and did not thereafter require any particular estate to support it; but if a particular estate was necessary, there was one sufficient in this case for that purpose.

9 and 10. The answer to these points is included in the answer to the eighth.

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11. The attainder and banishment of Beverly Robinson, Roger Morris and Mary his wife, in the year 1779, and the forfeiture of all their estate in the land to the people of the State of New York, and the conveyance to Timothy Carver of the lands in question, did not take away the right which the children of Roger and Mary Morris had under the marriage settlement deed.

12. The answer to this point is included in the answer to the eleventh.

13. Admitting that the power reserved to Morris and his wife to sell a part of the lands included in the marriage settlement deed became forfeited to the State, so far as it had not been executed, the sale to Timothy Carver could not, under the evidence in this case, be considered an execution of that power.

14. The whole title, both in law and equity, which may or can have vested in the children and heirs of Roger Morris and Mary his wife, of, in or to the lands and premises in question, has been, as between the grantors and grantee, *legally transferred to John Jacob Astor, [***21** his heirs and assigns, according to the true intent and meaning of the acts of the Legislature of the State of New York, which have been produced and read upon the trial.

15. A proper deed of conveyance in fee-simple from John Jacob Astor and all persons claiming under him to the people of the State of New York, would be valid and effectual to release, transfer and extinguish all right, title and interest which now is, or may have been vested in the children and heirs of said Roger Morris and Mary his wife, according to the true intent and meaning of the acts of the Legislature referred to in the next preceding instruction.

16 and 17. The plaintiff's action is not barred by any statute of limitations in this State.

The court then charged the jury.

After stating the plaintiff's title under the patent to Adolphe Philipse in 1697, and that it was not denied by the defendant, but that Mary Philipse in 1754 became seized, in severalty, in fee-simple of the premises in question, the court proceeded to say:

"At this point the dispute commences. On the part of the plaintiff, it is contended that the marriage settlement deed which has been produced and submitted to you, bearing date in the year 1758, was duly executed and delivered on or about the time it bears date; the legal operation of which was to vest in Roger Morris and his wife Mary, a life estate, with a contingent remainder to their children, which became vested in them on their birth, and that their right and title has been duly vested in Mr. Astor, by the deed bearing date in the year 1809. On the part of the defendant, it is contended that Mary Philipse never parted with her title in the premises by the marriage settlement deed set up on the other side, or that if she did, it was re-vested in her or her husband, and continued in them or one of them, until they were attainted in the year 1779, by an Act of the Legislature of this State, and that the title to the land in question thereby became vested in the people of this State, from whom the defendant derives title. Unless, therefore, the plaintiff can establish this marriage settlement deed so as to vest a legal

22*] *estate in the children of Roger Morris and Mary his wife, he cannot recover in this action.

"It will be proper for you, in examining and weighing the facts and circumstances of this case, to bear in mind that the children of Morris and wife could not assert in a court of law their right in this land until the death of Mrs. Morris in the year 1825, and since 1825 there has been no want of diligence in prosecuting and asserting the claim.

"In the year 1809, Mr. Astor purchased and acquired all the interest of the children of Morris and wife, and you are to consider him as now standing in their place.

"The first question then is, was the marriage settlement duly executed? In the first place, the plaintiff has produced the ordinary and usual evidence of the execution of the deed, has shown that Governor Livingston was the subscribing witness, and that in 1787 he went before Judge Hobart and made the usual and ordinary proof of the execution of the deed, such as was sufficient to entitle the deed to be recorded; the handwriting of the witnesses who are dead has also been proved. Upon this proof the *prima facie* presumption of law is, that the deed was executed in all due form to give it force and validity, and in the absence of all other evidence, the jury would be justified, if not conclusively bound to say, that everything was properly done, including a delivery. But whether delivered or not, is a question of fact for the jury.

"Delivery is absolutely essential; a deed signed, but not delivered, will not operate to convey land. But no particular form was necessary; if the grantee comes into the possession of the deed in any way which may be presumed to be with the assent of the grantor, that is enough, and is a good delivery in law; and if found in the hands of the grantee years afterwards, a delivery may fairly be presumed, and it will operate from and relate back to the time of its date, in the absence of all proof to the contrary. If a deed be delivered to an agent, or thrown on a table, with the intent that the grantee should have it, that is sufficient, although no words are used. Such proof as has been given in this case would be sufficient for a jury **23*]** to presume a delivery, *even in the case of a modern deed, and is much stronger in relation to one of ancient date. In this case, what else could be proved? Would it be reasonable to require anything beyond what the plaintiff has proved? The witnesses are dead; their handwriting has been proved, and a proper foundation is thus laid for presuming that everything was done to give effect and validity to the deed.

"Such being the case, the burden of proof is thrown on the other side to rebut the presumption of a delivery, warranted from these circumstances. Much stress has been laid upon the fact that the certificate of proof by Governor Livingston not only states that the witness saw the parties sign and seal, but that he saw them deliver the deed. In stating a delivery, the certificate is a little out of the ordinary form, and it is not important, and adds little or nothing to the evidence of a due and full execution of the deed, that the word *deliver* was inserted. This insulated fact is not of much importance,

for without that word, the legal effect of the proof would be the same; proof of the due execution for the purposes expressed in the deed, includes a delivery.

"What then is the evidence to bring the fact of delivery into doubt? I separate now between the release and the lease; these are two distinct questions, and I shall consider the question relative to the lease hereafter. The argument of the defendant is, that the deed was not delivered, and did not go into effect. Then what is the reasonable presumption to be drawn from the facts he has proved? keeping in mind that this is evidence, by the defendant to disprove the presumption of law from the facts proved, that the deed was duly delivered. It has been said on the part of the defendant that the deed was probably kept for some time, and that the design to have a marriage settlement was finally abandoned. If you believe from the proof made by Governor Livingston that the deed went into the hands of the parties, then there was a good delivery, because a deed cannot be delivered to the party as an escrow. Then is there any evidence to call the delivery into question? Where is the evidence to induce the belief that the deed was executed with any *understanding that it was not to have [***24** immediate effect, or that it was delivered to a third person as an escrow, or that the parties did not intend it as an absolute delivery? You have a right to say so, if there is evidence to support it; but if there is nothing to induce such a belief, then you are to say that it was duly delivered.

"It has been said that this was a dormant deed, never intended by the parties to operate; that it had slept until after the attainder and until the year 1787. There is weight in this, or rather there would be weight in it if the parties in interest had slept on their rights. But who has slept? Morris and his wife, Beverly Robinson and Joanna Philipse, the trustees: they are the persons that have slept, and not the children. This does not justify so strong an inference against the children as if they had slept upon their right. Is it fair in such a case to draw any inference against the children?

"It has been said that there were three copies of this instrument; it is somewhat uncertain how many copies there were or where they went. But suppose there were three copies, where would they probably go? Undoubtedly to the parties in interest. Mary Philipse would have one, and Roger Morris another, and the trustees the third. Mary Philipse, in a certain event, contemplated in the marriage settlement, would again become seized in fee. She therefore had an interest in having one copy; for although she had parted with the fee, she took back a life estate with the possibility of an ultimate fee in the land revesting in her. Roger Morris also had an interest under the deed, and it is therefore reasonable to presume that he had one copy of the deed. The third copy would have gone to the trustees, Beverly Robinson and Joanna Philipse. But where did this one come from? All you have on this subject is, that Mr. Watts received it from Morris in 1787, to have it acknowledged. This one, for the purpose of passing the title, is as good as though all three were produced.

"It has also been urged that this deed was
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not recorded until 1787. Is there anything in that fact that should operate against the children? They were minors for the greater part ^{25*} of the time down to the year 1787, when it was recorded.

"It has also been urged as a controlling fact, that Morris was here at the close of the war, and did not have the deed recorded before going to England. It appears from the testimony of Colonel Barclay that Morris and his family left New York for England before the evacuation of the city by the British army, which was on the 25th of November, 1783. It is well known as a matter of history that the British were in possession of the city of New York through all the war. Is there anything, then, in the fact that it was not recorded, from which an inference can be drawn against the deed? Where were the officers before whom Morris could at this time have had the deed proved? No law has been shown giving any such power, nor do I know of any such law. Then is there any just ground for a charge of negligence, even against Morris himself? After 1783 there were officers here before whom the deed might have been acknowledged or proved.

"Is there anything in omitting to have it recorded after that time? There was only three or four years' delay, and are there not circumstances reasonably to account for that, and show why it was recorded in 1787? In February preceding the time of proof and recording, the children made an application to the Legislature, asserting and setting forth their claim. They were told by the report of the committee, which was adopted by the House, if you have a right, as you say you have, go to the courts of law, where you will have redress.

"This was a very proper answer. The report did not, however, as has been urged, contain any admission of their title; nor did the committee give any opinion upon the validity of the claim; and if they had, we cannot regard it. But all they or the House said, was, that if what you allege be true, you have a remedy in the courts of law. This was calculated to awaken their attention and to induce them to prove and record their deed, as a precautionary measure. It has been said that this was no more than the ordinary transaction of proving a deed, and that in the case of an old deed, the ^{26*} witness finding his name to the deed, swears from that circumstance, rather than from any particular recollection, that he saw it executed. But in this case, was there not something special and particular preceding the proof of this deed; something calculated to awaken attention, and ought it to be considered no more than the ordinary transaction of proving an old deed? Governor Livingston, the witness who proved the deed, as has been proved to you, was a man of high character, an eminent lawyer, and a distinguished whig. It is fair to presume, also, that he knew what had been done just before in the Legislature. Is it not reasonable, then, to believe that his attention was particularly called to the transaction, and that he referred back to the time of the execution of the deed, and that he would not have proved it if he had not a recollection of what then took place?

"It is reasonable to presume, his attention being awakened, that he refreshed his recollection. Peters 4.

tion of the original transaction. It was proved at Judge Hobart's house. Mr. Watts drew the certificate. But can you presume that the witness would swear, and the judge would certify, without having read it? It is reasonable to presume that Judge Hobart, as well as the witness, knew what had taken place in the Legislature in this city a short time before. This certificate is a little out of the ordinary form; it states the execution to have been at or about the day of its date: they may have thought it necessary to show that the deed was not got up to overreach the attainer. Is there anything in the circumstances of this proof to induce the belief of unfairness?

"It is also said that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts, you must bear in mind the time when the interest vested in the children under this deed; for after that interest vested, none but themselves could defeat it. It is said there is doubt as to the time when the marriage took place, but it was probably between 1758 and 1761; for in the latter year Mary Morris executed a deed as the wife of Roger Morris. I am inclined to think the law is, that after the marriage, the parties to the deed could not disannul the deed. [*27 But certainly not after the birth and during the life of the children of that marriage.

"We now come to the acts that are said to be inconsistent with the deed. Those acts are of three distinct kinds or classes: 1. Those for settling the exterior lines of the patent. 2. The deeds to Hill and Merritt. And 3. The leases for the lives of other persons.

"In estimating the weight of the first class, it will be proper for you to bear in mind the situation of the patent to Adolphe Philipse. It was bounded north by the Kip (or Van Cortland & Co.) patent and the Beekman patent, and on the east by Connecticut. The first class of instruments produced by the defendant relate to the Connecticut line, the Beekman patent, and the Kip (or Van Cortland) patent. The first deed is that of January 18th, 1758: this relates to the boundary of the Beekman patent. You will see from this deed, and its recital, what the parties intended. It recites an agreement in 1754, to settle the lines of the two patents.

"You are not necessarily to take this as having been executed after the marriage settlement deed; delivery is what gives validity to a deed. Certainly Mary Philipse was not married at the time this deed was made, for if she had been, she would have signed it as Mary Morris. If she was not married, and had not executed the marriage settlement deed, she was seized in fee of the land, and had the absolute control over it.

"Again, it does not appear how much of the Philipse patent was conveyed by this deed, and it was made in pursuance of an agreement in 1754, to settle the boundary.

"The next is the patent to Philipse, Robinson and Morris, growing out of the settlement of the Connecticut line. The government settled the line between New York and Connecticut, making it a straight line instead of one parallel to the Hudson River, according to the patent; and this patent was given to Morris and others for the lands lying on the west side of that line. And the patent recites that Morris

and his wife had released to the king the land taken from the Philipse patent by the new line. This was an act to settle boundaries. Again, it **28*** is to be observed that Robinson and *Morris were both married; and yet the patent was not given to their wives, but to the husbands.

"The interest Morris had in the land was a life estate under the settlement deed, the same as it would have been without it. Without that deed, he had a life estate as tenant by the courtesy.

"Morris, instead of taking this patent to his wife or children, or in trust for them, took it to himself. He might, however, be considered as taking the land in trust for his children. But this alleged inconsistency of Morris is just as great without as with the settlement deed.

"The next is the deed to Verplank, in relation to the Kip or Rumbout Patent. It does not appear that this deed conveyed any of the Philipse patent. But suppose it did, it does not necessarily follow that it was intended to assert any right in hostility to the marriage settlement deed. Is it not a fair and reasonable presumption, these children being infants, that the parents meant this as a settlement of difficulties about boundary for the benefit of the children, and not that they intended to act in hostility to the deed? It was the act of parents, and not of strangers. The intention with which all these acts were done is important, as they are introduced to show that Morris and his wife have acted inconsistently with their right under the marriage settlement deed.

"We are next to consider the deeds to Hill and Merritt. Are these hostile to the settlement deed? If there had been no power to sell any part of the land, they would have been strongly inconsistent with the settlement deed. But that deed contains a power expressly giving them the right to sell in fee to the value of three thousand pounds. They have only sold to the amount of one thousand one hundred and ninety-five pounds, and so are within the power. But it has been said that these deeds do not recite the power—that was not necessary: the purchasers in these (Hill and Merritt) deeds would acquire as valid a title as if the power had been recited. These deeds are, therefore, not inconsistent with the settlement deed.

"The next thing to be considered is the three life leases. Were these such acts of hostility **29*** as to induce the belief that *the settlement deed was not delivered? It has been argued on the part of the plaintiff that the word *dispose*, in the power, would authorize these leases as well as sales in fee. This, I think, is not the true construction of the power: looking at the latter part of the power, it is evident that by the words *sell and dispose of*, they only contemplated sales, and not leasing for life or lives. And so, in strictness of law, they had no power to make these leases for lives. But if they had no such power, still the question returns, how is that to affect the rights of the children; and did they intend it in hostility to those rights? It could not affect their interest in the land. The question is not what was the legal effect of these acts, but how did Morris intend them? Did he actually mean to act in hostility to the deed? That is the question. You are not to construe it an act of hostility, unless it was so intended by Morris. It was a new country; clear-

ing and improving the lands was for the benefit of the children, and if Morris so intended these leases, they are not hostile to the deed. These are all the circumstances relied upon as being inconsistent with the settlement deed, and they are questions for you. I do not wish to interfere with your duties. It is for you to say whether the deed was duly executed and delivered.

"The next question for your consideration, is whether there was a lease as well as a release. In the judgment of the court, a lease was necessary to convey a legal estate to the children, and through them to Mr. Astor. Without a lease, this deed would only have operated as a bargain and sale, and the statute (for reasons that I need not stop to explain) would not have executed the ulterior uses. So a lease is indispensable to the plaintiff's title. Then the question is, are you satisfied that a lease was executed? This, perhaps, is the stress of the case. On this subject, questions of law are intermingled with the facts. The plaintiff says that the recital in the release is conclusive evidence of the lease; such evidence as cannot be disputed. If so, then it would operate as a technical estoppel, and Carver's mouth would be shut, and he would not be permitted to dispute the existence *of the lease, whether there [***30** was one in point of fact or not. But it is not enough to make it an estoppel that the defendant claims under the same party; he must claim under or through the same deed, or through the same title. Here neither the defendant nor the State claim through this deed, they claim in hostility to it; they say there never was such a deed; they claim the interest that was in Mary Philipse in 1754. This recital is not, therefore, to be considered a technical estoppel.

"The question then is, whether the recital can operate in any other way. The court has before decided in your hearing that this recital is evidence for the jury, and it is for you to say what weight and importance it ought to have. The defendant has excepted to the decision of the court that this is evidence, and if the court should have mistaken the law, the defendant will have his redress. You are, therefore, to take this recital as evidence legally and properly admitted; and if legal evidence, it is evidence for some purpose. It would be absurd for the court, after deciding that it is legal evidence, to tell you not to consider it, or that it is entitled to no weight or importance. You must, therefore, regard this recital as evidence.

"The recital being evidence, the question is for you to decide what is its weight and importance? In recent transactions, where the party can have other evidence of the fact, recitals are of little weight. But in ancient transactions, they are of more weight and consequence. There may be no witness to prove the fact. And the force and importance of a recital may be greater or smaller, according to the facts and circumstances of each particular case. Here the lease is lost, and it cannot therefore be shown who were the witnesses to it, nor with certainty what it contained. The witnesses to the release are dead, and the plaintiff could not, therefore, be called upon to produce them. In the proof of ancient transac-

tions, the rules of evidence must be relaxed in some measure, to meet the necessity of cases. Where witnesses cannot be had we have to resort to other proof. These will have greater ^{31*} weight in some cases than in others.* If the case is stripped of any fact or circumstance to induce suspicion of fraud, then a recital will have greater weight.

"From the release, it is reasonable to presume that the parties intended to convey a legal estate. This deed, if not drawn by Governor Livingston, was most likely drawn under his advice and direction, and is it not fair to presume that he drew the proper deeds to carry into effect the intentions of the parties? If he acted fairly, he would have done so; and is it not a fair presumption that he drew such an instrument as was customary at that day, and deemed necessary to convey the legal estate?

"It is proved that the lease and release was the ordinary mode of conveyance. Judge Benson says that was the uniform practice, and Colonel Troup says the same. This is an additional circumstance to induce the belief that a lease was executed, and it is for you to determine whether the circumstances are sufficient to satisfy you that what was usual and in accordance with the ordinary course of business, was done in this case.

"But it is objected that the lease is not produced. The plaintiff has, in the opinion of the court, accounted for this by proving it lost. It has been shown not to have been the general practice to record the leases with the releases; very few appear ever to have been so recorded in proportion to the releases, and those produced in court, on the part of the defendant, have never been recorded. It has been said that the lease had performed its office the moment the release was executed, and was no longer of any moment. This is not correct; but if the parties were under that impression, it will in some measure account for their not keeping it with greater care.

If you are satisfied from the evidence that there was a lease duly executed, then the plaintiff has a right to recover, unless some act has since been done changing the rights of the parties.

"The defendant's counsel have urged that this is not a case for presumptions in favor of ^{32*} the existence of a lease; that *presumptions can only be resorted to when the possession accords with the fact to be presumed. There may be some question on this point. I have examined all the cases cited, but I find none that come precisely to this case. So far as I understand the cases, presumptions cannot be resorted to in hostility to the possession. The mere fact of a naked possession proves but little. Courts, therefore, admit evidence of the declarations of parties in possession of land, to show how they hold. In this case the possession may be considered equivocal. Morris and wife would have been entitled to the possession whether there was or was not such a deed, and presuming a lease would not necessarily be presuming a fact in hostility to the possession. If you are, therefore, satisfied that Morris and wife were in possession, holding under the deed of marriage settlement, presumptions may be indulged in favor of the ex-

istence of the lease. But if you consider them holding the possession in hostility to the marriage settlement, it is not a case for presuming a lease.

"A lease and release are considered but one instrument, though in two parts. The absence of the lease is not the loss of an entire link in a chain of title, but it is a defect of a part of one instrument. Suppose a deed purporting to pass a fee produced without a seal, and from the lapse of time or some other cause, there is no appearance of its ever having had a seal? Then the party must show that it had been sealed, for otherwise it would not pass the fee. By what kind of evidence could this fact be established? Would it not be proper to look at the conclusion and attestation of the deed—Signed, sealed, &c.? Would it not also be proper evidence to show it was drawn by a man who knew that a seal was necessary to pass the estate, and other circumstantial evidence, and for the jury, from evidence of this description, to presume and find that the instrument was duly sealed, to supply the defect and infirmity of the deed?

"If you are satisfied the lease, as well as release, was executed and delivered, a legal estate has been shown in the *heirs of ³³ Roger and Mary Morris, and the plaintiff will be entitled to recover unless that title has been revested in Roger and Mary Morris, or one of them.

"It is said that the title has been revested in Mrs. Morris by some conveyance, since the settlement deed. This you may presume, if in your opinion the evidence will warrant such presumption. But no redelivery, cancelling or the like, would have that effect; there must have been a reconveyance. This must also have been made before the marriage, or at the utmost length, before the birth of a child; therefore, you can only look to circumstances arising before the marriage, or before the birth of a child, unless you should be of opinion that the acts of Roger Morris and his wife, which have been given in evidence, were in hostility to this marriage settlement deed. The children may have reconveyed since they came of age. But the circumstances do not weigh very strongly against them before 1825, when they were first in a condition to assert their rights. There cannot be any very strong grounds for supposing the children ever reconveyed. And if there is anything to satisfy you there was a reconveyance, you will say so, and it will defeat the plaintiff's right to recover. But in my judgment, the result will depend principally upon the question whether a lease and release were duly executed and delivered, so as to pass the legal estate.

"The deed of the State only passed such right to the defendant's father as the State had, and if the marriage settlement deed has been established, that was nothing more than the life estate of Morris and wife. It is not necessarily to be inferred from any of the acts read that the State intended to take any greater interest than such as the persons attained had. They sold what the commissioner of forfeitures judged had been forfeited. They did not examine in to the state of the title, but only exercised their judgment upon such information as they had. It was for that reason that the State conveyed

with warranty. The State cannot be presumed to have intended to conclude the rights of third persons who were not attainted. If, therefore, **34***] you shall find that the marriage settlement deed, consisting of a lease and release, was duly executed and delivered on or about the time it purports to bear date, the children of Roger and Mary Morris acquired under it a contingent remainder, which became vested on their birth, and the plaintiff will be entitled to recover unless that interest was destroyed or put an end to by some subsequent reconveyance, of which you will judge and determine."

Upon this charge, and on the opinion, the court left the case to the jury. A verdict and judgment were rendered for the plaintiff, and the defendant prosecuted this writ of error.

The case was argued for the plaintiff in error by *Mr. Bronson*, Attorney-General of New York and *Mr. Webster*; and for the defendant by *Mr. Ogden* and *Mr. Wirt*.

For the plaintiff in error the following points were made:

I. No estate ever vested in the children of Morris and wife under the settlement deed.

1. The remainder limited to the children by that deed was a contingent remainder, and could not vest in the lifetime of their parents.

2. By the attainder and banishment of Morris and wife in 1779, they became civilly dead, and their estate in the land determined, and the contingent remainder to the children failed for the want of a particular estate to support it.

3. If the attainder and forfeiture worked no more than an assignment of the particular (or life) estate, then the conveyance by the State of New York in 1782 to Timothy Carver, with warranty, was equivalent to a feoffment by the tenant for life, and destroyed the contingent remainder depending on that life estate.

4. By the attainder of Beverly Robinson, the surviving trustee in 1779, and the forfeiture of all his estate to the people of the State of New York, all seisin in the trustee to serve the contingent uses to the children was divested. The State cannot be seized to a use, and so there was no seisin to serve the contingent uses to the **35***] children when the event upon which they were to vest happened, and the State took the land discharged of the subsequent limitations in remainder.

II. Under the settlement deed (without a lease) the children could not take legal, but only trust or equitable interest in the land.

III. The judge erred in admitting evidence to prove the loss before it had been shown that a lease ever existed.

IV. The plaintiff did not prove the loss, nor did he sufficiently account for the nonproduction of the lease, and was not entitled to give secondary evidence of its contents.

1. The release states it was executed in three parts—there must also have been three parts to the lease, and the plaintiff should have accounted for all the parts before being permitted to give secondary evidence of the contents.

2. Most of the evidence of searches for the lease was of a loose and unsatisfactory character—depending, as to its sufficiency, upon mere hearsay evidence.

3. No sufficient search was proved among the papers of Mary Morris, formerly Mary Philipse.

4. No search was shown to have been made among the papers of Joanna Philipse, the mother of Mary Morris and one of the trustees.

5. No search was proved in the office of the Secretary of State, where the release was recorded, nor was any proved in the clerk's office of the counties of Dutchess and Putnam, where the land is situated.

6. A search, by a third person, among the papers of the children and heirs of Roger Morris and his wife, who were lessors of the plaintiff, was not sufficient. Those lessors were competent witnesses upon the question of loss, and should have been sworn or examined on commission.

7. The other lessors of the plaintiff, Messrs. Colden, Fowler, and Bogert, should have been sworn, as well as Mr. Astor, to prove that they had not got the lease.

8. It should have been shown where the release came from, when it came into the hands of the plaintiff, or Mr. Astor, and that the lease was not in that place.

*V. The recital in the lease does not [**36** bind the defendant by way of estoppel, nor is it evidence against him.

VI. This is not a case where a lease or other conveyance can be presumed.

VII. The plaintiff was not entitled to recover without proving the actual execution of a lease.

VIII. Evidence of what were the contents of a lease in a particular case between other parties, was not competent evidence to prove what were the contents of the lease in this case.

IX. If a lease of some kind was executed, the plaintiff was not entitled to recover on proving it lost, without also proving what were its contents.

X. The judge admitted evidence which was not pertinent, and which may have misled the jury.

1. A common practice to convey land by lease and release was not competent evidence to prove that a lease was executed in this case, or what were its contents.

2. The professional character of Governor Livingston was not competent evidence to prove either a lease or its contents.

3. Proof that it was not usual to record leases, was not competent evidence to prove the loss of a lease in this case.

4. Proof of what was the usual recital of a lease in a deed of release, was not competent evidence for any purpose.

5. The journal of the Assembly was not legal or competent evidence against the defendant.

6. The acts of the Legislature of the State of New York, relative to the claim of Mr. Astor, were not competent evidence against the defendant.

7. Proof that this suit was defended by the State of New York, was not competent evidence against the defendant.

XI. The judge misdirected the jury on the question of a delivery of the settlement deed.

XII. The judge misdirected the jury as to the grounds upon which they might find there was a lease as well as a release.

*XIII. The judge should have instructed [**37** ed the jury that this was a proper case for presuming a conveyance.

XIV. Roger Morris and Mary his wife, under the marriage settlement deed, had an interest in the land, and might convey in fee, to the amount of three thousand pounds in value. They did convey to the amount of one thousand one hundred and ninety-five pounds in value, and the residue of that interest was forfeited to and vested in the people of the State of New York, and the power was well executed by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

XV. The whole title, both in law and equity, which may or can have vested in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns.

XVI. A proper deed in conveyance in fee-simple from the said John Jacob Astor and all persons claiming under him, to the people of the State of New York, would not be valid and effectual to release, transfer, and extinguish, all right, title, and interest which now is, or may have been vested in the children and heirs of the said Roger Morris and Mary his wife.

XVII. The plaintiff's action is barred under the act limiting the period of bringing claims and prosecutions against forfeited estates.

XVIII. The plaintiff's action is barred under the General Limitation Act of 1788, and also under the General Limitation Act of 1801.

XIX. The plaintiff was bound to pay for the permanent improvements upon the land, by which its value had been increased.

Mr. Bronson, for the plaintiff in error, contended that on the true construction of the deed of settlement, no estate vested in the children of Roger Morris and wife. Morris and wife took upon their marriage an estate in the land for the term of their natural lives and **38***] the life of the survivor, *with a contingent remainder in fee to the children, which could not vest in the lifetime of their parents. The uses in the deed were: 1. To the trustees until the marriage. 2. To Morris and wife for life. 3. From and after the determination of the life estate to such children as might be born of the marriage. 4. But if they should have no child or children, or such child or children should happen to die in the lifetime of their parents, then either to Mrs. Morris, or to such persons as she should devise the same.

Thus the remainder was contingent and did not vest during the life of the parents, and it afterwards failed for the want of a particular estate to support it, the life estate of Roger Morris and wife having been forfeited. It was the obvious meaning of the deed that the residue of the estate should go to the children, if they survived the mother, and if not, to her, as either event should take place. It was thus a remainder limited to two persons or classes of persons, depending on survivorship; and until the happening of the event it could not become a vested estate in either.

This was the effect of the limitation over, and such a limitation is good at common law. There may be two concurrent remainders or contemporary fees, called alternate remainders; the latter to take effect in case the first shall Peters 4.

fail. (*Laddington v. Kime*, 1 Lord Ray., 203.) The same case is reported 1 Salk., 224; 1 Preston on Estates, 488, 493. The case before the court is more properly one fee, one remainder, and is like the ordinary case of a remainder limited to the survivor of two or more persons.

In answer to the allegation that the children on their birth took vested remainders in fee, and that the limitations over in case of the death of the children could only have taken effect by way of shifting use, it is urged that although by conveyances deriving their operation from the statute of uses, estates may be limited differently from the limitations by conveyances at common law, yet the difference between a remainder and a shifting use is, that a remainder must be limited to take effect in possession upon the regular determination of the estate which precedes it; but a shifting use does not *take effect upon the regular determina- [*39 tion of the preceding estate, but in derogation or abridgment of that estate. (1 Preston on Estates, 117, 92, 93; Cruise's Dig. Rem., ch. 5, sec. 19, 36.)

Springing and shifting uses, and executory devises are only admitted in cases of necessity, and it is well settled that where a limitation can take effect as a remainder with a sufficient freehold estate to support it, it shall not be construed as a springing or shifting use, or as an executory devise. (*Laddington v. Kime*, before cited; *Doe v. Holmes*, 3 Wils., 243; *Goodtitle v. Billington*, Doug., 725, 753; *Fearne* on Ex. Dev., 5.)

The principles of these cases fully apply to this case. There was no difficulty in giving effect to the limitation to Mrs. Morris, or her devisee as a remainder, construing the deed as giving the residue of the estate to the one or the other according to survivorship. Thus no estate could vest in the children during the lifetime of their parents. They had no certain or fixed right of future enjoyment. The case is, therefore, within the fourth class of cases, as they are arranged by Mr. Fearne; the person, though *in esse*, was not ascertained. (*Fearne* on Contingent Rem., 2, 3, 5, 9; *Biggott v. Smith*, Cro. Car., 102; Co. Lit., 378, A; Cruise's Dig. Rem., ch. 1, sec. 8; Bac. Abr. Rem. and Rev., D; 1 Preston on Est., 77; *Leonard Lovie's* case, 10 Co., 85, 86; 3 Coke, 20; 1 Plow. Rep., 20; *Smith v. Belay*, Cro. Eliz., 630.)

It is not the event which is to determine the preceding estate, but that which is to give effect to the remainder which distinguishes a contingent from a vested remainder. (1 Preston on Est., 67, 70, 71.) If the remainder to the children was vested in interest, it might be aliened or devised, and on their death it would descend to their heirs; and the limitation to the mother and her devisee might have been defeated, notwithstanding the death of the children before their parents. It is therefore evident that the remainder was contingent until the question of survivorship was determined. (1 Preston on Est., 64; Cruise's Dig. Rem., ch. 1, sec. 9; *Doe v. Provoost*, 4 Johns. Rep., 61; *Den v. Bagshaw*, 6 Durnf. & East, 512.)

*There are some cases upon wills [*40 where the courts, to carry into effect the intention of the testator, have held a contingent disposition of the estate to be a condition subse-

quent to divest the estate, and not a condition precedent. (4 Bos. & Pull., 313; 14 East, 601; 1 Maule & Sel., 327; 2 Johns. Cases, 314.) But in these cases the estates in remainder were so limited as to take effect in possession upon the regular determination of the preceding estate, or where it was necessary to effect the intention of the testator so to construe the limitation. The cases of *Doe v. Martin* (1 D. & E., 39); *The Earl of Sussex v. Temple* (1 Lord Raym., 311); *Matthews v. Temple* (Comberb., 407), do not interfere with the principles contended for on the part of the plaintiff in error.

1. The contingent remainder to the children failed upon several grounds:

2. By the attainder and banishment, by which Morris and wife became civilly dead, and their estate determined; there being from that event no particular estate to support it.

Banishment for life works the civil death of the party. (Co. Litt., 133; 1 Black. Com., 132, 133; 4 Johns. Ch. Rep., 218; 6 Johns. Ch. Rep., 118.) The remainder must vest in interest during the continuance of the particular estate, or the moment of its determination, or it is gone forever. (Fearn on Cont. Rem., 307, 326, 389; Cruise's Dig. Rem., ch. 6, sec. 35, 36; 2 Saund. Rep., 386; *Thompson v. Leach*, 1 Lord Raym., 316; *Lloyd v. Brooking*, 1 Ventris, 188; 2 Salk., 576.) In the cases of *Corbet v. Tickborn* (2 Salk., 576), and *Linch v. Coote* (2 Salk., 469), where it was held that by attainder for treason of the tenant for life the crown takes no other than the interest of the tenant, there was in the first case a still subsisting life estate to sustain the remainder, and in the second case the remainder was actually vested.

In *Borland v. Dean* (4 Mason's C. C. Rep., 174) it was held that the confiscation of the estate of the tenant for life did not defeat the remainder. But this was on the ground that it was a vested, and not a contingent estate at the time of the confiscation.

2. If the attainder and forfeiture worked no **41*** more than *an assignment of the particular and life estate, then the conveyance by the State in 1782 to Timothy Carver with warranty, was equivalent to a feoffment by the tenant for life, and destroyed the contingent remainder depending on that estate. (Fearn on Cont. Rem., 316, 318; Cruise Dig. Rem., ch. 6, sec. 1, 7; 2 Saunders, 386.) It is true that a bargain and sale by tenant for life will not destroy a contingent remainder, as it passes no greater interest than the person has. But the statute of New York, under which the commissioners acted, is part of the alienation as well as the deed, and the statute gives the deed of the commissioners all the effect of a feoffment with livery at common law.

3. By the attainder of Beverly Robinson, the surviving trustee in 1779, and the forfeiture of all his estate to the people of the State of New York, all seisin in the trustee to serve the contingent uses to the children was divested; and thus the remainder to the children of Roger Morris and wife was destroyed.

The State cannot be seized to a use, and so there was no seisin to serve the contingent remainder to the children, and the State took the land discharged of the subsequent limitations.

It is necessary to the execution of a use that

some person should be seized to the use. (Gilbert on Uses and Trusts, 125; *Chudleigh's case*, 1 Coke, 132; 1 Saunders on Uses and Trusts, 117, 181; 7 Cruise's Dig. Uses, ch. 3, sec. 78; Cruise's Dig. Rem., ch. 5, sec. 9.)

The king cannot be seized to a use, but by prerogative holds the lands discharged of the use, and the people of the State of New York have succeeded to all the rights and prerogatives of the former sovereign. (Cruise's Dig. Use, ch. 2, sec. 37; Cruise's Dig., ch. 3, sec. 9, 10; Vin. Abr. Uses (c); Gilbert on Uses and Trusts, 5, 6; *The People v. Herkimer*, 4 Cow., 345; *The People v. Gilbert*, 18 Johns. Rep., 227.)

The counsel then proceeded to argue that there should have been a lease, in order to sustain a marriage settlement. That the loss of the lease was not proved. But the court having decided that the recital of the lease in the deed of the ***13th** of January, 1758, was evidence [***42** between these parties of the original existence of the lease, the argument upon these points is omitted.

It was further argued that the recital in the lease does not bind the plaintiff in error by way of estoppel, nor is it evidence against him.

The Circuit Court held that a recital was not an estoppel, but that it was evidence against the defendant in that court of the existence of the lease.

It was not such evidence. The defendant did not claim under or through the deed, but claimed adversely to it, and deduced his title from the patent to Adolphe Philipse in 1697. The plaintiff then set up a deed of seventy years' standing, wholly disconnected with the defendant's claim of title, save that it was executed by one of the persons through whom the title had passed. It is denied that it could be evidence against anyone but the party who made it, and, possibly, his heirs and personal representatives, or others standing in his place.

It is not denied that the deed without the lease is good and valid, and divests the title of Mary Philipse as effectually as if a lease had been made; but without a lease the legal title is not placed where the plaintiffs below require it.

It is important to consider that there never has been a holding under this deed. Morris and wife were entitled to the possession of the estate without the deed, and it is necessary to look beyond the deed to ascertain under what title they hold. There is no evidence which shows that the deed was ever referred to by them as valid or subsisting; but by a series of acts altogether unequivocal and adverse to the deed, they exercised full ownership over the property, by granting it in fee, or on leases for life; acts inconsistent with the deed.

The doctrine that the recital is evidence against the defendant, goes the whole length of determining that an admission, made by any person through whom a title has passed, binds every one to whom the title may come; and that a deed, to which a party is a stranger, and under which there ***has** been no holding, [***43** not only binds him, by way of divesting the title of his grantor, but that he is also bound by any admission it may contain. The king is not bound by estoppels. (Vin. Abr. Estoppel, U., 2.) Nor are the governments of the

States of the United States bound by them. (*Elmendorf v. Carmichael*, 2 Litt. Rep., 481.)

The old doctrine was that a recital did not bind anyone, not even the party to the reciting deed. (Vin. Abr. Estop. M., pl. 5, 7; Co. Litt., 352 b.) But it is admitted that a different rule now prevails, and that recitals are for the most part evidence against the party to the deed, his heirs, and those standing strictly in the character of representatives, and against persons claiming through or under the deed. (*Denn v. Correll*, 3 Johns. Cas., 174; Will. Rep., 9; *Willoughby v. Brooke*, Cro. Eliz., 756; Com. Dig., Testmoigne, b. 5.) But in 2 Starkie on Ev., 30, it is said "a recital is not evidence against a stranger to a second deed;" and a man is a stranger to a deed when he does not claim under it, although he may claim under the same grantor.

The cases relied upon to support the position of the defendant in error do not warrant the conclusion claimed from them. (*Ford v. Lord Gray*, 1 Salk., 285; 6 Mod., 44.) In these cases the claims were under the grantor, in and under or through the reciting deed.

It is believed that no case can be found where the point has been adjudged that a recital was evidence against one claiming under the party to the reciting deed but not through it, unless where there has been a possession not to be accounted for, but on the truth of the recited fact. In such a case it may be evidence against a stranger. (*Norris's Peake's Ev.*, 164.)

Estoppels by verdict, admissions on record, &c., bind all privies (1 Phil. Ev., 245), because they operate on the interest in the land, and divest the title. (1 Salk., 276.) But a recital is mere matter of admission, which does not operate on the title to land nor affect it in the hands of a grantee of the person making the admission. Even the heir is not always bound by that which would estop his ancestor. 44*] (*Goodtitle v. Morse*, 3 T. R., 365. *Kercheval v. Triplett*, 1 Marshall's Ky. Rep., 7, 494.)

The judge admitted evidence which was not pertinent, and which may have misled the jury.

1. A common practice to convey land by lease and release was not competent evidence to prove that a lease was executed in this case, or what were its contents. 2. The professional character of Governor Livingston was not competent evidence to prove either a lease or its contents. 3. Proof that it was not usual to record leases was not competent evidence to prove the loss of a lease in this case. 4. Proof of what was the usual recital of a lease in a deed of release, was not competent evidence for any purpose. 5. The journal of the Assembly was not legal or competent evidence against the defendant. 6. The acts of the Legislature of the State of New York relative to the claim of Mr. Astor, were not competent evidence against the defendant. 7. Proof that this suit was defended by the State of New York, was not competent evidence against the defendant.

It may be said that this evidence was unimportant: it is for that very reason that we complain of its admission. And unless the plaintiff can show that it was legal evidence between these parties and upon the questions to be tried, the judgment must be reversed; for it Peters 4.

is impossible to say that the jury did not found their verdict upon it.

For what legitimate purpose were the acts of the Legislature concerning the claim of Mr. Astor given in evidence? If to excite the sympathy, or operate upon the prejudices of the jury, it was an improper and illegal purpose. We attempted to defend James Carver, and against him the plaintiff was to establish his right.

If the acts in question contained any admission in favor of the plaintiff's title, will it be contended that the Legislature could destroy or admit away the vested rights of James Carver? But those acts denied the title of Mr. Astor, and referred him to the courts of law to establish it by proof; and he was to do that against the tenants upon the land, not against the State.

*Again, those acts proposed a compromise to Mr. Astor; but there was no evidence that he had ever accepted those terms of compromise.

And how did it tend to establish the title of Mr. Astor, or anything concerning it to show that this suit was defended by the State of New York? If not legal evidence, a reversal of this judgment is asked. If Mr. Astor has a title to this land, he must prove it by legal and pertinent evidence.

The judge of the Circuit Court misdirected the jury on the question of the delivery of the settlement deed.

The force of this objection can only be seen by referring particularly to the case of the plaintiff below.

The evidence offered was the affidavit of Mr. Livingston of the execution of the deed, and that of Mr. Hoffman of the handwriting of the subscribing witnesses, both of whom were proved to be dead. The affidavit of Mr. Livingston was made, not from a recollection of the execution, but from his name having been subscribed as a witness. This was *prima facie* proof to put the instrument on record, and amounted only to presumptive evidence of a delivery of the deed. When a subscribing witness is called to prove the execution of a deed, two distinct facts are to be established. 1. The sealing or execution. 2. The delivery. (1 Stark. Ev., 331, 333, 334; 2 Stark. Ev., 473, 475, 477; *Jackson v. Phipps*, 12 Johns., 418.) Where the witness is dead, proof of the handwriting furnishes presumptive evidence of sealing and delivery, if there has been possession under it, or the deed comes from the grantee. But in the absence of possession, or where the deed was never in the hands of the grantee, the presumption is very slight. Such proof of a deed as will entitle it to be recorded is certainly no stronger than an acknowledgment by the party that he executed it as his act and deed, for the uses and purposes therein mentioned, and in neither case is the evidence conclusive, but only *prima facie* or presumptive, and such as may be rebutted. (*Jackson v. Dunlop*, 1 Johns. Cases, 114; *Maynard v. Maynard*, 10 Mass., 456; *Gardner v. Collins*, 3 Mason, 398.) These cases sufficiently establish that the proof or acknowledgment and *the recording of a deed, furnish only [46 *prima facie* evidence of delivery.

But upon the whole case it is thought that

any evidence of a presumption that there was an actual deliver of the deed, so that it became an operative and valid conveyance, was entirely destroyed by the facts of the case. The deed was prepared in contemplation of marriage, and, necessarily, was not to be delivered until the moment of the marriage ceremony. This must have been the case; as by its terms, if the marriage did not occur, the estate would be held by the trustees. The marriage did not take place immediately, for Mary Philipse, on the 18th of January, 1758, executed a deed for a part of the land in her own name. She appears to have been married before the 5th of March, 1761. It is probable the deed was thrown aside, increased confidence in Morris having made it of no importance, and that it was only brought forward afterwards for the purposes for which it is now set up. It was not recorded until 1787, although all the other title papers of the family were put on record. The recitals in the deeds given after it state all the circumstances of the title under Adolphe Philipse, but no deed recites this, or in any manner refers to it. There was no evidence that the deed had been seen after its execution in the hands of the trustees, or seen at all, until 1787, when it was produced by the grantor. Upon such facts it is difficult to believe that it was at any time before the Revolution a subsisting conveyance.

Other important facts were proved. The deeds before the war, given by Morris and wife, grant and convey a fee-simple in the parts of the land contained in the settlement, and do not mention a life estate. In settling the line with Connecticut, the surrender to the crown does not mention the trust deed; the parties style themselves owners and proprietors, and the grant of land, in consideration of the surrender, is to Roger Morris, and not subject to the pretended settlement. Beverly Robinson, a trustee under the deed of 1758, should have protected the trust, but he was a party to the compromise with the crown, under which five thousand acres were acquired in his own right by Roger Morris.

47*] *The misdirection of the court was in telling the jury that the evidence by which the delivery was brought into doubt was of no legal effect or importance. There was one error which pervaded every part of the charge in this particular. While the question was whether there was any deed, duly perfected by delivery, under which the children had rights, the judge assumed that fact and made it the basis of destroying the legal effect of that evidence given to disprove it. That this was a dormant deed, which had slept for twenty-nine years, went very strongly to impeach its validity; and the judge said, "there is weight in this, or rather there would be weight in it, if the parties in interest had slept on their rights." He then says, "the children have not slept," and asks, "is it fair in such a case to draw any inference against the children." This assumes the very fact in controversy—that there was a deed, and, therefore, that it was improper to draw any inference against the children from the acts or omissions of others.

He also contended that the court misdirected the jury upon the omission to record the deed,

and on the acts and conveyances of Morris and wife in disregard of the deed of 1758.

Several of the deeds are disposed of by the court by saying they were to settle boundaries; but they asserted a right to the lands in fee, and for what purpose they were made was of no moment. In relation to the leases, the judge said that Morris and wife, "in strictness of law," had no power to make them; but he adds, "how is that to affect the rights of the children?" This was equivalent to saying the children had rights—the very question in the case.

Upon the whole, it is evident that the court left nothing to the jury on the question of delivery. He also said that in his charge he had laid before the jury all the circumstances relative to the question of delivery, but he had omitted to state that this deed came out of the hands of the grantor, and some other facts important to the cause.

The judge should have instructed the jury that this was a proper case for presuming a reconveyance.

*The judge told the jury that they **[*48]** might presume a reconveyance if they thought the evidence would warrant the presumption; but he also said that in his judgment the case depended principally upon other grounds. It was, in fact, saying that it was not a proper case for presuming a reconveyance.

The presumption of such a conveyance was in accordance with the actual holding of the property from 1758 to the day of the trial, and all the parties connected with the title have acted at all times as though such were the fact.

In New York, and the local law governs in this case, the rule concerning presumptions of conveyances is in favor of the claims of the plaintiff in error here. (2 Wendell's Rep., 36; *Ham v. Schuyler*, 4 Johns. Ch. Rep.) So, too, in England, a reconveyance of the legal estate was presumed after a great lapse of time, though the possession was not originally adverse, but under a trust. And this case received the sanction of this court in *Provost v. Gratz* (6 Wheat., 418).

Roger Morris and Mary his wife, under the marriage settlement deed, had an interest in the land, and might convey in fee to the amount of three thousand pounds in value. They did convey to the amount of one thousand one hundred and ninety-five pounds in value, and the residue of that interest was forfeited to and vested in the people of the State of New York, and the power was well executed by the conveyance of the commissioners of forfeitures to Timothy Carver, the defendant's grantor.

In relation to the deeds to Hill and Merritt, the judge held that they were a good execution of the power in the settlement deed; but on this part of the case he held, admitting that the unexecuted portion of the power passed to the State by the forfeiture, yet that the conveyance to Timothy Carver by the State was not a good execution of the power. If Morris and wife could execute the power without reciting or professing to act under it, why could not the State do the same after they acquired the title?

If the power is to be regarded as an exception out of the grant, then Morris and wife had an interest or estate in the *land, and they **[*49]**

might convey without reciting the power. And it is equally clear that the residue of that interest or estate not aliened passed by the forfeiture, and so the defendant acquired a good title by the deed from the commissioners.

We think this power received different constructions upon different questions, and that either the Hill and Merritt deeds were inconsistent with the settlement deed, or that the defendant acquired a good title under the commissioners' deed.

The whole title, both in law and equity, which may or can have vested in the children and heirs of Roger Morris and Mary his wife, of, in and to the lands and premises in question, has not been, as between the grantors and grantee, legally transferred to the said John Jacob Astor, his heirs and assigns.

A proper deed of conveyance in fee-simple from the said John Jacob Astor and all persons claiming under him to the people of the State of New York, would not be valid and effectual to release, transfer, and extinguish, all right, title and interest, which now is, or may have been vested in the children and heirs of the said Roger Morris and Mary his wife.

These questions arise upon the admissions made by the parties before the jury, and which appear upon the record.

If the remainder to the children was contingent, and not to vest until the death of both their parents, then it is quite clear that it could not be aliened until the question of survivorship was determined. But if the court should hold that the remainder to the children was vested, subject to be divested by way of a shifting of the use on the event of their dying before their mother, then we contend that they could not alien to a stranger, although they might release to a person having an interest in the land. And if the conveyance would bind the party to it by way of estoppel, still it would not bind their heirs. (*Goodlittle v. Flunkner*, 3 T. R., 365; *Kercheval v. Triplett*, 1 Marshall's Ky. Rep., 494; 1 Preston on Est., 75, 76; Viner's Abr. Release, *G. Lampet's case*, 10 Coke, 50*] 46; *Hoe's case*, 5 Coke, 71; Com. *Dig. Grant, D. Assignment, C. 3; *Davis v. Hayden*, 9 Mass., 514, 519.)

The plaintiff was bound to pay for the improvements upon the land by which its value had been increased.

The substance of the provisions of the acts of the Legislature of New York is, that the purchaser of any forfeited estate, in case of eviction, should be paid the value at the time of the eviction of the improvements he had made on the land; not for his labor or expenditures, but the amount by which that labor and those expenditures should have increased the value of the land. The party who recovered his land would only pay the difference between the value of the land at the time of the recovery and what it would be worth at the time of the recovery without the labor and expenditures of the party evicted. This provision is both just and equitable.

It is contended that these provisions of the laws of New York are in conflict with the treaty with England in 1783.

The acts are general in their terms and in their operation; they have no relation to the character or country of the person who should

recover lands which had been sold or confiscated; they operate on all.

A partial legislation, prejudicial to British subjects, was the thing it was the object of the British government to provide against.

Did the British government intend to ask, or ours to give, privileges and immunities, or exemptions to British subjects that were not accorded to our own citizens?

The Legislature might perhaps have adopted such violent measures in relation to confiscated estates, which would have been unjust to our own citizens and to British subjects, and against such acts the treaty was intended to guard. But it cannot be supposed that the provision of the treaty was to extend to interfere with regulations founded upon the principles of national justice.

What were "the just rights" of persons having an interest in confiscated lands? Not a right to the future labor of others, by which the value of the lands should be enhanced. In 1783 no British subject had a "just right" to the increased value which James Carver[*51 should give to the lands after the year 1786, when the law was passed.

Mr. Ogden, for the defendant in error.

In 1754, Mary Philipse was seized in fee of a part of what was then called "Philipse Upper Manor," of which the premises in dispute in this suit are a portion. Mary Philipse is, therefore, the source from which both parties derive title.

The plaintiff in the court below must show that he has a good title under Mary Philipse. He claims under a deed of marriage settlement, executed by Mary Philipse, in consideration of her intended marriage with Roger Morris.

Was this deed executed and delivered by Mary Philipse? This is a pure question of fact to be decided by a jury. The jury have found the fact; their verdict is conclusive unless the judge of the Circuit Court has misdirected the jury in the law. If the misdirection of the judge was as to facts, it may have furnished ground for a new trial in the court below, but not for a reversal of the judgment here. (1 Serg. & Rawle, 333, 336.) If no illegal evidence was admitted, the judgment is conclusive.

The proof of the execution of the deed and of its delivery was made by the deposition of Mr. Livingston in 1787, and by proof of the handwriting of the witnesses who are dead. This is the ordinary proof on such matters; all the other proof was brought forward by the defendant, all of which was given to the jury. This evidence was not illegal.

If all the circumstances of this case are to be reviewed by this court, what are they? The proof of the deed had been made by Mr. Livingston, after it had been before the Legislature, and the claims of those under whom the plaintiff claims had become the subjects of inquiry.

It is objected that the deed was never heard of before the Revolutionary War, and that it had never been produced until the interests of the parties required its production. Had the parties who now exhibit the claim on the defendant considered it as an inoperative instrument they would have destroyed it, and have claimed from the crown a compensation

for the land as a part of the loss sustained by **52***] the war. But if *any conclusions can be drawn from these facts, they were properly for the jury. As to the fact whether the deed had been seen before the war, it may have existed, and yet not appear to this court, as the case is before this court on a bill of exceptions.

As to the deed not having been recorded at the time of its execution, there was no law in force requiring that it should be put on record. There is no strength in the argument that as the other muniments of title were on record, the fact that this deed is not found on record authorizes the belief that it never existed as a valid conveyance. A patent is always recorded before it issues. The deed to lead to uses, in the proceedings to bar the entail, was a part of the common recovery. The deed of partition, which operated on lands twenty miles square divided among three children, must have been recorded for the satisfaction of purchasers. But the settlement deed affected only the parties to it, and its recording was not called for.

Nor is it evidence that no such deed was in force that, in the conveyances made by Roger Morris and wife, after its execution, this deed was not mentioned. This was of no consequence in transferring property to strangers. But if these facts are of any value, they were proper for the jury in determining on the question of delivery, or on the presumption of a reconveyance.

In the marriage settlement, a power to convey lands to the amount of three thousand pounds was reserved, and conveyances of one thousand one hundred and ninety-five pounds were made. This power was properly executed without reciting that it was derived from the settlement deed. As to the presumption of a reconveyance, it is argued that a possession of seventy years was inconsistent with the marriage deed. But this was not the fact. In the year 1787 the deed was proved before Judge Hobart and was then recorded, and the claims of the children of Roger and Mary Morris were soon after presented to the Legislature of New York. It is an universal principle of law that if possession be consistent with a deed, it shall be presumed to be under it. In this case the **53***] acts of Roger Morris and *wife in the sale of the land, in granting leases, were of this character and should be so considered.

It is contended by the counsel for the plaintiff in error that the recital of the lease in the settlement deed does not bind him, because he does not hold under that deed; and does not bind the State of New York, his grantor, because of its sovereign character. In answer to the first, it may be said that if the plaintiff is not bound by the recitals, yet they were evidence which went properly to the jury, and their verdict has affirmed them. To the second it is submitted that although the king is not bound by recitals in his own deed, he is bound by those in deeds under which he claims. (Matthews, 201.) What was the legal operation of the deed? It was the conveyance of the estate to trustees for the use of Roger Morris and wife for life, remainder to their children, and if no children, a contingent remainder over to Mary Morris and her devisees. The remainder to the children was at first contingent, which vested at the birth of each child, and opened to let in

those who were born afterwards. (Cruise, Rem., ch. 5, p. 346, 364, 336, ch. 4, sec. 15, ch. 5, sec. 11, p. 350.)

It is said that the remainders were destroyed by the operation of the acts of attainder and forfeiture, and the conveyance by the State of New York. That these were equivalent to a feoffment, and destroyed the particular estate, and consequently the remainders. But the conveyance of the State with warranty, was not equal to a feoffment. There was no livery of seisin, and the operation of conveyances which pass the whole estate is confined to those with livery of seisin.

Nor was the attainder and banishment of Morris and wife, a civil death. The Treaty of Peace repealed the banishment, and thus restored them to civil existence. The estate depended, by the terms of its grant, on the natural death of the grantors.

And the law is, that if a particular estate is determined the remainderman might enter, but he is not compelled to do so. (2 Ves., Sen., 482; 7 East, 32.) The act of attainder intended *to forfeit only the interest of Roger [**54** Morris and wife. Its terms extend no farther, and such only could be its operation. The offense charged against them was not treason, and no forfeiture was effected but according to the words of the law. (2 Johns. Rep., 248.) A condition or possibility was not forfeited. (4 Mason, 174.) The act did not intend to terminate the estate of Roger Morris and wife, but to transfer it to the State of New York and to continue it afterwards. Thus, for all purposes of sustaining the remainders it did continue, and their estate being limited to their lives is now fully determined by their death; and their children, under whom the plaintiff below claimed, were fully entitled to the land.

As to the claim to be paid for the improvements, the Treaty of 1782 confirmed all unforfeited estates, and protected them from State legislation. The rights of those interested in lands were then vested, and could not be impaired. In 1782 the land held by the plaintiff in error was conveyed to him, and the acts of the Legislature of New York, under which he claims to be paid for his improvements, were passed in 1784 and 1786. He did not buy the land on the faith of these acts, and he has no claim to their legal provisions or to any equities under them.

Mr. Wirt, also for the defendant in error, said, this case arises under the Attainder and Confiscation Act of the State of New York. The confiscation having fallen on the estate of Roger Morris and Mary his wife, under which the property was sold, and the remainder in the children of Morris and wife having been, as is contended by the defendants in error, protected by the Treaty of Peace, was sold to John Jacob Astor, and is now claimed under that purchase.

As the State of New York had sold the estate under the confiscating law, claiming the fee-simple to be forfeited, it considered itself responsible to the purchasers, should their grantees be ousted, after the life estate acknowledged to have been in Morris and wife should terminate.

Under these circumstances Mr. Astor thought it advisable to present his claim to the Legisla-

55*] ture of New York, and certain *acts were passed, by force of which, should the title be established by competent and designated judicial proceedings to be in him, the State of New York has offered to pay him four hundred and fifty thousand dollars on his executing a full and complete conveyance of the estate, both in law and equity; which sum is to be reduced to two hundred and fifty thousand dollars if it shall be determined that he shall be liable to pay for the improvements made on the confiscated property since the sale by the State.

The acts provide that as a test of the real merit of Mr. Astor's title, five suits in ejectment shall be prosecuted to judgment, and the decision of three actions out of the five shall be conclusive on all parties.

Under these acts the trial in question has been had, not under the general law of ejectment which prevails in the State, but under the special provisions made for the ease, and deranging the general rules of evidence in some particulars. On this trial the verdict and judgment were in favor of Mr. Astor, and the defendant has brought the case here by writ of error, upon which writ no questions are open for consideration but errors in law committed on the trial. Whether the jury decided properly on the evidence is no question for this court. Such suggestions could only have been properly made on a motion for a new trial, or if the case were here on a demurrer to evidence.

The errors alleged to have been committed on the trial may be divided into four classes:

1. Errors in the admission and rejection of evidence.

2. Errors in the construction of the deed of marriage settlement, and the operation of the Act of Attainder and Confiscation.

3. Errors in the charge to the jury.

4. Errors in awarding the writ of possession, without requiring the plaintiff to pay for the improvements.

1. Errors in the admission and rejection of evidence. This was a prolific head of exceptions, and in order to estimate them correctly, the court must advert to the precise point of the controversy at which they arose, and the situation of the parties to the suit.

56*] *In 1758 the marriage settlement, the purport of which has been frequently stated in argument, was executed between Roger Morris, Mary Philipse, and the trustees, Beverly Robinson and Joanna Philipse, the mother of Mary Philipse. The contingent remainder limited by the deed to the children in fee became vested on their birth; and all the children having been born before the year 1779, the condition of the property at that time was, that Morris and wife held an estate for life in it, with a remainder in fee to their children, which remainder continued in them until 1809, when they sold the same to Mr. Astor.

The defendant claims under the Act of Attainder and Confiscation of New York, passed on the 22d of October, 1779. The estate forfeited by that act was all that which Roger and Mary Morris had on the day of its passage. This, we say, was a life estate merely as it regards the premises in this suit, leaving the remainder in fee in the children untouched.

How is this act to be construed? As a forfeit-

feiture for treason? If so, the forfeiture would have relation only to the time of the offense for avoiding all subsequent alienations of land. (2 Hawk., ch. 49, sec. 30.) But the courts of New York have expressly decided it is not to be considered as imposing a forfeiture for treason; that the act was a specified offense, and not treason; and that the extent of the forfeiture is to be sought for only in the act itself. This court has held that State decisions on State laws are binding here.

The forfeiture is not, therefore, of the estate of Mary Morris as it came to her from her father, but as it was subject to all her conveyances of all or any part of it, and to any dispositions she may have made of it up to the time of the enactment of the law.

If, then, the deed of 1753, under which we claim, was really executed, being a prior alienation, the title of the State and of her grantees is barred. Thus, both plaintiff and defendant claim under Mary Philipse, they are both privies to her and to her estate. The plaintiff below is a privy by deed, the defendant a privy by law.

*Could the State, on the trial of the **[*57]** cause, have been considered as a stranger? They claim the estate of Morris and wife. They took the estate they held in October, 1779, and they were consequently bound by all their prior alienations.

The States are not, indeed, privies in blood nor in deed by voluntary alienation; but they are privies in law, like the lord by escheat or forfeiture. They belong to the class of those who come in by act of law, or "in the post," as Lord Coke terms it. (Coke Lit., 352, a.) And thus, being privies in law, they are bound by the same rules of evidence and by the same estoppels as privies in blood or privies in deed.

Mr. Wirt then went into a particular examination of the decision of the court below on the admission of the deed of release in evidence. He contended that on the proof of the deed by Mr. Livingston, and on the evidence of Mr. Hoffman and Mr. Benson of the handwriting of the subscribing witnesses, they being dead, it was competent evidence. (Cited, 1 Starkie, 333, 340, 341).

The defendant, he argued, did not question the sealing of the deed, but he did question its delivery, and he offered circumstances as evidence to lead to the presumption that the deed, although solemnly prepared, had never been delivered.

All these circumstances were admitted in evidence by the plaintiff below without objection; none were excluded by the court, and the defendant had the full benefit of them. They bore on a question of fact, the delivery of the deed; and their effect belonged to the jury exclusively, who have found that the deed was delivered. These circumstances, and the effect of the testimony do not belong to the argument here. All that is to be inquired into is, whether the judge committed an error in law on this subject. No such error existed; none will be found in the charge. The instructions of the court to the jury left to them the decision of the value and weight of the evidence.

He contended, 1. That the recital of the deed was not only some evidence of the existence of the lease, but that in this case, it was an actual

58*] estoppel against the State of *New York to deny its existence. 2. That if it was not an estoppel, it was unquestionably evidence to the extent to which it was admitted.

If it was an estoppel, all questions which arise upon the exclusion of the auxiliary proof are superseded; for it could not prejudice the defendant to have let in such proof to establish a fact which he was already estopped to deny.

It is assumed as a proposition that the recital of a lease in a deed of release is evidence not only against the releasor, but against all who claim under him by subsequent title, whether they deduce their title through the deed or not. That such a recital is not only evidence, but is an estoppel which binds the releasor and all who take the estate in his right by subsequent title derived from him; and it is only against strangers in estate and blood, having no privity with the one who has made the recital, that the existence and loss of the recited instrument is required to be proved *aliunde*.

The distinction that the recital binds those only who claim the estate through the deed cannot be sound, because it is admitted that such a recital binds the heir, who does not claim through the deed, but through a line of descendants or of descents and devise blended, without the necessity of calling to his aid any collateral deed made by any of his ancestors; and yet he is bound not only by the deeds of his ancestors but by all their recitals.

Why is he bound? Because he takes the property under the ancestor precisely as the ancestor held it, claiming it in right of his ancestor, and is, therefore, bound by every admission under seal which would bind that ancestor. This is precisely the case with the State of New York. She took the estate under the same principles and bound by the same admissions, not as a privy in blood, but by privity of law; which it will be shown is the same in effect according to the doctrine of estoppels.

The State of New York is not an alienee for a valuable consideration, she stands in a situation resembling rather that of the heir, than that of such an alienee. The estate of the ancestor descends on the heir by the general law of the land; this estate vests in the State under **59*]** a particular law. *In both instances it vests in the same character, and in the same right; in the precise situation in which it was held by the person last seized.

The authorities maintain the principles and the positions here assumed. (Gilbert's Ev., by Lofft, 101; 1 Phil. Ev., 355; 1 Saunders on Pleading and Evidence, 42; Peake, 164; 1 Stark., 369; 6 Mod., 44; 1 Salk., 285; 2 Levinz, 108, 242; Vaughan, 74; 4 Binney, 231; *Penrose v. Griffith*, 6 Binney, 416.)

The principles settled by those cases are that recitals bind the party and all who claim under him by subsequent conveyances, but not those who claim under him by conveyance prior to the reciting deed. The operation of the recitals is not confined to those who claim under the specific deed of recital, but extends to all who claim by subsequent title.

Now the plaintiff in error is just in this predicament, for he claims under the same grantor by title derived subsequently to the date of the reciting deed. He claims under those who themselves claim under that deed; he claims

the very interest which the deed moulds and limits, and therefore may be said to claim under the deed.

But while none of the cases which have been cited recognize this distinction, there are others which seem to put an end to it entirely. (*Marchioness of Annandale v. Harris*, 2 P. Wms., 432; *Doe, ex dem. Colden, v. Cornell*, 3 Johns. Cases, 174.)

We are told by Lord Coke (Co. Lit., 352), that recitals are reciprocal. Such, too, is the law of New York. (*Lansing v. Montgomery*, 2 Johns. Rep., 382.) And, therefore, since the State can estop the heir by such a recital, the State shall herself be estopped by a similar recital. Suppose that the deed of release had settled the estate on Roger Morris in fee, and that the Act of Attainder and Forfeiture had fallen on his person alone? Can there be a doubt that the purchaser under the State would have defended himself under the lease, and that the wife and children would have been estopped from denying its existence? The decision in *Denn v. Cornell* establishes this. (3 Johns. Cases, 174.)

But if the release is not an estoppel, the judge in the *court below did not err; [***60** for he did not admit it as an estoppel, but only as some evidence of the existence of the lease. Was he wrong in this? The cases which have been cited to prove it an estoppel do at least establish that it is evidence, that is, some evidence against the parties and all who claim under them. (Matthews on Presumptive Proof, 201. See also *Garwood et al. v. Dennis*, 4 Binn., 314; 3 Preston on Estates, 28, 29, 30, 31.)

If the court were not to regard the recital as some evidence that a lease had been executed, what was to be done with the release which had been proved, and was regularly in evidence. Could they regard it as a simple bargain and sale, vesting the whole legal estate in the trustees, and leaving equitable estates only in Roger Morris and wife and in their children? The instrument disavowed that character for itself. It declared itself to be a deed founded on a lease, and its design to be to transfer the uses into possession, under the statute of uses. The instrument being in the cause could not be got out of it, and the recital is part of it. The court were to give its legal character to the instrument, and on the truth of the recital its legal character depended; was not the recital enough to justify the court in saying, it appears there was a lease; you must produce the lease or account for its nonproduction? If the court could have said this, it is enough to justify the opinion which was expressed; for such was simply the effect of the opinion which was expressed.

Upon the alleged errors in the legal construction of the deed of marriage settlement, and the operation of the Act of Confiscation and Attainder, Mr. Wirt observed that the first point in which error is stated to have existed was in holding that under the marriage settlement there was a vested remainder in the children on the 22d of October, 1779, the date of the Act of Confiscation. The children were all born before 1779, and the remainder vested on their birth.

The question is as to the legal effect of the limitation to the children. The construction of the Circuit Court, which we support, is, Peters 4.

1. That the remainder in fee limited to the children was contingent until the birth of the first child.

61*] *2. That on the birth of the first child the whole remainder vested in fee.

3. That on the birth of the second child the remainder vested in the first opened to receive him, and so on until all the children were born, when it became a vested remainder in the whole.

On the other side, the position is, that the remainder did not vest on the birth of the children, but continued to be a contingent remainder until it should be seen whether the children would survive the mother; because the enjoyment of the estate depended on that contingency, for if the mother should survive she took the remainder.

We apprehend that the counsel for the plaintiffs has not sufficiently adverted to the distinction between the contingency on which a remainder is to vest in interest, and that on which it is to vest in possession. Vested remainders are still contingent as to the enjoyment during the continuance of the particular estate, and by the death of a remainderman for life, before the determination of the particular estate, the vested remainder is gone forever; it is divested on this event, and goes over to the ulterior remainderman. During the life of the remainderman, however, it continued to be a vested remainder; for it was vested in interest, however uncertain the enjoyment.

The distinction between a vested and a contingent remainder does not depend on the contingency on which it is to vest in possession, but on that on which it is to vest in interest. The question, and the only question is this: is the remainderman *in esse*, and capable of taking, if the life estate should determine? If he be, the remainder is at once a vested remainder, though it may be uncertain whether it will ever vest in enjoyment. (Ferne, 215, 216.)

Now, the children of Roger Morris and wife were *in esse* before the year 1779, and were capable of taking in possession, if the possession had become vacant by the death of the tenant for life. They had therefore a vested estate.

As to the objection that they were not capable of taking the possession during the life of their parents. This is confounding the capability to take the possession with the right to **62*]** take it. In any vested remainder the capacity to take the possession arises before the right to take it. That capacity exists as soon as there is a person *in esse* who meets the description of the remainderman, and nothing is interposed between him and the possession except the particular estate, while the right to take it is yet in suspense until the determination of the particular estate. And as soon as a remainderman is presented who meets the description of the limitation, and between whom and the possession nothing stands but the particular estate, the remainder vests in interest, though it may chance never to come into possession; for many are the vested remainders which have passed away, without having vested in possession.

On the 1st of October, 1779, there was a life estate in the parents; there were children of the marriage, remaindermen, all *in esse*, and nothing interposed between them and the possession except the particular estate; and had that par-

ticular estate ended on the 1st of October, 1779, they had capacity to take, and most certainly would have taken. These principles are fully sustained in Ferne on Remainders, 215, 216, and the cases cited by the counsel for the plaintiff in error do not impugn them.

The question depends on the very terms in which the remainder is limited. The remainder limited over has nothing to do with the vesting of the first remainder, though it may have something to do with the enjoyment of the estate. In this case the limitation is not to such of the children as may be living at the death of their parents. Such a limitation might have altered the rights of the parties; as it would have remained uncertain until the death of the parents, who would be, and whether there would ever be a remainderman.

It is not, however, a life estate which is given to the children, but an estate in fee-simple. Now, upon the construction given on the other side, which considers the lives of the children as running against the life of the mother, both contingent until her death and the survivor to take the estate—suppose the children to have died before the mother, leaving children; was it the intention of the settlement that they should be disinherited?

*By no construction can this be made [***63** an estate tail by implication; but if it could, it would not vary or affect the vesting of the estate, subject to their dying without issue in the life of the mother.

The authorities to show that an estate is not prevented from vesting in interest, though the possession may be subject to be defeated by future contingencies, are *Doe v. Perrynne*, 3 T. R., 484; 4 T. R., 39; 4 Bos. & Pull., 313; 1 Maule & Selwyn, 321; 6 Price's Rep., 41.

It has been said, for the plaintiff in error, that these were concurrent, contingent remainders, and that both were contingent until the survivor who was to enjoy the estate was ascertained. This is the same position in effect with that to which an answer has been given. They are not concurrent, but successive remainders; the first remainder is to the children, and failing the vesting of that, the limitation to the mother would survive and vest.

Courts never consider remainders concurrent contingencies except from absolute necessity. (Ferne, 377.) But if they were concurrent, they remained so only until the birth of a child of the marriage, and then the remainder fully vested in such child. (*Luddington v. Kime*, 1 Lord Ray., 203.)

The next supposed error is in the construction of the acts of attainder and confiscation; and on the assumption that this is a vested remainder, it is not understood to be contended that the Act of Confiscation would affect it.

Errors in the charge to the jury. No important errors in law in the charge have been insisted on, but such as have already been the subject of comment. The residue of the objections are that the judge, in summing up the facts, put the evidence to the jury too favorably for the plaintiff below, and did not put it sufficiently strong for the defendant.

Are the judge's remarks upon the evidence errors in law? There is no case which supports such a position; on the contrary, it is expressly laid down that they are not such errors. (1

Serg. & Rawle, 333.) Resting upon this authority, the charge may be left to its own vindication, not doubting that that vindication will be ample and sufficient for it.

64*] *As to the question of improvements.

The case is this: There are remainders in fee protected by the Treaty of 1783, and the State of New York has seized and sold the life estate, declaring by acts subsequent to the Treaty that with respect to all improvements made by the tenant for life, the remainderman shall not have his estate until he shall have paid for those improvements.

1. Is this consistent with the nature of the estate?

2. Are these acts compatible with the Treaty?

As to the first inquiry, Roger Morris and wife were tenants for life, the remainder in fee belonging to their children. The relative rights of the parties were fixed by the deed of marriage settlement.

Under this deed, could Morris and his wife charge the remainderman in fee with any improvements they should put on the land? Suppose, after having improved the lands, by their last will and testament they had directed that the remainderman should not enter until they paid for the improvements? Would such a will have operated against their children? Suppose they had sold their estate for life, stipulating that the purchasers, before the property should be taken from them after their decease by the remainderman, should be paid for all buildings and improvements made on the land. Would such a covenant have operated on the children? Under the deed of settlement no power thus to charge the fee was reserved. When, therefore, the State of New York took the estate of Morris and wife, they held it as it had been held, and they succeeded to them as tenants for life, with no other powers over the estate than they had. Unless this was so, they took a greater estate than was held by them.

But the Act of Confiscation disclaims this. It purports to take the estate of Morris and wife only, and as they held it on the 22d of October, 1779. The act does not purport or profess to disturb or impair any estate, except the estates of persons named in it.

The State of New York could not, by mere right of succession to the estate of Morris and **65*]** wife, impose this burden *on the remaindermen, and impair their rights. It would be a most unjust and palpable violation of the rights of property, a usurpation of power altogether unwarranted by the nature of the estate which they had taken under the law. Nor does the power thus to charge the estate of the remainderman result from their general power of legislation. It was not a general act, which declared that all remaindermen should pay for improvements. It was confined to estates confiscated by the Act of 1779. It was in effect a declaration by the tenant for life that the remainderman should not have his estate until he paid him for his improvements. It thus became an individual action, and was not a legislative action.

But if it was a legislative action, its effect was an enlargement of the Confiscation Act of 1779. It was a new confiscation, *pro tanto*, imposed on these remaindermen.

Who is to receive the value of these improve-

ments? The acts of the State of New York show that they are to be paid for by them; the value is to be deducted from the sum payable to Mr. Astor, and thus the amount is to go into the fisc of the State. This is a confiscation of the estates of children for the offenses of their fathers.

2. Let us turn to the Treaty of 1783 and consider the question under that treaty.

The court will perceive that the Act of 1784 has nothing to do with this case. That act was prospective, and the sale to Carver was made in 1782. It is the Act of May, 1786, which alone can effect this case; and by the suggestion it appears that the claim is for improvements made since that act. Such a claim is in direct opposition to the fifth article of the Treaty of Peace. The terms of the article are: "And it is agreed that all persons who have any interest in confiscated lands, either by will, marriage settlement, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

Persons claiming an interest in lands by marriage settlement are one of the classes put by the treaty, and their "just rights" are the rights they had when the treaty was made. These rights were fixed at the time of the treaty by *the marriage settlements, and they [**66** were to enter on their estates on the death of the tenants for life, without any responsibility for the improvements placed upon them during the tenancy.

But here is a law of New York, passed three years after the treaty, which declares that they shall not enter on their estates without paying the full value of those improvements. Is not this an "impediment" raised by this law to the prosecution of their just rights, and consequently a violation of the treaty?

It is said to be no impediment to the prosecution of their just rights, because it is just that they should pay for the improvements. This resolves itself into a question of law; which is, whether the remainderman in fee cannot justly take possession of the estate when his title to the possession commences, without paying for improvements put on the land by the holder of the intermediate estate. This is no question to a legal mind.

In relation to the equitable view of the question, this is not the case of a party who, having a right to the present possession, has stood by and seen valuable improvements put upon the estate without disclosing his title, for the children had no title to the possession until the death of their mother.

Nor is there anything in the argument that these improvements were made in ignorance of their title. Where is the law which requires that a party thus situated shall disclose his title? It may also be urged that the acts of the Legislature of New York bear upon their face evidence of a general knowledge that there were outstanding titles which might lead to the eviction of their purchasers, and that they are on their face leveled against the very titles which stand protected by the treaty.

Mr. Webster, for the plaintiff in error.

The first inquiry in the case was as to the manner in which the verdict was obtained. Was it regularly proved that any conveyance was ever completed by which Mary Morris parted

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with her fee in the land, and which was existing **67***] as a *valid conveyance in October, 1779? We say it was not: because, we say, the judge misdirected the jury on the evidence bearing upon that point.

We say a judge may commit errors which this court may correct, either, 1. In admitting evidence which ought not to have been admitted. 2. In rejecting what ought to have been admitted. 3. By misstating the effect, not the weight of evidence. 4. By misleading the jury by a wrong statement to them of what the evidence really is.

The two first propositions no one will deny. (*Tayloe v. Riggs* 1 Peters, 183, 596; *Chirac v. Reinecker*, 2 Peters, 625; *Dunlap v. Patterson*, 5 Cowen, 243.)

The weight of evidence is for the jury. If a judge happens to say that he thinks A more credible than B, it is a remark on evidence. If he says that it strikes him as not proved that a bond was given, it is the same; not so, if he speaks of the tendency or effect of evidence. If he says, this evidence, if believed, tends to establish the party's right when it does not, or that it does not when it does; then it is error, because it is a remark not on evidence, but on the law of evidence. So if he misstates the thing to be proved, or the object for which it is intended or its legal bearing, this is error.

With these general principles in view, we mean to examine the judge's ruling on the trial in the Circuit Court.

1. As to the evidence of the question of the lease. Nothing was proved but by the testimony of Governor Livingston and Mr. Hoffman. This was all merely formal. Governor Livingston's oath was in the very words of the attestation, and no more; it was written for him beforehand, and in the formal words of attesting an instrument. He was an old man, swearing to a transaction then thirty years old; and there was no proof, no circumstance of which he had any recollection, but from seeing his signature. There was no more in this than in all other certificates of attestation; they usually certify delivery before any actual delivery is made, and this was the fact in one of the conveyances by Mr. Astor in this case.

The deed was doubtless executed at the house **68***] of Mrs. *Philipse. All this is no more than proving his own handwriting in 1787, and this would have answered the same purpose. All that was proved in this case was merely formal; it is just what would have been done if the parties had intended only to have a deed prepared, to be delivered or not, as they should afterwards decide, as an escrow. It is certain he did not see any actual delivery of the deed, and, while nothing is imputed to Governor Livingston, his testimony goes no further than has been stated.

There was no other proof of the existence of this paper until it was proved in April, 1787. It is not traced to the hands of the grantees. No one ever saw it; it was not shown to the Legislature. Perhaps, on this evidence and its effects, the judge did not misdirect the jury.

This, though perhaps *prima facie* proof, was the slightest of all proof. No actual delivery shown, no possession of the deed by the grantees. Now, suppose a marriage had not taken place, and the trustees had set up this deed; it would

have been said at once that the presumption of delivery was overruled. Anything else that carries an equal presumption destroys the *prima facie* proof. It is, of all cases, the one in which subsequent events might intercept the delivery of the deed.

We were not called upon to disprove delivery; it was enough for us to bring the fact of delivery into doubt, everything else without delivery was nothing. The judge in this matter was right.

Now, what did we offer against this evidence. 1. The deed was never recorded or proved; this was not required by law, but it was usual, especially with this family; all their deeds were recorded; the first patent, the deed to lead to uses, the deed of partition, and the will was proved in chancery.

The settlement deed of all others was a proper deed to be recorded; it was to provide for unborn children, and the practice of the family was not to be changed. The trustees would, in accordance with their duty, prove and record this deed to preserve the rights of the children.

More especially, why was not this deed proved and recorded *in 1783? Forfeitures were **69*** then all over, the children were born, and perhaps of men's estate. Only one part was found, and that had been carried beyond seas. Would prudent men have so acted? The treaty had then established the children's rights.

Now, we say that this part of the case was not accurately stated to the jury. The judge asks if these circumstances should operate against the children? we say they should; and we think here is a plain misdirection in point of law.

We say that all the evidence relied upon by us, drawn from the conduct of the immediate parties to the supposed deed, is evidence against the children. The judge says these facts should not operate against the children; we contend that they should and must, and this is a direct question of law, not a mere remark on evidence.

Again, the judge excuses Morris from recording the deed, because he says there were at that time no offices for recording deeds. But this could only be from 1775 to 1783. Our argument is, that if the deed had ever been delivered, it would have been recorded before 1775. Is the form of this argument fairly stated? Is it legally stated? Then again, as to not recording in 1783 the judge asks, are there not circumstances to account for this delay of three or four years? This is equivalent to saying that there are such circumstances.

2. The sleeping of this settlement from 1758 to 1787—twenty-nine years—is relied upon to prove that it never had a legal existence. No witness ever saw it. It was not heard of by any of the family. It is recited in none of the conveyances. These are material facts. In the history of this title each deed recites the previous deed down to that now under examination; below it they recite not through it, but over it, or as if it were not in existence. There is an absolute absence of every possible fact looking to or recognizing the existence of this deed for thirty years.

Now, is not this of itself evidence of weight and importance to rebut the presumption of delivery?

How does the judge answer this? He says **70***] there would *have been weight in this if the children had slept thus long; we say it is just as strong against them, for the purpose for which we use it, as against Morris and wife and the trustees. "The children slept upon their rights;" the very question is whether the children had any rights. It is not whether they shall be barred, but whether they ever had any estate. Now this is clear matter of law. "Is it fair to draw any inference in such a case against the children?" That is, the jury understood the judge to say the law will warrant no such inference. We say it will.

3. The manner of holding the property, and acts inconsistent with the title under the deed, disprove its existence.

Here is a whole series of acts extending over many years by the very persons who were parties to the supposed settlement, and absolutely irreconcilable to the idea of its real subsistence. These were the conveyances executed by Roger Morris and wife, in which the settlement was not mentioned, and conveyances made in direct disaffirmance of it. The charge of the judge upon these matters was altogether erroneous.

The deeds thus executed and the agreements, indicate a holding of the property in fee-simple, not a holding under the settlement. And the judge says that they are within the limitation of the power reserved in the settlement deed, and not inconsistent with it.

Is this so? By the settlement deed, Morris and wife had estates for life only; in the deeds they expressly covenant they are seized in fee. Now the consistency or inconsistency of these deeds is a question of law, though the effect of the inconsistency is a question for the jury. The judge has said that in point of law they are consistent deeds, that there is no inconsistency between the covenants in the deed and the title under the settlement. Is this correct?

If the judge had said that this form of executing the powers might have been used through mistake; that the deeds might have been inartificially drawn; and that the jury might consider those circumstances; it had been well enough. But he withdraws the **71***] whole matter at once from *the consideration of the jury by directing them, as matter of law, that there is no inconsistency. Can this be sustained?

As to the life leases, they were not given under the power reserved in the settlement deed, nor in execution of the power. They are totally inconsistent with it, and the evidence shows a system of leasing the lands. How does the judge dispose of these? It was a question of intention, as we say, and the judge asks, how do these facts affect the rights of the children? This is equivalent to saying they do not affect the rights of the children at all, in point of law. This is a legal direction on the effect of evidence. Is it right? Might not these acts affect the children?

Again, the judge says, did Morris intend these acts in hostility to the children? That is not the true question. The question is whether these acts go to show that there were no rights in the children. The truth is, the judge proceeded altogether on the supposition that there had been an original acknowledged right in the children, and that we were attempting to bar

that right by adverse possession. We say these acts prove, or tend to prove, that there was no subsisting settlement, and that not only the weight but the bearing and effect of this evidence was misstated to the jury.

We contend that everything from 1758 to the Revolution, bearing either way, bears against the settlement deed as a subsisting deed and for the original title; everything giving indications either way, indicates a holding under the original title. That in thirty years there was no act to the contrary. We do not say these circumstances are conclusive as matters of law, but we say they are cogent as matters of evidence, and we say the judge substantially withdrew the consideration of them from the jury.

On the other important fact that the deed came in 1787 from the hands of the grantor, the judge said nothing. He omitted to notice the circumstance, although he stated that he had mentioned all the circumstances of the case.

Then the case is: 1. That the deed, thirty years after its date, is still found in the hands of the grantor, not proved, *acknowl- [**72** edged or recorded. 2. That no other part of the indenture is produced, lease or release, though search has been made for it. 3. That no one ever saw the deed from its date until 1787. 4. That no one act was done in thirty years recognizing the existence of the deed for thirty years. 5. That subsequent conveyances, deducing the whole title and reciting every other conveyance in the chain, make no mention of any such settlement deed. 6. That there is a series of acts, deeds, conveyances and compacts, beginning within five days of the date of the supposed settlement and coming down to the Revolution by parties to the supposed deed, wholly inconsistent with any idea of its subsistence.

Now, we admit that a jury may set up the settlement deed against all this evidence, provided no direction be given them after the evidence is put in, and provided no improper direction be given. We do not ask the court to decide on the weight of evidence. But we say, if the judge misstates the object of the evidence offered; if he misdirects as to its tendency and effects; if he states incorrectly the views in which it is evidence; then the jury has been prevented from passing intelligently on the matter. We say the directions of the judge on these facts were not according to the law of the case.

It is also contended that the acts of the Legislature of New York were not evidence in the cause. The effect of their introduction was to change the parties before the jury. They were not general laws of the land, and they were important testimony. For the admission of such evidence a court will reverse a judgment. (3 Cow., 621; 16 Johns., 89; 5 Cow., 243.)

As to the recital of the lease in the deed of release, how far does it bind the plaintiff in error and the State of New York, under which he claims?

It is admitted that recitals estop the party to the deed, himself and his heirs, because the heir is bound by the covenants of his ancestor. They also affect every person claiming under the instrument, unless it was offered as pre-

sumptive evidence of a grant in order to support a possession which *could not be accounted for but on the supposition of such grant. These principles are fully sustained by the elementary writers, and by the cases in 1 Salk., 285, 286; *Ford v. Grey*, 6 Mod., 44; 4 Binney, 355; Norris's Peake, 164; Archbold's Pleading, 380; Saunders on Pleading and Proof; Preston on Estates, 43; Phil. Ev., 410; 1 Salk., 276.

There is no case in which a recital has been held to bind a person who comes in, *in invitum*. The alienee may be protected by covenants. But suppose a creditor who has the land in execution; he takes it bound by everything his debtor has said, not by everything his debtor has said. It operates by way of admission. Under what circumstances is one man bound by the admissions of another? Suppose an admission under hand and seal that the property is held fraudulently. This will not bind the alienee without notice.

In the case in 1 Salk., 285, *Ford v. Grey*, what is meant by "those claiming under him?" Is it the persons who claim under the same conveyance, or merely by subsequent deed? The court had just decided that admissions in an answer in chancery bind the party, but not his alienee. If the court designed these words in their extended sense, they would have suggested the distinction between an answer and a deed.

The State of New York is a stranger to the deed of Morris and wife, and the recital should not, upon sound principles of law, have been admitted to prove the existence of the lease. But the Circuit Court admitted the recital to prove the existence of the lease, and also its contents. Upon the cases decided in Pennsylvania, in 4 Binney, 614, and another, the possession was equivocal, and secondary evidence was called in aid. Those decisions turned on the special circumstances of the case. The case in 17 Ves., 134, was a case in which the lease was to be proved. Counsel were employed to examine the papers before the conveyance. The chancellor admitted the release, because the possession could not be accounted for on any other ground. If possession is equivocal, the exigency under which this case would apply has not arisen.

In Buller's *Nisi Prius*, 254, it is said, "when 74*] possession *has gone along with the deed many years, the original of which is lost or destroyed, a copy or abstract may be given in evidence." In Matthews the doctrine is fully set forth, 188, 189, 190. And in the authorities cited, it is distinctly stated that the recital of a lease in the release is evidence in those cases where auxiliary proof is admitted to make out the presumption of a conveyance to support a possession. Now, if the possession is equivocal, *ex natura rerum*, the presumption can never arise. (*Ricard v. Williams*, 7 Wheat., 59.)

In the case before the court the possession, so far as the acts of the parties to the alleged settlement deed are to give it a character, has been shown to be adverse to the terms and purposes of that deed, and not at any time such as could have existed had the deed been considered operative and in force. When, therefore, the parties did not by their acts give to the deed any influence, ought it to operate on those who were entirely strangers to it, and who rely on Peters 4.

the acts and proceedings of the parties to the deed to prove it had not a valid existence. This is to give it effect and power over the rights of strangers, when these were never permitted by the parties to prevail as to themselves.

Upon the title acquired by the children of Roger Morris, under the deed of settlement, *Mr Webster* argued,

The question upon this title is now for the first time to be discussed. The construction which this court will give to that deed may be in favor of Mr. Astor, and carry the rule as to contingent remainders to the extent claimed by his counsel; but there has been no case referred to which sustains the doctrine.

In all the definitions and general doctrines of remainders, the counsel for both parties agree. A remainder is "a remnant of an estate, expectant on a particular estate, created together with it, at one time." A contingent remainder is a "remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding estate."

These contingent remainders are classified under four divisions, and the fourth class is where the contingency *consists in the [*75 person not being ascertained, or not in being, at the time the limitation was made.

The remainder now in question is of this class. Unquestionably when created it was contingent, because it was uncertain who would take. The example put by Fearnie illustrates our case as is contended: "If an estate be limited to two for life, remainder to the survivors in fee, the remainder is contingent, for it is uncertain who will be the survivor. (Fearnie ou Rem., 9.) And this case cannot range with the principles claimed for the defendant in error.

Now, it being clear that this remainder being, at the time of its creation, contingent, because the persons to take were not ascertained, the question is, did it vest on the birth of a child of Roger Morris and wife, or remain contingent until the determination of the particular estate? We maintain the latter proposition.

Our view of the question is this: The deed created an estate for life in Morris and wife, with a remainder (not remainders), with an alternative aspect; or, in other words, to be disposed of, or go in one or other of the two ways, according to the events. We think the case precisely the same as if the words had been "an estate to Morris and wife for life, and to the children of the marriage in fee, if the parents should die leaving children; otherwise to the right heirs of Mary Morris."

It has been argued that the object in giving a fee to the children was a high and leading one—that this was the first purpose and all others were secondary. But the deed will bear no such construction.

It must be observed that the estate to be secured was the estate of Mary Morris. The object of the settlement was not to divest it, but to keep it in her control, and in the line of descent of her own right heirs. In only two events is it to be divested from her own right heirs. 1. If she have children living it is to go to them, who, though her heirs, would take as purchasers. 2. The right to dispose of the es-

tate by will in case of her dying without issue, and give away the estate to whom she pleased.

If she neither left children nor made a will, 76*] the estate *would go to her own right heirs. In no event was it to be divested from her right heirs to the heirs of Morris, unless she should desire to have it so; and thus the true object of the settlement was no more than to point out two events, in either of which the transmission of the estate to her right heirs should be intercepted. To use popular language, the estate is not vested in the children by the deed; it is to be settled on them, if there should be children surviving the parents.

The estate is to move from the line of legal transmission before it can be vested in the children as purchasers, and the removal is to take place on the happening of the contingency; this contingency, we say, is nothing other than the living of the children at their parents' death, or their surviving their mother.

Suppose the grant had been from a stranger to Morris and wife for life, and after their death to their children, if living; or otherwise, to the right heirs of the wife. Would not this have been a clear case of survivorship? It is stronger in this case, where Mary Philipse is the grantor, and proposes not to dispossess herself nor her own right heirs, except in the happening of certain conditions and contingencies.

Now, we say that there is no intent or purpose manifested by this deed which is not capable of being carried into full effect according to its nature and import as a regular remainder. It comes, as has been said, within the regular definition of a remainder, and of a contingent remainder of the fourth class. (Cited. Preston on Estates, 119, 92, 93, 71, to show that it is a contingent remainder in Mr. Fearne's fourth class.)

It is not pretended that the limitation could not take effect as a remainder.

For the rule of law is universal and unbending. "If a limitation can take effect as a remainder, it shall not be construed to take effect under the doctrine of shifting uses." (2 Cruise, 350.) The doctrine of shifting cases is analogous to that of executory devises. "If there be a freehold to support the remainder, it shall not be construed an executory devise." (*Doe v. Holmes*, 3 Wilson, 243; *Luddington v. Kime*, 77*] 1 *Lord Raymond, 203; 2 Cruise, 283; Douglass, 757.) In Douglass, 225, Lord Mansfield says: "It is perfectly clear and settled that when an estate can take effect as remainder, it shall not be construed to be an executory devise or shifting use." This principle precisely meets the case of the plaintiff in error. (The same point is settled, 3 T. R., 485; 2 Cruise, 285.)

The counsel for the defendant in error insist that this is a vested remainder at the birth of the first child of Morris and wife, and that we do not attend to the distinction between remainders vesting in interest and vesting in enjoyment. We have endeavored to pay a due regard to this distinction.

A remainder vests in interest whenever the person is ascertained, and is *in esse*, and has a fixed right of future enjoyment. In the authority cited by the counsel (Fearne, 215), the remainder is absolutely limited to a person *in*

esse. Now, in the case before the court, it was not absolutely settled that the children would take; it could not, on the view we have taken of the deed of settlement, be absolutely ascertained until the parents' death.

It is said, here is a person *in esse*, ascertained, and capable to take if the particular estate falls; and it is, therefore, a vested remainder. But the fallacy of this position is in this: He is capable of taking; that is, he is the person who may take, but he is not capable of taking, because he is not in a condition to take. Mrs. Morris had just as much capacity to take as the children, but who shall take, is not ascertained. No one has a fixed and absolute right, nor can this be the case until the death of Mrs. Morris. The facts of the case fully exemplify the application of these principles. Mrs. Morris was married, had children, and had a brother who would be her heir-at-law should she die leaving no children. Now, if she should have survived her children, her brother would take the estate. Is this not a case of mere survivorship? (Preston, 7; Croke Eliz., 630; *Denn v. Bagshaw*, 4 D. & E., 512; 4 Johns., 61.)

We say that as this remainder was capable of taking place as a regular remainder, it cannot take effect by way of shifting use. The law is fixed upon this point; there is no principle *which would induce the court to [*78 give it a construction to operate as a shifting use.

The operation of such a view of the case will show that it cannot be adopted. A son is born; we say the estate cannot be vested, because it is not ascertained that he will have it. If it does vest, it may defeat the whole purpose of the settlement. The counsel for the defendants in error say it shall vest; and if events make it necessary, we will divest it by the doctrine of shifting uses.

What will be the consequences of such a principle? On the birth of a son the remainder vests; he dies within a few hours after his birth; where is the estate then? It cannot go back to its original situation—once vested it is no longer a contingent remainder. It has gone to his paternal uncle, out of the family. Suppose another child born, how can it go back? It never can by shifting use; for there can be no conveyance by shifting use, which conveyance is not provided in the deed. There is no provision in the deed that if the estate has been once vested in the right heirs of the children, it shall afterwards be divested. When the estate has once gone to the right heirs of the children, it is irrevocable—the whole force of the deed is spent.

Besides, the result would be that to preserve the fee, to keep it safe, it should be transmitted to the Morris family and be subject to forfeiture.

If the remainder was contingent, it fell on the attainder and banishment of Roger Morris and wife. This is the clear doctrine of law. *Barland's* case was like it. That was pronounced an escheat, and there was no attainder, no banishment. If a scintilla of the estate was left in the trustees, that passed by the Act of Attainder and Banishment also.

Upon the claim of the plaintiff in error to be paid for his improvements, he argued that it was questionable whether the terms of the

treaty were intended to apply to such a case. This action is not brought to prosecute an interest in lands by debt or marriage settlement, but for the mere lands themselves, to which an absolute title is created by a marriage settlement. The interest meant by the treaty was a lien on lands, not the lands themselves. This **79***] is apparent from an *examination of the terms of the treaty. Marriage settlements are coupled with debts, and an interest in lands by debt can only be a lien; and an interest in lands by marriage settlement, when found in this connection, can only mean a charge on land by settlement deed.

It is to be observed that the treaty provides for any interest in land, whether by debt, marriage settlement, or otherwise. Now, if this means a claim to the land itself, these things would follow:

1. Suppose the children had been put into the Act of Attainder, they could have pleaded the treaty, because they had an interest in the land; that is, a title to the land itself, under the marriage settlement. This was their "just right," and the Confiscation Act would have been an impediment. 2. Morris and wife might have sued in their lifetime, for they had an interest in the land under a marriage settlement. 3. The comprehensive term, "or otherwise," would have let in everybody named in the act. This would have repealed all the confiscation acts at once, which the treaty did not do. It only recommended their repeal. There is nothing to operate against the statute but the treaty.

He contended that the treaty did not apply to this case. Its application could not interfere with the rights of those who had improved the property and added to its value, so that when it was recovered, the party who recovered obtained more than his title originally gave him. The treaty protects the just rights of those who are included in its provisions, but the party who has recovered the land cannot say he has a just right to the improvements made on the land—not made by an intruder, but by a purchaser of a title which was good during the life of Morris and wife. The laws of New York relative to this subject would be in force against her own citizens, and it could not have been intended that British subjects should have rights and privileges greater than our own citizens. The law interposes no impediment to the recovery of the property the grantee of the children of Morris and wife are really entitled to; it allows them to recover the land in the situation **80***] it was at the time of the *settlement, and as it was, if Morris and wife had died a natural, instead of a civil death, in 1779.

Mr. Justice Story delivered the opinion of the court:

This is a writ of error to the Circuit Court of the Southern District of New York, in a case where the plaintiff in error was the original defendant. The action is ejectment, brought upon several demises; and among others, upon the demise of John Jacob Astor. The cause was tried upon the general issue, and a verdict rendered for the original plaintiff, upon which judgment was entered in his favor; and the present writ of error is brought to revise that judgment.

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Both parties claim under Mary Philipse, who, it is admitted, was seized of the premises in fee, in January, 1758. Some of the counts in the declaration are founded upon demises made by the children of Mary Philipse, by her marriage with Roger Morris; and one of whom is upon the demise of John Jacob Astor, who claims as a grantee of the children.

Various exceptions were taken by the original defendant at the trial to the ruling of the court upon matters of evidence, as well as upon certain other points of law growing out of the titles set up by the parties. The charge of the court in summing up the case to the jury is also spread, *in extenso*, upon the record, and a general exception was taken to each and every part of the same on behalf of the original defendant. And upon all these exceptions the case is now before us.

We take this occasion to express our decided disapprobation of the practice (which seems of late to have gained ground) of bringing the charge of the court below, at length, before this court for review. It is an unauthorized practice, and extremely inconvenient both to the inferior and to the appellate court. With the charge of the court to the jury, upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own *judgment choose to [**§1** give them. They neither are, nor are they understood to be, binding upon them as the true and conclusive exposition of the evidence.¹ If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement; and by being made known at the moment, would often enable the court to correct an erroneous expression, or to explain or qualify it, in such a manner as to make it wholly unexceptionable, or perfectly distinct. We trust, therefore, that this court will hereafter be spared the necessity of examining the general bearing of such charges. It will in the present case be our duty, hereafter, to consider whether the objections raised against the present charge can be supported in point of law.

The original plaintiff claimed title at the trial under a marriage settlement, purporting to be made and executed, on the 13th of January, 1758, by an indenture of release between Mary Philipse of the first part, Roger Morris of the second part, and Joanna Philipse and Beverly Robinson of the third part; whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c., &c., she, Mary Philipse, granted, released, &c., unto Joanna Philipse and Beverly Robinson, "in their actual possession now being, by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possession, and to their heirs, all those several lots or parcels of land, &c., &c.," upon

1.—See *Evans v. Eaton*, 7 Wheat. Rep., 356, 426.

certain trusts and uses in the same indenture mentioned. This indenture, signed and sealed by the parties, with the usual attestation of the subscribing witnesses (William Livingston and Sarah Williams) to the sealing and delivery thereof, with a certificate of the proof of the due execution thereof by William Livingston (one of the subscribing witnesses), before Judge Hobart, of the Supreme Court of New York, **§2*** on the 5th of April, 1787, and *a certificate of the recording thereof in the secretary's office of the State of New York, was offered in evidence at the trial by the plaintiff, and was objected to by the defendant upon the ground that the certificate of the execution was not legal and competent evidence, and did not entitle the plaintiff to read the deed in evidence without proof of its execution. The judge who presided at the trial, overruled the objection and admitted the deed in evidence. This constitutes the first exception of the defendant. A witness was then sworn, who testified that the signatures of William Livingston and Sarah Williams to the deed were in their proper handwriting, and that they were both dead. The deed was then read in evidence. The certificate of the probate of the deed before Judge Hobart is in the usual form practiced in that State, excepting only that it states, with somewhat more particularity than is usual, that William Livingston, one of the subscribing witnesses, &c., being duly sworn, did testify and declare, "that he was present at or about the day of the date of the said indenture, and did see the within named Joanna Philipse, Beverly Robinson, Roger Morris and Mary Philipse, sign and seal the same indenture, and deliver it as their and each of their voluntary acts and deeds," &c.

We are of opinion that under these circumstances and according to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture (by which we mean not merely the signing and sealing, but the delivery also) to justify the court in admitting it to be read to the jury, and that in the absence of all controlling evidence, the jury would have been bound to find that it was duly executed. We understand such to be the uniform construction of the laws of New York in all cases where the execution of any deed has been so proved, and has been subsequently recorded. The oath of a subscribing witness before the proper magistrate, and the subsequent registration are deemed sufficient, *prima facie*, to establish its delivery as a deed. The objection was not, indeed, seriously pressed at the argument.

The next exceptions of the defendant grew **§3*** out of the *nonproduction of the lease recited in the deed of marriage settlement, and of the insufficiency of the evidence to establish either its original existence, or its subsequent loss. We do not think it necessary to go into a particular examination of the various exceptions on this head, or of the actual posture under which they were presented to the court, or of the manner in which they were ruled by the court. Whichever way many of the points may be decided, our opinion proceeds upon a ground which supersedes them, and destroys all their

influence upon the cause. We are of opinion not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence, and superseded the necessity of introducing any other evidence to establish it.

The reasons upon which this opinion is founded will now be briefly expounded. To what extent, and between what parties, the recital of a lease in a deed of release (for we need not go into the consideration of recitals generally) is evidence, is a matter not laid down with much accuracy or precision in some of the elementary treatises on the subject of evidence. It is laid down generally, that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed.

Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not, *per se*, evidence of the existence of the lease. But, if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary *proof in the absence of [***§4** more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself under such circumstances materially fortify the presumption from lapse of time and length of possession of the original existence of the lease. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital of the fact of such a lease in an old deed is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession.

Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence.¹ Peake on Evidence (p. 165) seems, indeed, to have entertained a different opinion; and to have thought, even as between the parties, the recital was admissible as secondary evidence only upon proof that the lease was lost. But in this opinion he is not supported by any modern authority; and it is very questionable if he has not been misled by confounding the different operations of recitals as evidence between strangers and between parties. It may not, however, be unimportant to examine a few of the authorities in support of the doctrine on which we rely. The cases of *Marchioness of Anandale v. Harris* (2 P.

1.—See 1 Phillips on Evid., ch. 8, sec. 2, p. 411; 1 Stark. Evid., part 2, sec. 123, page 301, sec. 156, page 369; Com. Dig. Estoppel B. C., Evidence B., 5; Mat-

thews on Presumpt., 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 269; Co. Litt., 352; Mayor, &c., of Carlisle v. Blamire, 8 East's Rep., 487.

Wm's., 432), and *Shelley v. Wright* (Willes's Rep., 9), are sufficiently direct as to the operation of recitals by way of estoppel between the parties. In *Ford v. Gray* (1 Salk., 285), one of the points ruled was, "that a recital of a lease in a deed of release is good evidence of such lease against the releasor and those who claim under him; but as to others it is not, without proving that there was such a deed, and it was lost and destroyed." The same case is reported in 6 Mod., 44, where it is said that **85***] it was ruled, "that *the recital of a lease in a deed of release is good evidence against the releasor, and those that claim under him." It is then stated that "a fine was produced, but no deed declaring the uses, but a deed was offered in evidence which did recite a deed of limitation of the uses, and the question was whether that (recital) was evidence: and the court said that the bare recital was not evidence; but that if it could be proved that such a deed had been, and lost, it would do if it were recited in another." This was doubtless the same point asserted in the latter clause of the report in Salkeld; and, thus explained, it is perfectly consistent with the statement in Salkeld, and must be referred to a case where the recital was offered as evidence against a stranger. In any other point of view it would be inconsistent with the preceding propositions as well as with the cases in 2 P. Williams and Willes. In *Trevivan v. Lawrence* (1 Salk., 276), the court held that the parties and all claiming under them were estopped from asserting that a judgment sued against the party as of trinity term was not of that term but of another term; that very point having arisen and been decided against the party upon a *scire facias* on the judgment. But the court there held (what is very material to the present purpose) that "if a man makes a lease by indenture of D, in which he hath nothing, and afterwards purchases D in fee, and afterwards bargains and sells it to A and his heirs, A shall be bound by this estoppel; and, that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the lands comes; and an ejectment is maintainable upon the mere estoppel." This decision is important in several respects. In the first place it shows that an estoppel may arise by implication from a grant that the party hath an estate in the land which he may convey, and he shall be estopped to deny it.¹ In the next place it shows that such estoppel binds all persons claiming the same land, not only under the same deed but under any subsequent conveyance from **86***] the same party; that *is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place it shows that an estoppel, which (as the phrase is) works on the interest of the land, runs with it into whose ever hands the land comes. Now, this last consideration comes emphatically home to the present case. The recital of the lease in the present release works on the interest in the land; the lease gave an interest in the land, and the admission of it in the release enabled the latter to operate in the manner which the parties intended. The es-

toppel, therefore, worked on the interest in the land, not by implication merely, but directly by the admission of the parties. That admission was a muniment of the title, and as an estoppel traveled with the title into whose ever hands it might afterwards come. The same doctrine is recognized by Lord Chief Baron Comyn in his Digest, Estoppel B. & E., 10. In the latter place (E., 10) he puts the case more strongly; for he asserts that the estoppel binds, even though all the facts are found in a special verdict. "But," says he (and he relies on his own authority), "where an estoppel binds the estate, and converts it to an interest, the court will adjudge accordingly. As if A leaves lands to B for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C for ten years, and all this is found by verdict, the court will adjudge the lease to B good, though it be so only by conclusion. A doctrine similar in principle was asserted in this court in *Terrett v. Taylor* (9 Cranch, 52). The distinction, then, which was urged at the bar, that an estoppel of this sort binds those claiming under the same deed but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by subsequent deed are bound in the same manner as privies in blood; and so, indeed, is the doctrine in Comyn's Digest, Estoppel B., and in Coke Litt., 352, *a*.

We may now pass to a short review of some of the American cases on this subject. *Denn v. Cornell* (3 Johns. Cas., 174) is strongly in point. There, Lieutenant-Governor Colden, in 1775, made his will, and in it recited that he had *conveyed to his son David his lands [**87**] in the township of Flushing, and he then devised his other estate to his sons and daughters, &c., &c. Afterwards, David's estate was confiscated under the Act of Attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the State. No deed of the Flushing estate (the land in controversy) was proved from the father; and the heir-at-law sought to recover on that ground. But the court held that the recital in the will that the testator had conveyed the estate to David, was an estoppel of the heir to deny that fact, and bound the estate. In this case the estoppel was set up by the tenant claiming under the State, as an estoppel running with the land. If the State or its grantee might set up the estoppel in favor of their title, then, as estoppels are reciprocal and bind both parties, it might have been set up against the State or its grantee. It has been said at the bar that the State is not bound by estoppel by any recital in a deed. That may be so where the recital is in its own grants or patents, for they are deemed to be made upon suggestion of the grantee.² But where the State claims title under the deed, or other solemn acts of third persons, it takes it *cum onere*, and subject to all the estoppels running with the title and estate, in the same way as other privies in estate.

In *Penrose v. Griffith* (4 Binn. Rep., 231), it was held that recitals in a patent of the commonwealth were evidence against it, but not

1.—See also *Fairtitle v. Gilbert*, 2 T. Rep., 171; *Helps et al. v. Hereford*, 2 B. & Ald., 242; *Rees v. Lloyd*, Wightwick's Rep., 123.

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2.—But see *Comm. v. Pejepscoot Proprietors*, 10 Mass. Rep., 155.

against persons claiming by title paramount from the commonwealth. The court there said that the rule of law is, that a deed containing a recital of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently. The reason of the rule is, that the recital amounts to the confession of the party, and that confession is evidence against himself and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same court in *Garwood v. Dennis* 88*] (4 Binn. Rep., 314). In *that case the court further held that a recital in another deed was evidence against strangers, where the deed was ancient, and the possession was consistent with the deed. That case also had the peculiarity belonging to the present, that the possession was of a middle nature, that is, it might not have been held solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The court thought that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed was good corroborative evidence even against strangers. And other authorities certainly warrant this decision.¹

We think, then, that upon authority, the recital of the lease in the deed of release in the present case was conclusive evidence upon all persons claiming under the parties in privity of estate, as the present defendant in ejectment did claim; and, independently of authority, we should have arrived at the same result upon principle; for the recital constitutes a part of the title, and establishes a possession under the lease necessary to give the release its intended operation. It works upon the interest in the land and creates an estoppel, which runs with the land against all persons, in privity, under the releasers. It is as much a muniment of the title as any covenant therein running with the land.

This view of the matter dispenses with the necessity of examining all the other exceptions as to the nature and sufficiency of the proof of the original existence and loss of the lease, and of the secondary evidence to supply its place.

The next question is, supposing the marriage settlement duly executed, what estate passed by it to Morris and his wife and their children. 89*] The uses declared in the deed are in *the following terms: "to and for the use and behoof of them, the said Joanna Philipse and Beverly Robinson (the releasees) and their heirs until the solemnization of the said intended marriage; and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the term of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them,

and to his, her, or their heirs and assigns forever. But in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever. And in case the said Roger should survive the said Mary Philipse, without any issue by her, or that such issue is then dead without leaving issue, then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form as the said Mary Philipse shall at any time during the said intended marriage, devise the same by her last will and testament," &c., &c. There are other clauses not material to be mentioned.

The marriage took effect; children were born, and, indeed, all the children were born before the attainder in 1779. Mary Morris survived her husband, and died in 1825, leaving her children, the lessors of the plaintiff, surviving her. The conveyance taking effect by the statute of uses upon a deed operating by way of transmutation of possession, no difficulty arises in giving full effect, by way of springing or shifting or executory uses, to all the limitations, in whatever manner they may be construed. The counsel for the original defendant contend that the parents take a life estate, and that there is a remainder upon a contingency, with a double aspect. That the remainder to the children is upon the contingency of their surviving their parents; and in case of their nonsurvivorship, *there is an [90 alternative remainder to the mother, which would take effect in lieu of the other. That, consequently, the remainder to the children was a contingent remainder during the life of their parents; and as such it was destroyed by the proceedings and sale under the Act of Attainder and Banishment of 1779. The Circuit Court was of a different opinion, and held that the remainder to the children was contingent until the birth of a child, and then vested in such child, and open to let in after-born children; and that there being a vested remainder in the children at the time of the Act of 1779, it stands unaffected by that act.

We are all of opinion that the opinion of the Circuit Court upon the construction of the settlement deed was correct. It is the natural interpretation of the words of the limitations, in the order in which they stand in the declaration of the uses. The estate is declared to be to the parents during their natural lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her, and their heirs and assigns forever. If we stop here, there cannot be a possible doubt of the meaning of the provision. There is a clear remainder in fee to the children, which ceased to be contingent upon the birth of the first, and open to let in the after-born children.² It is perfectly consistent with

1.—See, in addition to the foregoing authorities, Buller's N. P., 254; Gibb. Evid., 100, 101; Bean v. Parker, 17 Mass. Rep., 591; Wilkinson v. Scott, 17 Mass. Rep., 244; Inhab. Braintree v. Inhab. Hingham, 17 Mass. Rep., 432; Kite's Heirs v. Shrader, 3

Litt. Rep., 447; 2 Thomas's Co. Litt., 582, note.

2.—See Doe v. Perryn, 3 T. R., 484; Doe v. Martin, 7 T. R., 83; Bromfield v. Crowder, N. R., 313; Doe v. Trovoost, 4 Johns. Rep., 61.

this limitation that the estate in fee might be defeasible and determinable upon a subsequent contingency, and upon the happening of such contingency, might pass by way of shifting executory use (as it might in case of a devise by way of executory devise) to other persons in fee; thus mounting a fee upon a fee. The existence, then, of such executory limitation over, by way of use, would not change the nature of the preceding limitation and make it contingent, any more than it would in the case of an executory devise. The contingency would attach, not to the preceding limitation, but to the executory use over.

Let us now consider what is the effect of the **91*** succeeding clause in the settlement deed, and see if it be capable, consistently with the apparent intention of the parties, of operating as an alternative remainder under the double aspect of the contingency, as contended for by the original defendant. The clause is, "but in case the said Roger Morris and Mary shall have no such child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then, &c." Now, it is important to observe that this clause does not attach any contingency to the preceding limitation to the children, but merely states the contingency upon which the estate over is to depend. It does not state that the children shall not take unless they survive the parents, but that the mother shall take in case she survives her husband without issue. She, then, and not the children, is to take in case of the contingency of her survivorship. It is applied to her and not to them. Besides, upon the construction contended for at the bar, if all the children should die during the lifetime of the parents, leaving any issue, such issue could not take; and yet a primary intention was to provide for the issue of the marriage. Nor in such a case could the mother take the estate over; for that, by the terms of the settlement, could take effect only in case she survived her husband without issue. The subsequent clause demonstrates this still more fully; for her power to dispose of the estate by will in case her husband survives her is confined to such survivorship, if "such issue is then dead without leaving issue."

Another difficulty in the construction contended for is that the children must survive both parents, and that if they should survive the mother and not the father, in that event they could not take; yet the settlement plainly looks to the event of the death of the mother without issue, as that alone in which the estate over is to have effect. It is also the manifest intention of the settlement that if there is any issue, or the issue of any issue, such issue shall take the estate; which can only be by construing the prior limitation in the manner in which it is construed by this court. The general rule of law, founded on public policy, is **92*** that limitations of this nature shall be construed to be vested, when, and as soon as they may. The present limitation, in its terms, purports to be contingent only until the birth of a child, and may then vest. So that whether we consult the language of the settlement, the order of its provisions, the apparent intention

of the parties, or the general rule of law, they all lead to the same results—that the estate to the children was contingent only until their birth; and that when the Act of 1779 passed, they being all then born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate.

This view of the settlement deed renders it wholly unnecessary to enter upon any minute consideration of the nature and operation of the Attainder Act of 1779, since it is clear that that act, whether it worked a transfer or destruction of the life estate of the parents (and, in our opinion, the form was its true operation), it did not displace the vested remainder of the children, but left it to take effect upon the regular determination of the life estate.

In respect to another point raised at the argument, that the power reserved to Roger Morris and his wife under the marriage settlement to dispose of the land to the amount of three thousand pounds, so far as it remained unexecuted by them, was by the Attainder Act of 1779 transferred to the State, and might be executed by the State, we are of opinion that it is not well founded. In the first place, we consider this to be a power personal in the parents, and to be exercised in their discretion, and not in its own nature transferable. Even under the statutes of treason in England, powers and conditions, personal to the parties, did not by an attainder pass to the crown. (1 Hale's Pl. Cr., 240, 242, 244, 245, 246; *Jackson v. Catlin*, 2 Johns. Rep., 248; Sugden on Powers, 174, 176.) And it has been settled in New York that the offense stated in the act was not, strictly speaking, treason, but *sui generis* as the terms of the act stated it.¹ In the next place, the act purports to vest in the State, by forfeiture, the "estates" only of the offenders; and being a penal act, it is to be construed [**93** strictly. A power to dispose of land in the seisin of a third person, is in no just sense an estate in the land itself. In the next place, the deed of the commissioners authorized by the act purports generally to convey all the estate, right, title, and interest of the offenders in the property conveyed, and does not purport to be any execution of a limited nature and object. In every view the doctrine contended for is untenable.

Passing over, for the present, some minor exceptions, we may now advance to the consideration of the objections urged against the charge of the court; and these objections, so far as they have not been already disposed of by the questions growing out of the proofs applicable to the lease, are to the direction of the court upon the point whether there was or was not a due delivery of the marriage settlement deed. If that deed was duly delivered, then no acts done after the marriage by the parents, however inconsistent with that deed, could affect the legal validity of the rights of the children once acquired and vested in them under it. But the point pressed at the trial was whether it was ever executed and delivered at all, so as to have become an operative conveyance, or whether there was a mere nominal execution by the parties; and whether it was laid aside and abandoned as a

1.—*Jackson v. Catlin*, 2 Johns. Rep., 248.

conveyance before the marriage, and never became complete by delivery. There was at the trial what the law deems sufficient *prima facie* evidence of the delivery of the deed. But certain omissions as well as certain acts of the parents were relied on to rebut this evidence, and to establish the conclusion that there had been, in point of fact, no such delivery. With the value of these acts and circumstances as matters of presumption for the consideration of the jury by way of rebutter of the *prima facie* evidence, this court has nothing to do, and does not intend to express any opinion thereon. But so far as they bore upon the fact of delivery, they applied with the same force in relation to the children as they did in relation to the parents; that is, so far as they were presumptive of the nondelivery of the deed they furnished the same presumption against the children that they would against the parents. They were open to explanation and observation, and had **94*** just as much weight in the one case as in the other. They were not acts or omissions which bound the children, supposing them to have any vested interest; but circumstances of presumption to be weighed, as far as they went, to establish that no interest ever vested in them by reason of the nondelivery of the deed of settlement. Whatever might be the inconsistency of these acts with the provisions of that deed, that inconsistency was no otherwise important than as it might furnish a presumption against the existence of the deed as an operative conveyance.

It is in reference to these considerations that the argument at the bar had insisted upon objections to the charge of the judge at the trial; and in examining the charge on this head difficulties have occurred to the court itself.

The circumstances principally relied upon were, the dormancy of the settlement deed from 1758 to 1779; the omission to record it until 1787; and the supposed inconsistency of certain deeds, executed by the parents between 1758 and 1773, with the title under that settlement.

In respect to the dormancy of the deed the charge is as follows: "It has been said that this is a dormant deed, never intended by the parties to operate; that it had slept until after the attainder, and until the year 1787. There is weight in this; or rather there would be weight in it if the parties in interest had slept on their rights. But who has slept? Morris and wife, Beverly Robinson and Joanna Philipse, the trustees. They are the persons that have slept, and not the children. This does not justify so strong an inference against the children as if they had slept upon their rights. Is it fair in such a case to draw any inference against the children?"

To two of the judges this appears to amount to a direction that in point of law the dormancy of the deed during this period, not having been the act of the children, does not furnish the same presumption of the nondelivery against them as it would against the parents; and that, to give the presumption from this circumstance full effect, it ought to appear that the children had slept on their rights; that is, had acquiesced in such dormancy of the title. To those judges **95*** this direction seems erroneous, because the presumption is the same whether the children acquiesced or not.

In respect of the nonrecording of the deed, the charge proceeds to state. "It has also been urged that this deed was not recorded until 1787. Is there anything in this fact that should operate against the children? They were minors for the greater part of the time down to the year 1787, when it was recorded, &c., &c." It seems to the same judges that the same distinction as to the effect of the presumption in the case of the parents, and that of the children pervades this, as it does the former statement.

As to the inconsistency relied on, the introductory part of the charge is as follows: "It is also said that Morris and his wife have done acts inconsistent with the deed. In weighing the force and effect of these acts you must bear in mind the time when the interest vested in the children under this deed; for after that interest vested, none but themselves could divest it," &c. It is certainly true that after the interest was once vested in the children, no act, however inconsistent with the deed, done by the parents could affect that interest. But the point of view under which the argument was addressed to the court was, that such inconsistency furnished ground for a presumption of a nondelivery of the deed; and in this point of view it seems to the same judges that this part of the charge relies too much upon a distinction between the parents and children as to the effect of the presumption. In another part of the charge the judge very properly puts all these acts of supposed inconsistency upon the true ground—what was the interest of the parties in these acts, and whether they were done in hostility to the deed, supposing it inoperative, or as acts of parents acting beyond the deed for what they might deem beneficial to their children, and for the interest of all concerned in the estate.

To the other judges, however, these objections do not appear to be well founded when taken in connection with the general scope and object of the remarks of the judge in his charge upon this branch of the case. The purpose for which these omissions and acts of alleged inconsistency in Morris were offered had been explicitly stated. The jury had been told ***that they were relied upon to rebut the [96** evidence of delivery of the deed, which had been offered on the part of the plaintiff below. Before entering upon any comments on this evidence, and to prepare the minds of the jury for the due application of the remarks, the judge observed, "what, then, is the evidence to bring the fact of delivery into doubt? What is the reasonable presumption to be drawn from the facts proved? keeping in mind that this is evidence on the part of the defendant to disprove the presumption of law, from the facts proved, that the deed was fully delivered. The jury were therefore duly apprised of the bearing of these circumstances, and the purpose for which they were offered. And they could not but have understood that it was submitted to them to judge of the weight to which they were entitled; otherwise the evidence would have been excluded as inconsistent, and the jury must have understood that they did weigh to some extent against the children; for when speaking of the objection that the deed had lain dormant for a number of years, the jury were told that this circumstance did not justify so

strong an inference against the children as if they had slept upon their rights, thereby admitting that it was open to an inference against them, but not so strong as if they had been of age, and the life estate of their parents ended, and they during that delay had been in a situation to assert their rights. And should it be admitted that the judge erred in this suggestion, it would amount to no more than an intimation of his opinion upon the weight of evidence. The same remark will apply to every part of the charge, when the rights of the children are spoken of in contradistinction to those of their parents. They refer to the delivery of the deed. Thus, with respect to the delay in recording the deed, the judge puts the question to the jury in this form: "Is there anything in the fact that it was not recorded, from which an inference can be drawn against the deed." Pointing the attention of the jury to the fact of delivery, and not to any controlling distinction between the interest of the children and their parents, the bearing of the remarks of the judge with respect to the various deeds executed by Morris and his wife, *and which are alleged to have been inconsistent with the marriage settlement, could not have misled the jury. It is true they were told that in weighing the force and effect of those acts they must bear in mind the time when the interest vested in the children under the deed. This remark must have been understood by the jury as subject to their finding with respect to the delivery of the deed, and not as expressing an opinion that the interest of the children vested at the date of the deed. For, if that had been understood as the opinion of the judge, the evidence, as before observed, would have been inadmissible, and the jury would have been told that it could have no bearing upon the case. Instead of which, it had been before explained to them that the object of this evidence was to disprove the delivery of the marriage settlement deed, and not to divest any interest that had become vested in the children. And in the conclusion of this part of the charge the judge tells the jury, "these are all the circumstances relied upon as being inconsistent with the settlement deed, and these are questions for you. I do not wish to interfere with your duties. It is for you to say whether the deed was duly executed and delivered."

The jury had been told in a previous part of the charge that delivery of the deed was essential in order to pass the title, and that this was a fact for them to decide; and it was in conclusion left to them in as broad a manner as could be done. The whole scope of the charge on this point left the evidence open for the full consideration of the jury, and the remarks of the judge are no more than a mere comment on the weight of evidence, and as such were addressed to the judgment of the jury, and not binding upon them. If a decided opinion had been expressed by the judge upon the weight of the evidence, it is not pretended that it would be matter of error to be corrected here. But the charge does not even go thus far; and it is believed by a majority of the court that it is not justly exposed to the criticisms which have been applied to it.

In respect to that part of the charge which comments upon the various deeds made by the Peters 4.

parents, which were *relied upon as in- [*98 consistent with the settlement deed, no objection has occurred to any member of the court except as to the comments on the deeds to Hill and Merritt, and the life leases to other persons. In respect to the deeds to Hill and Merritt, one judge is of opinion that the statement "that these deeds are not inconsistent with the settlement deed," is incorrect in point of law, because those deeds contained a covenant of seisin; and under the settlement deed, although Morris and wife had a right to convey the land, they were not in the actual seisin of it, and, therefore, such a covenant was inconsistent with the settlement deed. But the other judges are of opinion that this part of the charge is correct, because Morris and wife had, under the settlement deed, a power to convey in fee lands to a much greater amount; that it was not necessary to recite in their deeds of sale their power to sell; and that the covenant of seisin, being a usual muniment of title and not changing in the slightest degree the perfection of the title actually conveyed, did not, in point of law, whether there was a seisin or not, create any repugnancy between those deeds and the settlement deed. If the parties had in those deeds recited the settlement deed and the power to convey, and had then conveyed with the same covenants, the deeds could not have been deemed, in point of law, inconsistent with the power under the settlement deed; but would have been deemed a good execution of the power, and the covenants a mere additional security for the title. The same judge is also of opinion that the life leases which were given in evidence, not having been made in pursuance of the power in the marriage settlement deed, are by their terms and effect so inconsistent with it as to authorize the jury to find against its delivery on this ground alone; and that the Circuit Court erred in charging the jury that the effect and operation of these leases was not a subject for their inquiry, and that their bearing on the cause depended on the intention of Morris.

To the other judges, however, the charge in this particular is deemed unexceptionable. The judge decided that these life leases were unauthorized by the power; and the *question [*99 was, what influence they ought to have upon the point of nondelivery of the settlement deed; they not deriving any validity or force under it. Were they acts of ownership over the property which could not be explained consistently with the existence of the settlement deed, or were they acts which, though unauthorized, might fairly be presumed to be done without any intention to disclaim the legal title under that deed? In estimating this presumption, it is to be considered that these were the acts of parents, and not of strangers. That it does not necessarily follow because parents do unauthorized acts in relation to the estates of their children, they intend those acts as hostile or adverse to the rights of their children. Parents may, from a sincere desire to promote the interest of their children, and to increase the value of their estates, make leases for the clearing and cultivation of their estates which they know to be unauthorized by law, but which, at the same time, they feel an entire confidence will be confirmed by their children. The very

relation in which parents stand to their children excuses, if it does not justify, such acts. It will be rare, indeed, if parents may not confidently trust that their acts, done *bona fide* for the benefit of their children, will, from affection, from interest, from filial reverence, or from a respect to public opinion, be confirmed by them. The acts of parents, therefore, exceeding their legal authority, admit of a very different interpretation from those of mere strangers. The question in all such cases is, what were the intentions and objects of the parents? Did they act upon rights which they deemed exclusively vested in themselves? or did they act with a reference to the known interests vested in their children? It appears to the majority of the judges that the circumstance of the life leases was properly put to the jury as a question of intention; and that the jury were left at full liberty to deduce the proper conclusion from it.

The next point is as to the improvements claimed by the tenant in ejectment under the Act of New York of the 1st of May, 1786. That act declares "that in all cases of purchases made of any forfeited estates in pursuance of any of the laws directing the sale of forfeited estates, **100*** in which any *purchaser of such estates shall be evicted by due course of law, in the manner mentioned, &c., &c., such purchaser shall have like remedy for obtaining a compensation for the value of the improvements by him or her made on such estate, so by him or her purchased, and from which he or she shall be so evicted, as is directed in and by the first clause in the Act of the 12th of May, 1784." The latter act declares that the person or persons having obtained judgment shall not have any writ of possession, nor obtain possession of such lands, &c., until he, she or they shall have paid to the person or persons possessing title thereto, derived from or under the people of the State, the value of all improvements made thereon after the passing of the act. Neither the Act of 1784 nor of 1786 purports to give a universal remedy for improvements in cases of eviction by title paramount; but is confined to cases of confiscated estates where the title comes by sale from the State. However operative it may be as to citizens of the State (on which it is unnecessary to give any opinion), the question before us is, whether such improvements can be claimed in this case consistently with the Treaty of Peace of 1783.

By the fifth article of that treaty, it is agreed "that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." By the sixth article it is agreed that "there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for or by reason of the part which he or they may have taken in the war; and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property." We think that the true effect of these provisions is to guaranty to the party all the rights and interests which he then had in confiscated and other lands, in the full force and vigor which they then possessed. He was to meet with no impediment to the assertion of his just rights, and no future confisca-

tions were to be made of his interest in any land. His just rights were at that time to have the estate whenever it should fall into possession, free of all incumbrances or *liens [***101** for improvements created by the tenants for life, or by purchasers under the State. To deny him possession, or a writ of possession, until he should pay for all such improvements, was an impediment to his just rights, and a confiscation, *pro tanto*, of his estate in the lands. The argument at the bar supposes that there is a natural equity to receive payment for all improvements made upon land. In certain cases there may be an equitable claim; but that in all cases a party is bound by natural justice to pay for improvements made against his will, or without his consent, is a proposition which we are not prepared to admit. We adhere to the doctrine laid down on this subject in *Green v. Biddle* (8 Wheat., 1).

We are of opinion that the claim for improvements in this case is inconsistent with the Treaty of Peace, and ought to be rejected.

A number of objections of a minor nature are spread upon the record, such as exceptions to the admission of evidence to prove the common practice to convey lands by way of lease and release, and the admission of the journals of the Legislature; to the admission of the act of compromise between the State and John Jacob Astor; to the sufficiency of the title of Astor under the deed of the children of Morris and wife, to extinguish their title, &c., &c. To all these we think it unnecessary to make any farther answer than that they have not escaped the attention of the court, and that the court perceive no valid objection to the ruling of the Circuit Court respecting them.

Upon the whole, it is the opinion of this court that the judgment of the Circuit Court be, and the same is hereby affirmed with costs.

Cited—5 Pet., 198; 6 Pet., 609, 610, 612, 632; 7 Pet., 390; 10 Pet., 265; 4 How., 127; 11 How., 323; 13 How., 146; 18 How., 85; 5 Wall., 805, 806; 6 Wall., 475, 478; 10 Wall., 366; 16 Wall., 464; 19 Wall., 175; 9 Otto, 659; 14 Otto, 398; 3 Wood. & M., 512; 2 Blatchf., 13; Bald., 203, 363; 2 Curt., 247; 2 Cliff., 203; 5 Mason, 443; 17 Bank. Reg., 526.

Ex-parte* MARTHA BRAD- [*102**
STREET, in the matter of JAMES JACKSON,
ex dem. MARTHA BRADSTREET,
v.
DANIEL THOMAS.

Practice—rule to show cause—bill of exceptions.

A rule had been granted on the district judge of the Northern District of New York to show cause why he did not sign a bill of exceptions in a case tried before him. The court said that on the day of the return of the rule, the district judge has a right to show cause, whether the person who obtained the rule moves or not. He has a right to have the rule disposed of.

On the trial of a cause in the District Court of the United States for the Northern District of New York, exceptions were taken to opinions of the court delivered in the course of the trial; and some time after the trial was over a bill of exceptions was tendered to the district judge which he refused to sign, objecting to some of the matters stated in the same, and at the same time altering the bill then tendered so as to conform to his recollection of the facts of the case, and inserting in the bill all that he deemed proper to be contained in the

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same; which bill of exceptions, thus altered, was signed by the judge. On the motion of the party who had tendered the bill of exceptions, a rule was granted on the district judge to show cause why he did not sign the bill of exceptions as first tendered to him. To this rule the judge returned his reasons for refusing to sign the bill so tendered, and stating that he had signed such a bill of exceptions as he considered correct.

BY THE COURT—This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. The object of the rule is to oblige the judge to sign a particular bill of exceptions which has been offered to him. The court granted the rule to show cause, and the judge has shown cause by saying he has done all that can be required from him, and that the bill offered is not such a bill as he can sign. The court cannot order him to sign such a bill.

A return by the district judge to a rule to show cause need not be sworn to by him. [103]

The law requires that a bill of exceptions should be tendered at the trial. If a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it.

AT January Term, 1829, on motion of *Mr. Key*, and on affidavit filed, the court granted a rule on the Honorable Alfred Conklin, District Judge of the Northern District of New York, to show cause why he did not sign a certain bill of exceptions tendered to him on **103*** the part of the plaintiff, in *the case of *James Jackson, ex dem. Martha Bradstreet, v. Daniel Thomas*, which cause had been tried before him and a verdict given for the defendant. The rule was made returnable on the second Monday in January of this term. The same rule was obtained in the case of *Jackson, ex dem. Martha Bradstreet, v. Joseph Kirkland*.

To this rule the district judge, on the 10th of December, 1829, returned with the bills of exceptions which had accompanied the copy of the rule as served upon him, his reasons for refusing to comply with the demand of the plaintiff.

On the 27th day of February, the return day of the rule having passed, *Mr. Storrs*, after notice to *Mrs. Bradstreet*, moved to take up the return of Judge Conklin. He said that many important titles depended upon the decision of the cases in which the rules had been granted, and one of these cases was upon the calendar of this court. The return has been made, and the district judge has obeyed the mandate of this court. This application is also submitted at the instance of the district judge, who is not willing to stand before the court without a decisive inquiry into his proceedings.

Mr. Key objected to the court taking up the case on the application of any one but *Mrs. Bradstreet*. It was for her to call it up during the term, and to determine at what time. It will depend on the result of the case on the calendar what course she will pursue.

Mr. Chief Justice MARSHALL. The district judge of the Northern District of New York has been called upon by a rule of this court to show cause, and on the day of the return of the rule he has a right to show cause, whether the person who obtained the rule moves or not. There is no question but that Judge Conklin has a right to have the rule disposed of.

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The case went off until the following motion day, by agreement.

Afterwards, *Mr. Storrs* said the return to the rule having been made by Judge Conklin in his official capacity, he had not sworn to it; but if this shall be required by the court it will be done.

**Mr. Chief Justice MARSHALL*. The [*104 judge need not swear to the return of the reasons why he refused to sign the bill of exceptions.

The return set forth that at the time of the trial of the cause mentioned in the rule, no bill of exceptions was tendered, nor were any exceptions reduced to writing, except by himself in the minutes which he kept of the trial, unless, which was probable, the counsel also noted them in their minutes. Several weeks after the trial the amended bill of exceptions, accompanied by a paper containing numerous amendments proposed by the counsel for the defendant, was delivered to him for correction; and he thereupon proceeded, with due deliberation, and with the aid of his notes of the trial, to correct and settle the same in conformity, as nearly as possible, with the truth of the case. No counsel appeared for either party, and no application was made for some time for the bill of exceptions by the counsel in the cause. In an amended return, the district judge stated that some correspondence had taken place with *Mrs. Bradstreet* in relation to alterations proposed to be made in the bill of exceptions; and in an interview with her, nothing was said by her which was understood as an intimation of her intention or wish to be heard further upon the subject.

The return then proceeds to state that in the bill of exceptions, as proposed by *Mrs. Bradstreet*, many alterations had been made in terms and language, of little importance, and matters are introduced as having occurred on the trial which did not occur; circumstances are misstated and opinions are imputed to him which he did not express, and thus many parts of the amendments proposed by the plaintiff were untrue, and that, therefore, the same were not signed by him. The particulars to which these representations refer are stated in the return.

The return, after stating that in reference to an instrument of writing produced in the cause (in the bill of exceptions as signed by the judge), a brief description of the instrument was inserted instead of the whole, *in extenso*, which had been done in conformity with the established rules of practice requiring only so much of the evidence offered upon the trial *as is sufficient fully and fairly to [*105 present every question of law embraced in the exception, proceeds—

“In conclusion, I have only to add the expression of my conviction that although this rule of law has by no means been rigidly applied in abridging this bill, it has in no instance been departed from to the prejudice of the plaintiff.”

“If, however, on a particular examination of the bill and amendments (without which, I may be permitted to remark, it is impossible to form a just conclusion), your honorable court should, in regard to the documentary evidence, entertain a different opinion, I shall most

cheerfully obey its mandate to correct the supposed error."

Mr. Storrs, on a motion to discharge the rule, stated that this court would never require a judge to sign a bill of exceptions which he considers incorrect. The court will adopt another course, and will leave it to the judge to re-examine the bill, and to do what he shall consider proper.

The bill of exceptions was not made out and offered to the judge at the trial, which is the practice in New York, nor was it presented to him until a long time afterwards; and it was then corrected according to his notes.

The true course would be to refer the matter back to the judge, and let him appoint a time, on notice to both parties, to appear before him, and revise the bill of exceptions. This the judge is perfectly willing to do.

Mr. Storrs stated that he was the counsel for the parties in interest in the case, and he was desirous to see that their interests should not suffer. He also wished to present the case on the part of Judge Conklin, and ask the attention of the court to it.

Mr. Key, in opposition to the motion, contended,

1. That this court would consider the bills of exceptions as duly tendered, inasmuch as the judge, though he states that they were not tendered during the term, does not allege that they were out of time; and if, by the general practice of the court, or by consent, they were written during the trial and presented afterwards, which is not denied, they ought to be considered in time. (6 Johns. Rep., 279; 2 Tidd, 788.) That this had been agreed to be **106***] inferred *from the return made by the district judge, and from the affirmation of facts in the affidavit not denied in the return.

2. This court will now look at the bills of exceptions and the returns; and whatever parts of the bills have been objected to, and the objections justified by the return they will order to be certified; and such facts as have been objected to, and the objections not sustained by the return, the judge will also be called on to certify. (2 Lord Ray., 1008.) Unless this is done the remedy by *mandamus* is nugatory.

It was unimportant as to the manner in which the omissions should be required to be certified. This might be done in any mode most respectful to the judge.

The intimation of the counsel for the district judge that the bills of exceptions may be settled by a hearing before the judge on notice, would probably remove all the difficulties in the case if the rule should now be discharged.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The court is unanimously of opinion that the rule ought not to be granted.

This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. If the court had granted a rule upon the district judge to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause, and

the judge has shown cause, by saying he has done all that can be required from him, and that the bill offered to him is not such a bill as he can sign.

Nothing can be more manifest than that the court cannot order him to sign such a bill of exceptions. The person who offers a bill of exceptions ought to present such a one as the judge can sign. The course to be pursued is either to endeavor to draw up a bill, by agreement, which the judge can *sign, or **[*107]** to prepare a bill to which there will be no objection, and present it to the judge.

The court will observe that there is something in this proceeding which they cannot, and which they ought not to sanction. A bill of exceptions is handed to the judge several weeks after the trial of the cause, and he is asked to correct it from memory. The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory, at a distant period, when he may not accurately recollect them. And the judge ought not to allow it.

If the party intends to take a bill of exceptions he should give notice to the judge at the trial, and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it.

It is ordered by the court that the *mandamus* as prayed for be, and the same is hereby refused; and that the rule heretofore granted in this cause be, and the same is hereby discharged.

See S. C., 7 Pet., 634; 8 Pet., 538.

Cited—5 Pet., 219; 4 How., 16; 6 How., 275; 16 How., 29; 12 Otto., 358; 3 Wood. & M., 225, 537.

Ex-Parte* JOHN L. TILLING- **[*108]
HAST, ESQUIRE.

Admission to practice in Supreme Court.

That a counselor practicing in the highest court of the State of New York, in which he resides, had been struck off from the roll of counselors of the District Court of the United States for the Northern District of New York, by the order of the judge of that court, for a contempt, does not authorize this court to refuse his admission as a counselor of this court.

This court does not consider the circumstances upon which the order of the district judge was given within its cognizance; or that it is authorized to punish for a contempt which may have been committed in the District Court of the Northern District of New York.

MR. HOFFMAN moved the court for the admission of Mr. J. L. Tillinghast as a counselor of this court.

He stated that he was a counselor of the Court of Chancery of the State of New York and of the Supreme Court of that State, and was at this time in the full exercise and enjoyment of the rights and privileges of a counselor of those courts. He exhibited the certificates in due form of the time of the admission of Mr. Tillinghast to practice in the courts, and that he is now a practitioner of the same. He was enabled to say, from knowing the opinions of three of the judges of the Supreme Court of New York, that Mr. Tillinghast was respected, and had their confidence.

It was understood that the rule of this court was to admit persons who practiced in the highest courts of the several states, and Mr. Tillinghast was, therefore, completely within the rule.

It was disingenuous not to refer to a circumstance which had occurred in relation to Mr. Tillinghast in the District Court of the United States for the Northern District of New York. In that court he had been stricken off the roll of counselors of the court by order of the district judge.

If the causes of that proceeding are now to be inquired into, under the relations which existed between him and Judge Conklin, and the respect he entertained for him, Mr. Hoffman said he should not interfere. But this court will not look into this circumstance, and **109*** the mere fact of an individual *having been stricken off the roll would not, in itself, induce the court to refuse his admission here. This might occur at the request of the individual, or it might be the effect of his acceptance of an office which disqualified him to practice; as that of marshal. Upon this fact alone the court will not reject this application.

But if the court will go into an examination of the circumstances of the case, Mr. Tillinghast is fully prepared and willing to proceed; in which he will have the aid of other counsel. He is desirous that this court would hear the facts and decide upon them, and he expects to be able in the investigation fully to vindicate himself from all reproach.

It is understood that on a former occasion, when a *mandamus* was applied for to the district judge to restore the applicant to the roll of counselors, this court would not go into an examination of the facts of the case, and they may not now be disposed to do it. It might also be objected to it that it would be *ex-parte*, and will give to Judge Conklin no opportunity to be heard on the matter.

The certificates of the admission of Mr. Tillinghast to practice in the highest courts of New York, and of his now being a counselor of those courts, were then filed by Mr. Hoffman.

Mr. Chief Justice MARSHALL. The court has had under its consideration the application of Mr. Tillinghast for admission to this bar.

The court finds that he comes within the rules established by this court. The circumstance of his having been stricken off the roll of counselors of the District Court of the Northern District of New York, by the order of the judge of that court for a contempt, is Peters 4.

one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorized to punish here for contempts which may have been committed in that court.

When, on a former occasion, a *mandamus* was applied for to restore Mr. Tillinghast to the roll of counselors of the District *Court, [***110**] this court refused to interfere with the matter; not considering the same within their cognizance.

The rules of this court having been in every respect complied with, Mr. Tillinghast must be admitted a counselor of this court.

On consideration of the motion made by Mr. Hoffman, it is ordered by the court that John L. Tillinghast, Esq., of the State of New York, be admitted as an attorney and counselor of this court, and he was sworn accordingly.

Cited—19 How., 13; 7 Wall., 378-380, 384.

*BOYCE & HENRY, *Plaintiffs in Error*,
v.

TIMOTHY EDWARDS, *Defendant in Error*.

Bill of exchange—promise to accept—distinction between action on bill as accepted and on breach of promise to accept—case of Coolidge v. Payson—rule as to interest when drawer and drawee are in different states.

Action on two bills of exchange drawn by Hutchinson, on B. & H. in favor of E., which the drawers, B. & H., refused to accept, and with the amount of which bills E. sought to charge the defendants as acceptors, by virtue of an alleged promise before the bills were drawn.

The rule on this subject is laid down with great precision by this court in the case of Coolidge v. Payson (2 Wheat., 75), after much consideration and a careful review of the authorities, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise. [121]

Whenever the holder of a bill seeks to charge the drawee as acceptor upon some occasional or implied undertaking, he must bring himself within the spirit of the rule laid down in Coolidge v. Payson. [121]

The rule laid down in Coolidge v. Payson requires the authority to be pointed at the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application. [121]

The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been attended to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character; and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. [122]

Courts have latterly leaned very much against extending the doctrine of implied acceptances so as to sustain an action upon a bill. For all practical

Note—Bills, that a written promise to accept is equivalent to acceptance. See note to Coolidge v. Payson, 2 Wheat., 66.

purposes in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of bills; and this has led judges frequently to express their dissatisfaction that the rule has been carried so far as it has; and their regret that any other Act than a written acceptance on the bill had ever been deemed an acceptance. [122]

As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable by an action for the breach of the promise to accept, as they would be by an action on the bill itself. [123]

The contract to accept the bills, if made at all, was made in Charleston, South Carolina. The bills were drawn in Georgia, on B. & H. in Charleston, and with a view to the State of South Carolina for the execution of the contract. The interest is to be charged at the rate of interest in South Carolina. [123]

112*] *ERROR to the Circuit Court of South Carolina.

An action of *assumpsit* was brought in the Circuit Court of South Carolina by Timothy Edwards, a citizen of the State of Georgia, against Boyce & Henry, merchants of Charleston, upon two bills of exchange drawn by Adam Hutchinson at Augusta, Georgia, on the plaintiffs in error, dated the 27th of February, 1827, payable sixty days after sight, amounting together to four thousand four hundred and thirty-one dollars. The bills were duly protested for nonacceptance and nonpayment.

The plaintiff in the Circuit Court gave in evidence a letter from Boyce, Johnson & Henry, dated at Charleston, March 9th, 1825.

"Mr. Edwards: Mr. Adam Hutchinson, of Augusta, is authorized to draw on us for the amount of any lots of cotton he may buy and ship to us, as soon after as opportunity will offer; such drafts will be duly honored."

He also gave in evidence the following notice, signed by Kerr, Boyce, and George Henry, which was published in the Charleston newspaper, on the 28th of March, 1825:

"The copartnership heretofore existing under the firm of Boyce, Johnson & Henry is this day dissolved by the death of Mr. Samuel Johnson, Jun. The business will be conducted in future by the subscribers under the firm of Boyce & Henry, who improve this opportunity of returning thanks to their friends for their liberal patronage, and hope by assiduity and attention to merit a continuance of their support."

The plaintiff also gave in evidence a letter from Boyce & Henry to Adam Hutchinson, dated September 14th, 1826, which contained these words: "But in the meantime if you can buy cotton on good terms, you are at liberty to draw as before."

Also a letter from the same to the same, dated the 16th of September, 1826, advising him of the sale of a large parcel of cotton, and saying, "we wrote you last mail with authority to draw on us as usual, if you could buy to make here at 8 to 9 cents."

Also another letter from the same to Adam [113*] Hutchinson, *of January 4th, 1827. "Your favor of the 1st inst. is received. You have entirely mistaken us as to our losing confidence in you; our idea is this: we are unable to keep so large a sum beyond our control as the amount which is now standing on our books. For instance, should any accident happen to

you, where would be the money to pay your drafts which are now on us and are accepted? Should you die, the cotton or money would of course be held by whoever manages your estate. But to come to the point, we feel every disposition to give you every facility in our power; you are, therefore, at liberty to draw on us when you send the bill of lading. We do not put you on the footing of other customers, for we do not allow them to draw for more than three-fourths in any instance. You may draw for the amount," &c.

Also a letter of February 17th, 1827, acknowledging the receipt of the bill of lading for one hundred and fifty-eight bales of cotton, and stating as follows: "Your bills have been presented which you gave to Timothy Edwards, which we would have accepted, had we heard from you concerning the first bill," &c.

The plaintiff then gave in evidence a letter from Adam Hutchinson, of February 7th, 1827, to Boyce & Henry, saying, "the cotton by the Edgefield you will please have reweighed and put into store, as I do not wish it sold until the draft drawn against it becomes due. I am shipping by the Commerce one hundred and nineteen bales cotton; it cost \$3,320," &c.

Also a letter of the 9th of February, 1827, from Adam Hutchinson to Boyce & Henry.

"After writing you by last mail, I bought thirty-nine bales of cotton more, and shipped it per the Commerce, &c.; the thirty-nine bales cost here one thousand one hundred and eleven dollars, &c. I yesterday drew upon you two drafts for two thousand three hundred and thirty-one dollars, and for two thousand one hundred dollars, at sixty days, in favor of Mr. T. Edwards, which please honor."

The defendants in the Circuit Court objected to the reading *in evidence the letters [*114 from Boyce, Johnson & Henry to Timothy Edwards, in March, 1827; also to the letters from Boyce & Henry, and from Adam Hutchinson to Boyce & Henry. But the objections were overruled by the court.

The court stated to the jury that the letter of Boyce, Johnson & Henry of the 9th of March, 1825, in connection with other evidence in the cause, was sufficient to charge the defendants in the Circuit Court as acceptors. The court relied principally on the fact that Boyce & Henry, on the 12th of April, 1825, a few days after they had announced the dissolution of the copartnership of Boyce, Johnson & Henry, had credited themselves in the account current which accompanies the bill of exceptions with the sum of \$1,313.58 due by Adam Hutchinson to the late firm, thus identifying the firms, and continuing the responsibility under the letter of guarantee to the plaintiff, dated 9th March, 1825. The court also relied upon the continued acceptance and payment by the defendants of numerous bills between the date of that letter and 15th February, 1827, previous to which day, viz., on the 12th February, 1827, they refused to accept the bills in question.

The court also charged the jury that unless, from all the circumstances, the jury should believe that the plaintiff knew of the letter from Boyce & Henry of the 4th of January, 1827, addressed to A. Hutchinson, and that he took the bills of February 8th, 1827, upon the faith of that letter, it would not legally bind them to

accept the said bills; but that it was entirely a question for the jury whether the plaintiff had dealt with Hutchinson on the faith of that letter; and, moreover, whether he had or not, was immaterial, because the previous letter, the notice, the accounts rendered, and the numerous bills drawn and accepted, were ample authority for the plaintiff to take the bills in question. The court also instructed the jury that the true question was whether the plaintiff had dealt with Hutchinson on his credit, or on the credit of Boyce & Henry. That the terms of the letter of the 4th of January having been complied with, the defendants were bound, in good faith, to accept the drafts of **115***] the *8th of February; that the money raised by the sale of the one hundred and fifty-eight bales of cotton must be regarded as the money of Edwards and not of Hutchinson; that it was not material whether the letter was written before or after the bill was drawn; for in either case it was, according to law, an acceptance.

A verdict and judgment were entered for the plaintiff in the Circuit Court allowing the plaintiff interest according to the laws of Georgia; and the defendants having moved for a new trial, which was refused, brought this writ of error.

They contended: that the charge of the court was erroneous; and that the verdict to the jury was contrary to law.

1. Because the letter of credit from Boyce, Johnson & Henry to Timothy Edwards in favor of Adam Hutchinson, in March, 1825, was inadmissible as evidence against Boyce & Henry; and, at all events, it gave no authority to Hutchinson to draw on Boyce & Henry.

2. Because the other circumstances relied upon by the court to identify the firms of Boyce, Johnson & Henry and Boyce and Henry, so as to extend the obligations of the said letters from the former to the latter, were wholly insufficient for that purpose, or for making the defendants liable on other grounds.

3. Because the letters of Boyce & Henry to Adam Hutchinson, and from Hutchinson to Boyce & Henry, were inadmissible as evidence in this case; and even if they were not, they could create no right or obligation, as between Edwards and Boyce & Henry, particularly as no proof was adduced to show that these letters were known to Edwards when he took the drafts.

4. Because the accounts current between Boyce & Henry and Hutchinson produced by the plaintiff, showed that at the time the drafts were drawn, Hutchinson was indebted to the defendants nearly \$10,000, and the proceeds of the one hundred and fifty-eight bales of cotton were rightly applied to that balance.

5. Because Georgia interest ought not to have been allowed.

6. Because the charge of the judge, and the **116***] finding of the *jury, were erroneous in the foregoing particulars, and in several others.

Mr. M'Duffie, for the plaintiffs in error, stated that the practice in South Carolina was to move the court for a new trial, and on its refusal to take a writ of error.

The question in this case depends upon the law of acceptance, the plaintiffs in error asserting that they were not bound to accept or

pay the bills of exchange, which are the subjects of this suit.

The first point to be maintained by the plaintiffs in error is, that the letter of Boyce, Johnson & Henry ought not to have been admitted to prove a claim on the firm of Boyce & Henry, as the firms were different and distinct. The death of Johnson dissolved the partnership and terminated their obligations. A promise to one firm cannot be transferred and made available to another. (4 Taunton, 693.) There are good reasons why this responsibility should not be asserted. The death of Johnson gave a new position to the parties, and the partnership of Boyce and Henry was liable only for its own engagements. According to the principles which have been established in this court, even the firm of Boyce, Johnson & Henry would not have been bound to accept these bills. Was the stipulation in the letter to be everlasting? This court has said that a letter of credit shall not be binding on anyone beyond a reasonable time.

The charge on the books of the plaintiffs was a mode of keeping the accounts, but this does not prove that the firms were identical. Their continued acceptances are relied upon; they do not prove the obligation to accept bills which they refused.

Is the letter of Boyce, Johnson & Henry, if it bound the new firm, available to prove a contract with Timothy Edwards, who never saw the letter? The law upon this matter is settled definitively. A verbal promise to accept a bill before it is drawn is not binding. This is sustained by all the authorities. (1 East, 106; 4 East, 74; 4 Cowp., 393.) In *Coolidge v. Prynson*, in this court (2 Wheat., 66), the court lay *down the principles which regulate [**117***] this subject. The bill must be taken with a knowledge of the promise to accept, and upon the credit of that promise. The plaintiff below did not know of the contract in this case, if any existed.

In England, the judges have endeavored to limit the liability to accept bills to be drawn. (Holt's Rep., 181; Chitty on Bills, 219, note.) Such bills are injurious to the safety of commerce. They create a floating and an uncertain capital. Before the plaintiffs in error should have been held liable, it should have been proved that Edwards saw the letter.

As to the allowance of interest according to the law of Georgia, the contract to accept and pay, if any was made, was entered into in Charleston. The bills, although drawn in Georgia, were to be paid in Carolina; and there the letters were written on which the plaintiff in the Circuit Court relied to establish the liability of the defendants. It was, therefore, exclusively a contract in Carolina, and the law of that State was the law of the contract as to interest.

Mr. Berrien, for the defendant in error, argued that the letter of Boyce, Johnson & Henry, on the 9th of March, 1825, taken in connection with the advertisement of the 29th of that month, and the continued course of business carried on between the parties up to 1827, when the bills in the suit were drawn, bound the plaintiffs in error to accept the bills drawn by Adam Hutchinson. The objection to the admission of the letter of the 9th of March.

1825, is, that it was not the act of the parties to this suit; but this was the precise question between the plaintiff and the defendants in the Circuit Court. It was therefore a question of the effect of that letter on the rights of the plaintiff, and no other. It was proper to submit it to the jury, who would draw their conclusion of its operation and of its application, from all the circumstances.

Independently of that letter, the mere course of trade between the parties from March, 1825, to February, 1827, created an implied obligation on the part of Boyce & Henry to accept the bills drawn by Hutchinson in the course of that trade, until notice of the revocation of his authority to draw bills.

If the letter of the 4th of January is considered as a revocation *of the general power to Hutchinson, still the terms of that letter seem to have been complied with, and the obligation of Boyce & Henry under that letter was complete.

The principles upon which the defendant in error rests has been established in *Coolidge v. Payson* (2 Wheaton, 66). A person who takes a bill on the credit of a promise to accept it, if drawn in a reasonable time, has a right to recover; the promise is a virtual acceptance. The right of Hutchinson to draw was known to Edwards.

The general notice given by Boyce & Henry, on the 28th of March, 1825, that they had succeeded to the business of the former firm, was an assumption of the obligations of that firm; and in proof of this, they accepted bills drawn on the firm of Boyce, Johnson & Henry, after the advertisement. In their accounts with Hutchinson, he is charged with the balance due to Boyce, Johnson & Henry. Afterwards, thirty-one bills drawn by Adam Hutchinson in the same course of business were accepted and paid, amounting to sixty-seven thousand eight hundred and sixty-five dollars. These acts were a ratification on their part of the authority given on the 9th of March, 1825.

As regards Edwards, Hutchinson may be considered as the agent of the plaintiffs in error, purchasing on their account, and on their guarantee. The letter of the 27th of January, 1827, would then only affect the defendant, if he had notice of it; and if he had, as the terms of that letter were complied with, they were bound to accept the bills. If the terms were not conformed to, this should have been proved in the court below by the plaintiffs in error.

The letter of the 4th of January, 1827, was a distinct and substantive agreement to accept on certain terms, which were complied with on the part of the drawer; and if Edwards took the bill on the faith of that letter, the plaintiffs were bound. This question was properly left to the jury by the court.

Mr. Justice THOMPSON delivered the opinion of the court:

This was an action of *assumpsit* brought in the Circuit Court of the United States for the **119*** District of South Carolina, *upon two bills of exchange drawn by Adam Hutchinson in favor of Timothy Edwards, the plaintiff in the court below, upon Boyce & Edwards, the defendants, both bearing date on the 8th of February, 1827; the one for two thousand one

hundred dollars, and the other for two thousand three hundred and thirty-one dollars, payable sixty days after sight.

The cause was tried before the district judge; and in the course of the trial several exceptions were taken on the part of the defendants below to the admission of evidence and the ruling of the court upon questions of law, all which are embraced in the charge to the jury, to which a general bill of exceptions was taken, and the cause comes here upon a writ of error.

The bills of exchange were duly presented for acceptance, and on refusal were protested for nonacceptance and nonpayment; but the plaintiffs sought to charge the defendants as acceptors, by virtue of an alleged promise to accept before the bills were drawn. And whether such liability was established by the evidence, is the main question in the cause. The evidence principally relied upon for this purpose consisted of two letters, the first as follows: "Charleston, March 9th, 1825. Mr. Edwards, Dear Sir, Mr. Adam Hutchinson, of Augusta, is authorized to draw on us for the amount of any lots of cotton which he may buy and ship to us, as soon after as opportunity will offer; such drafts shall be duly honored by yours, respectfully, Boyce, Johnson & Henry."

Johnson soon after died; and on the 28th of the same month of March, the defendants published a notice in the Charleston newspapers announcing a dissolution of the partnership by the death of Johnson, and that the business would be conducted in future under the firm of Boyce & Henry. The other letter is from the defendants, of the date of the 4th of January, 1827, addressed to Adam Hutchinson, in which they say, "you are at liberty to draw on us when you send the bill of lading. We do not put you on the footing of other customers, for we do not allow them to draw for more than *three-fourths in any instance. You [***120** may draw for the amount." &c.

The defendants' counsel had objected to the admission of the first letter from Boyce, Johnson & Henry, and contended that this did not bind Boyce & Henry to accept bills drawn on them after the dissolution of the partnership was known, and desired the court so to instruct the jury. But the court stated to the jury that the said letter, in connection with the other evidence in the cause, was sufficient to charge the defendants as acceptors. The other evidence referred to by the court, as would appear from other parts of the charge, was the letter of the 4th of January, 1827; the notice of the dissolution of the partnership; the accounts rendered by the defendants; and the numerous bills, drawn and accepted by them, all which had been given in evidence in the course of the trial.

According to the view which we take of the instruction given by the court below at the trial, that the defendants upon the evidence were liable as acceptors, it becomes very unimportant to decide whether the letter of Boyce, Johnson & Henry should have been admitted or not. For we think, in point of law, there was a misdirection in this respect; even if the letter was properly admitted. We should incline, however, to the opinion that this letter, at the time when it was offered and objected to,

Peters 4.

and standing alone, would not be admissible evidence against the defendants. It was dated nearly two years before the bills in question were drawn, and was from a different firm. It was evidence between other and different parties. A contract alleged to have been made by Boyce & Henry could not be supported by evidence that the contract was made by Boyce, Johnson & Henry. It might be admissible, connected with other evidence showing that the authority had been renewed and continued by the new firm, and in support of an action on a promise to accept bills drawn on the new firm. But that was not the purpose for which it was received in evidence, or the effect given to it by the court in the part of the charge now under consideration. It was declared to be sufficient, **121*** in *connection with the other evidence, to charge the defendants as acceptors. And in this we think the court erred. Had the letter been written by the defendants themselves, it would not have been sufficient to charge them as acceptors.

The rule on this subject is laid down with great precision by this court in the case of *Coolidge v. Payson* (2 Wheat., 75), after much consideration, and a careful review of the authorities, "that a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This case was decided in the year 1817. The same question again came under consideration in the year 1828, in the case of *Schimmelpennich et al. v. Bayard et al.* (1 Peters, 284), and received the particular attention of the court, and the same rule laid down and sanctioned; and this rule we believe to be in perfect accordance with the doctrine that prevails both in the English and American courts on this subject. At all events, we consider it no longer an open question in this court; and whenever the holder of a bill seeks to charge the drawee as acceptor upon some collateral or implied undertaking, he must bring himself within the spirit of the rule laid down in *Coolidge v. Payson*; and we think the present case is not brought within that rule.

With respect to the letter of the 9th of March, 1825 (in addition to the objections already mentioned, that it is not an authority to draw emanating from the drawees of these bills), it bears date nearly two years before the bills were drawn; and what is conclusive against its being considered an acceptance, is that it has no reference whatever to these particular bills, but is a general authority to draw at any time, and to any amount, upon lots of cotton shipped to them. This does not describe any particular bills in terms not to be mistaken.

The rule laid down in *Coolidge v. Payson* requires the authority to be pointed at the specific **122*** bill or bills to which *it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application.

And this leading objection lies also against the letter of the 4th of January, 1827. It is a general authority to Hutchinson to draw, upon sending to the defendants the bills of lading Peters 4.

for the cotton. This is a limitation upon the authority contained in the former letter, even supposing it to have been adopted by the new firm; and must be considered, *pro tanto*, a revocation of it. Hutchinson is only authorized to draw upon sending the bills of lading to the defendants. And although it may fairly be collected from the evidence that that was done in the present case, it does not remove the great objection that it is a general authority, and does not point to any particular bills and describe them in terms not to be mistaken, as required by the rule in *Coolidge v. Payson*. The other circumstances relied on by the court to charge the defendants as acceptors, are still more vague and indefinite, and can have no such effect.

The court, therefore, erred in directing the jury that the evidence was sufficient to charge the defendants as acceptors, and the judgment must be reversed.

The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise.

Courts have latterly leaned very much against extending the doctrine of implied acceptances so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient and injurious to the credit of the bills; and this has led judges frequently to express *their [***123** dissatisfaction that the rule had been carried as far as it has, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance.

As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself.

In the case now before the court, the evidence is very strong, if not conclusive, to sustain an action upon a count properly framed upon the breach of the promise to accept. The bills in question appear to have been drawn for the exact amount of the cost of the cotton shipped at the very time they were drawn. And if the bills of lading accompanied the advice of the drafts, the transaction came within the authority of the letter of the 4th of January, 1827; and if satisfactorily shown that the bills were taken upon the credit of such promise, and corroborated by the other circumstances given in evidence, it will be difficult for the defendants to resist a recovery for the amount of the bills.

With respect to the question of interest, we think that if the plaintiff shall recover at all, he will only be entitled to South Carolina interest. The contract of the defendants, if any was made upon which they are responsible, was made in

South Carolina. The bills were to be paid there; and although they were drawn in Georgia, they were drawn, so far as respects the defendants, with a view to the State of South Carolina for the execution of the contract.

The judgment of the Circuit Court must be reversed, and the cause sent back with directions to issue a venire de novo.

Cited—4 How., 278; 18 Wall., 620; 1 Otto, 414; 1 Blatchf., 340-342; 1 Story, 27; 2 Story, 237, 240; 2 McLean, 464.

124*] THE UNITED STATES, *Appellants*,

v.

JOHN MORRISON ET AL., *Appellees*.

Lien of judgment on land in Virginia—elegit and writ of fieri facias.

There is no statute in Virginia which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this, the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of this right.

Soon after this case was decided in the Circuit Court for the District of East Virginia, a case was decided in the Court of Appeals of the State in which this question on the execution law of the State of Virginia was elaborately argued and deliberately decided. That decision is, that the right to take out an *elegit* is not suspended by suing out a writ of *fi fieri facias*, and, consequently, that the lien of the judgment continues pending the proceedings on that writ. This court, according to its uniform course, adopts the construction of the act which is made by the highest court of the State.

A PPEAL from the Circuit Court for the District of East Virginia.

In the Circuit Court the United States filed a bill, the object of which was to make certain real property, assigned on the 22d of October, 1823, by John Morrison to Robert G. Ward, subject to a judgment obtained in their favor in the Western District of Virginia, in October, 1819. The assignment made by Morrison to Ward was general, of all his property, in trust for the payment of his debts to sundry persons. The deed of trust referred to certain previous deeds of trust which Morrison had executed, conveying a large portion of the same property to secure particular debts. The previous deeds were all executed subsequent to the rendition of the judgment in favor of the United States in October, 1819, viz., on the 14th of February, 1823; the 21st of February, 1823; the 9th of March, 1823. Divers creditors of Morrison had issued their executions of *fi fieri facias* against the property of John Morrison, which had been duly levied upon the same before the execution of the general assignment of October, 1823.

On the day the judgment was obtained by the United States in 1819, a part of the same **125*]** was enjoined, and an execution *was issued for the remainder, which was levied on the property of Morrison and Roberts, and a forthcoming bond was given by John Morrison, Roberts, and their sureties; and the debt not being paid, an execution was awarded against Morrison, Roberts, and one of the sureties, and issued in April, 1822. While it was in the hands of the marshal, and before it was levied, the agent of the treasury, at the instance of the

defendants, instructed the marshal to forbear levying it on condition of the defendants' paying the costs; and the costs being paid the marshal did not make a levy, and made a return within the year 1822 that all further proceedings were suspended in pursuance of the said instructions. A second *fi fieri facias* was issued on the 5th of February, 1825, on which the marshal returned "no effects found not conveyed by deed of trust."

In the bills filed by the United States, they asserted their claim to the payment of their judgment against Morrison in preference to all the other creditors, out of the property assigned to Ward; this claim extending over the property conveyed in the deeds executed prior to the assignment, and also to the proceeds of other real property levied on by executions issued by creditors. The claim was asserted upon two distinct grounds. 1. Upon the sixty-fifth section of the Act of Congress of 1799 (ch. 128), which declares that in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, &c., shall be first satisfied, &c. 2. Upon the ground that their judgment against Morrison gave them a lien upon the land, which, under the facts of the case, they allege was a subsisting one, to overreach the liens created by the deeds executed by Morrison.

The Circuit Court were of opinion that the deed of October, 1823, was a general assignment, and that the United States were entitled to priority out of the subject contained in that deed; that nothing was to be considered as effectually conveyed by that deed which had been embraced by the previous deeds, or levied upon by executions previous to that deed: that the United States had no claim, either by virtue of *their statutory priority or judgment, [***126** to the property contained in the previous deeds and levied upon by the previous executions, except to any surpluses which might remain: and proceeded to decree in favor of the United States for the value of all the property in the deed of October, 1823, not embraced by the previous deeds and executions, there being no surplus; and dismissed their bill, so far as it asserted a claim to charge the property conveyed by said prior deeds, or covered by the executions.

From so much of the decree as dismissed their bill to the extent stated, the United States appealed to this court.

For the United States, Mr. Berrien, Attorney-General, contended.

That the judgment of the United States against Morrison was, at the time of executing the several deeds, a good, subsisting and prior lien; and that they are entitled to have the proceeds of the sales of the real estate of Morrison first applied in satisfaction of the judgment.

The general rule is understood to be, that in settling the priorities of incumbrances, judgments are regarded as such from the time of rendering them; and that in England, and those States whose laws are similar, with a view to such an object, no inquiry is made to ascertain whether an *elegit* had issued, or the election to issue it had been entered on the roll within the year and a day.

It is confidently believed that no such case can be found. And it is understood that the Circuit Court concurred in the principle, but rested its decision on two grounds. 1. That the *elegit* would not overreach the title of an incumbrancer or purchaser, unless at the time that the conveyance was made to the incumbrancer or purchaser, the judgment creditor could sue out an *elegit*; and 2. That after a partial levy of a *fiery facias*, an *elegit* could not be sued out until another *fiery facias* was sued out, and a return of *nulla bona* had thereon.

This conclusion was deduced from the construction given by the court to the Virginia statute of executions. This is, therefore, emphatically a case which calls into exercise the 127*] principles so often, and in so many various forms asserted by this court, of a determination to conform its decisions to that of the State courts in their local laws. (1 Wheat., 279; 2 Wheat., 317; 6 Wheat., 316; 10 Wheat., 153, &c., &c.)

With this view of the subject, there has been obtained a statement of a case almost contemporaneously decided in the Court of Appeals of the State of Virginia, after an elaborate argument. It is the case of *Fox v. Rootes et al.*, not yet reported; but a statement of which having been communicated to the counsel of the appellee, is now submitted.

This case disposes definitively of the first point ruled in the Circuit Court; for the Court of Appeals have therein decided that a judgment creditor is entitled to priority over a subsequent incumbrancer, though his judgment had been rendered many years before, and no execution had ever issued on it, and of course no execution could issue until revived by *scire facias*.

It is unnecessary, on this branch of the subject, to make any other remark than that if in the construction of the laws of Virginia this court conforms its decision to that of the Court of Appeals of Virginia, the case is decisive of the present controversy, unless the objection suggested by the counsel of the appellees that it has not been reported should weigh with the court. Should this be important, the court will retain the cause until an authentic copy of the decision can be obtained.

The case of *Coleman v. Cooke* (6 Randolph, 618) is relied upon as in itself sufficient to sustain the claim of the United States. The counsel for the appellee supposes it does not overrule the case of *Eppes v. Randolph* (2 Call., 125), to which he has referred, nor conflict with the decision of the Circuit Court in this case. It is true that it is said by the court in *Coleman v. Cooke* that the cases of *Eppes v. Randolph* and *The United States v. Morrison* do not touch the case of *Coleman v. Cooke* on the question of jurisdiction, nor on its merits; but they immediately state it to have been "the uniform course of the English Court of Chancery to consider a judgment with a capacity to acquire the right to sue out an *elegit* by *scire facias* or otherwise, as a 128*] lien, &c.; and in the very front of the decision in *Eppes v. Randolph* they proceed to decide that the plaintiffs in that case had an existing capacity to sue out *elegits* upon their decrees, "without any preliminary proceeding whatever;" while in direct conflict with the decision of the Circuit Court in this case, they Peters 4.

affirm that a party having taken out a *fiery facias*, which had been levied and returned in part satisfied, may sue out an *elegit* without a second *fiery facias* and the return of *nulla bona*.

The Circuit Court proceeded on the principle that at the time of the execution of the deeds of trust in February and March, 1823, the United States had no existing capacity to sue out an *elegit*; while the Court of Appeals have decided that such capacity existed without any preliminary proceeding whatever, and that this capacity subsisted, notwithstanding the partial levy of a *fiery facias*, and without suing out a second writ and procuring a return of *nulla bona*.

On the principles settled by the Court of Appeals in the case of *Coleman v. Cooke*, the United States had unquestionably a capacity to sue out an *elegit* at the time of the execution of the deeds of trust in February and March, 1823.

The case of *Tyler v. Rice*, furnished by the counsel of the appellee, is a decision in an inferior court. The time allowed by law for taking out the *elegit* had expired; but in the case at bar, the year and day had not expired when the deeds were executed.

The United States cannot be in a worse situation by the issuing and partial levy of the *fiery facias* than they would have been had no execution whatever issued on that judgment up to the time when the deeds of trust were made; since the Court of Appeals have decided that the partial levy of the *fiery facias* did not impair their right to sue out an *elegit*, and that it was competent to them to do so without any preliminary step whatever. It follows that as the year and day had not elapsed when the deeds of trust were executed, the United States had at that time the capacity to sue out an *elegit*, and are consequently entitled to the benefit of their lien arising from their judgment.

In a case depending exclusively on the construction given by the courts of Virginia to a statute of that State, it is not deemed necessary to extend further remarks.

Mr. Barbour, for the appellees, relied on the following points: 1. That the three deeds created specific and perfected liens on the property therein conveyed, and that the levy of the several executions created the like liens on the property on which they were levied; which could not be displaced by any statutory priority of the United States, since that priority is not, of itself, equivalent to a lien. (*Conard v. The Atlantic Insurance Company*, 1 Peters, 386.)

2. That the judgment of the United States, though it might have created a lien which would have been available if an *elegit* had been issued within the year, or an election entered on the record within that time, to charge the goods and half the land, yet neither of these having been done, it gave the United States no lien as against purchasers or incumbrancers. (*Eppes v. Randolph*, 2 Call., 125, 85; 1 Peters, 386.)

3. Although a *fiery facias* was issued within the year, yet three years having elapsed after it was issued, within which time the liens of the appellees were created and before the next execution issued, that could not properly issue without a *scire facias*, the effect of which would be prospective only—and the first *fiery facias* having been suspended by order of the agent

of the treasury, the United States lost, by this interference and indulgence, any benefit they might have derived for having issued the execution.

He said it was conceded that if a debtor to the United States made a general assignment of his estate, as in the case before the court, they would be entitled to a preference over all the other creditors; whatever might be the dignity of their debts, unless those creditors have some specific lien upon his property. But when that specific lien existed, he contended the claim of the United States to a priority of payment cannot be sustained.

It must be admitted that where any *bona fide* and absolute conveyance is made, the property passes so as to defeat the priority. It has been **130*** supposed that the case of *Thelusson v. Smith* (2 Wheat., 396) had decided that such would not be the effect of an absolute conveyance or prior lien. But this court, in *Conard v. The Atlantic Insurance Company* (1 Peters, 386), have said that the case of *Thelusson v. Smith* has been greatly misunderstood at the bar; and they affirm the law to be as has been now stated. They say, "if before the right of preference has accrued to the United States the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fiery facias*, the property is divested out of the debtor, and cannot be made liable to the United States. The court refer to *The United States v. Fisher* (2 Cranch, 358, 1 Condens. Rep., 421), and *The United States v. Hooe* (3 Cranch, 73, 1 Condens. Rep., 322), for the same principles.

From these authorities it is asserted that the United States have no right to priority of payment by force of the statute over any creditors having specific and perfected liens. If this principle be true, there is at once an end of the question in this case, in the first aspect of it; because some of the appellees have that specific lien by virtue of deeds of trust duly executed, and others by executions actually levied on Morrison's property before the execution of the assignment in October, 1823; and therefore, although the claim of the United States to priority is established by that deed, yet the specific liens have intercepted anything from passing into the hands of the assignee to be derived from the property subject to these liens, unless there should be a surplus after their discharge.

But, if they can claim no priority by force of the statute, then the inquiry is, can they claim the same by virtue of their judgment merely? It will at once occur to the court that the judgment, as such, under no circumstances could create any lien on the personal property of Morrison, and only on half his lands; so that this aspect of the question has reference only to a supposed lien upon one-half of the land.

It is conceded that the judgment created a lien on the land; which, had it been consummated **131*** in proper time and *in a proper mode, would have been available against the claims of the appellees. The nature of the interest of a judgment creditor in the land of his debtor is very distinctly stated by the court in the case of *Conard v. The Atlantic Insurance Company* (1 Peters, 443).

From this authority it fully appears that, as it respects other persons, the judgment gives no available lien unless it is consummated by a levy on the land, and by following up the steps of the law.

Let us now see what are those steps in Virginia, which are essentially necessary to this consummation. In that State the only execution which can issue against the land is the writ of *elegit*, by virtue of which one moiety is extended. In 2 Call, 125, and especially in 186, 187, it is distinctly said by the Court of Appeals what a judgment creditor must do in order to preserve his lien. He must either issue his *elegit* within the year, or enter on the roll, as in England, or in the record book here, that he elects to charge the goods and half of the land, which would be equal to issuing the *elegit*.

If he does neither, he may on motion be allowed to enter the election *nunc pro tunc*; but in the latter case, if there has been an intervening purchaser, the motion will be denied on the principle of relation.

A *scire facias* may indeed be issued to revive the judgment, but that will operate perspective-ly, not so as to avoid mesne alienations here. Now, let us try the case before the court by the standard here laid down.

The judgment was obtained in April, 1822, and not only was no *elegit* issued within the year, but none has ever been issued; nor has there ever been an entry on the record book of an election to charge the goods and half the land. Here, then, is an entire absence of both the requisites, the one or the other of which is declared to be a *sine qua non* to the preservation of the lien created by the judgment.

It is true that all the deeds in favor of the other creditors of Morrison were executed, and all the executions were levied within the year after the rendition of the judgment; and if, therefore, the *elegit* had been issued, or the election *had been entered within the [***132** year, it would have had relation back to the date of the judgment, and have overreached the subsequent liens of the deeds and executions. But neither of these things having been done, we have the authority of the Court of Appeals for saying that the lien created by this judgment overreached nothing.

The doctrine of this case is supported as well by principle as authority. Let us examine the origin of a lien attributed to a judgment. At common law, a judgment did not bind the lands. The lien is the creature of this court, derived by construction from the statute of Edward, which gives to the creditor the election to take half the lands; the court holding purchasers to constructive notice of the judgment.

But it is a rule of law that after twelve months and a day the judgment shall be presumed to be satisfied, so that when that time is suffered to elapse, the party is put to his *scire facias* to remove the presumption before he can issue his execution. (3 Black. Comm., 41.) The purchaser then acting on the presumption produced by the laches of the creditor, it surely is more reasonable that the creditor whose negligence produced a loss should bear it, than the purchaser, to whom it is not imputable.

The common-law principle is supported by

Peters 4.

the Virginia statute, which, in terms, authorizes the creditor to issue execution within the year. In confirmation of this reasoning, cited Gilbert on Executions, 12; 2 Call, 142. If in a real action, where the land itself is recovered, and the demandant suffers the year to elapse without execution, the purchaser is protected; the reason is much stronger where money only is recovered, and other executions may issue than those which affect the land.

The reason of the doctrine in the case of *Eppes v. Randolph*, requiring either the actual issuing of an *elegit* within the year or the entry on the record book of an election to do so, is rendered manifest by seeing the beneficial results which flow from it. The purchaser by these means has fair notice given to him of the intention of the judgment creditor to consummate his lien. This notice is ample to put him **133*** on his guard, and is to every essential purpose equivalent to the notice which is given by the recording of a prior deed. This ease, with the reasoning on which it is founded, would seem to be conclusive against the second ground assumed by the United States; the claim to a priority by virtue of their judgment.

But it is supposed that the case of *Coleman v. Cooke* (6 Randolph, 618), is in conflict with the case of *Eppes v. Randolph*. The court in that case decided that after *fiery facias* levied and returned in part, an *elegit* may be issued without pursuing the *fiery facias* to a return of *nilil*; and that a creditor thus situated is competent to maintain a suit in chancery for the purpose of vacating fraudulent conveyances. They do not, however, decide anything on the subject of lien, as between a judgment creditor and a *bona fide* purchaser; on the contrary, they refer to the case of *Eppes v. Randolph*, and the decision in this case; and distinguish them from that by saying that these cases proceed upon their respective merits, and not upon the question of jurisdiction; and whether right or wrong, do not touch the case under consideration.

As to the ease of *Fox v. Rootes et al.*, in which it is said the whole of the principles claimed by the appellants have been settled in their favor, it may be observed that the case is not reported, and that we have no statement of the facts of the case, so as to enable the court to judge of their bearing and application; and the point decided may be differently understood from what it would be and ought to be. The case seems to have been decided before *Coleman v. Cooke*, and it is, therefore, obvious that it cannot apply to that case; as if it had, that case would have superseded the necessity of most of the discussion in the case of *Coleman v. Cooke*. In the case of *Fox v. Rootes*, the cases of *Coleman v. Cooke* and *Eppes v. Randolph* were referred to, and not overruled, but distinguished from them. Such a decision as is supposed would be against the justice of the case; against the settled rules in *Eppes v. Randolph*, and against the opinion of this court in *Conard v. The Atlantic Insurance Company* (1 Peters, 443).

134* Great injustice would be done to innocent purchasers by holding their purchases to be overreached by a lien after a year, against their presumption. So, too, it would have the effect of making estates unalienable for twenty years; for no man would be safe in laying out

money on land. A *seire facias* is required by the statute where no execution has been issued.

If the lien did not, *per se*, overreach the judgment, then it cannot be sustained that this effect was produced by the execution of that judgment. The *fiery facias* issued in 1822 was suspended until 1825. Another *fiery facias* was issued which was returned *nulla bona*. It has been shown that an execution must, in the first instance, issue within a year and a day, or none can issue without a *seire facias*. Upon principle, then, it would seem to follow that after one execution issued within the year, and more than a year elapsed before a second, in like manner there must be a *seire facias*; and so it is decided that even after a renewal by a *seire facias*, if no execution is issued within a year, there must be another *seire facias*. (Tidd's Practice, 1008.) But executions may be continued down regularly by intermediate continuances, and then another might issue after a year. (1 Strange, 100; 2 Wilson, 82; 6 Bac., 107.) The next step was to allow the party to enter the continuances at any time, and this, although a legal fiction, was well enough between the parties to the suit; but this fiction of law is always applied to promote justice; and accordingly, the court say, in *Eppes v. Randolph*, that whilst a motion may be made to enter an election of one *elegit*, *nunc pro tunc*, it will not be allowed so as to affect intermediate purchasers. (Cited, Tidd, 1003, 4.)

Again, the first execution was suspended in its operation before the levy by order of the treasury, and the greater portion of the liens were created before the second issue. This seems to bring the case within the principle of the cases in 1 Wilson, 44; 2 Johns., 418; 3 Cowen, 272; that wherever a plaintiff in a first execution grants indulgence to the defendant by a delay of execution or sale, the property becomes liable to a second execution.

Now, if an execution actually levied loses its lien by this *indulgence, surely one [***135** never levied, in consequence of an agreement for indulgence, cannot have the effect of continuing a lien, and that, too, upon real estate, which in its nature applies only to personal estate.

The decision in the first case proceeds on the ground that the judgment creditor shall not, by indulgence to the defendant, save his property from other creditors; so he ought not to be allowed to grant that indulgence by a delay which deceives purchasers, and, indeed, involves them in loss. He ought not to be allowed to retain a more general lien produced by judgment, when he extends to the defendant an indulgence; which, in case of a specific lien produced by the actual levy of the *fiery facias*, would be sufficient to divest it, and subject the property to other executions.

Afterwards, on a subsequent day of the term, Mr. Barbour stated that he had received a transcript of a decree made by the chancellor of the Richmond District, affirming the principle of *Eppes v. Randolph*, which was made in March, 1828.

He also asked the attention of the court to the dates in *Coleman v. Cooke* (6 Randolph, 619); from which he said it appeared that on the 19th of February, 1819, the original decree

was made, upon which an execution issued, on which a part only of the money decreed being made; the bill was filed February, 1820, and of course therefore within the year. The question as to the effect of the lapse of more than a year did not therefore arise; and the court say, in p. 630 of the report, that at the time when the bill was filed, the plaintiffs had an existing capacity to sue out *elegits* upon their decrees, which might well be, consistently with the case of *Eppes v. Randolph*, the year not having then elapsed.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The single question in this case is, whether the United States, or certain other creditors of the defendant, John Morrison, have the prior lien on lands of the said Morrison which have been conveyed to those creditors.

In October, 1819, the United States obtained a judgment against John Morrison in the District Court of Virginia, on which a *fiery facias* issued. The goods taken in execution were restored to the debtor according to the law of Virginia, and a bond taken with a condition to have them forthcoming on the day and place of sale. This bond being forfeited, an execution was awarded thereon by the judgment of the District Court on the 2d of April, 1822. A *fiery facias* was issued on the second judgment, the return on which was that the costs were made, and all further proceedings suspended by order of the agent of the Treasury Department. The conveyances under which the defendants claim were dated in February and March, 1823. The United States contend that the judgment of April, 1822, created a lien on these lands which overreaches these conveyances.

There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of the right.

The statute concerning executions enacts that "all persons who have recovered or shall hereafter recover any debt, damages or costs in any court of record, may, at their election, prosecute writs of *fiery facias*, *elegit*, and *capias ad satisfaciendum* within the year for taking the goods, lands and body of the debtor." The third section provides that when any writ of execution shall issue, and the party at whose suit the same is issued shall afterwards desire to take out another writ of execution at his own proper costs and charges, the clerk may issue the same, if the first be not returned and executed; and where upon a *capias ad satisfaciendum* the sheriff shall return that the defendant is not found, the clerk may issue a *fiery facias*, and he shall return that the party hath no goods, or that only part of the debt is levied, in such case it shall be lawful to issue a *capias ad satisfaciendum* on the same judgment; and where part of a debt shall be levied upon an *elegit*, a new *elegit* shall issue for the residue; and where

nihil shall be returned upon any writ of *elegit*, a *capias ad satisfaciendum* or *fiery facias* may issue, and so *vice versa*.

*By the construction put by the Circuit Court on this section, the party who had sued out a *fiery facias* could not resort to an *elegit* until the remedy on the *fiery facias* was shown by the return to be exhausted. The United States had sued out a *fiery facias* on the judgment of April, 1822, and the remedy on that writ was not exhausted in February and March, 1823, when the deeds of trust under which the defendants claim were executed. In the opinion of that court the United States could not, at the date of those deeds, have sued out an *elegit*. As the lien is the mere consequence of the right to take out an *elegit*, that court was of opinion that it did not overreach a conveyance made when this right was suspended.

A case was soon afterwards decided in the Court of Appeals, in which this question on the execution law of the State was elaborately argued and deliberately decided. That decision is, that the right to take out an *elegit* is not suspended by suing out a writ of *fiery facias*, and, consequently, that the lien of the judgment continues pending the proceedings on that writ. This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the State. The decree, therefore, is to be reversed and annulled, and the cause remanded to the Circuit Court, that its decree may be reformed as is required by this opinion.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Fifth Circuit and District of East Virginia, and was argued by counsel; on consideration whereof, this court is of opinion that the claim of the United States to the lands conveyed by the deeds of February and March, 1823, under the lien created by their judgment of April, 1822, ought to have been sustained, and that so much of the decree of the said Circuit Court as dismisses the original and amended bill of the plaintiffs, so far as it claims to charge the property conveyed by the deed of trust of the 14th of February, in the year 1823, from John Morrison to James A. Lane and William Ward, and by the deed of the 21st of February, in the year [*138] 1823, from John Morrison to James W. Ford, and by the deed of the 9th of March, in the year 1823, from the said Morrison to Inman Horner, is erroneous, and ought to be reversed. This court doth therefore reverse the said decree, as to so much thereof, and doth remand the cause to the Court of the United States for the Fifth Circuit and District of Virginia, with directions to reform the said decree so far as it is hereby declared to be erroneous, and to affirm the lien of the United States on the lands in the said deed mentioned. All which is ordered and decreed accordingly.

Cited—13 Pet., 479, 483; 7 How., 765; 2 Black., 433, 603; 1 Wall., 212, 213; 1 Otto, 360; 1 Dill., 567; 5 Blatchf., 391; 2 Cliff., 319; 2 McLean, 80.

139*] *THE COLUMBIAN INSURANCE COMPANY OF ALEXANDRIA, Plaintiff's in Error,

v.

ASHBY & STRIBLING, Defendants.

Insurance—abandonment—case of Chesapeake Ins. Co. v. Stark.

Action on a policy of insurance on the brig Hope, from Alexandria to Barbadoes, and back to the United States. On the outward voyage, the Hope put into Hampton Roads for a harbor during an approaching storm, and was driven on shore above high water-mark. A survey was held, and she was recommended to be sold for the benefit of all concerned. The assured abandoned, and there was no pretense but that the injury which the vessel had sustained justified the abandonment. The question in the case was whether, by the acts of the assured, the abandonment had not been revoked.

There can be no doubt but that the revocation of an abandonment before accepted by the underwriters may be inferred from the conduct of the assured; if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of fact; and is not to be decided by the court as matter of law. [143]

In the case of the Chesapeake Insurance Company v. Stark (6 Cranch, 272), this court lays down the general rule that if an abandonment be legally made, it puts the underwriter completely in the place of the assured; and the agent of the latter becomes the agent of the former, and that the acts of the agent interfering with the subject insured will not affect the abandonment. But the court takes a distinction between the acts of an agent and the acts of the assured. That in the latter case, any acts of ownership by the owner himself might be construed into a relinquishment of the abandonment, which had not been accepted.

But the court in that case did not say, and we think did not mean to be considered as intimating that every such act of ownership must necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment. The practical operation of so broad a rule would be extremely injurious. [144]

ERROR from the Circuit Court of the County of Alexandria, in the District of Columbia.

This was an action on the case brought by Ashby & Stribling against The Columbian Insurance Company of Alexandria, on a policy of insurance on the brig Hope, on a voyage from Alexandria, to and at Barbadoes and back to the United States; the vessel valued at three thousand dollars, and the sum insured being one thousand dollars. The loss was stated to be, "that while the vessel was proceeding on her voyage, and before her arrival at Barbadoes, **140*]** she was, *by storm and peril of the sea, sunk, and wholly lost to the plaintiffs, and did not arrive at Barbadoes." The declaration also avers that the plaintiffs did in due time and form abandon the vessel to the defendants.

The facts of the case are fully stated in the opinion of the court, and the only question before the court was whether, on the evidence laid before the jury, it was competent for the jury to infer, and they ought to infer that Stribling, one of the assured, for himself and his partner, Ashby, had revoked the abandonment made as stated to the insurance company.

Mr. Jones, for the plaintiffs in error, contended that the conduct of Mr. Stribling was a revocation of the abandonment. The persons on board a vessel which may be wrecked are the agents of the assured and the owners; but this does not exclude the insurers from interfering, and, if they think proper, from taking charge of the property; and if the party insured comes in and resists the authority of the assurers, he resumes the title to the property, and the assurers are discharged. (Cited, *The Chesapeake Insurance Company v. Stark*, 6 Cranch, 268.)

In this case the agent of the insurance company was at the place where the vessel was wrecked, and was ready to do everything for the safety of the property, and to get it off. This was prevented by the sale made by the directions of the assured, and against the wish of their agent.

If the owner or master of a vessel does acts wholly inconsistent with the rights of the assured, it is a waiver of the abandonment. (2 Marsh. on Insurance, 614, and cases there cited.)

Mr. E. J. Lee and Mr. Swann, for the defendants in error, denied that after the abandonment was made the insurance company acted in relation to the property assured. The agent of the company left Alexandria before the abandonment was received by the company, and no authority was transmitted to him at Norfolk after the same. All his acts were, therefore, without warrant from the company.

In his letter offering to advance money to get off the vessel, *the liability of the in-[***141** surance company for the loss was expressly reserved. He did not order the sale of the vessel to be stopped for the plaintiffs in error.

This court, on examining the evidence will say it was not such as the jury should have considered sufficient to show that the abandonment was withdrawn or revoked. The whole of the conduct of Mr. Stribling was, in the situation in which he stood, perfectly proper; and the evidence of the auctioneer shows that to have been the case, and that after the sale had commenced he did no more than express an opinion. (Cited, Phillips on Ins., 407; 5 Serg. & Rawle, 506.)

Mr. Jones, in reply, contended that the sending of the agent of the insurers to Norfolk was evidence of authority, and that the reservation in the letter addressed by him to the auctioneer was only to operate if the vessel should be saved, and be put in a situation to proceed on the voyage insured.

Mr. Justice Thompson delivered the opinion of the court:

This case comes up on a writ of error to the Circuit Court of the District of Columbia for the County of Alexandria.

It is an action upon a policy of insurance bearing date the 28th of May, 1825, on the brig Hope, on a voyage from Alexandria to Barbadoes, and back to a port in the United States. The vessel is valued at three thousand dollars, and the sum insured is one thousand dollars.

The loss, as alleged in the declaration, is that the vessel, whilst proceeding on her voy-

Note—Insurance, "rotten clause" in a policy, and what is "a regular survey" under. See note to *Jauney v. The Columbian Ins. Co.*, 10 Wheat., 412. Peters 4.

age, and before her arrival at Barbadoes, was by storm and peril of the seas sunk and wholly lost to the plaintiffs. The whole evidence is spread out upon the record, and upon which the defendants' counsel prayed the court to instruct the jury that it was competent for them to infer, and that they ought to infer from the evidence, that the plaintiffs had revoked the abandonment which they had made to the defendants; which instruction the court refused to give, and a bill of exceptions was duly taken to such refusal. And whether the court erred in refusing to give the instruction prayed, is the only question in the case.

142*] *From the evidence, it appears that captain Brown, the master of the vessel, put into Hampton Roads for the purpose of making a harbor and securing his vessel from an approaching storm, which, from the appearance of the weather, threatened to be very severe. And on the 5th of June, by the violence of the storm, the brig was driven on shore, above high water-mark, near Crany Island. On the next day a survey was held upon her, and the surveyors, after examining her situation and the injury she had received, recommended her to be sold for the benefit of all concerned. And on the 14th of June, Stribling, one of the owners, being at Norfolk, sent a letter of abandonment to the defendants, which was received by them on the 17th of June. There was no pretense but that the injury which the vessel had sustained justified the abandonment. But the question was whether such abandonment had not been revoked, and the circumstances relied upon to show such revocation were, that James Sanderson, the secretary of The Columbian Insurance Company, arrived at Norfolk on the evening of the 16th of June, being before the letter of abandonment was received by the defendants, and on the same evening offered to Stribling, one of the plaintiffs, to supply the money necessary to get the vessel off. And two days afterwards he made the same offer to James D. Thorborn, the agent of the plaintiffs, stating that he had come to Norfolk at the request of the defendants, and to take such measures as he might think advisable for their interests, and to give every aid to the owners of the brig; and he forbid Thorborn and Stribling from proceeding in the sale, which was then about to take place according to an advertisement which had been previously published in the Norfolk papers. But Stribling, on consultation with Thorborn, directed the sale to be continued. The refusal of Stribling to accept the offer of Sanderson to supply the money necessary to get the vessel off, and proceeding in the sale after being forbid by Sanderson, are the acts alleged to have constituted a revocation of the abandonment.

The instruction prayed for to the jury ought not in its full extent to have been given, unless **143*]** the evidence was such as *in judgment of law amounted to a revocation of the abandonment. If the court had only been requested to instruct the jury that they might from the evidence infer a revocation, the prayer would not have been so objectionable. But a positive direction that they ought to infer such revocation, would have been going beyond what could have been required of the court, under

the evidence in the cause. There can be no doubt but that the revocation of an abandonment before accepted by the underwriters, may be inferred from the conduct of the assured; if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of facts; and is not to be decided by the court as matter of law. We do not, however, in the present case, see any evidence which would have fairly warranted the jury in finding that the abandonment had been revoked. The injury was such as to occasion almost an actual total loss of the vessel, and there could have been no possible inducement for the assured to revoke the abandonment. There is no evidence to justify the conclusion that Stribling was acting for his own benefit, and not for that of the underwriters. The assured, by operation of law, became, after the abandonment, the agent of the underwriters, and was bound to use his utmost endeavors to rescue from destruction as much of the property as he could, so as to lighten the burden which was to fall on the underwriters. The assured had received no information from the underwriters whether they accepted or refused the abandonment. Nor did Sanderson, who professed to act as their agent, communicate any information to Stribling on that subject; and it would seem from the testimony of Thorborn that the conduct of Sanderson was calculated to cast some suspicion upon his motives. He says "he then thought, and still thinks, the course pursued by him must have been designed to perplex and embarrass the persons who were engaged in the management of the affairs of the vessel; since his letter was not delivered until the sale had *commenced, and no [***144** authority was shown by him from the defendants to make arrangements for getting the vessel off, or to defray the expense that had already been incurred on her account." Although Stribling knew Sanderson, as secretary of the Columbian Insurance Company, he could not thereby know that he was clothed with authority to bind the company by whatever arrangement he should make. His authority as secretary did not clothe him with any such power. It is true Stribling did not demand of him to show his authority from the company, and this might be considered as open to the conclusion that such authority was admitted; but all this was matter for the consideration of the jury, and the court could not assume that he was or was not authorized to bind the underwriters.

In the case of *The Chesapeake Insurance Company v. Stark* (6 Cranch, 272), this court lays down the general rule that if an abandonment be legally made, it puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former; and that the acts of the agent, interfering with the subject insured, will not affect the abandonment. But the court takes a distinction between the acts of an agent and the acts of the assured; that in the latter case, any acts of ownership, by the owner himself might

be construed into a relinquishment of an abandonment, which had not been accepted.

The court in that case did not say, and we think did not mean to be understood as intimating, that every such act of ownership must necessarily, and under all possible circumstances be construed into a relinquishment of an abandonment. The practical operation of so broad a rule would be extremely injurious.

It would deter owners from interfering at all for the preservation of the subject insured, and leave it to perish for fear of prejudicing their rights under the abandonment. All such acts must be judged of from the circumstances of each case. The *quo animo* is the criterion by which they are to be tested.

If in this case Stribling, the owner, had become the purchaser of the brig, and had got **145***] her off and fitted her up, it *would have afforded very strong, if not conclusive evidence of a relinquishment of the abandonment. But such was not the fact, and whatever he did appears to have been done in good faith and with a view to the preservation of the property. But this case is very distinguishable from that of *The Chesapeake Insurance Company v. Stark*. There the underwriters had refused to accept the abandonment, and the court applied the rule to that case. In such a case the assured is at liberty to revoke the abandonment. But here the owner did not know whether the underwriters would refuse or accept the abandonment. No answer had been received to the letter of abandonment, and the assured was left in uncertainty as to his right of revocation. We think, therefore, that there was no act of ownership exercised by Stribling which the law would pronounce a revocation of the abandonment, or which called upon the court below to instruct the jury that they ought to infer a revocation from any such acts.

The other circumstance relied upon is that Sanderson, who professed to act as the agent of the underwriters, offered to supply the money necessary to get the vessel off and put her in a situation to pursue the voyage.

What effect this offer would have had upon the right of the assured to abandon, until the experiment to get off the vessel had been tried, provided such offer had been unconditional and made before the abandonment, either by the underwriters themselves, or by an agent fully authorized for that purpose, is a question upon which we give no opinion; the case does not require it. The authorities on this point do not appear to be in perfect harmony. (6 Mass. Rep., 484; 5 Serg. & Rawle, 509; 3 Mason, 27; 2 Term Rep., 407; 2 Wash. C. C. Rep., 347.)

The present case, however, is not accompanied with these circumstances. The abandonment here had actually been made before the offer to pay the expenses of getting off the vessel, and no answer from the underwriters had been received, nor did Sanderson undertake to decide that question for them. Although he professed to act as the agent of the underwriters he showed no authority for that **146***] purpose; and *one of the witnesses swears that he thought the course pursued by him was designed to perplex the proceedings in relation to the vessel; and his letter to Thor-

burn, making the offer of the money, has this condition: "I reserve to the company all right of defense, in case they should not be liable for any part of the expenses attending the business.

Under such circumstances it is very clear the assured could not be required to waive an abandonment, which, from anything that he knew, might at that time have been accepted; in a case, too, where there was a clear and undeniable right to abandon.

The court below did not, therefore, err in refusing to instruct the jury that they ought to infer from the evidence that the abandonment had been revoked.

The judgment must be affirmed.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with cost and damages at the rate of six per centum per annum.

See S. C., 13 Pet., 331.

Cited—10 How., 308; 2 Curt., 68, 337; Woolw., 286.

*SAMUEL D. HARRIS, Marshal of [***147**
the United States for the District of Massachusetts, *Plaintiff in Error*,
v.

JAMES D'WOLF, JUN., *Defendant in Error*.

Conditional assignment of vessels and cargoes—attachment by the United States—replevin—unpaid duties—case of Conard v. Atlantic Insurance Company—failure to deliver bill of lading to assignee—Act of March 2d, 1799.

The plaintiff in replevin, James D'Wolf, claimed the merchandise under an assignment executed by George D'Wolf and John Smith to him, in consideration of a large sum of money due by them to James D'Wolf, and in consideration of advances to be made to them by him. The assignment transferred four vessels and their cargoes, three of which vessels were then at sea, and one in New York ready to sail, the property of the assignors. The assignment was to be void on the payment to James D'Wolf of the money due to him; and if it should not be paid, the assignee to enforce the pledge by process and arrest in all countries or places whatsoever, and to sell the same for the payment of the amount due by them, the assignor, to George D'Wolf. The merchandise for which this action of replevin was instituted was part of the return cargo of one of the vessels. The defendant, Harris, pleaded that the merchandise was not the property of the plaintiff, but of George D'Wolf and John Smith; and justified the taking of the goods of the plaintiff, as marshal of the District of Massachusetts, by virtue of a writ of attachment sued out in the District Court of the United States for the District of Massachusetts, in which suit judgment was obtained against George D'Wolf. On the trial the plaintiff in the replevin proved the assignment, that large sums of money were due to him by George D'Wolf and John Smith, that the goods were part of the property assigned, that he had used all proper means to take possession of the goods, but was prevented by the attachment issued by the United States. The defendant proved that the goods were imported into the United States by D'Wolf and Smith, and that at the time of the importation they

were indebted to the United States for duties which were due and unpaid to an amount exceeding the value of the merchandise attached, and that the Octavia, and one of the vessels assigned, with a cargo on board ready for sea, was at New York at the time of the assignment; which ship was not delivered to James D'Wolf, the assignee, nor were the bills of lading assigned, the cargoes on board the vessels being consigned to the masters for sales and returns.

BY THE COURT: In the case of Conard v. The Atlantic Insurance Company (1 Peters, 306), it was decided that the nondelivery of a vessel assigned to secure or pay a *bona fide* debt did not make the assignment absolutely void. This court is well satisfied with that opinion.

The deed of assignment conveyed to the assignee a right to the proceeds of the outward-bound cargoes on board the vessels assigned to James D'Wolf.

The failure of George D'Wolf to deliver to the assignee the copies of the bills of lading which were in his possession, did not leave the property subject to the attachment of creditors, who had no notice of the deed. It was held in the case of Conard v. The Atlantic Insurance Company that such a transfer gives the assignee a right to take and hold those proceeds against any person but the consignee of the cargo, or purchaser from the consignee without notice.

148*] *That the consignees of the merchandise were indebted to the United States on duty bonds remaining due and unpaid at the time of the importation, did not under the sixty-second section of the Act of March 2, 1799, make the merchandise, as to the United States, the property of the consignees, notwithstanding the assignment; and make the attachment of the United States for the debt due to them sufficient to bar the action of replevin brought by the assignee.

THIS case came before the court by writ of error to the Circuit Court of Massachusetts.

In the Circuit Court the defendant in error instituted an action of replevin to recover a quantity of merchandise claimed by him under a special assignment executed to him by George D'Wolf and John Smith to secure debts *bona fide* due to him, and which merchandise had been seized by Samuel D. Harris, the defendant in the suit, as marshal of the United States, under executions issued at the suit of the United States against George D'Wolf and John Smith, on judgments obtained against them for duties.

The marshal claimed to hold the merchandise as subject to the executions; and the cause was tried in the Circuit Court in December, 1827, and a verdict under the charge of the court was given for the plaintiff. At the trial the defendant prayed the court to give certain instructions to the jury which the court refused to give; to which refusal the defendant excepted, and prosecuted this writ of error. These instructions appear in the opinion of the court.

The case was submitted to the court without argument by the counsel.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment of the Court of the United States for the First Circuit and District of Massachusetts, in an action of replevin claiming the restitution of twenty-three cases of silks which had been attached at the suit of the United States, against George D'Wolf. The property was claimed by the plaintiff in replevin, under a deed dated on the 19th of November, 1822, executed by George D'Wolf and John Smith, in which they acknowledged themselves to be severally indebted

to the said James D'Wolf in large sums [*149 of money, and agreed, in consideration thereof, and in consideration of other advances to be made by the said James D'Wolf, to convey, and did convey to the said James D'Wolf the ship Octavia, then lying in the port of New York nearly ready for sea, and the three brigs Quill, Arab, and Friendship, then actually at sea, their tackle, &c., and the proceeds and investments of their cargoes, &c., which said vessels and cargoes were the property of the said George D'Wolf and John Smith. To this conveyance a condition was annexed that it should be void on the payment to James D'Wolf of the money which should be due to him, on the failure to pay which it should be lawful for the said James D'Wolf at any time or times to enforce the pledge by process and arrest of the premises or any part thereof in all courts or places whatsoever, and cause the same to be sold, and the proceeds to be applied in satisfaction of the moneys which may then be due from them or either of them. The silks were part of the return cargo of one of these vessels.

The defendant pleaded that the said silks were not the property of the plaintiff, but of George D'Wolf and Smith; and justified the taking thereof, as marshal of the district, by virtue of a writ of attachment sued out of the Court of the United States for the said district, in which suit the United States obtained judgment against the said George D'Wolf.

At the trial the plaintiff proved his deed of assignment, that the silks were part of the proceeds of the cargoes of the ship Octavia and brig Arab, that he had used all proper means to take possession of them, and that they were attached by the defendant, as marshal, by virtue of process sued out by the United States. He also proved debts against George D'Wolf and John Smith, severally, on account of his advances for them, which were intended to be secured by the deed of assignment, to a very large amount.

The defendant proved that the said silks were imported into the United States, consigned to George D'Wolf and John Smith, and that at the time of the importation of said silks, said George D'Wolf and John Smith were indebted to the United States in bonds given by them respectively for *duties which were then [*150 due and unpaid, to an amount much exceeding the value of the silks replevied. The defendant also proved that at the time the deed of assignment was executed the ship Octavia lay at New York with her cargo on board, nearly ready for sea; but that possession was not delivered, nor were the bills of lading indorsed or delivered to the plaintiff. The cargoes were consigned to the several masters for sales and returns.

Many other circumstances were given by the plaintiff in evidence to show the fairness of the deed of assignment, which were met on the part of the defendant by other circumstances, on which he relied to show that in point of law it was fraudulent. These do not affect the opinions given by the Circuit Court to which exceptions were taken, and therefore are not recited.

After the testimony was closed, the defendant's counsel moved the court to instruct the jury that the deed of assignment was fraudulent.

lent as to creditors, and void. This instruction the court refused to give; but left it to the jury to determine upon all the evidence of the case whether the said deed was executed with an intent to defraud or delay the creditors of the said George D'Wolf and John Smith, and if so executed, then the same was fraudulent and void as to such creditors.

As the whole question of fraud was submitted to the jury, it is incumbent on the plaintiff in error, if he would support this exception, to show some defect in the deed itself, which makes it absolutely void as to creditors, whatever may be the fairness of intent with which it was executed. He relies on the fact that possession of the Octavia was not delivered as making the deed of assignment absolutely void.

This question was decided upon full consideration in the case of *Conard v. The Atlantic Insurance Company* (1 Peters, 386), and this court is well satisfied with that opinion.

The counsel for the defendant also prayed the court to instruct the jury that although the deed of assignment might be valid, it could not transfer a right to the proceeds of the outward-bound cargoes; which instruction the court refused to give.

151*] *This question also is decided in the case of *Conard v. The Atlantic Insurance Company*.

The counsel for the plaintiff also moved the court to instruct the jury that the failure of George D'Wolf and John Smith to deliver to James D'Wolf the copies of the bills of lading which were in their possession, severally, when the bills of lading were executed, leaves the property subject to the attachment of creditors who had no notice of the deed. This instruction the court refused to give.

In the case of *Conard v. The Atlantic Insurance Company* the court determined that a deed of assignment such as was executed in this case, was capable of transferring the right to the proceeds of the outward cargo as between the parties; of consequence such transfer gives the assignee a right to take those proceeds and hold them against any person but the consignee of the cargo, or person who is a purchaser from the consignee, without notice. These principles were settled in the case which has been already cited.

The counsel also moved the court to instruct the jury, that if the consignees of the said silks were at the time indebted to the United States on duty bonds remaining due and unpaid, then, that by virtue of the sixty-second section of the Act for the collection of duties, passed the 2d of March, 1799, the said goods were, as to the United States, the goods of the said consignees, notwithstanding the said deed, and in the legal custody of the said collector; and that the attachment in favor of the United States was good and sufficient to bar the action.

This instruction was refused.

This question was considered and determined in the case of *Harris v. Dennie*, decided at this term.

The questions raised in this cause have all been decided in this court as they were decided by the Circuit Court. There is no error in the opinions to which exceptions have been taken, and the judgment of the Circuit Court is affirmed with costs.

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*JOHN BEATY, Plaintiff in error, [*152
v.

THE LESSEE OF A. KNOWLER ET AL.,
Defendant in Error.

Tax sale—provision in act that it should be "public"—authority of a corporation—construction of charter.

Ejectment. The defendant claimed the land in controversy under a tax sale which was made by a company incorporated by the Legislature of Connecticut in 1796 called "the proprietors of the half million of acres of land lying south of Lake Erie," and incorporated by an Act of the Legislature of Ohio, passed on the 15th of April, 1803, by the name of "The proprietors of the half million of acres of land lying south of Lake Erie, called the sufferers' land." In 1806 the Legislature of Ohio imposed a land tax, and authorized the sale of the lands in the State for unpaid taxes, giving to the owners the right to redeem within one year after the determination of their minority. This act was in force in 1808. In 1808 the directors of the company, incorporated by the Legislatures of Connecticut and Ohio, assessed two cents per acre on the lands of the company for the payment of the tax laid by the State of Ohio, and authorized the sale of those lands on which the assessments were not paid. The lands purchased by the defendant were the property of minors at the time of the sale, they having been sold to pay the said assessments under the authority of the directors of the company. Held, that the sale of the land under which the defendant claimed was void.

The provisions in the Act of Incorporation of Ohio that it should be considered a public act must be regarded in courts, and its enactments noticed without being specially pleaded, as would be necessary if the act were private. [167]

That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the Act of Incorporation. [168]

From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain those objects. [171]

The words, "all necessary expenses of the company," cannot be so construed to enlarge the power to tax, which is given for specific purposes. A tax by the State is not a necessary expense of the company, within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers. [171]

The provision in the tenth section, "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the State," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. [171]

FROM the Circuit Court of Ohio.

This was an ejectment for lands in the State of Ohio; and on the trial in the Circuit Court the defendant excepted to the charge of the court, and prosecuted this writ of error.

*The facts are fully stated in the [*153 opinion of the court.

The case was argued by *Mr. J. C. Wright* for the plaintiff, and by *Mr. Vinton* for the defendant.

Note—Corporation, limited to the exercise of the powers specially conferred upon it.

A corporation has no power except what is given by its incorporation act, either expressly or as incidental to its existence, and its express power. *Beaty v. Knowler, supra*; affirming *S. C.*, 1 McLean, 41; *Perrine v. Chesapeake and Delaware Canal Co.*, 9 How., 172; *Russell v. Topping*, 5 Mc-

Mr. Wright contended that the court below erred in their instruction to the jury.

1. In instructing the jury that the directors of the company incorporated by the Legislature of Connecticut in the year 1796, designated as "The proprietors of the half million of acres of land lying south of Lake Erie," and by a law of Ohio passed the 15th of April, 1830, had no legal authority to assess the tax on the land for the nonpayment of which it was sold.

2. That the proprietors of the land included in the provisions of the acts, who were minors, were not bound by the assessment of the tax and the sale of the land.

He said the only questions which arose on the case are these; nothing else was excepted to on the trial.

Those instructions involve the construction of certain laws of Connecticut and of the State of Ohio, which, in general, have received no interpretation from the courts in those States.

The correctness of the instructions will depend on the law of Ohio, that of Connecticut having been introduced to show the history of the transaction out of which this controversy has arisen. But as the company was organized under the law of Ohio, and in a manner entirely different from that of the law of Connecticut, and the tax was laid according to its provisions, that is to be put out of the question.

It was objected to the validity of the assessment of the tax that the charter does not authorize the directors to assess a tax to pay that levied by the Legislature of Ohio. It is conceded at once that the power is not given in express terms, but is fully included in the several powers to assess a tax. Act of the 15th of April, 1803, sec. 2.

The plain and obvious reading of this grant of power is, "to defray all necessary expenses of the said company in purchasing and extinguishing the Indian claim of title, surveying, locating, making partition of the land; and to **154**"] defray *all other necessary expenses of said company, power is given," &c.

Two descriptions of powers are confided to the directors by this provision. The first relates to expenses necessary for specified objects, and the second is equally plenary to all purposes; "to defray the necessary expenses of the said company."

This power is also included in the tenth section of the act, "to do whatever shall to them appear necessary and proper for the well order-

ing and interest of the company, not contrary to the laws of the State.

If the directors, in the exercise of their discretion, thought the money to be raised by this assessment was proper to defray necessary expenses, or useful for the well ordering of the company, they had full power to lay the tax. It would be difficult to employ words to convey a more unlimited discretion to the directors, and their view in laying the tax is clearly developed in the vote:

"Voted, unanimously, that a tax of two cents on the pound be assessed to defray the expenses of a tax laid by the Legislature of Ohio, &c., and all other necessary expenses for the good of the proprietors of the said land."

If the directors had power to assess the tax, then, 2. Were the infant lessors bound by the assessment?

It will hardly be contended that minors cannot in any event be clothed with powers as corporators; that is indisputable. The resolve of the State of Connecticut released and quit-claimed to eighteen hundred individuals named in the act, the half million of acres, "and to their legal representatives where dead, and to their heirs and assigns forever." (Swan's Ohio Land Laws, 81 to 100.) The ancestor of the lessors of the plaintiff was then alive, and one of the persons named in the resolve. He took an estate in fee as a tenant in common with all the others. In 1792 Connecticut constituted these grantees a corporation, and gave them, their heirs and assigns, succession as corporators; and provided that the expenses and taxes should only be a charge on the land. The ancestor of the plaintiff's lessors, with the other grantees, organized the corporation under this act, and partook of all the powers it conferred. By his death in 1800, *the in- **[155** terest he held in the land devolved upon his heirs subject to the corporation; and by the very terms of the charter they took his place as corporators, representing together in the corporation the interest their parent had represented alone. These heirs were owners and proprietors of their ancestor's share in the lands when Ohio incorporated them with all "the owners and proprietors." This suit was brought in 1825, when all the heirs were probably of age, as the tax was laid in 1808.

Under the law, the lands were divided, and two thousand four hundred acres were set

Lean, 194; Dartmouth College v. Woodward, 4 Wheat., 518 636; Blair v. Perpetual Ins. Co., 10 Mo., 559; Beatty v. Marine Ins. Co., 2 Johns., 109; N. Y. Firemen's Ins., Co. v. Ely, 2 Conn., 678, 699; Hosack v. College of Physicians, 5 Wend., 547; Brady v. Mayor of N. Y., 20 N. Y., 312; 7 Bosw. N. Y., 601.

It is a general rule that corporations can only act in the manner prescribed by law. Their power is derived only from their act of incorporation. Head v. Providence Ins. Co., 2 Cranch, 127.

A corporation has only such powers as its charter gives, either expressly, or as incident to its existence. Without clear legislative authority to do so, no corporation can mortgage its franchises. Authority to mortgage its "road, income, and other property," does not authorize a mortgage of its franchises, though such authority includes the power to make a deed of trust in the nature of a mortgage. Pullan v. Cincinnati R. R. Co., 4 Biss., 35.

A corporation has power to make commercial notes without express authority. Matter of Herule M. L. Assurance Soc., 6 Ben., 35.

A corporation created by statute has no rights and can exercise no powers except such as are expressly given or necessarily implied. Huntington v. Savings Bank, 6 Otto, 388; Wheeling v. Mayor of Baltimore, 1 Hugh., 90.

Notwithstanding the liberality of construction of conferred powers, it must still be regarded as the rule that a corporation can exercise no powers to take and hold property except what is given by its act of incorporation, either expressly, or such as are incidental to its express powers. New London v. Brainard, 22 Conn., 522; Strauss v. Eagle Ins. Co., 5 Ohio St., 59; Commonwealth v. Erie and North East R. Co., 27 Penn. St., 339; City Council of Montgomery v. Plankroad, 31 Ala. N. S., 76; Caldwell v. City of Alton, 33 Ill., 416; 1 Potter on Corp., sec. 28; Smith v. Morse, 2 Cal., 524; McMullen v. City Council of Charleston, 1 Bay., 46; People v. Utica Ins. Co., 15 Johns., 358; N. Y. Firemen's Ins. Co. v. Ely, 5 Conn., 560; State v. Washington Social Library Co., 11 Ohio, 96; Boyce v. City of St. Louis, 29 Barb., 650; 18 How. Pr. N. Y., 125; State v. Mayor of

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apart for the interest of Douglass, the ancestor of the lessors of the plaintiff. This division the lessors recognize and ratify. They bring suit for a part of the allotment assigned to them in the division, and not for an undivided sixth of the two thousand four hundred acres, part of the five hundred thousand acres. They avail themselves of the Act of Incorporation, and yet claim they are not corporators, nor bound by the acts of the directors under it.

The adult, as well as the minor heirs, have all gone on as corporators. No dissent was ever expressed; but, on the contrary, all, as one, represent the share. If these minors are not bound by the acts of the corporation, all remains as at the death of their ancestor in 1808, and the partition must be gone into anew; and the separate allotment, under which the forest has disappeared and the wilderness has been made to blossom as the rose, is all to be done away, and the lands thrown into common. Everything in the country will thus be thrown into confusion.

Would this be just to the co-tenants? and yet it is the inevitable result of the principles given in the instructions to the jury.

Mr. Vinton, for the defendant in error, contended,

1. That the lessors of the defendant in error were not parties to or bound by said acts of incorporation.

2. That the directors under the Ohio Act of Incorporation had no power to assess a tax to pay a State tax of that State.

3. That the tax was void for uncertainty, it being assessed in part for undefined purposes.

156* 4. That the sale being conducted contrary to the manner prescribed by the laws of Ohio, was void.

5. The sale was void because the collector omitted to give the notice required by said Act of Incorporation of the time when the tax would become due.

It has been holden by this court that a grant to a private corporation is a contract; and consequently, to bind the corporators, their assent, express or implied, must be had. (*Dartmouth College v. Woodward*, 4 Wheat., 659, 657, 682; *Ellis v. Marshall*, 2 Mass., 275, 279.)

It therefore becomes necessary to inquire if this is a private corporation, and, if so, whether the defendants in error had, by their assent, express or implied, made themselves parties to it. In 4 Wheat., 668, 669, public corporations

are defined "to be such only as are founded by the government for public purposes, where the whole interests belong also to the government." This definition will test the character of the corporation in question. The entire interest of this corporation consisted of private property, and the purpose of the act was the regulation of that property for the benefit of the proprietors.

The government of Ohio had no interest in the corporation, nor did it seek to attain any purpose of its own by the Act of Incorporation. The declared objects of the act were to enable the proprietors of the sufferers' lands "to extinguish the Indian title, to survey them into townships or otherwise, and make partition of them among themselves." These are all private purposes, intended for their own emolument and advantage. The corporation is, therefore, in its nature, a private corporation. Here an inquiry arises as to the effect of the last section of the Act of Incorporation, which declares that act to be a public act. A similar enactment has been introduced into the bank charters of that State which no one ever imagined to be public corporations on that account. The evident intention of this declaration is not to change the nature of the corporation, but to relieve the corporators from the inconvenience of special pleading and making proof of their corporate existence, according to the usages of the common law. To this extent the provision is politic and reasonable; but to go beyond that ***157** and give it the effect of making the corporation a public corporation in the sense of the definition laid down, would be unreasonable, and according to the principles settled by this court in the *Dartmouth College* case, not in the power of the Legislature of Ohio. (4 Wheat., 671, 672.)

This brings us to the question of assent. No express assent by the defendants in error to this Act of Incorporation is pretended.

An implied assent is relied upon. Jonathan Douglass, the ancestor of the defendants in error, died in 1800. The Act of Incorporation by the Legislature of Ohio was passed in 1803. And in 1808 the land in controversy was sold to pay a tax assessed under that act. At the time of the sale four of the defendants in error were minors, and, consequently, not able in law to contract or assent to become corporators.

Assent, in such a case, is not one of the exceptions to the legal disabilities of infants. Lapse

Mobile, 5 Port., 279; *The President of Jacksonville v. McConnell*, 12 Ill., 138; *Petersburgh v. Mappin*, 14 Ill., 193; *Oakland v. Carpenter*, 13 Cal., 540; *Martin v. Nashville Building Association*, 2 Cal., 418; *Shand v. Henderson*, 2 Dow. Parl. Cas., 519; See also *Gozler v. Corporation of Georgetown*, 6 Wheat., 593; *Jackson v. Brown*, 5 Wend., 590; *Sumner v. Marcy*, 3 Wood. & M., 105; *Blanchard's Gun-Stock Turning Co. v. Warner*, 1 Blatch. C. C., 258; *Trustees of South Newmarket Methodist Society v. Peaslee*, 15 N. H., 317.

All incidental powers may be exercised by them or by their officers or agents. *Smith v. Eureka Mills*, 6 Cal., 1.

Besides the express and substantive powers conferred by their charters, corporations take, by implication, all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers. *New England Fire and Marine Ins. Co. v. Robinson*, 25 Ind., 536; 1 Barb., 184; 1 Sand. Ch., 280; *Madison Plankroad v. Watertown Plankroad Co.*, 5 Wis., 173; *Clark v. Peters* 4.

Farrington, 11 Wis., 306; 1 Black. Com., 474; 1 R. S. N. Y., 599; *Leavitt v. Blatchford*, 5 Barb., 10.

But powers that would impair vested rights are never raised by implication, nor is a principal power or grant conferred by statute or charter to be construed to carry, as an incident, anything not implied in the principal; not usually appurtenant to it, and not possessed of a similar character. Nor can it be held to include anything which would have been refused as a principal thing, or anything which, on the most liberal construction, is not necessary and proper to carry the principal express powers into effect. *Morris & Essex R. R. Co. v. City of Newark*, 2 Stock., 352; 2 Kent's Com., 298, 299; 9 Conn., 180; 5 Conn., 560; 2 Cranch, 127; 15 Johns., 383; 15 Wend., 259; 5 Taunt., 792; 2 Cow., 667, 668; *Sumner v. Marcy*, 2 Wood. & M., 105, 168.

As to corporations being bound by acts and contracts of agents not in writing, see note to *Mechanics' Bank v. The Bank of Columbia*, 5 Wheat., 326; also *Fleckner v. The United States*, 8 Wheat., 338.

of time is relied upon to raise a presumption of assent; the common law fixes the period at which the presumption arises at the end of twenty years, which had not elapsed when this suit was instituted. The counsel for the plaintiff in error has argued that the present claimants took the estate of their ancestor as he left it; and has, on this ground, endeavored to make out the power of the Legislature of Ohio to bind them by its act because the Legislature of Connecticut had, in 1796, incorporated the proprietors of these land to enable them to effect similar objects.

There is no proof that Jonathan Douglass ever gave his assent to the Connecticut act, and if he did, it has no connection with the present case. The affairs of the Connecticut corporation were conducted by a board differently organized and called by a different name from the board of directors which assessed the tax under which the land in controversy was sold. The proceedings now called in question were had under the act of Ohio. Douglass died in 1800, and it could not be one of the conditions on which his heirs inherited his estate, that they should become parties to an act of incorporation that the State of Ohio, which then had **158***] *no being as a State, might pass three years after his death. Nor does it follow that because the ancestor or his heirs were parties to one corporation, that therefore they were bound to become parties to a new and distinct corporation, created by another and independent authority. It has been urged upon the court that if this doctrine prevail it will overturn a great amount of property; but that no more proves the fact of assent than if it would only overturn a small amount. It has been further contended that the suit now pending is predicated from the partition made by the directors under the Ohio Act of Incorporation, and, consequently, affirms their proceedings and estops the defendants in error from denying the fact of their assent. No principle of law is better settled than that one tenant in common may bring an ejectment against his companion to be let into possession. Every such tenant has a right to the common enjoyment of the whole and every part of the premises, and against all strangers he has an exclusive right of possession to the whole and every part thereof. From this principle it follows, as a necessary consequence, that he has a right to his possessory action against such stranger for the whole or any part of the premises. The suit, then, against the plaintiff in error as a trespasser upon a specific part of this grant of the land, is no admission by the defendants of a partition; and, consequently, is no affirmance of the partition, if any was made by the directors, which the record does not show.

2. The second point denies the authority of the directors to assess the tax in question. In the case of *Head v. Providence Insurance Company* (2 Cranch, 167; 1 Condens. Rep., 371), the court say that "a corporation may correctly be said to be precisely what the Incorporating Act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner that act authorizes;" and in 4 Wheat., 636, this court defines a corporation in these words: "It is the mere creature of the law, and possesses only those properties

which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Its powers are, therefore, to be construed strictly. *To determine the [***159** question of the power of the directors to assess the tax, it is necessary to look into the Incorporating Act, and to examine it in all its parts.

It is not pretended that the act confers an express grant of power to assess the tax. The inquiry then arises, was the power incidental to the existence of the corporation? A formal and specific enumeration of the purposes for which the corporation was created is set out in the preamble, and also in the second section of the act.

They are, "to extinguish the Indian title to the grant of a half million acres of land, to survey and locate the same into townships or otherwise, and to make partition among the proprietors." To effect these objects, and to defray all other necessary expenses of said company, power was given to the directors to levy taxes. Was the tax assessed by the State of Ohio a company charge or expense? The tax of the State was a lien upon the estate of each tenant in common, which his companion was no more bound to pay than he would be to discharge the lien of a judgment at law or a mortgage of his co-tenant. The twenty-third section of the Act of Ohio assessing the State tax, is conclusive of this point.

It enacts that when any tract of land charged with tax is owned by two or more persons, the collector shall receive from any person tendering the same, his or her proportion of the tax due thereon.

Under this provision of the act, any one of the proprietors might, by paying his proportion of the tax, discharge the lien of the State upon his estate. And his interest could no more be affected by the sale of the right of his companion for nonpayment than if that right were conveyed away by the companion himself, or sold to pay a judgment at law. The tax of the State, then, was not a company charge; nor was the payment of it by the company in any way necessary or incidental to the existence of the corporation. Again, was the aid of the corporation necessary to enable the State to collect its tax? The power of the State to collect its own taxes by its own agents cannot be denied.

If, therefore, we find the State did create its own agents *for the collection of this [***160** tax, and put into their hands all the necessary means to discharge this duty, every presumption in favor of collecting it by the agents of the corporation is excluded. On looking into the tax law of Ohio, we find the tax covered all the lands in the State, the company's lands included; that agents were appointed to collect all the tax without any exception; for this purpose the State was divided into collection districts, one of which embraced the land in controversy. The aid of the company, therefore, was not necessary to a perfect execution of the law of Ohio; and the means provided by the Legislature for its execution excludes the idea that it relied upon this corporation for any such assistance as it thought proper to volunteer.

But it has been insisted that the tenth section of the Act of Incorporation confers upon the directors the power to assess a tax to pay a tax

of the State. It empowers them, in general terms, to do whatever to them shall appear necessary and proper to be done for the well ordering and interest of the proprietors, not contrary to the laws of Ohio. This section contains no specific and substantive grant of power. It ought, therefore, to be construed to be a general grant of the means necessary and proper for the execution of the specified purposes of the act of incorporation.

So understood it does not, in fact, enlarge the powers of the corporation, and seems to have been introduced into the act from abundant caution.

3. Before the examination of the remaining points, it may be proper to notice an objection that has been urged by the opposing counsel. It is insisted that we are not at liberty to present either of these points to the court because they do not form part of the opinion of the court below to which exceptions were taken at the trial. The objection is predicated from the supposition that the writ of error was sued out to reverse the opinion of the court, instead of the judgment itself. The writ covers the whole record; and if it shall appear from an inspection of it that there is no error in the judgment, it cannot be reversed, whatever may be the errors in the opinion of the court.

The record sets out the proof of the title of **161***) the plaintiffs *below. It is a perfect title. The title of the defendant below, as proved by him, is also spread upon the record. If that title is defective, it cannot avail him against the perfect title of his opponents. We are, therefore, at liberty to examine that title as it appears on the record.

The third objection, then, is that the tax was void, being assessed in part for undefined purposes. The objects of the tax are declared in the resolution of assessment to be "to defray the expenses of a tax laid by the State of Ohio, and other necessary expenses for the good of the proprietors of the said land." The taxing power of the corporation is limited to certain purposes specified in the Incorporating Act, which would doubtless include the means necessary and proper for the full attainment of those purposes. It must be exercised within those limits, and in such a manner that it can be known with certainty whether they have been exceeded. If otherwise, its assumptions of power could neither be detected nor controlled. For example, let it be conceded that the corporation had no power to assess a tax to pay a tax of the State; is it not apparent that a tax for that purpose might be assessed under the vague terms "for the good of the proprietors?" The undefined portion of the tax must therefore be void.

The tax is one entire and indivisible thing, and if void for part, it must be for the whole. It cannot be ascertained how much of the land in controversy, if any part of the tax was authorized, was sold to pay the valid, and how much the invalid portion of the tax.

4. The sale was contrary to the laws of Ohio. By the tenth section of the Act of Incorporation the directors were restrained from doing those things that were contrary to the laws of the State. The collectors of the State tax were required to reside in their collection districts, to give bond and security to the State for the

faithful collection and paying over the tax to the State treasurer. The sale and collection in this case was made by a company collector, residing in a distant State, who gave no bond to the State nor was in any manner accountable to it. The sale was made without the reservation of the right of redemption, which the law of *Ohio secured to infants and [***162** to others laboring under legal disabilities. The collectors for the corporation exacted fees and charges not allowed by the laws of Ohio, and thus increased the amount of the tax beyond what the State collector was authorized to receive.

In all these particulars and others that might be enumerated, the sale was contrary to the settled law and policy of Ohio, and therefore vicious.

5. Admitting the corporation had the power to assess and collect the tax in question, still, in making the collection, the company's collector did not conform to all the requisites prescribed to him by the Act of Incorporation. That act requires the collector to give notice of the time when the tax became due by advertising the same for at least three weeks in a newspaper published in each of the counties of New Haven, Fairfield, and New London, in the State of Connecticut. If the tax was not then paid, the collector was required to make another and further publication of the time and place of sale, for default of payment.

The record shows an advertisement of sale for nonpayment, but does not show that proof was made of an advertisement of the time when the tax became due. The cases of *Williams v. Peyton* (4 Wheat., 79, 83), and of *Parker v. Rule's Lessee* (9 Cranch, 64), are expressly in point, and they show conclusively that the advertisement cannot be presumed in the absence of proof, and that its omission is a fatal irregularity.

Mr. Wright, in reply, contended that the provisions of the law of Ohio under which the tax was assessed laid the tax on the whole body of the lands owned by the eighteen hundred persons. It was a common charge on the whole lands, which at the time were held by the proprietors undivided. It was consequently a necessary expense upon the company, for which the directors were authorized to provide by the assessment of a tax. The law of Ohio looked to the land for the tax, and required the collectors to sell for the collection of it; and for the tax due on an entire undivided tract, an entire portion of the whole was directed to be sold. An *attempt to sell in parcels [***163** would be to make a partition among the proprietors. No one could pay his own tax and preserve his own share, because he owned no specific part; his joint interest would be more or less prejudiced if any sale for taxes of the entire tract took place.

He proceeded to show, by a reference to the law of Ohio laying the tax, further difficulties which would have attended the sale of part of the whole body of the land for the tax; and he argued that the payment of the tax by the directors was necessary to preserve the lands of the company.

It is said the tenth section of the Act of Incorporation confers no power to tax. That section was intended to give some power, and

it authorizes that to be done which is "necessary and proper for the well ordering and interests of the owners and proprietors." These terms fully comprehend the power, and authorized the doing of that which would save the property from sale under the State law.

It is objected that the assessment is void for uncertainty, being in part for undefined purposes. It was for the Ohio tax, and other necessary expenses for the good of the proprietors of the land. While it is admitted that it ought to have mentioned the objects, it is denied that it was required that they should be specified. Were they for the general interests and for the general good? This has not been denied.

In the Act of Incorporation there is no reservation in favor of minors. In the general law, minors are allowed to redeem in a year after attaining adult years. In what manner? Not by treating the sale as void, but by paying the tax, interest and penalties, and for the improvements. These requisites suppose the sale valid.

But the question before the court is one of power, not of policy. The omission of the Legislature to make a politic provision concerning the rights of minors, does not deny the right; on the contrary, it admits the power. It cannot be maintained that this affects the validity of the sale. All the incapacities, and all the privileges of minors are the mere creatures of municipal law. The state of minority itself is created and regulated by that law, and the period of its duration varies in different States.

164*] *The Act of Incorporation of Ohio operated upon adults and on minors alike. No distinction is made in respect to their rights. The courts cannot originate such distinction.

No authorities have been adduced in support of our positions. They are supposed to rest on principles familiar to the profession. Their application to the case before the court cannot be tested by precedent, for the whole case is one *sui generis*. The analogies illustrative of their application result more directly from the principles themselves than from adjudged cases, which can bear but remotely upon an insulated controversy. (Cited, *Knowler, Douglass et al. v. Coit*, 1 Ohio Rep., 519.)

Mr. Justice McLEAN delivered the opinion of the court:

This was an action of ejectment, brought in the Circuit Court of Ohio, to recover possession of one thousand two hundred acres of land, parcel of two thousand four hundred acres, in what is called the Connecticut Reserve.

On the trial below, it was agreed that Jonathan Douglass, the ancestor of the plaintiff's lessors, became proprietor of the premises in question in May, 1793, under the laws of Connecticut granting lands to certain sufferers, and died the 6th of March, 1800, vested with the legal title, which he held in common with many other proprietors, the land not being set apart or apportioned to any one of the whole. That the lessors of the plaintiff were his heirs-at-law, and held as partners or tenants in common.

On the trial it was proved by the plaintiff below that on the 5th of May, 1808, four of the lessors were minors.

The defendant set up a title under a tax sale, which was made by the company incorporated for the management of said lands.

This company was first incorporated by the Connecticut Legislature in the year 1796. No person is named in the act, but the corporators are designated as "The proprietors of the half million of acres of land lying south of Lake Erie." Under this law the corporation was organized. In 1797 the Connecticut Legislature passed an amendment to this law.

*On the 15th of April, 1803, the Leg- [**165** islature of Ohio passed an act incorporating those owners and proprietors by the name of "The proprietors of the half million of acres of land lying south of Lake Erie, called sufferers' land;" and by that name gave succession to them, their heirs and assigns.

This was called the sufferers' land, from the circumstance of its having been given by the State of Connecticut to indemnify the losses its citizens had sustained in the Revolutionary War.

The Act of Incorporation by the Legislature of Ohio required nine directors to be appointed, who were authorized to hold their meetings out of the State. In the second section power is given to the directors to extinguish the Indian title; to survey the land into townships, or otherwise to make partition as they should order among the owners, in proportion to the amount of loss; and amongst other things the act provided "that to defray all necessary expenses of said company in purchasing and in extinguishing the Indian claim of title to the land, surveying, locating, and making partition thereof, as aforesaid, and all other necessary expenses of said company, power be, and the same is hereby given to, and vested in the said directors and their successors in office, to levy a tax or taxes (two-thirds of the directors present agreeing thereto) on said land, and have power to enforce the collection thereof."

The ninth section provides "that all sales of rights, or parts of rights, of any owner or proprietor in said half million acres of land, made by the collector, shall be good and valid, so as to secure an absolute title in the purchaser; unless the said owner and proprietor shall redeem the same within six calendar months next after the sale thereof, by paying the taxes for which the said right or rights, or parts thereof, had been sold, with twelve per cent. interest thereon, and costs of suit." The act contains no provision in favor of the rights of infants or *femes covert*.

By the tenth section of this law it is provided, "that said directors shall have power and authority, and the same is hereby given to them and their successors, to do whatever shall to them appear necessary and proper to be done for *the well ordering and interest of [**166** said owners and proprietors, not contrary to the laws of the State." The eleventh directs that "supplies of money which shall remain in the hands of the treasurer after the Indian title shall be extinguished and said land located and partition thereof made, shall be used by said directors for the laying out and improving the public road in said tract, as this Assembly shall direct." The act is declared to be a public one in the twelfth section.

An act imposing a land tax was passed

by the Ohio Legislature in 1806, which remained in force in 1808. This act required entry to be made of lands for taxation. A perpetual lien was imposed on the land, whether entered or not, for the amount of the tax, and minors had a right to redeem their land sold for taxes within one year after their minority expired. It appeared in proof, at the trial, that at a meeting of the directors of the company convened at the court-house in New Haven, on Thursday, the 5th of May, 1808, agreeably to a notification duly issued according to the ordinances of said directors, it was unanimously voted by six directors, being all that were present, that a tax of two cents on the pound, original loss, be assessed on the original rights or losses, in said half million acres of land, to be paid by each proprietor thereof, in proportion to each person's respective share or loss, as set in the grant of said lands made by the State of Connecticut; to be collected and paid by the several collectors to the treasurer of this company on or before the 1st of July, 1808, to defray the expenses of a tax laid by the Legislature of the State of Ohio, and other necessary expenses for the good of the proprietors of said land.

The defendant gave in evidence the assessment of a tax upon the rights of the said Jonathan Douglass, the appointment of a collector, the issuing of a warrant of collection, the advertisement of sale for taxes, the sale of a part of the right of said Douglass, amounting to twelve hundred acres, for taxes, to Elias Perkins, who conveyed the tract to the defendant.

The Circuit Court instructed the jury that the directors had no power to assess said tax, and that the infant lessors were not concluded ***or** bound by such assessment. To these instructions the defendant excepted. The jury found a verdict of guilty, and judgment was rendered thereon.

A reversal of this judgment is prayed for by the plaintiff in error on the following grounds:

1. The court erred in their instruction to the jury that the directors had no legal authority to assess the tax.

2. That the minor proprietors were not bound and concluded by the assessment and sale.

It is not contended in this case that this company could derive corporate powers to do any act in Ohio in relation to the sufferers' land under the statute of Connecticut. All their powers must be derived from the law of Ohio. This law, it is insisted, is a private act, not designed for public purposes, and, consequently, cannot affect the rights of any individual who did not assent to its provisions. That the provision declaring it to be a public act does not alter the principle, for the rights derived under it are of a private nature, being limited to those who have an interest in the land; and it is denied that any evidence of assent has been shown by the lessors of the plaintiff or their ancestor.

Several authorities were cited as having a bearing upon the objections thus stated. The names of the sufferers are published in the Connecticut act or resolution in 1792, with the amount allowed to each as his indemnity for losses sustained. In this act is found the name of the ancestor of the lessors of the plaintiff. Peters 4.

His right descended to them, subject to the same conditions by which it was originally held.

The provision of the law of incorporation that it should be considered a public act must be regarded in courts of justice, and its enactments noticed without being specially pleaded, as would be necessary if the act were private.

That a private act of incorporation cannot affect the rights of individuals who do not assent to it, and that in this respect it is considered in the light of a contract, is a position too clear to admit of controversy. But, in the present case, this objection seems not to have been made in the court below; where proof of the assent, if necessary, might have been submitted to the jury.

*From the nature of the right asserted ***168** and the circumstances under which it was originated, this court cannot doubt that the assent of the proprietors may be fairly presumed both to the act of Connecticut and to that of Ohio. Rights have been protected and regulated under those laws, and to the provisions of the latter are the claimants indebted, in a great degree, for the present value of the remainder of the land which they still hold; and, as has been well argued, if they participate in the benefits of the law, they can set up no exemption from its penalties.

The main question in the case is whether the directors have the power, under the Act of Incorporation, to assess a tax on each proprietor's share to pay a tax to the State. That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the Act of Incorporation. In the second section of the act, power is given to the directors to extinguish the Indian title, under the authority of the United States, when obtained; to survey and locate the land into townships, or otherwise to make partition; and to defray all necessary expenses in carrying these objects into effect; and to meet these and "all other necessary expenses of said company," the directors are authorized to levy a tax or taxes on said land, and to enforce the collection thereof. As the power to tax for the purpose of paying a tax to the State is not found among the enumerated powers of the directors, it must be derived, if it exist, under the words, "all other necessary expenses of said company;" or under the tenth section, which provides that "the directors shall have power to do whatever to them shall appear necessary and proper to be done for the well ordering and interest of the proprietors, not contrary to the laws of the State." In favor of this construction, it has been ingeniously argued that partition not having been made of the land it could not be entered for taxation as required by the law of the State. That the half million of acres must be entered on the duplicate of the collector as one tract, and that it would be ***impracticable** for the collector to as- ***169** certain and collect from each proprietor his just proportion of the tax. That many of the proprietors are nonresidents, and that any proportion of them being desirous of paying their part of the tax would not be discharged by do-

ing so; as a part of the entire tract, involving their interests, would be liable to be sold for any balance of the tax which remained unpaid.

Whether partition was made of the land when the directors assessed the tax does not appear, nor is it considered a fact of much importance in the case. No argument drawn from convenience can enlarge the powers of the corporation. Was the tax imposed a "necessary expense of said company," within the meaning of the act?

That these words would cover the expense of necessary agents to assess and collect a tax legitimately imposed by the directors, is clear, and also other incidental expenses, arising from carrying into effect the powers expressly given; but do they invest the directors with a new and substantive power? If they do, how is the exercise of the power to be limited? Must it depend upon the discretion of the directors to determine all necessary expenses of the company.

Ample provisions are found in the State law imposing a land tax for the assessment and collection of the tax. A lien is held on all the taxable land in the State, whether entered for taxation or not; and if the tax should not be paid by a time specified, the collector was authorized, after giving notice, to sell the smallest part of the tract which would bring the amount of the tax.

For the convenience of nonresidents, district collectors were appointed, who were required to hold their offices at places named in the act. The collector for the district including the sufferers' land held his office at Warren, within what is called the Reservation of Connecticut.

The law imposing the tax operates upon the land in controversy and raises a lien, the same as on any other taxable lands in the State.

It appears, therefore, that it was not the intention of the Legislature to look to the corporation for the payment of the tax assessed under the law, but to the land, as in all other **170*** cases. And if any part of the land had been sold by the State in which minors had an interest under the law, they had a right to redeem it within a year after they became of age. This is an important provision, and is not contained in the Act of Incorporation.

The agents of the State were paid for their services out of the tax collected; those of the corporation by the company. It would seem, therefore, that the tax collected by the State would be less expensive to the proprietors than if collected by their own agents, and less hazardous to their rights, as the interests of minors were protected. If, therefore, the argument drawn from convenience could have any influence, it could not operate favorably to the power of the directors.

The power to impose a tax on real estate, and to sell it where there is a failure to pay the tax, is a high prerogative, and should never be exercised where the right is doubtful.

In the preamble of the Ohio Act of Incorporation there is a reference in the Connecticut Act, and to the cession of the reserve by that State to the Union, and a statement that it was annexed to the State of Ohio. And as a reason

for the passage of the act, it is stated that said "half million of acres of land are now within the limits of Trumbull County in said State, and are still subject to Indian claims of title; wherefore, to enable the owners and proprietors of said half million acres of land to purchase and extinguish the Indian claim of title to the same (under the authority of the United States, when the same shall be obtained), to survey and locate the said land, and to make partition thereof to and among said owners and proprietors in proportion to the amount of losses, which is or shall be by them respectively owned," &c. These are the objects to be accomplished by the Act of Incorporation, and which could not be attained by the individual efforts of the proprietors. In the eleventh section of the act it is provided "that supplies of money which shall remain in the hands of the treasurer after the Indian title shall be extinguished and said land located and partition thereof made, shall be used by said directors for the laying out and *improving the **[171]** public roads in said tract, as the Legislature should direct."

From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain these objects.

The words "all necessary expenses of the company" cannot be so construed as to enlarge the power to tax, which is given for specific purposes. A tax to the State is not a necessary expense of the company within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers.

The provision in the tenth section, that the "directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interest of the proprietors, not contrary to the laws of the State," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred.

If the words of this section are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the directors a power over the land only limited by their discretion. They could dispose of the land and vest the proceeds in any manner which they might suppose would advance the interest of the proprietors. It is only necessary to state this consequence to show the danger of such a construction. The restrictions imposed in other parts of the statute very clearly demonstrate that it was not the intention of the Legislature to invest the directors with such a power. Upon a full view of the various provisions of the Act of Incorporation, the court do not find a power given to the directors to assess a tax, as has been done in the case under consideration, to pay a tax to the State. The judgment of the Circuit Court must, therefore, be affirmed with costs.

Aff'g 1 McLean, 41.

Cited—5 Pet., 666, 672; 10 Pet., 380 (n); 11 Pet., 546, 559; 6 How., 319; 13 How., 354; McAL., 375; 3 Wood. & M., 112; 5 Bank. Reg., 105; 4 Biss., 41.

172*] *JOHN V. WILCOX AND THOMAS WILCOX

v.

THE EXECUTORS OF KEMP PLUMMER.

Assumpsit—malpractice by an attorney—when statute of limitation began to run.

Action of *assumpsit* to recover from the defendant, in the character of an attorney-at-law, the amount of a loss sustained by reason of neglect or unskillful conduct.

A promissory note was, by the plaintiff, placed in the hands of P. for collection. He instituted a suit in the State court thereon against the drawer on the 7th of May, 1820, but neglected to do so against the indorser. The drawer proved insolvent. On the 8th of February, 1821, he sued the indorser, but committed a fatal mistake by a misnomer of the plaintiffs; upon which, after passing through the successive courts of the State, a judgment of nonsuit was finally rendered against the plaintiffs. Before that time, the action against the indorser was barred by the statute of limitations, to wit, on the 9th of November, 1822. This suit was instituted on the 27th of January, 1825. The statute of limitations of North Carolina interposes a bar to actions of *assumpsit* after three years.

The questions in the case were whether the statute of limitation commenced running when the error was committed in the commencement of the action against the indorser, or whether it commenced from the time the actual damage was sustained by the plaintiffs by the judgment of nonsuit. Whether the statute runs from the time the action accrued, or from the time that the damage was developed or became definite. Held, that the statute began to run from the time of committing the error by the misnomer in the action against the indorser.

The ground of action here is a contract to act diligently and skillfully, and both the contract and the breach of it admit of a definite assignment of date. When might this action have been brought, is the question, for from that time the statute must run.

When the attorney was chargeable with negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action.

THIS case came before the court on a division of opinion between the judges of the Circuit Court of the United States for the District of North Carolina.

It was an action of *assumpsit*, to which was pleaded the statute of limitations.

It was alleged, and proof offered, that on the 28th of January, 1820, the testator of the de-
173*] fendants, who was a collecting attorney, accustomed to collect for John V. Wilcox & Co., received from them for collection a note which had been drawn by Edmund Banks, on the 2d of October, 1819, payable to John Hawkins two months after date, and by him indorsed, on the 9th of November, 1819, to Hinton & Brame, and by them, subsequently, to the plaintiffs.

On the 7th of February, 1820, the testator, Kemp Plummer, instituted a suit in the name of John V. Wilcox and Thomas Wilcox, who composed the firm of John V. Wilcox & Co., against Banks, and in August, 1820, recovered a judgment against him. Banks proved insolvent, and on the 8th of February, 1821, the tes-

tator caused a writ to be issued in the names of John V. Wilcox, Arthur Johnson, and Major Drinkherd, as copartners in the firm and style of John V. Wilcox & Co., against Hawkins, the indorser of the note.

This action, thus instituted and docketed as a suit by John V. Wilcox & Co. against John H. Hawkins, was, after various delays, brought to a trial in April, 1824, when the plaintiffs were nonsuited; and this nonsuit was affirmed on an appeal to the Supreme Court, at June Term, 1824.

Thereupon the present suit was instituted, viz., on the 27th of January, 1825, by John V. Wilcox and Thomas Wilcox, copartners under the firm and style of John V. Wilcox & Co., against the testator of the defendants; and on his death this suit was revived against them by *scire facias*.

Two breaches were assigned, in distinct counts, by the plaintiffs in their declaration:

The first, that the testator neglected to institute any suit for them against the indorser until the 9th of November, 1822, on which day the remedy against the indorser was barred by statute.

The second, that he instituted and carried on for them the suit, as hereinbefore stated, against the indorser, negligently and unskillfully; and before the same was terminated, the remedy against him was barred as aforesaid, as fully appears by the record.

The jury found a verdict for the plaintiffs, subject to the opinion of the court on the statute of limitations. The time allowed by this statute for bringing all actions on the case, *is three years after the cause of action [***174** accrues, and not afterwards.

In the Circuit Court it was contended by the defendants that on the first count of the declaration the cause of action arose from the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection; or, at all events, after the failure to collect the money from the maker; and that on the second count, his cause of action arose at the time of committing the blunder in the issuing of the writ in the names of the wrong plaintiffs.

It was contended by the plaintiffs that on the first count their cause of action accrued when the testator of the defendants suffered the remedy to be extinguished by a neglect to sue on or before the 9th of November, 1822; and on the second count, when the suit unskillfully brought and prosecuted was terminated; or, at all events, on the 9th of November, 1822.

It was agreed that if the positions taken on the part of the defendants be correct on both counts, then a judgment is to be entered for the defendants.

If those taken by the plaintiffs be correct, then a judgment is to be entered for the plaintiffs on both counts; or if either of the positions thus taken by the plaintiffs be correct, then a judgment to be entered for the plaintiffs on the count, wherein the statute ought not to bar.

On which questions the judges divided in opinion, and directed the difference to be certified to the Supreme Court.

Mr. Wirt, for the plaintiff, maintained that the positions taken by the plaintiffs in the Circuit Court were correct, and that the same should

NOTE.—Agency.—That an agent or attorney is liable to the principal for negligence or unskillful conduct, see note to Bell v. Cunningham, 3 Pet., 69. Peters 4.

be so certified to the Circuit Court by this court.

The action is against an attorney for negligence, by which the plaintiffs lost their debt. It is admitted that an attorney is only liable for gross negligence. (2 Starkie's Evid., 133.) In all the cases it is held that the action is not maintainable until the debt is not recoverable. (*Russel v. Palmer*, 2 Wilson, 328; 3 Day, 390.)

175*] *It is the loss of the debt which gives the action, and where the object of the action is to recover the whole debt from the attorney, the cause of action does not arise until the debt is lost.

If the plaintiff has sustained a special damage by the negligence of the attorney, which is short of the loss of the whole debt, he may have an action for such special damage; and the cause of action will arise from the date of the negligence which produces it. But, where the negligence is charged to be the cause of the loss of the whole debt, the cause of action does not arise until the negligence has continued so long as to produce that effect.

Thus, in this case, it was not the negligence of one or two years which produced the loss of the debt; it was not until the continuance of this negligence for three years had raised the bar of the statute of limitations in favor of the original debtor that the loss of the debt became complete, and the cause of action for the whole debt arose against the attorney.

Starkie says, in an action against an attorney for negligence, it seems that the statute runs from the time when the plaintiff was damaged, and not from the time of the negligence.

If this be law, it decides the case before the court; for the plaintiff was not damaged to the extent of the demand made by this action until his right of action was extinguished against the original debtor; that is, until the bar of the statute arose to protect that debtor. (Ballantine on Limitations, 100, 101.) Now, the universal principle is that the cause of action runs from the act or omission which produces the injury.

There are some modern cases which on their first aspect may seem to bear adversely on this action, but when examined with reference to this principle, and compared with the cause of action stated in this declaration, they will be found to proceed on a marked distinction between these cases and the case at bar.

In the case of *Short v. M'Carthy* (3 Barn. & Ald., 626), the attorney had neglected to examine whether certain stock the plaintiff was about to purchase stood in the name of the seller on the books of The Bank of England.

176*] He reported *that it did, and the plaintiff purchased. The court held that the cause of action arose from the time of the neglect to make the examination, and his false report that he had done so. This was a single act, by which the mischief was done.

The case of *Howell v. Young*. (5 Barn. & Cres., 259; 11 Eng. Com. Law Rep., 219). This is a case similar to that of *Short v. M'Carthy*. The attorney neglected to examine if real property was incumbered, and the statute was held to run from his neglect, which was a single act. In both those cases the injury was consummated at once by an act of negligence. And herein the cases have a strong resemblance to

that of *Hilson v. Boddington* (11 Com. Law Rep., 223), cited by Holroyd, *Justice*, in *Howell v. Young*.

In reply to the argument for the defendant, *Mr. Wirt* said the question is whether, during the whole of the connection of Mr. Plummer with his clients, he had used due diligence? The distinction is between a single act of wrong and a continuing act of wrong. The first cause of action was not sufficient in itself: until its effect was fatal to the plaintiffs' interests, no suit could have been maintained. The error in the inception of the suit was a continuing cause of action.

The principle being acknowledged that an attorney is not liable but for gross negligence, and not for every negligence—for that only which produces the injury; could an action have been brought on the failure of Mr. Plummer to institute the suit properly? This would not have been permitted.

In this case, every year was a new negligence until the final loss of the plaintiffs' debt. It is suggested that the principle which in some cases makes the statute of limitations run from the time of the knowledge of the fraud or injury, will apply.

Mr. Justice Story. This principle applies only in cases of torts; and it has been expressly decided not to apply to cases of *assumpsit*.

Mr. Webster, for the defendant.

The question is whether the statute of limitations was not a sufficient bar to both counts in the declaration.

*To consider them separately. The [***177** first count alleges that no suit was brought against the indorser until he was discharged by the Act of Limitations, which was on the 9th of November, 1822. Mr. Plummer received this note for collection on the 28th of January, 1820. He sued the drawer of the note, and had judgment in August, 1820, but obtained no satisfaction, the drawer having failed. According to the allegations on this count, he then delayed more than two years before he took any steps against the indorser. This was negligence clear and actionable. He should have used all reasonable diligence, and as soon as he intermitted that diligence, he was liable to an action for neglect. The cause of action against him is his omitting to sue the indorser so soon as he ought to have sued him; and the true question is, when did this cause of action arise?

The plaintiff contends that this cause of action arose when the indorser was discharged by lapse of time; but this cannot be maintained. Suppose there had been no statute of limitations by which an indorser would have been discharged, would not an action have lain against Mr. Plummer for not suing him? He had a reasonable time, according to the course of the courts and the practice of the country, within which to sue the indorser; and if he did not sue within such a reasonable time, he himself was subject to a suit for negligence.

He had promised to use all common diligence to collect the note. Uncommon delay was a breach of that promise and a cause of action. It is not at all material to this cause of action whether the full extent of damage was then ascertained or not ascertained. It was enough that there was a cause of action. From

that moment the statute began to run. The law regards the time when the cause of action arises, not the time when the degree of injury, more or less, is made manifest; and when the cause of action is a breach of promise or neglect of duty, the right to sue arises immediately on that breach of promise or neglect of duty; and this right to sue is not suspended until subsequent events shall show the amount of damage or loss. This may be shown at the time of **178*** trial; or, indeed, if it be not actually ascertained at the time of trial, the jury must still judge of the case as they can, and assess damages according to their discretion.

A rule different from this would be attended with one of two consequences—either no action could be brought in such a case until the full amount of injury was ascertained, or a fresh and substantive cause of action would arise on every new addition to the probability of loss.

The cases are clear and decisive to show that in such cases as this the cause of action arises with the original neglect. (*Short v. M'Carthy*, 3 Bar. & Ald., 626, 630; 3 Eng. Com. Law Rep., 403; *Battley et al. v. Faulkner et al.*, 3 B. & A., 288; 3 Eng. Com. Law Rep., 289; *Hovell v. Young*, 5 B. & C., 254; 11 Eng. Com. Law Rep., 219; 2 Saunders on Pleading and Evid., 645.)

Hovell v. Young is much like this case. It was an action against an attorney for negligence where no loss actually resulted, and where the negligence itself was not discovered for some years. The court held the action accrued from the time of the breach of duty. There the action was ease; but the court looked to the real nature of the transaction, and applied the statute to it, disregarding the form of action. Holroyd, Justice, said, "the loss does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or negligence of the attorney, and consequently there is no new cause of action." This language is strictly applicable to the case before the court. Omitting to sue beyond a reasonable time, Mr. Plummer was guilty of negligence; a cause of action had then accrued against him; his omitting still farther to sue was no new neglect, it was no new cause of action, but merely the continued existence of the former cause.

Counsel below illustrated this rule of law very well by referring to the cause of action for defamation. If words, not in themselves actionable, be spoken, and special damage result, the party injured may sue within the time limited for such suits after the happening of the injury; because, in such case, the specific injury is the cause of action. But if words be spoken which are of themselves actionable, and **179*** special damage result also, in such case, notwithstanding or not regarding the time of the happening of the special damage, the statute of limitation will run from the time of speaking the words.

It seems to have been contended for the plaintiff in the court below on this first count, that Mr. Plummer was bound to sue the indorser; that this was a continuing obligation, and that every day furnished a new fault and a new injury, till the claim on which he should have sued was extinguished. If this mode of argu-

ment be plausible, it is no more. The same reasoning would apply, and with equal force, to every case of implied promise. If one borrows money, it is his duty to pay; and he is in default every day, and commits a new injury every day until he does pay. Yet the statute runs in his favor from the day when he first ought to pay.

Mr. Plummer was bound to sue at the first court because that was reasonable time; not suing then, he was from that moment liable to an action for negligence; and supposing him not to have sued at all, as this first count charges, his fault was then complete.

But the true view of the case, no doubt, is that attempted to be raised under the second count. Mr. Plummer did sue; but he sued negligently or unskillfully. He brought a suit against the right party on the plaintiffs' note, but he misdescribed the plaintiffs. This was his error. Here was the negligence; and, therefore, here the cause of action. He might have been sued for this negligence the next day after he issued the writs; and the plaintiffs would have been entitled to recover such damages as they could show, at the time of trial and on the trial, they had sustained. This original error in the attorney was a breach of duty, from which the failure in the suit resulted as a consequence. The failure in the suit was not his breach of duty; the loss of the debt was not his breach of duty. These were both but the consequences of that breach. They were its results, and they fixed the measure of damages, but were not the negligence which was alone the cause of action. It is established law that the limitation of the statute is to be referred to that act or omission which gives the cause of action, *without any regard to the consequences [**180** which ascertain the amount of damages. (1 Salk., 11.)

In the view which the plaintiffs' counsel takes of this matter, it would necessarily follow that after the first term or court in which Plummer could have sued and ought to have sued, the plaintiff had a new cause of action against him every day for three years; each day's neglect being, as it is said, a new default or new cause of action. If each day's neglect be a new default and new cause of action, it is quite clear that the pendency of a suit for yesterday's default would be no bar to a suit founded on a default of today; and if these causes of action be, as is contended they are, all new, independent and distinct, then it follows that independent and distinct damages may be given in each. Arguments can be no more than specious which lead to results like these.

Mr. Justice JOHNSON delivered the opinion of the court:

This suit was instituted in the Circuit Court of the United States in North Carolina, to recover of the defendants the amount of a loss sustained by reason of the neglect or unskillful conduct of their testator, while acting in the character of an attorney-at-law.

A promissory note was placed in his hands for collection by the plaintiffs. He instituted a suit in the State court thereon against Banks, the drawer, on the 7th of February, 1820, but neglected to do so against Hawkins, the indorser. Banks proved insolvent; and then, to

wit, on the 8th of February, 1821, he issued a writ against the indorser, but committed a fatal misnomer of the plaintiffs, upon which, after passing through the successive courts of the State, a judgment of nonsuit was finally rendered against them. Before that time the action against the indorser was barred by limitation, to wit, on the 9th of November, 1822, and this suit was instituted on the 27th of January, 1825.

The form of the action is *assumpsit*; and the plea now to be considered is the act of limitation, which in that State creates a bar to that action in three years.

The case is presented in a very anomalous form; but in order to subject it to any known **181*** class of rules, we must consider *it as coming up upon opposite bills of exceptions, craving instructions, on which the court divided. This court can only certify an opinion on the points so raised; that part of the agreement stated in the record which relates to the rendering of judgment on the one side or on the other, must have its operation in the court below.

There were two counts in the declaration: the one laying the breach in not suing at all until the note became barred, thus treating as a mere nullity the suit in which the blunder was committed, and the other laying the breach in the commission of the blunder; but both placing the damages upon the barring of the note by the Act of Limitation. As this event happened on the 22d November, 1822, this suit is in time if the statute commenced running only from the happening of the damage. But if it commenced running either when the suit was commenced against the drawer or a reasonable time after, or at the time of Bank's insolvency, or at the time when the blunder was committed; in any one of those events the three years had run out. And thus the only question in the case is whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite.

And this we hardly feel at liberty to treat as an open question.

It is not a case of consequential damages, in the technical acceptance of those terms, such as the case of *Gillon v. Boddington* (1 B. & P., 541), in which the digging near the plaintiff's foundation was the cause of the injury; for in that instance no right or contract was violated, and by possibility the act might have proved harmless, as it would have been had the wall never fallen. Nor is it analogous to the case of a nuisance; since the nuisance of to-day is a substantive cause of action, and not the same with the nuisance of yesterday, any more than an assault and battery.

The ground of action here is a contract to act diligently and skillfully, and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted? is the question, for from that time the statute must run.

182* *When the attorney was chargeable with negligence or unskillfulness his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual

damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action.

This is fully illustrated by the case from *Salkeld and Modern*, in which a plaintiff having previously recovered for an assault, afterwards sought indemnity for a very serious effect of the assault which could not have been anticipated, and of consequence could not have been compensated in making up the verdict.

The cases are numerous and conclusive on this doctrine. As long ago as the 20th Eliz., 1 Croke, 53, this was one of the points ruled in *The Sheriff's of Norwich v. Bradshaw*. And the case was a strong one; for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Battley v. Faulkner* (3 B. & A., 288) was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In the case of *Short v. McCarthy*, which was *assumpsit* against an attorney for neglect of duty, the plea of the statute was sustained though the proof established that it was unknown to the plaintiff until the time had run out. And the same point is ruled in *Granger v. George* (5 B. & C., 149.) In both cases the court intimating that if suppressed by fraud it ought to be replied to the plea, if the party could avail himself of it. In *Howell v. Young* the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of the action, and not from the time of damage or discovery of the injury.

The opinion of this court will have to be certified in the *language of the defend- [**183** ants' supposed bill of exceptions, to wit, "that on the first count in the declaration the cause of the action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection, or at all events, after the failure to collect the money from the maker. And that on the second count his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs."

This case came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of North Carolina, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion in pursuance of the Act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that it be certified to the said Circuit Court of the United States for the District of North Carolina, "that on the first count in the declaration the cause of action arose at the time when the attorney ought to have sued the indorser, which was within a reasonable time after the note was received for collection, or, at all events, at the failure to collect the money from the maker; and that on the second count

his cause of action arose at the time of committing the blunder in issuing the writ in the names of wrong plaintiffs; all of which is accordingly hereby certified to the said Circuit Court of the United States for the District of North Carolina.

Cited—8 Otto, 474; Bald., 416; 2 Dill., 268.

184*]

*ADAM BARTLE

v.

WILLIAM D. NUTT, Administrator of
GEORGE COLEMAN.

*Corruption of Public officers—contract void as
against public morals.*

A contract was made for rebuilding Fort Washington, by M., a public agent, and a deputy quartermaster-general, with B.; in the profits of which M. was to participate. False measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury. A bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction one-half of the loss sustained in the execution of the contract.

Held, that to state such a case was to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court.

The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, is but a just infliction for premeditated and deeply practiced fraud. He must not expect that a judicial tribunal will degrade itself, by an exertion of its powers to shift the loss from one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law.

THIS was an appeal from the Circuit Court of the County of Alexandria in the District of Columbia. The appellant was complainant in that court.

The case was argued by *Mr. Swann* and *Mr. Jones* for the appellant, and by *Mr. Taylor* for the appellee.

Mr. Justice BALDWIN delivered the opinion of the court:

This suit was brought on the chancery side of the Circuit Court of the District of Columbia for the County of Alexandria by the appellant (complainant) against the appellee (respondent). The object professed is to obtain a settlement of accounts arising out of a partnership charged to have existed between the complainant and respondent and one Ferdinand Marsteller.

The bill charges that in 1814 a contract was entered into between the complainant and the government of the United States for rebuilding Fort Washington.

*That when the contract was made it [*185 was agreed between the respondent, Ferdinand Marsteller, and the complainant, that they should share the profits of the contract—that is, that each of them should receive one-third part of the profits. That the respondent was to furnish the concern with such merchandise as might be necessary, disburse the funds of the concern, and keep the accounts relative to such disbursements; that the complainant was to superintend the work, and Marsteller to drawing and furnishing the money for carrying it on.

The bill charges that under this arrangement the work was commenced and finished, and that on its measurement it was supposed a profit had been made of about four thousand five hundred dollars; and that, accordingly, one thousand five hundred dollars were advanced to the respondent as his share of the profits.

That about the close of the business it was discovered that Marsteller had committed great frauds on the government, and that the complainant gave information of these frauds to the Department of War, in consequence of which Marsteller was disgraced and soon after died insolvent.

That soon after this development the respondent instituted suit against the complainant for a balance claimed on his store account, and for money disbursed by him for complainant. That the complainant instituted a cross action against the respondent; and both suits were, by mutual consent, referred to arbitrators.

NOTE.—Contracts void as against public policy, or as illegal.

Contracts for general services in procuring legislation are void, from public policy, and it is the duty of the court so to declare. *Weed v. Black*, 2 MacArthur, 268.

But contracts which provide compensation in consideration of particular service to be rendered, such as collection of evidence, the preparation of papers, or the delivery of arguments in support of a claim, are legitimate everywhere. *Ibid.*

A contract for a contingent fee for the collection of a claim against the United States, which is otherwise fair upon its face, is not in violation of public policy. *Burbridge v. Fackler*, 2 MacArthur, 407.

A contract between a government claimant and a claim agent employing the services of the agent in obtaining the passage of a private Act of Congress for payment of the claim which clearly contemplates paying the agent for personal solicitations of members of Congress and other services such as are known as "lobbying" is void, because contrary to public policy. *Trist v. Child*, 21 Wall., 441.

An agreement to make compensation for purely professional services in obtaining the passage of a law, such as drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting

them, orally or in writing, to a committee or other proper authority, and other services of like character, is valid. So, a contract to pay the expenses of procuring passage of a law, is not necessarily illegal. *Trist v. Child*, 21 Wall., 441; *Bohm v. Goldstein*, 53 N. Y., 634.

Where, in the contract, stipulations to pay for professional services and for lobby services are blended and confused, the whole contract is void. Where the stipulation to pay for services of the latter character exists, it effects fatally, in all its parts, the entire body of the contract. *Ibid.*

A contract providing a compensation for obtaining legislation, or to prevent legislative investigation into the affairs of a railway corporation is void. *Usher v. McBratney*, 3 Dill., 385.

An agreement to pay a contingent compensation for professional services of a legitimate character, is prosecuting a claim against the United States pending in one of the executive departments, is not in violation of law or public policy. *Stanton v. Embrey*, 3 Otto, 93; U. S., 548.

A promise to an officer in consideration of forbearance to prosecute, is void as against public policy. *Keir v. Leeman*, 9 Adol. & Ell., 371.

So an agreement to use one's influence with the common council of New York, to procure a lease, was held void as against public policy. *Wall v. Charlick*, N. Y. Leg. Obs., July, 1850, p. 230.

That when the reference was made, the complainant expected that the arbitrators would go into a full examination of the partnership accounts in relation to the government contract, as well as in relation to the individual accounts of the parties. But that when the arbitrators proceeded to act, they declined looking on the transaction as a partnership one, and thought themselves bound to consider the accounts as unconnected with that concern, and finally awarded against the complainant four thousand four hundred and ninety-seven dollars and forty-two cents, in which was included an allowance of one thousand five hundred dollars for Coleman's share of the profits of the con-
186* tract, and one *thousand five hundred and thirty-four dollars for commissions in disbursing the money received from the government.

That the copartnership has been always indebted to the complainant on account of the contract with government.

The bill then proceeds to some details respecting the accounts, at this time not important, and prays for an account and general relief.

The answer admits that the complainant in 1814 entered into a contract with Ferdinand Marsteller, agent for the United States, for the rebuilding of Fort Washington, with the terms and conditions of which contract the respondent had no concern.

That it being necessary to have an agent in Alexandria to procure supplies for carrying the contract into effect, and as Marsteller had expressed a wish that the money should be disbursed through the agency of the respondent, and that the respondent should keep the accounts between Marsteller and the complainant, the latter agreed that the respondent should act as agent, and in the first instance offered him as a compensation a share of the profits, and the complainant afterwards offered him a commission of five per cent. on the disbursements. That the respondent accepted of the latter offer, and under it entered on the agency, after having refused the first.

The respondent denies that he was in any

shape interested as a copartner with the complainant and Marsteller, or with either of them, in relation to the said contract, or that he ever received any share of the profits; but admits the charge of a commission of five per cent. on the money disbursed by him.

He admits that the complainant having refused to pay the balance due from him to the respondent on private account, he did institute suit against him. That a cross suit was brought by the complainant against the respondent. That both suits were referred to arbitrators, who awarded in the respondent's favor the sum of four thousand four hundred and ninety-seven dollars and forty-two cents. That on the investigation before the arbitrators, the complainant set up as an offset the same claim which he prosecutes in this suit, and that it was rejected as unsupported by evidence.

*The respondent relies on that award, [***187** and the judgment on it, as a bar to further proceedings.

The cause came on to be heard on the bill and answer, and after various proceedings, not necessary to notice, the bill was dismissed without costs; the court being of opinion that the partnership charged was contrary to public policy and sound morals, and that a court of equity ought not to lend its aid to either of the parties against the other.

Among the exhibits in the cause was the contract between the complainant and the government, dated 17th September, 1814, signed and sealed by complainant, and witnessed by Thomas Lowe.

"Accepted for the United States by order of Colonel Monroc, Secretary of War, September 30th, 1814."

F. MARSTELLER,
Deputy Quartermaster-General."

The proposition for this contract was addressed by Bartle to Marsteller in writing, and the contract was signed on the same day.

From the evidence taken in the case it clearly appears that Marsteller acted as the agent of the United States in making the contract. That the materials furnished and the labor performed were under the direction of Bartle. That

The following contracts have been set aside, as against public policy. (1) Marriage brokerage contracts, by which a party engages to give another compensation, if he will negotiate an advantageous match for him. (2) A reward promised for using influence and power over another person, to induce him to make a will in his favor. (3) Secret conveyances and settlements in contemplation of marriage. (4) Contracts in general restraint of marriage. (5) Contracts in general restraint of trade. (6) Agreements founded upon violation of public trust or confidence, or duty, or for the violation of public law. (7) Contracts for the buying, selling or procuring of public offices. (8) Contracts founded on corrupt considerations, or moral turpitude. *Story's Eq. Jur.*, secs. 263 to 296; *Chappel v. Brockway*, 21 Wend., 117; *Ross v. Sadgbeer*, 21 Wend., 166; *Lawrence v. Kidder*, 10 Barb., 641; *Dunlop v. Gregory*, 10 N. Y., 641; *Holbrook v. Waters*, 9 How. Pr. N. Y., 535; *Noble v. Bates*, 7 Cow., 307; *Mott v. Mott*, 11 Barb., 127; *Jarvis v. Peck*, 10 Paige, 118; *Crawford v. Russell*, 62 Barb., 92.

A note or other contract made in consideration of an act forbidden by law, is absolutely void. 14 Mass. R., 322; 5 Johns. R., 327; 3 Wheat., 204; 4 Pet., 410; 11 East., 502; 1 Binn., 110; 2 Gall., 560.

If the consideration of a bond or covenant be illegal, that illegality will constitute a good defense at law, as well as in equity. *Smith v. Aykewall*, 3 Atk., 566; *Collins v. Blantern*, 2 Wilson, 347; *Pax-*

ton v. Popham, 9 East, 408; *Greville v. Atkins*, 9 Barn. & Cr., 462; *Fytche v. Bishop of London*, 1 East, 487; *Vauxhall Bridge Co. v. Spencer*, 1 Jacob, 64; *Westmeath v. Westneath*, 1 Dow's N. S., 519; *First Cong. Church v. Henderson*, 4 Rob. Louis. R., 209; *Overman v. Clemmons*, 2 Dev. & Batt., 185; *Terrett v. Bartlett*, 21 Vt., 184; *Wooster v. Miller*, 7 Smodes & M., 380.

Agreement not to bid, or to prevent competition at judicial sale, void. *Jones v. Caswell*, 3 Johns. Cas., 29; *Thompson v. Davis*, 13 Johns., 112; *Brisbane v. Adams*, 3 Comst. N. Y., 129; *Wheeler v. Wheeler*, 5 Lans., 355; *Brackett v. Winans*, 48 N. Y., 667.

No action will lie for services as a lobby-agent in attending to a claim before the Legislature, or to procure the passage of a private law. Agreements in respect to such services being against public policy. *Harris v. Roof*, 10 Barb., 489; 7 Watts., 152; 5 Watts. & S., 315; *Platt on Cov.*, 570; *Chitty on Cont.*, 220, 583; 5 Halst., 87; 3 Halst., 54; 4 Mces. & W., 361; 7 Bing., 369; *Rose v. Truax*, 21 Barb., 361; 18 Pick., 472; 5 Penn., 452; 1 Verm., 264; 4 Comst., N. Y., 449; *Sedgwick v. Stanton*, 14 N. Y. 289; *McKee v. Cheney*, 52 How. Pr., N. Y., 144.

Otherwise of an agreement to compensate an attorney for advocating a bill before the legislature or its committee, or an agent who goes before them to make necessary explanations. *Hiliyer v. Travers*, 1 Am. Law R., 146; *Barker v. Cairo R. R. Co.*,

Peters 4.

the money was principally received from the government by Marsteller, paid over by him to Coleman, who disbursed it on the orders of Bartle. There can be no doubt that Bartle and Marsteller were partners in the profits of the contract; but the capacity in which Coleman acted does not seem to be so certain. There is very strong evidence of his being a partner; but it is not very material whether he was an agent or a party in a contract made and carried into effect under the circumstances which attended this. The shades of difference which would in either event distinguish the moral or legal aspect of the cause, are too slight to engage the attention of the court.

By the account of the complainant against the firm of Marsteller, Coleman & Bartle, it appears that his charges amount to fifty-eight thousand three hundred and seventy-four dollars, and that there is a loss to the concern of **188*** ten *thousand five hundred and thirty-eight dollars, one-half of which he charges to Coleman; and he seeks to recover this by deducting the amount from a judgment obtained against him by Coleman in the Circuit Court, affirmed here on a writ of error.

Of the alleged loss on this contract, the sum of eight thousand eight hundred and sixty dollars is thus accounted for in the complainant's account against the firm.

"To deductions made by the government (which are against the operative mechanic) from the work and materials, *vide* abstracts B. F., eight thousand eight hundred and sixty dollars of this sum." Of this sum it appears by abstract B. that three thousand one hundred and ninety-eight dollars were for an overcharge of fifty cents per perch of stone, and fifty cents per thousand of bricks, beyond the contract price; and by abstract F., that five thousand six hundred and sixty-one dollars were for over measurement of stone, brick and carpenter work; so that deducting these two items from the amount of the loss on the contract, it is reduced to one thousand six hundred and seventy-eight dollars.

The case, then, presented for the consideration of the Circuit Court, and now before us

for revision, is this: a contract made by the complainant with a public agent, a deputy quartermaster-general, to an amount exceeding fifty thousand dollars, in the profits of which he was to participate; false measures attempted to be imposed on the government; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for, and pay to one of the parties in such a transaction, the one-half of a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government.

To state such a case is to decide it. Public morals, public justice, and the well-established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court.

*The law leaves the parties to such a [***189** contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers by shifting the loss from the one to the other; or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.

This court is unanimously of opinion that the Circuit Court were right in dismissing the complainant's bill, and affirms their decree with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said Cir-

3 Thomp. & C., N. Y., 328; Russell v. Burton, 66 Barb., 539.

An agreement between two citizens, applicants for an office, that one of them shall withdraw, so the other will have a better chance for the appointment, and the latter agrees to pay the former a portion of the emoluments of the office in consideration thereof, is void, as against public policy. Gray v. Hook, 4 N. Y., 4 Comst., 449.

An agreement to influence directors of a corporation by personal influence, and thereby procure from them a contract for building their road, is void, as against public policy. Davison v. Seymour, 1 Bosw., N. Y., 88.

A contract to procure a return of duties by an officer in the custom-house, for a share of the amount recovered, is void, for same reason. Satterlee v. Jones, 3 Duer., N. Y., 102.

The following contracts are void as against public policy: Contracts for purchase by agent of execution debtor at execution sale. Holloway v. Stephens, 1 Hun., 308. Fraudulent combination to secure award of public contract. People v. Low, 6 Hun., 390. Contract to establish fictitious market price or to enhance market prices, void. Livermore v. Bushnell, 5 Hun., N. Y., 285; Clancey v. Onondaga Salt Co., 62 Barb., 395; Arnold v. Pittston Coal Co., 68 N. Y., 558; reversing S. C., 2 Hun., 591; 5 Thomp. & C., 143. Of one candidate to with-

draw in favor of another. Robinson v. Kalbfleisch, 5 Thomp. & C., N. Y., 212. Combination to secure public contract offered by proposal. Dutch v. Harrison, 37 Super. Ct., 5 J. & S., N. Y., 306.

Contract to use influence with municipal department to procure lease, void. Pease v. Walsh, 39 Super. Ct., 7 J. & S., N. Y., 514; S. C., 49 How. Pr., N. Y., 269.

Contract between two bidders for public work, that in case the contract should be awarded to either, both should share equally in the profits and losses, is void. Atcheson v. Mallon, 43 N. Y., 147.

Contract to pay assignee in bankruptcy extra compensation in addition to his legal fees, void. Cowing v. Altman, 5 Hun., N. Y., 556; reversed on another point in 71 N. Y., 435.

Contract with an attorney to prosecute a claim against the State, before the Legislature, for a contingent fee, is valid, if it contemplate none but professional services. Russell v. Burton, 66 Barb., 539.

A contract to issue the stock of a corporation in a lump, for work unperformed, to give the party a controlling interest in the company, is void. Barnes v. Brown, 11 Hun., 315.

So, a contract to subscribe for stock of a railroad company, on condition that the road be located on a certain route. Dix v. Shaver, 14 Hun., N. Y., 392.

cuit Court in this cause be, and the same is hereby affirmed with costs.

Aff'g 3 Cranch C. C., 283.

Cited—1 McLean, 301; 2 McLean, 277; 3 Wood. & M., 492.

190*] *JAMES CALDWELL, *Appellant*,

v.

JOHN TAGGART AND MARY, HIS WIFE,
ET AL.

Equity—bill to compel execution of securities for money loaned—necessary parties—breach of trust in a father, protection of infant children against.

Where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said: It has been urged in reply to those grounds of reversal for want of parties or for want of due maturation for a final hearing, that nothing is ordered to be mortgaged or sold besides the interest of the party who is ordered to execute the mortgage, or whose interest is to be sold, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has means of reducing every right to certainty and precision, and is therefore bound to employ these means in the exercise of its jurisdiction.

The general rule is, "that however numerous the persons interested in the subject of a suit, they must all be made parties, plaintiff or defendant, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subjects, deciding upon and settling the rights of all persons interested in the subject of the suit; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.

Where in the course of proceedings in a suit in chancery in the Circuit Court it is apparent that the father has not presented the interests of his children for protection, the court said: Although there is no appeal taken in behalf of the children, the court, while interfering to prevent the breach of a trust in behalf of the father, can hardly be expected to pass over without noticing an omission in the father, amounting to a breach of trust, to the prejudice of his infant children. [201]

APPEAL from the District Court of the Western District of Virginia.

The appellees, who are citizens of Maryland, filed their bill in the Court of the United States for the Western District of Virginia, in which the material allegations set forth are, that on the 22d of June, 1809, Grizzle Taggart, mother of John Taggart, conveyed to William Copeland Goldsmith and James Caldwell, all her estate for the uses and purposes
191*] *mentioned in the deed exhibited with the bill. A part of the estate so conveyed consisted of a debt due to the said Grizzle from Keller & Foreman of Baltimore, which was secured by a mortgage on valuable real property called the Salisbury Mills.

That about the year 1817, Caldwell, who was the nephew of Grizzle, importuned her and her son John and his wife, to consent to permit him to receive the money due on the mortgage, and to use it in the purchase of an estate called the White Sulphur Springs, situate in Greenbrier County, Virginia, and which belonged to the heirs of Michael Bowyer; and to induce them to yield their assent he represented that estate to be very valuable, and promised that he would encumber it (when purchased) by a mortgage to secure the money which he should receive from Keller & Foreman.

The complainants further state that consent was accordingly yielded on the conditions proposed, in consequence of which Caldwell (who was then sole trustee, the other being dead) received from Keller & Foreman the sum of fifteen thousand seven hundred and sixty dollars and seventy cents in discharge of their mortgage, which he appropriated to the purchase of several shares of the copartners of the said Michael Bowyer in the said estate, or paid therewith for some shares previously purchased.

Some time afterwards, as the complainants further allege, in order to satisfy Grizzle Taggart of the propriety of his purchase, and that the security promised would be ample, Caldwell brought her from her residence in Baltimore to the White Sulphur Springs. That she returned about the beginning of October, 1817, well pleased with the property; that Caldwell promised to execute the mortgage immediately after her return, but that in a very short time Grizzle departed this life without it having been done.

A few days after this event, Caldwell, secretly and unknown to the complainants, as they state, executed a mortgage in favor of Jeremiah Sullivan and others, on his interest in the White Sulphur Springs estate, to secure the sum of twenty thousand dollars. A second mortgage, to *secure the same [*192 debt, was executed by Caldwell, bearing date the 15th of September, 1819, and both were duly recorded (and are in the record). It is stated that some defect unknown to the complainants was supposed to exist in the mortgage of the 24th of October, 1817, which was the reason for the second being executed.

After the death of Grizzle Taggart, her son, John Taggart, as the complainants state, applied to Caldwell to execute the mortgage which he had promised on the White Sulphur Spring estate. He then informed the said John, that he had executed the mortgage of the 24th of October, 1817, before mentioned, on which the said John upbraided him with his breach of trust. Caldwell then promised to extinguish the incumbrance out of the annual profits of the estate, and to make provision for the debt created as before mentioned. Nothing, however, was done; the complainants being without any written evidence of their claim until the 9th of September, 1823, when Caldwell executed a paper, exhibited with the bill, acknowledging the sum of fifteen thousand two hundred and sixty dollars and seventy cents to be due on account of principal, and two thousand nine hundred dollars on account of interest.

NOTE.—As to necessary parties to suits in equity, see note to Morgan v. Morgan, 2 Wheat., 290; and note to Marshall v. Beverly, 5 Wheat., 313.

The bill further states that the mortgagees, Jeremiah Sullivan and others, instituted a suit to foreclose the equity of redemption; but before the case was brought to a hearing, a certain Richard Singleton purchased the mortgage and obtained a transfer thereof; that to secure the money paid for the mortgage and other money advanced, he obtained a deed of trust from Caldwell on his interest in the estate, that is, four-sevenths obtained by purchase, and one seventh in right of his wife, who is a daughter of Michael Bowyer.

The complainants further state that the profits of the said estate are great, but that such is the imprudence of Caldwell that he has never paid any part of the principal or interest on the mortgage, either before or since Singleton acquired it; that he is incurring other large debts, and that he has no other means to pay the money due to them except his interest in the White Sulphur Spring estate. They insist that they hold an equitable **193*** lien on that estate so far *as Caldwell's interest extends, and they pray that it may be subjected to their debt; that another trustee may be appointed to execute the trust created by the deed of the 22d of June, 1809, and for general relief.

To this bill James Caldwell and his wife filed a joint answer, sworn to on the 30th of September, 1827, the material statements of which are the following:

He admits the execution of the deed of the 22d of June, 1809, though he states that he was not apprised of its existence until after it was recorded. He admits that he received from Keller & Foreman the sum of fifteen thousand seven hundred and sixty dollars and seventy cents, due to Grizzle Taggart, and embraced in the deed executed by her; but he alleges that he was her debtor to that amount, and that to secure the debt he had given a deed of trust to Nicholas Brice, as trustee. That at his request, Grizzle and her son John consented to release his deed of trust, so as to enable him, Caldwell, to sell the property (Salisbury Plains) to Keller & Foreman, which was accordingly done, and he received the money. That the release exhibited with the answer was executed by Nicholas Brice, Grizzle Taggart, John Taggart and Mary his wife, when he was not present.

He alleges that Brice agreed, on his behalf, without consulting him, that the debt due from him to the said Grizzle, or a part thereof, should be vested in bank stock, and that the agreement and instrument of writing mentioned in the release contemplated that object; that he never executed any such writing, though he was informed before the delivery of the release of the proposition to invest the money due from him in bank stock, and refused to accept it on that condition, of which the parties interested were informed; but that the release was afterwards, by their consent, or without objection from them, delivered. That he was unwilling to accept the release on the condition proposed, because his object in desiring it was the use of the money.

He alleges that the money which he obtained from Keller & Foreman was applied to the payment of his debts, and not to the pur-

chase of the White Sulphur Springs, or any interest therein, or anything due therefor.

*He denies that it was his object to **[*194]** invest the money obtained by him in the White Sulphur Spring property, or that he obtained the release by any such representation, or by any promise to give an incumbrance thereon. That he acquired the White Sulphur Spring property with other funds, and never contemplated securing the debt due to Grizzle Taggart on that property; but expected to pay it out of a large debt due to him from another person, which he failed to realize.

He admits that Grizzle Taggart visited the White Sulphur Springs; that he returned with her in 1817; but denies that she was brought there with the views mentioned in the bill. He says he does not recollect, and has no reason to believe that a single word passed between him and her in relation to his giving a mortgage or other lien on that property, either during the said visit, or at any other time.

Caldwell denies that there was any stipulation between him and John Taggart and Mary his wife, or either of them, that the debt should be secured by a mortgage on the White Sulphur Spring property. He states that he does not recollect that the said John ever upbraided him with a breach of trust. He admits that he had a conversation with John in 1819 upon the subject of his giving the mortgage to secure other persons, and that John Taggart then said, that he ought, in the first place, to have secured the debt in which he was interested. In reply to which, he stated that he was willing to secure that debt by a lien on the property, as soon as the other was extinguished, which he supposed he would be able to do after the lapse of some time. Previous to this, Caldwell states that he has no recollection of having conversed with John Taggart on the subject of giving a lien, though the fact of his having executed the other mortgage was known to John as early as 1817.

He states that he does not believe that John Taggart ever thought that he had deceived him. That there was no privacy in giving the mortgages of the 24th of October, 1817, and 15th of September, 1819, which he admits he executed to secure the same debt. As evidence to show that *John did not believe he had been **[*195]** deceived, he exhibits a letter from him, which is in the record.

He admits the execution of the paper exhibited with the complainants' bill, bearing date the 9th of September, 1823; the pendency of a bill to foreclose the equity of redemption on the mortgage of the 15th of September, 1819; the subsequent purchase of Richard Singleton, and the execution of a deed of trust for his benefit, as stated in the bill.

James Caldwell then proceeds to state in his answer the interest which he has in the White Sulphur Spring property. 1. That his wife is entitled to one-seventh, as one of the heirs of Michael Boyer. 2. That she is entitled to another seventh by virtue of a conveyance made to her by her brother, John Bowyer. 3. He claims one-seventh by purchase from William Bowyer, to whom he paid only one hundred dollars of the purchase money. The contract is referred to, and filed among the papers of

this court. He states that William Bowyer is dead, having made a will which is exhibited and copied into the record. 4. He claims another seventh by purchase from William Bedford, who is stated to have purchased the interest of Thomas Bowyer, a son of Michael. That for this interest he stands indebted six thousand dollars, with interest, for which a deed of trust was executed on the property purchased, a copy of which is exhibited; and a suit has been brought to enforce this lien. 5. He claims the interest of James Bowyer, another son of the said Michael. The remaining two shares, he states, are in Frances Bedford and Elizabeth Copeland, daughters of Michael Bowyer.

Caldwell insists that if, contrary to his expectation, the complainants should establish a specific lien on any part of the said property, that it can only extend to such interests as he owned when such lien originated; and that it ought not to be extended to defeat the rights of others, or their equitable lien for purchase money due to them from him; and he requires that their rights shall be precisely ascertained and adjusted, before any effort shall be made to enforce such lien in favor of the complainants, and that partition shall be made according to the rights of the parties.

196* Caldwell further states that an indenture was executed by him and his wife and the other persons interested by which it was agreed that all the lands and tenements of which Michael Bowyer died seized should be divided between the parties by commissioners chosen for that purpose, except two hundred acres, including the White Sulphur Springs, buildings, &c., which should be held in common; that this partition has never been made. He insists that if the complainants should establish the lien demanded by them, that partition should be made according to said agreement, and his part in the two hundred acres first subjected.

He admits that the White Sulphur Spring estate is valuable, but regrets that the profits are not as great as estimated by the complainants. He deems it unnecessary and irrelevant to exhibit a schedule of his receipts and expenditures, or an account of his management and history of his domestic affairs. He states that he is desirous of paying all the debts which he owes, and particularly that claimed in this case, the justice of which he has never denied; that he trusts an apology will be found for not having effected that sooner, in the embarrassed situation of his affairs. Such was the condition of the White Sulphur Spring property when he obtained possession, that he has been compelled to incur many expenditures to make it at all productive. He has well-founded hopes that if he is suffered to continue his exertions, that in a few years he will be able to do full justice to all the world; but that the interests of his creditors require that he should not be destroyed by an unmerciful pressure of their demands.

Caldwell objects to the measure of relief sought by the complainants as not being warranted by the laws of the land, the principles of equity, or the dictates of justice. So far as they set up any pretended parol agreement, he insists that it is within the operation of the statute of frauds and perjuries, of which he prays the benefit, as if it had been specially pleaded.

Caldwell moreover states that he feels it his duty to protect the trust fund committed to his care from any appropriation not contemplated by the donor. He denies the right of the complainants to take that fund *from the control [***197** of the trustees, or to exhaust or expend the principal; and says that the interest, or profits only, can be applied to the use of the *cestuis que trust*.

The defendant, the wife of James Caldwell, states that her interests in the White Sulphur Spring property are, in some respects, different from those of her husband; and that she is advised that no agreement made by him, in which she has not concurred in the form prescribed by law, affects her rights, derived by descent, devise, or conveyance. She refers to a copy of the deed (which is not in the record) executed by her brother John Bowyer, to show that she is entitled to the sole and exclusive use and benefit of his share. As to the interest of her deceased brother, William Bowyer, she contends that she is entitled to the same, or the purchase money thereof, during her life, in the same exclusive and separate manner; and that after her death the property passes to her children and nephew. She refers to the agreement between her husband and the said William Bowyer to show that the latter had the privilege to revoke the contract if the purchase money should not be paid; which privilege she says passed to her by the will of the said William, which privilege she claims to exercise, so far as the same may be necessary for her complete protection. She prays that she may be permitted to answer separately, or that her rights may be investigated and decided, as if she had done so. She says she has no knowledge of the justice of the debt claimed and how it originated.

Depositions were taken in the District Court establishing certain facts which are sufficiently referred to in the opinion of this court, and when the cause came on to a hearing the court made the following decree:

This cause came on to be heard on the bill, answers, exhibits, and examination of witnesses, and was argued by counsel. On consideration whereof, and for reasons set forth in a written opinion filed among the papers in this cause, it is adjudged, ordered and decreed, that the defendant, James Caldwell, do forthwith execute a proper deed of mortgage to Silas H. Smith, who is hereby appointed trustee for that purpose, providing for the annual payment to *the said trustee of the legal interest on [***198** the sum of fifteen thousand seven hundred and sixty dollars and seventy cents, the amount of the sum withdrawn by the said defendant from the trust fund, to commence this day; to be paid by the said trustee to John Taggart during his life, and on his death that the principal, with any interest that may accrue after the death of the said John, to be paid to the children of said John, and Mary his wife, according to the provisions of the deed executed by Grizzle Taggart on the 22d of June, 1809, and filed among the papers in this cause. And it is further adjudged, ordered and decreed, that the said defendant pay unto the plaintiff, John Taggart, the sum of seven thousand five hundred and thirteen dollars and forty cents, being the amount of interest now due on the said sum of fifteen thousand seven hundred and sixty

dollars and seventy cents; and in case the said defendant shall make default in the payment of the said sum of money, so that the same or any part thereof shall remain due and unpaid on the 5th of August next, then it shall be the duty of the marshal of this court to proceed to sell all the right, title and interest which the defendant may have in the White Sulphur Spring estate, in the County of Greenbrier, for ready money; having first advertised the time and place of sale, in some newspaper published in Richmond, Staunton, and Lewisburg, for thirty days before such sale, and that he report his proceedings to this court. And it is further adjudged, ordered and decreed, that the said defendant pay unto the plaintiffs their costs expended in the prosecution of this suit.

From this decree the said James Caldwell prayed and obtained an appeal to the Supreme Court of the United States.

The case was argued by *Mr. Wirt* for the appellant, and by *Mr. Sheffy* for the appellees.

Mr. Wirt contended, 1. That the necessary and proper parties had not been called before the District Court when the decree was pronounced.

2. That as to those who had been called before the court, the cause had not been matured for a decree when the same was pronounced.

199*] *3. That the decree is inconsistent with the relief prayed for by the bill.

4. That the decree was not justified by the evidence in the cause.

5. That even if such a decree could have been justified by the general evidence, it would only have been after the prior liens on the property had been marshaled by the report of a master commissioner, and the remaining interest of Caldwell in the property precisely ascertained and fixed by the decree.

Mr. Sheffy, for the appellees, argued that there is no error in the decree injurious to the rights of the appellant.

Mr. Justice JOHNSON delivered the opinion of the court:

The material facts of this case may be thus stated:

Grizzle Taggart, wishing to make provision for the family of her son, John Taggart, conveyed a considerable property to one Goldsmith, and the defendant, James Caldwell, to the use of herself for life, then to the joint use of John Taggart and his wife for life, to the use of the survivor for life, and finally, to be distributed among their children. The children, together with their parents, preferred this bill. The deed bears date the 22d of June, 1809, and contains a clause empowering John and his wife, or the survivor of them, to sell and dispose of the trust property, "and invest it in other property subject to the like uses and trusts, and to repeat the same as often as they may think beneficial for them and their children.

In July, 1812, Goldsmith being dead, Caldwell prevailed upon the *cestuis que trust*, Taggart and wife, to permit him to make use of a large sum of money raised upon the trust property, and secured it to them by a mortgage on the Salisbury Mills, executed to Nicholas Brice, in terms adapted to the purposes of the original

trust deed. Afterwards, in the year 1816, Caldwell prevailed upon the *cestuis que trust* to make another change of application of the trust found in his favor by executing a release of the mortgage to enable him, as is alleged in the bill, to make a purchase of the Sul- [*200 phur Springs in Virginia, and under a promise to mortgage that property when purchased to secure the money according to the original trusts.

These facts make out the complainants' case, and excepting the three allegations—that the last loan was solicited for a specific purpose, that it was applied to that purpose, and under a promise that the property when purchased should be mortgaged to secure the loan according to the trusts—the answer admits the facts set out in the bill. It is, then, a clear case for relief; since the defendant Caldwell, uniting in himself the two characters of trustee and debtor to the trust fund, was guilty of a clear breach of trust in availing himself of the release of 1816 without seeing the debt well secured, agreeably to the deed of 1809. He must in any event be decreed to substitute such security as he ought to have taken upon any other change of investment effected in pursuance of the original trust. But the complainants here go for specific relief, claiming to stand in the relation of *cestuis que trust* or mortgagees of a specified property; upon the ground, as to the first relation, of having paid the consideration money, and as to the second, of having surrendered their existing mortgage upon Caldwell's promise to execute that in contemplation; and in one or the other or both those rights, to have the property placed in the hands of a receiver, that the income may be applied to extinguish prior incumbrances and leave the property free to satisfy this claim. The bill also contains the prayer for general relief, but the specific claim must first be disposed of before the general prayer can be considered.

The court below sustained the allegations of the bill relative to the promise to mortgage the specific property, and decreed Caldwell to execute a mortgage accordingly, to secure the principal sum of fifteen thousand seven hundred and sixty dollars. It then goes on to order the interest calculated to the date of the decree, amounting to seven thousand five hundred dollars, to be paid by a day prescribed, or in default thereof, that the property so ordered to be mortgaged to secure the principal, shall be sold to raise the interest. We think it clear that there is an error in this, since the [*201 interests of those in remainder would thus be sacrificed to the first taker. And although there is no appeal taken in their behalf, yet the court, while interfering to prevent the breach of a trust in behalf of the father, can hardly be expected to pass over without noticing an omission in the father, amounting to a breach of trust, to the prejudice of his infant children.

In an instance, therefore, in which a decree so obviously needs reforming, it is without reluctance that the court lays hold of such legal grounds for reversing it as may be considered under the appeal taken by the defendant.

The complainants in their bill set out that soon after receiving and using the release before mentioned, Caldwell purchased the five-sevenths of the interest in the Sulphur Springs,

and shortly after mortgaged the same to Sullivan and others to secure certain large sums which they had assumed for him; that this mortgage was foreclosed according to the laws of Virginia, and finally lifted and assigned to Mr. Richard Singleton, who advanced thereon for the relief of Caldwell twenty-three thousand dollars, to secure which the latter executed a trust deed to A. Stevenson and F. Bowyer, which it appears became absolute by failure of payment more than a year since.

And when the defendant, Caldwell, as well as Frances Bedford, come to answer to the allegations of the purchaser of the property in question, we find that, although Caldwell has repeatedly executed deeds conveying or incumbering five-sevenths of the whole, he does not pretend to make title to more than one-seventh, to wit: the share of James Bowyer. The rest are either vested in his wife or his children, or incumbered with prior liens, which will probably sweep the whole.

His answer also introduces into the cause a deed of partition, or one partaking of that character, executed by the parties interested in this property, bearing date in 1810, by which a division or distribution has been agreed upon adapted to the nature of the property, and in which every individual has so distinct an interest that it may well be questioned whether, until it is in some way carried into execution, it **202*** will be possible for any purchaser to know what he is buying. This deed has not been copied into the record sent up, but it is presumed that it could hardly have been passed over in the court below.

Of the interests thus introduced into the cause by the answer, that of the children of Thomas Bowyer, as set out in Mrs. Bedford's answer, and that of the children of Mrs. Caldwell and Mrs. Copeland, as shown by the will of William Bowyer, are wholly unrepresented.

And as to the interest of Mrs. Copeland or her representatives, although there was an order for a decree *nisi*, the decree nowhere appears to have been entered, nor evidence of the service or return of the rule exhibited in the record.

In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction.

There is no want of learning in the books on this subject. The general rule is laid down thus: "However numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do

complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation." And again, "all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the *suit," extending in most ***203** cases to heirs-at-law, trustees and executors.

Thus, in a case in which a remainderman in tail brought a bill against the tenant for life to have the title deeds brought into court, and there were annuitants on the reversion, and a child interested under a trust term of years prior to the limitation to the plaintiff—that is, incumbrances prior and posterior to the plaintiff—Lord Hardwicke (3 Atk., 570) refused a decree without first making them parties. So, where husband tenant for life, remainder to his wife for life, remainder over, brought his bill without joining the wife, the objection was made and sustained on the ground that if there was a decree against the husband, it would not bind the wife. (1 Atk., 289.)

So, if an under mortgagee brings his bill to foreclose the original mortgagee, he must make the first mortgagee a party. (3 P. W., 643.) This is the relation in which the complainants here seek to place themselves in reference to Mr. Singleton.

And there are various cases in which, though the heir-at-law is not a necessary party, he is made such in practice, and the reason assigned is to free the estate from every blame that may lessen its value at the sale. (2 Ves., 431; 3 P. W., 91; 3 Br. Ch. Rep., 229, 365.)

And so in cases of indefinite or blended interests, all the participators are necessary parties; as where a residue is devised to several, or even devised by specified shares.

It is clear, then, that this cause must go back as well to have the necessary parties made as to have the decree reformed and reduced to legal precision.

It is true this course might have been avoided if this court, upon looking through the complainants' case and allowing the full benefit of everything that has been legally established, had seen that a decree might now finally be rendered against the appellant. It would then have been nugatory to send it back for parties. But such is not the conclusion to which this court has arrived; it has already expressed the opinion that to a certain extent it is a very clear case for relief, and all the difficulties arise upon the nature of the *relief prayed and ***204** granted. There is no knowing what new aspect may be given to the cause, when all the necessary parties come in and answer. But as it is now presented, had the prayer for specific relief upon the Sulphur Springs been out of the cause, it would not have been sent back without such a decree against the defendant, Caldwell, as the court below ought to have rendered.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of West Virginia, and was argued by counsel; on consideration whereof, it is ordered and decreed by this court, that the decree of the said District Court

in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings to be had therein, according to law and justice.

Cited—13 Pet., 375; 16 Wall., 451; 2 McLean, 306; Bald., 194, 416; 9 Bank. Reg., 305; 3 McAr., 46.

205*] *JOHN LLOYD, *Plaintiff in Error*,

v.

CHARLES SCOTT, Bailiff of WILLIAM S. MOORE, *Defendant*.

Rent charge—usury—Virginia statute—requirements of usurious transaction—ignorance of law—right to repurchase rent—usurious securities in hands of third persons—case of De Wolf Johnson—practice.

S. being seized in fee of four brick tenements and lots of ground in Alexandria, in consideration of five thousand dollars, granted to M. an annuity or yearly rent charge of five hundred dollars, to be issuing out of and charged upon the houses and ground, and covenanted that the same should be paid to M., his heirs and assigns forever thereafter, with the right to distrain in case of nonpayment of the same. In the deed granting the rent charge, M., the grantee, covenanted, that at any time after five years, on the payment of five thousand dollars with all arrears of rent, he, M., would release the said rent charge, and the same should cease. S. covenanted to keep the buildings in repair, and that he would have them fully insured against fire, and assign the policy of insurance for the protection of M., the money from the insurance to be applied to the rebuilding or repairing the houses, if destroyed or injured by fire. Afterwards, S. by deed of bargain and sale, conveyed to L., the plaintiff in error, the houses and lots of ground subject to the payment of the rent to M., who since the same conveyance has been seized of the same. The rent being unpaid, M. levied a distress for the same, and L. brought replevin; and the defense to the claim for rent set up to the avowry was, that the transaction was usurious, and the deed granting the rent charge was, by the laws of Virginia, absolutely void.

The statute of Virginia of 1793, provides that no person shall take, directly or indirectly, more than six per cent. per annum on loans of money or forbearance for one year; and it declares that all bonds and other instruments for a greater amount of interest shall be utterly void. [223]

The requisites to form an usurious transaction are, 1. A loan either express or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done, is an important ingredient to constitute this offense. [224]

An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches. [224]

The act of usury has long since lost that deep moral stain which was formerly attached to it, and is now generally considered only as an illegal or immoral act because it is prohibited by law. [224]

If the court were in this case limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity and no evidence were adduced giving a different character to the transaction, the argument that though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, as it was a purchase, it was legal, would be unanswerable. An annuity may be purchased like a tract of land or

other property; and the *inequality of price [*206 will not of itself make the contract usurious. If the inadequacy of consideration be great in any purchase, it may lead to suspicion, and connected with other circumstances, may induce a court of chancery to relieve against the contract. [225]

In this case five thousand dollars were paid for a ground rent of five hundred dollars per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a *bona fide* purchase of an annuity, there is an end of the question; and the condition which gives the option to the vendor to repurchase the rent by paying the five thousand dollars after the lapse of five years would not invalidate the contract. The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury. [225]

The purchase of an annuity, or any other device used to cover an usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced. [226]

If the party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. Where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty, which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury. [226]

All the material facts to constitute usury are found in the second plea. It states a corrupt agreement to loan the money at a higher rate of interest than the law allows. That the money was advanced, and the contract executed in pursuance of such agreement. That on the return of the principal with the full payment of the rent, after the lapse of five years, the annuity was to be released. The amount agreed to be paid above the legal interest for the forbearance is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty. Five hundred dollars, under cover of the annuity, were to be paid annually for the forbearance of the five thousand dollars; making an annual interest of ten per cent. Do not these facts, uncontradicted as they are, amount to usury? Is it not evident from this statement of the case, that the annuity was created as a means for paying the interest until the principal should be returned, and as a disguise for the transaction? Such is the legitimate inference which arises from the facts stated in the plea. [227]

The principle seems to be settled that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons, who are entire strangers to the transactions. A stranger must "take heed to his assurance at his peril;" and cannot insist on his ignorance of the corrupt contract in support of his claim to recover upon a security which originated in usury. [228]

In the case of *DeWolf v. Johnson* (10 Wheat., 367), the first mortgage being executed in Rhode Island in 1815, was not usurious by the laws of that State; and the second mortgage executed in Kentucky in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure, was not involved in that case. [229]

The law of Virginia having declared that a contract infected by usury is void, and by the deed from S. to M., a right to enter on the premises and distrain for the *rent is claimed under a deed, [*207 which, upon the admissions in the pleadings, is usurious; the premises upon which the distress was made, being held by L. under a conveyance from S., L. may set up the defense of usury in the deed, against the summary remedy asserted by M. under the deed. [230]

This case came before the court on a judgment in the Circuit Court for the defendant, the avowal in replevin, he having demurred to the pleas of the plaintiff in an action of replevin. The court having reversed the judgment of the Circuit Court, remanded the cause, with instructions to the Circuit Court to overrule the demurrer, and permit the defendant, the avowant, to plead. [231]

NOTE.—As to usury, see note to *Levy v. Gadsby*, 3 Cranch, 180; and note to *Fleckner v. Bank of United States*, 8 Wheat. 338; and note to *Slacum v. Pomroy*, 6 Cranch, 221.

Peters 4. U. S., Book 7.

THIS was an action of replevin brought by the plaintiff to replevy certain goods and chattels which the defendant, as bailiff of Will-

iam S. Moore, had taken upon a distress for rent claimed by the said Moore to be due upon certain houses and lots in Alexandria, owned and held by the plaintiff. The sum for which distress was made is five hundred dollars. The declaration is in the usual form, and the damages claimed one thousand dollars.

The defendant filed his cognizance, in which he acknowledges the taking of the goods, &c., in the declaration mentioned, and states that a certain Jonathan Scholfield was seized in fee of four brick tenements and a lot of ground in the town of Alexandria, and being so seized, he, by his indenture, dated the 11th of June, 1814, of which deed profert is made, in consideration of five thousand dollars, by the said William S. Moore paid to him by the said Jonathan Scholfield, he granted, bargained and sold to him, the said William S. Moore, one certain annuity or yearly rent of five hundred dollars, to be issuing out of and charged upon the said four brick tenements and lot of ground, to be paid to the said William S. Moore, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars each, on the tenth of December, and on the tenth of June in each year forever thereafter. To have and to hold the said annuity or rent charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns, to his and their only proper use forever. It also states that the said Jonathan Scholfield, for himself, his heirs and assigns, did, by the said indenture, among other things, covenant with the said William S. Moore, his heirs and assigns, that he, the said **208*** Scholfield, his heirs and assigns, would well and truly pay and satisfy to him, the said Moore, his heirs and assigns, the said annual rent of five hundred dollars by equal half-yearly payments forever; and if the rent should not be paid as it became due, that on every default it should be lawful for the said Moore, his heirs and assigns, to make distress for it. That the said William S. Moore was seized of the said rent on the said 11th of December, 1814, and has since remained seized thereof.

The cognizance further states that on the 29th of October, 1816, the said Jonathan Scholfield, by his deed of bargain and sale conveyed to the said John Lloyd, the plaintiff, forever, certain tenements and lots of ground in the said town of Alexandria, whereof the said four brick tenements and lot of ground before mentioned, on which the said distress was made was parcel; subject, by the terms of the said deeds, to the payment of the said annuity or rent of five hundred dollars to the said William S. Moore, his heirs and assigns. That the said John Lloyd has been ever since seized and possessed of the same; and that on the 10th of June, 1824, two hundred and fifty dollars, a part of the said rent, was due, and on the 10th of December, 1824, two hundred and fifty dollars, the balance of the said annual rent, was due and unpaid to the said William S. Moore, for which said sum of five hundred dollars, the said defendant, as bailiff aforesaid, levied a distress. It concludes by praying judgment for one thousand dollars, being double the rent in arrear and distrained for.

By the deed from Scholfield to Moore, he (Moore) for himself and his heirs and assigns,

covenants with Scholfield, his heirs and assigns, that if he, the said Scholfield, his heirs or assigns, "shall at any time after the expiration of five years from the date of the deed pay to the said Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent and a ratable dividend of the rent for the time which shall have elapsed between the half year day then next preceding and the day on which such payment shall be made, he, the said Moore his heirs and assigns, will execute and deliver any deeds or instruments which may *bc necessary for releasing and extin- [***209** guishing the rent or annuity hereby created, which, on such payments being made, shall forever after cease to be payable."

By the same deed Jonathan Scholfield covenants that he was then in his own right seized in fee-simple of the premises charged as aforesaid, free from any condition or incumbrance other than which is specified and provided for in a deed from him, Scholfield, to Robert I. Taylor, dated the day before the date of the deed to Moore.

The said Scholfield further covenants for himself, his heirs and assigns, that he "will forever hereafter keep the buildings which now are or hereafter may be erected on the premises charged, fully insured against fire in some incorporated insurance office, and will assign the policies of insurance to such trustee as the said Moore, his heirs or assigns, may appoint, to the intent that if any damage or destruction from fire shall happen, the moneys received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged." There is also a covenant on the part of Scholfield for a further conveyance to carry into effect the intention of the parties, and also a warranty on his part to warrant and defend the said annuity or rent to the said Moore, his heirs or assigns, against any defealcations or deductions for or on account of him, the said Scholfield, his heirs or assigns.

To this cognizance the plaintiff, after praying oyer of the indenture from Scholfield to Moore, demurred specially; and assigned the following causes:

1. Because the deed of indenture from Jonathan Scholfield and Eleanor his wife to William S. Moore, in the said cognizance mentioned, shows upon the face of it a corrupt and usurious contract between Jonathan Scholfield and William S. Moore, altogether void in law, and entirely incompetent to justify the taking of the said goods and chattels in the plaintiff's declaration mentioned.

2. Because the essential parts of the indenture are not set forth in the cognizance.

3. Because the indenture is variant, and different from that alleged in the cognizance.

*4. Because the whole cognizance is [***210** void and insufficient in law to justify the taking of the goods and chattels in the declaration mentioned.

At the same time the plaintiff filed four pleas. In each of which pleas he craves oyer of the deed of indenture in the cognizance mentioned, which was granted to him.

The first plea states that before the making of the indenture, that is to say, on the 11th of June, 1814, it was corruptly agreed between Scholfield and Moore, that he (Moore) should

"advance" to Scholfield the sum of five thousand dollars, and in consideration thereof, that Scholfield and his wife should grant, by a deed of indenture duly executed and delivered to Moore, his heirs and assigns forever, a certain annuity or yearly rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon, which lot is particularly described in the said plea, and stated to be in the town of Alexandria; which annuity or rent of five hundred dollars was to be paid to Moore, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars, on the 10th of December and on the 10th of June forever thereafter. It was further corruptly agreed that he, Scholfield, in and by the deed, should bind himself, his heirs, executors, administrators and assigns, to Moore, his heirs and assigns, that Scholfield would well and truly pay to him, Moore, his heirs and assigns, the said rent or annuity of five hundred dollars, by equal half-yearly payments on the 10th of June and the 10th of December in each year forever thereafter, as it became due. It further states if the same should not be paid as it became due, the right of distress for it is reserved to Moore, his heirs and assigns. The plea also states if sufficient property could not be found on the premises to make the said rent or annuity, after the expiration of thirty days from the time the same became due, it should be lawful for Moore to enter on the premises and to remove Scholfield, his heirs and assigns, and for him, Moore, his heirs or assigns, to possess and hold the same as his or their property.

The plea further states that it was corruptly **211***] agreed between *Scholfield and Moore, that he, Scholfield, should further covenant in the said indenture, that he, Scholfield, was seized at the time of making the deed in his own right, in fee-simple in the premises, free from any condition or incumbrance other than such as was specified in a deed from him to Robert L. Taylor; and that he would thereafter keep the buildings fully insured in some incorporated insurance office, and assign the policies to such trustee as Moore, his heirs or assigns, should appoint; and that he would make any other deed for a further assurance of the title to the premises; and that he would warrant and defend the title of Moore to the rent or annuity. It is also stated in said plea that Moore did further corruptly agree that he would, in the indenture, covenant for himself, his heirs or assigns, with Scholfield, his heirs and assigns, that if he, Scholfield, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the indenture, pay to Moore, his heirs or assigns, the sum of five thousand dollars together with all arrears of rent and a ratable dividend of the rent for the time which should have elapsed between the half year's day then next preceding, and the day on which such payment should be made, he, Moore, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity.

The plea then avers that on the 11th of June, 1814, in pursuance and in prosecution of this corrupt agreement, William S. Moore did advance to Jonathan Scholfield the sum of five Peters 4.

thousand dollars, and that Scholfield and his wife and William S. Moore did make, seal and duly deliver to each other respectively the said deed as their act and deed, which was duly acknowledged and recorded; that the deed was made in consideration of money advanced upon and for usury; and that there has been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the sum of five thousand dollars, so advanced as aforesaid, for the term of one year. The plea concludes with a verification, and prays judgment for damages for the unjust taking and detention of the goods, &c.

*The second plea is in all respects like [***212** the first, except it states that the agreement was that Moore should "lend" to Scholfield five thousand dollars. It then states that the parties agreed a deed should be made containing all the covenants set forth in the first plea. It then avers that in pursuance and in prosecution of this corrupt agreement, Moore did advance to Scholfield the sum of five thousand dollars; and that Scholfield and wife and Moore made and executed the deed aforesaid, in pursuance of this corrupt agreement, which was duly acknowledged and admitted to record. And that the deed was made in consideration of "money lent upon and for usury;" and that by it there has been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the sum of five thousand dollars so lent as aforesaid for the term of one year. This plea concludes as the first does.

The third plea is more general than the first and second. It states that before the making of the indenture, that is to say, on the 11th of June, 1814, it was corruptly agreed between Scholfield and Moore, that he (Moore) should "advance" to him (Scholfield) the sum of five thousand dollars, upon the terms and conditions and in consideration of the covenants and agreements in the indenture mentioned and contained; and that in pursuance of this corrupt agreement, and in the prosecution and fulfillment of the same, Moore did advance to Scholfield the sum of five thousand dollars, and they, Scholfield and Moore, did make, seal, and duly deliver the deed to each party respectively, as their act and deed. And that the deed was in consideration of money advanced upon and for usury, and that by the indenture there has been taken and reserved above the rate of six dollars in one hundred, for the forbearance of the sum of five thousand dollars, so advanced as aforesaid for the term of one year. This plea concludes as the first does.

The fourth plea is like the third, except it is stated that the agreement was to "lend" five thousand dollars upon the same terms stated in the third plea. It then avers that in pursuance and in execution of the corrupt agreement in the indenture mentioned, Moore did "lend" to Scholfield the *sum of five thousand [***213** dollars; that the deed was duly executed by the parties and recorded; that it was made in consideration of money lent upon and for usury, and that by the said deed there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the sum of five thousand dollars, so lent as aforesaid for the term of one year. This plea concludes as the others do.

To each of these pleas the defendant demurred specially, and assigned for causes:

1. That the said pleas do not set forth with any reasonable certainty the pretended contract, which is alleged to have been usurious, and do not show an usurious contract.

2. That they do not state the time for which the said pretended loan was made.

3. That they do not state the amount of interest reserved or intended to be reserved on the said pretended contract.

4. That they do not set forth any loan or forbearance of any debt.

5. That they neither admit nor deny the sale and conveyance of the premises charged with the said annuity or rent to have been made by Jonathan Scholfield to the plaintiff.

Upon the demurrer to the cognizance and on the demurrer to the pleas the Circuit Court rendered judgment for the defendant for one thousand dollars, the double rent claimed in the cognizance, and costs.

The plaintiff sued out this writ of error, and before this court assigned for error:

1. That the deed which forms a part of the cognizance is on its face usurious.

2. That the pleas set forth, with sufficient certainty, a spurious contract.

The case was argued by *Mr. E. J. Lee* and *Mr. Swann* for the plaintiff in error, and by *Mr. Jones* and *Mr. Taylor* for the defendant.

For the plaintiff, it was contended that the deed of Scholfield to Moore of the 11th of June, 1814, was a contract to pay five hundred dollars per annum for five years for the use of five thousand dollars, which is equal to ten per cent. **214*** per annum. The object of this device was to evade the statute against usury. The deed does not set forth the purchase of an annuity; but Scholfield being seized of the property in fee, receives five thousand dollars from Moore as a loan, and then grants to Moore a rent of five hundred dollars per annum for the use of the money. The stipulations in the deed are to pay the rent half-yearly for five years, not to redeem the property by paying the five thousand dollars; and after that time, on his continuing to pay the five hundred dollars, the property is to remain charged with the same. The deed gives a right of distress and entry on the premises, and stipulates that the property shall be kept in repair and the buildings insured at the expense of Scholfield and his assigns. If any of the houses shall be destroyed by fire they are to be rebuilt, and there is a covenant for the payment of the rent against any defalcations or deductions by Scholfield. The whole sum payable by Scholfield in five years for interest, insurance, taxes and repairs, including the five thousand dollars, would amount to eight thousand seven hundred and fifty dollars, a large excess beyond legal interest.

There must have been great distress to induce such a contract; and upon its face it exhibits all the features of usury, although there is no stipulation which plainly expresses the contract to be one of mere loan, with a compensation for forbearance beyond what is lawful.

It is not necessary that it should appear on the face of the deed that it was a loan or for-

bearance. If this is the result, it will authorize the application of the statute.

To show that the transaction on the face of the deed, though it assumes the form of a ground rent, is a usurious contract, cited, 1 Inst. book 3, sec. 534; 5 Co. Rep., 69; *Lawley v. Hooper* (3 Atk., 278); *Flayer v. Sir Brownlow Sherard* (Ambler, 19); 3 Barn. & Ald., 664; (4 Camp. Rep., 1; *Powel v. Waters* (17 Johns. Rep., 176); 5 Randolph's Rep., 347; *Barnard v. Young* (17 Ves., 44).

The preceding cases show that where there is a covenant either on the part of him who advances the money to accept of repayment or of the borrower to repay it, or where ***215** the right to repay the money is reserved by the contract; that the money was advanced as a loan, and a contract entered into for its repayment, it is usurious.

But if it is urged that this is a contract for the sale of a rent charge, the answer is that at the time the contract was made no rent existed. It is an original grant of an annual rent to be issuing out of, and to be charged on certain houses.

Technically, an annuity is not a ground rent. (2 Blac. Com., 41, 461; Co. Lit., 144.)

Is the usury properly pleaded?

It is said that the contract is not set forth with reasonable certainty in the pleas. But the pleas bring out the whole deed in which the contract is shown, and thus the defendant is fully informed what that contract is upon which the allegation of usury arises.

An indenture set out upon oyer becomes a part of the plea. (1 Chitty, 664.) By becoming a part of the plea they set out the contract, and by so doing the defendant is informed of what he is to answer.

It is admitted that in a plea of usury it is necessary to set out the facts with such certainty as that they can be understood by the party to answer them, by the jury who are to ascertain them, and by the court who are to give judgment upon them. (1 Chitty's Plead., 236, 237.) All these objects are fully obtained by the pleas filed in this case.

The second objection is that the pleas do not show a usurious contract. It is submitted to the court that the deed does show that five thousand dollars were paid, not for an existing ground rent, but that Scholfield was to pay for five years certain, five hundred dollars per annum for the use of that sum. The facts, as has been alleged, show this intention, and the desire of the parties to conceal it and give it the appearance of the purchase of an annuity or rent charged.

If the document produced by the plaintiff as his cause of action exhibits such facts as would if pleaded show a loan, then the defendant need not prove that the money advanced to him was a loan, nor need he prove by other evidence than the deed that the loan was mentioned by the lender ***before** the making of the ***216** contract, in the form in which it was executed. Usury is a question of law, and if all the facts which go to show the intent of the parties, appear by the showing of the plaintiff, by a special verdict or otherwise, it is sufficient. It is not necessary to state in the pleadings, or that the jury should find them, that there was a corrupt agreement. It is sufficient if facts appear

which in law amount to usury. (*Roberts v. Tremayne*, Cro. James, 508; 1 Call, 62; *Price v. Campbell*, 2 Call, 119.) The intention of the parties is a legal inference from established facts. (5 Randolph, 145, 146 to 162; *Whitworth v. Adams*, 5 Rand., 352, 560; 4 Mun., 66; 6 Cranch, 652.)

The facts set forth by the deed, which forms a part of the pleas, according to the cases cited, show an usurious contract. The first plea states an advance of five thousand dollars for five hundred to be paid annually. Scholfield could not release himself from the payment of the sum for five years. The plea states that this advance was made and the deed executed in pursuance of this corrupt agreement, and that the five thousand dollars were advanced upon and for usury, and that there had been thus reserved and taken by Moore above the rate of six per cent. for forbearance of five thousand dollars for the term of one year. All this is admitted by the demurrer.

The second plea states this as lent. The third plea states the sum to have been advanced upon the agreement stated in the first plea; and the fourth is general, and states the sum as lent. The demurrer admits the money to have been lent and advanced as stated in the pleas.

The second objection to the pleas is that they do not state the time for which the loan was made. This is immaterial, as the pleas state that five hundred dollars are to be paid each year for the forbearance of five thousand dollars.

The plea expressly states that above the rate of six per cent. in the hundred dollars, for the forbearance of five thousand dollars, is reserved; and by making the deed a part of it, does state the forbearance to be for five years certain, and as long after as Scholfield pleased, or his inability to return the money continued. **217*** The answer to the third objection is of the same character; the deed shows the amount of interest reserved and to be paid. It is expressly stated to be more than legal interest. To this point see 3 Term Rep., 533; 4 Term Rep., 353; 6 Rand., 661.

But in this case the party to the contract is not before the court, and he is not bound to set forth the usurious contract, as those are who were the immediate parties to it. (*Hill v. Montague*, 2 Maule & Selw., 377.)

The plaintiff in the replevin is not a party to this usurious contract. The defendant claims to make him liable to pay five hundred dollars by distraining his goods and chattels found on the premises charged by the contract between him and Scholfield; he is therefore a stranger to the particulars of the agreement, and he puts in the plea of usury. Less certainty is required when the law presumes that the knowledge of the facts is particularly in the opposite party. (1 Clitty Plead., 258; 13 East's Rep., 112; Com. Dig. Plead., c. 626.)

The fourth objection is that no loan or forbearance is set forth in the pleas. It is true the term *loan* is not used; but it is said the money was advanced, and that he was to receive five hundred dollars as a ground rent annually for five years for the advance, and that it was lent, and that Moore did lend five thou-

sand dollars to Scholfield, for which he was to pay him five hundred dollars per year. The pleas all state that for the forbearance of the sum of five thousand dollars so advanced and lent, above the rate of six dollars in the hundred for one year was reserved and taken.

The fifth objection is that the pleas neither admit nor deny the sale by Scholfield to the plaintiff of the premises charged with the rent.

This is not material. If it was admitted that the sale was made by Scholfield to Lloyd charged with the annuity or ground rent claimed by the avowant, under a contract which in law is usurious, and therefore void, the plaintiff could not be compelled to pay, in the form of a rent, the usurious interest reserved by this contract.

The cause of demurrer was probably suggested by the case of *De Wolf v. Johnson et al.* (10 Wheat., 367). It is contended that the principles involved and decided in that ***218** case do not apply to the case now before the court. The decision in that case rested mainly on the fact that the contract originally made was not usurious by the law of Rhode Island. The case before the court is one where the defendant seeks in the form of a distress for rent to make the personal property of the plaintiff liable under a contract which is usurious and void at law, and the question is whether the defendant can avail himself of such a contract.

A party in whose favor a contract which is usurious has been made, cannot make use of it for any purpose whatever. (*Barnard v. Young*, 17 Ves., 44; 1 Starkie's Rep., 385; Comyn. on Usury, 175; *Whitworth v. Adams*, 5 Rand., 356; *Harrison v. Hammill*, 5 Taunt., 780; *Gaither v. The Farmer's Bank of Georgetown*, 1 Peters's Rep., 37; *Jackson v. Henry*, 10 Johns., 195.)

Mr. Taylor and *Mr. Jones*, for the defendants in error.

The pleas do not anywhere charge a loan to have been made on an usurious contract; it is only stated "and so the money was loaned upon usury." The charge of usury is a mere deduction from facts. The pleas state no collateral agreement as to a loan, and the whole of the contract is that which is contained in the deed. The deed in itself contains no contract which is usurious. It is a contract to pay the sum of five hundred dollars per annum in half-yearly payments for five years certain; and after that time the payment of five thousand dollars will be an extinguishment of the obligation, and a restoration of the property which is given to secure the payment. It is one thing to decide upon this contract as contained in the deeds, and another to decide on a collateral statement of usury.

The first question is whether Lloyd can avail himself of this usury if it existed?

He is bound by a contract with his vendor Scholfield; he is bound to pay this annuity to Moore, and it is important to Scholfield that he shall do so; as he, Scholfield, is under a personal contract to pay the same.

A deed is not void for usury, it is only voidable, as all deeds which take effect from delivery are not void, and must be made ***219** so by pleading. (3 Burr., 1804; Bull. *Nisi Prius*, 224; 5 Co., 119.)

As this contract is only voidable, who can

avoid it? can anyone do it? Certainly not a stranger.

By a reference to the Usury Act of Virginia, which is very full, its whole object will be seen to be to protect the parties to the contract. The spirit and object of it do not extend to other parties. By the third and fourth sections the relief in equity is confined to the borrower. He may go into chancery and recover the money lent and the interest, but if Lloyd recovers in this case, if he escapes the payment of the rent, Scholfield will lose the money given to him; he cannot afterwards recover from Moore.

Lloyd is not here a stranger, but he was acquainted with the facts and is bound to pay the rent. He cannot set up a plea of usury, which injures his vendor. He is estopped by his purchase from so doing.

The law of usury is different in cases of personal and real property. The assignee of an equity of redemption cannot plead usury in the mortgage; and a purchaser under a mortgage is not affected by usury in the origin of the contract. (10 Wheat., 367; 10 Johns. Rep., 185.) A mortgage upon an usurious consideration is void only against the mortgagee, and those who may lawfully hold the estate under him. A purchaser of the mere equity of redemption cannot avoid the mortgage by plea or proof of usury. (13 Mass. Rep., 515.)

Is it competent for an intruder to set up a title? or for a tenant at will to contradict the title of his landlord? A tenant in possession cannot set up usury against the title of his landlord. Idiocy and lunacy may be avoided by the parties, but not by strangers, and these rules will fully apply to other deeds. (8 Term Rep., 390; 4 Co., 123; 8 Co., 42; Co. Lit., 271, *a*.)

This transaction does not constitute a usurious contract. To such a contract the obligation to repay the money is essential. (Ord. on Usury, 23.) If the money may be returned or not, at pleasure, is it such a loan; and there must be a loan to make it usury. An option **220*** to return makes the *transaction a purchase. These questions are exclusively proper for a jury, and the court cannot decide them.

This mode of investment is common in Alexandria. The purchase of a ground rent or rent charge is a usual mode of providing for families and children; and the usual price of such rents is ten years' purchase.

The pleas are bad in form and substance. 1. In pleading the statute, a general plea is bad. The agreement and sum taken must be charged and shown. The contract must be specially set out, and the usurious intention with which it was made must be set out. Forbearance, and giving day, are the effective words of the statute; and they must be averred. (1 Hawkins's P. C., 332, s. 24; Shower, 329; 2 Maule & Selwyn, 377; 1 Saunders, 295; Stephens on Pleading, 343.)

The pleas do not show an usurious agreement. They do not aver one collateral to the deed, but set out the deed in its terms. They call it usury. And the effect of the demurrer is not to assist the plaintiff. A demurrer admits facts well pleaded, not epithets or names or illegitimate conclusions. If the facts do not make out usury, no usurious intent can alter the legal character of the deed. *Burton's case* (5 Co.

Rep., 69) was the grant of an annuity; the plea sets out the facts, and charges them to be usurious. On demurrer, the court said that the matter shown does not amount to usury; the allegation that it is so is repugnant to the matter shown, and a demurrer is not an admission of all the matters pleaded, but of such only as are well pleaded.

The question then is, is the deed, *per se*, usurious? not whether it is evidence of another collateral contract. What is its legal import? Does it import a loan? It says it is a purchase. Does it mean anything else than the purchase of a redeemable annuity? It does not. The right to redeem after five years is secured by the deed. It has been repeatedly decided that the purchase of an annuity, at however extravagant a price, is not usury. (1 Wilson, 295; Cro. Eliz., 27; 2 Lev., 7; 3 Wilson, 390; 2 Schoales & Lcs., 393; 1 Bro. Ch. Rep., 94; Holt's *Nisi Prius* Cases, 295.)

Mr. Swann*, in reply, stated that the **[*221] demurrer was entered to the deed because on its face it showed an illegal contract, and required no plea. (Cited, Chitty on Contracts, 239, 240; 1 Sid., 285; 1 Saund., 295; 5 Mod., 593.) At the same time the pleas were entered, which present, in different forms, the contract as a loan, as an advance, as a corrupt agreement. The demurrer admits the facts stated in these pleas, and all the inferences may be drawn which could be from facts found by a special verdict.

In answer to the arguments of the counsel for the defendants there were cited 3 Atk., 280; 1 Wilson, 295; 7 Bac. Ab. Usury, 194; 3 Bos. & Pull., 159; 3 Barn. & Ald., 664; 4 Camp., 1; 3 Harris & John., 109; 5 Munf., 223.

Mr. Justice McLEAN delivered the opinion of the court:

This is an action of replevin brought to replevy certain goods and chattels which the defendant, as bailiff of William S. Moore, had taken upon a distress for rent claimed to be due upon certain houses and lots in Alexandria, owned and possessed by the plaintiff. The sum for which the distress was made is five hundred dollars.

The declaration is in the usual form, and the damages are laid at one thousand dollars. The defendant filed his cognizance, in which he acknowledges the taking of the goods specified in the declaration, and states that a certain Jonathan Scholfield, being seized in fee of four brick tenements and a lot of ground in the town of Alexandria, by his indenture, dated the 11th of June, 1814, in consideration of five thousand dollars, granted, bargained and sold to William S. Moore one certain annuity or yearly rent of five hundred dollars, to be issuing out of and charged upon the said houses and ground, and paid to the said Moore, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars, on the 10th of December, and on the 10th of June, in each year, forever thereafter; to have and to hold, the said annuity or rent charged and payable as aforesaid, to the said William S. Moore, his heirs and assigns forever. It also states that the said Scholfield, for himself and his heirs and assigns, did, by the said indenture, among other things,

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222*] *covenant well and truly to pay to the said Moore, his heirs and assigns, the said annual rent of five hundred dollars, by equal half-yearly payments forever. And if the rent should not be paid as it become due, it should be lawful for the said Moore, his heirs and assigns, to make distress for it. That Moore was seized of the rent on the 11th of December, 1814, and has since remained seized thereof.

The cognizance further states that on the 29th of October, 1816, the said Jonathan Scholfield, by his deed of bargain and sale, conveyed to Lloyd, the plaintiff, forever, certain tenements and lots of ground in the town of Alexandria, whereof the said four brick tenements and lot of ground were parcel, and subject to the rent charge stated. That Lloyd has been seized ever since and possessed of the same; and that on the 10th of June, 1824, two hundred and fifty dollars, a part of the rent, was due, and on the 10th of December following, two hundred and fifty dollars, the balance of the annual rent, was due and unpaid; for which sums the defendant, as bailiff, levied a distress.

The cognizance is concluded by praying a judgment for one thousand dollars, being double the amount of the rent in arrear.

Moore covenants in the deed that if Scholfield, his heirs or assigns, "shall at any time after the expiration of five years from the date of the deed, pay to the said Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half-year day then next preceding the day on which such payment shall be made; he, the said Moore, his heirs and assigns, will execute and deliver any deeds or instruments which may be necessary for releasing and extinguishing the rent or annuity hereby created; which, on such payment being made, shall forever after cease to be payable."

Scholfield covenanted for himself, his heirs and assigns, that he would keep the buildings in repair; have them fully insured against fire; and would assign the policies of insurance to such trustee as Moore, his heirs or assigns, might appoint, that the money may be applied **223*** to the rebuilding of *the houses destroyed by fire, or repairing any damage which they might suffer.

To this cognizance the plaintiff filed a special demurrer, which in the argument he abandoned, and relies upon the special pleas of usury. To each of the four pleas the defendant demurs specially, and assigns for causes of demurrer,

1. That the said pleas do not set forth with any reasonable certainty the pretended contract, which is alleged to have been usurious, and do not show an usurious contract.

2. That they do not state the time the said pretended loan was made.

3. That they do not state the amount of interest reserved or intended to be reserved, on the said pretended contract.

4. That they do not set forth any loan or forbearance of any debt.

5. That they neither admit nor deny the sale and conveyance of the premises charged with the annuity or rent to have been made by Scholfield to the plaintiff below.

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Upon these demurrers the Circuit Court rendered judgment for one thousand dollars, the double rent claimed in the cognizance.

The plaintiff here prays a reversal of this judgment.

1. Because the deed which forms a part of the cognizance on its face shows an usurious contract.

2. Because the pleas set forth, with sufficient certainty, an usurious contract.

The statute of Virginia against usury was passed in 1793, and provides that no person shall take, directly or indirectly, more than six dollars for the forbearance of one hundred dollars per annum; and it declares that all bonds and other instruments for a greater amount of interest shall be utterly void.

In support of the demurrer, it is argued that the pleas are defective, as they do not contain any allegation of facts which amount to usury; and that the decision must turn on the construction of the contract between Scholfield and Moore. And it is contended that although usury appears upon the face of a deed, yet advantage can only be taken of it by plea. That the obligee may explain the contract, by *showing a mistake in the scrivener, [**224** or a miscalculation of the parties.

In Comyn on Usury, 201, it is laid down that in an action on a specialty, though it appear on the face of the declaration that the bond, &c., is usurious, still no advantage can be taken of this unless the statute be specially pleaded. (3 Salk., 391; 5 Coke's Rep., 119; Chitty on Contracts, 240; 1 Sid., 285; 1 Saund., 295, a.) The decision of this point is not necessarily involved in the case.

The requisites to form an usurious transaction are three:

1. A loan either express or implied.

2. An understanding that the money lent shall or may be returned.

3. That a greater rate of interest than is allowed by the statute shall be paid.

The intent with which the act is done is an important ingredient to constitute this offense. An ignorance of the law will not protect a party from the penalties of usury, where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

At an early period in the history of English jurisprudence, usury, or as it was then called, the loaning of money at interest, was deemed a very high offense. But since the days of Henry VIII. the taking of interest has been sanctioned by statute.

In this country some of the States have no laws against taking any amount of interest which may be fixed by the contract.

The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law. Assuming the position that the pleas contain no averments which extend beyond the terms of the contract, the counsel in support of the demurrers have contended that no fair construction of the deed will authorize the inference that it was given on an usurious con-

225*] sideration. *It was the purchase of an annuity, it is contended; and though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, yet this does not taint the transaction with usury.

If the court were limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction, this argument would be unanswerable. An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of consideration be great in any purchase, it may lead to suspicion; and, connected with other circumstances, may induce a court of chancery to relieve against the contract.

In the case under consideration, five thousand dollars were paid for a ground rent of five hundred dollars per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a *bona fide* purchase of an annuity, there is an end to the question; and the condition which gives the option to the vendor to repurchase the rent by paying the five thousand dollars after the lapse of five years, would not invalidate the contract. (1 Brown's Ch., 7, 93.) The right to repurchase, as also the inadequacy of price, would be circumstances for the consideration of a jury.

The case reported in 2 Coke, 252, is strongly relied on by the counsel for the defendant. In that case an action of debt was brought upon an obligation of three hundred pounds, conditioned for the payment of twenty pounds per annum during the lives of the plaintiff's wife and son. The defendant pleaded the statute of usury, and that he applied to the defendant to borrow of him one hundred and twenty pounds at the lawful rate of interest; but that he corruptly offered to deliver one hundred and twenty pounds to him, if he would be obliged to pay twenty pounds per annum.

The court considered this as an absolute contract for the payment of twenty pounds per annum during two lives; and no agreement being made for the return of the principal, it was not considered usury. But, they stated, if there **226***] had *been any provision for the repayment of the principal, although not expressed in the bond, the contract would have been usurious.

This is a leading case, and the principle on which it rests has not been controverted by modern decisions.

Scholfield, it appears, was under no obligation to repurchase the annuity, but he had the option of doing so after the lapse of five years, which is a strong circumstance to show the nature of the transaction.

The purchase of an annuity or any other device used to cover an usurious transaction will be unavailing. If the contract be infected with usury, it cannot be enforced.

Where an annuity is raised with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. (3 Bos. & Pull., 159.) On this point there is no contradiction in the authorities.

If a party agree to pay a specific sum exceeding the lawful interest, provided he do not pay

the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty.

Where a loan is made to be returned at a fixed day with more than the legal rate of interest, depending upon a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

Does the decision in this case, as has been contended, depend upon a construction of the contract? Are there no averments in the pleas which place before the court material facts to constitute usury, that do not appear on the face of the deed?

If the court were limited to a mere construction of the contract, they would have no difficulty in deciding that the case was not strictly embraced by the statute.

In the second plea the plaintiff below prays oyer of the deed of indenture, and, among other statements, alleges "that it was corruptly agreed between the said Scholfield and the said Moore, that the said Moore should lend to him the sum of five thousand dollars, and in consideration thereof that he should *ex- **227** ecute the said deed, &c." And in another part of the same plea it is stated "that the said Moore did corruptly agree that he would in the said indenture covenant, &c., that if the said Scholfield, his heirs and assigns, should at any time after the expiration of five years from the date of said indenture pay to the said Moore, his heirs and assigns, the sum of five thousand dollars, together with all arrears of rent, he, the said Moore, would release to him the said annuity."

And it is further alleged "that the said Moore, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Scholfield the said sum of five thousand dollars." And again, "that the said deed of indenture was made in consideration of money lent upon and for usury; and that by the said indenture there has been reserved and taken above the rate of six dollars per annum in the hundred, for the forbearance of the said sum of five thousand dollars so lent as aforesaid."

The fourth plea contains, substantially, the allegations as to the lending, &c., that are found in the second plea.

The facts stated in the pleas are admitted by the demurrers, and the question of usury arises on these facts, connected as they are with the contract.

Although the second and fourth pleas may not contain every proper averment with technical accuracy, yet they are substantially good. All the material facts to constitute usury are found in the second plea.

It states a corrupt agreement to loan the money at a higher rate of interest than the law allows. That the money was advanced and the contract executed in pursuance of such agreement. That on the return of the principal, with a full payment of the rent after the lapse of five years, the annuity was to be released. The amount agreed to be paid above the legal interest, for the forbearance, is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty. Five hundred dollars, under cover of the annuity,

were to be paid annually for the forbearance of the five thousand dollars, making an annual interest of ten per cent. Do not these facts, un-
228*] contradicted *as they are, amount to usury? Is it not evident, from this statement of the case, that the annuity was created as a means for paying the interest until the principal should be returned, and as a disguise to the transaction? Such is the legitimate inference which arises from the facts stated in the plea.

At this point in the case an important question is raised—whether Lloyd, the plaintiff in the replevin, being the assignee to Scholfield, can set up this plea of usury in his defense. It is strongly contended that he cannot. He purchased this property, it is alleged, subject to the annuity, and paid for it a proportionably less consideration. That knowing of the charge before he made the purchase, it would be unjust for him now to evade the payment. And the inquiry is made whether Lloyd could plead usury in this contract if the annuity had been purchased by Scholfield. He would be estopped from doing so, it is urged, by the obligations of his own contract, as he is now estopped from resisting the claim of Moore.

As to the injustice of the defense, it may be remarked that the objection would apply with still greater force against Scholfield if he were to attempt, by a similar defense, to evade the payment of the annuity. He received the money after assenting to the contract; but he is at liberty to evade the payment of the annuity by the plea of usury. Is the position correctly taken, that no person can avail himself of this plea but a party to the original contract?

The principle seems to be settled that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons who are entire strangers to the transaction. (Comyn on Usury, 169.) A stranger must “take heed to his assurance at his peril,” and cannot insist on his ignorance of the contract in support of his claim to recover upon a security which originated in usury.

In the case of *Lowe v. Waller* (Douglass, 735), the plaintiff was the indorser of a bill originally made upon an usurious contract, though he had
229*] received it for a valuable *consideration and was entirely ignorant of its vice, the Court of King's Bench, after great consideration, determined that the words of the statute were too strong; and that after what had been held in a case on the statute against gaming, the plaintiff could not recover.

If a bill of exchange be drawn in consequence of an usurious agreement for discounting it, although the drawer to whose order it was payable was not privy to this agreement, still it is void in the hands of a *bona fide* indorser. (2 Camp., 599.) In Holt's N. P., 256, Lord Ellenborough lays down the law that a *bona fide* holder cannot recover upon a bill founded in usury; so neither can he recover upon a note where the payee's indorsement through which he must claim has been made by an usurious agreement. But, if the first indorsement be valid, a subsequent usurious indorsement will not effect him, because such intermediate indorsement is not necessary to his title to sue the original parties to the note.

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If a note be usurious in its inception, and it pass into the hands of a *bona fide* holder who has no notice of the usury, and the drawer give to the holder a bond for the amount of the note, the bond would not be effected by the usury. (8 Term Rep., 390.)

In the case of *Jackson v. Henry*, reported in 10 Johnson, 185, a plea of usury was set up to invalidate the title of a purchaser at a sale of mortgaged premises. This sale, under the statute of New York, is equivalent to a foreclosure by a decree in chancery; and the court decided that the title of the purchaser was not affected by usury in the debt for which the mortgage was given. The statute of New York declares all bonds, bills, contracts and assurances, infected with usury, “utterly void.” And so say the court, on the adjudged cases, when the suit at law is between the original parties, or upon the very instrument infected.

The case of *De Wolf v. Johnson*, reported in 10 Wheat., 367, is relied on by the counsel for the defendant as a decision in point.

In that case it will be observed that the first mortgage, *being executed in Rhode [***230** Island in 1815, was not usurious by the laws of that State; and the second one, executed in Kentucky, in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure, was not involved in that case.

The Virginia statute makes void every usurious contract; and the second plea contains allegations which, uncontradicted, show that the contract between Moore and Scholfield was usurious in its origin.

This contract, thus declared to be void, is sought to be enforced against Lloyd, the purchaser of the property charged with the annuity. Between Scholfield and Lloyd there is a privity; and if the contract for the annuity be infected with usury, is it not void as against Lloyd?

In this contract a summary remedy is given to enter on the premises and levy, by distress and sale of the goods and chattels there found, for the rent in arrear; and if the distress should be insufficient to satisfy the rent, and it should remain unpaid for thirty days, Moore is authorized to enter upon the premises and to expel Scholfield, his heirs and assigns, and hold the estate. Lloyd, as the assignee of Scholfield, comes within the terms of the contract: and is liable, being in possession of the premises, to have his property distrained for the rent, and if it be not paid, himself expelled from the possession. Under such circumstances, may he not avail himself of the plea of usury and show that the contract, which so materially affects his rights, is invalid? Moore seeks his remedy under this contract, and if it be usurious and consequently void, can it be enforced?

If usury may be shown in the inception of a bill to defeat a recovery by an indorsee who paid for it a valuable consideration without notice of the usury, may not the same defense be set up where, in a case like the present, the party to the usurious contract claims, by virtue of its provisions, a summary mode of redress.

The court entertain no doubt on this subject. They think a case of usury is made out by the

facts stated in the second plea, and that Lloyd may avail himself of such a defense.

231*] *The judgment of the Circuit Court must be reversed, and the cause remanded, with instructions to overrule the demurrers to the second and fourth pleas and permit the defendant to plead.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Alexandria, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to overrule the demurrers to the second and fourth pleas, and to permit the defendant to plead, and for such further proceedings as to law and justice may appertain.

See S. C., 9 Pet., 418.

Cited—12 Pet., 146; 4 Cranch C. C., 217; 3 McLean, 346; 6 McLean, 624.

232*] *JOHN P. VAN NESS, AND MARCIA, HIS WIFE, *Complainants, Appellants,*
v.

THE MAYOR, ALDERMEN, AND BOARD
OF COMMON COUNCIL OF THE CITY OF
WASHINGTON, AND THE UNITED STATES
OF AMERICA, *Defendants.*

*Rights of former proprietors of Washington city
lands.*

In 1822 Congress passed an Act authorizing the corporation of Washington to drain the ground in and near certain public reservations, and to improve and ornament certain parts of the public reservations. The corporation are empowered to make an agreement by which parts of the location of the canal shall be chauged for the purpose of draining and drying the low grounds near the Pennsylvania Avenue, &c. To effect these objects, the corporation is authorized to lay off in building lots certain parts of the public reservations, Nos. 10, 11, and 12, and of other squares, and also a part of B street, as laid out and designated in the original plan of the city, which lots they may sell at auction and apply the proceeds to those objects, and afterwards to inclosing, planting and improving other reservations, and building bridges, &c., the surplus, if any, to be paid into the Treasury of the United States. The act authorizes the heirs, &c., of the former proprietors of the land on which the city was laid out, who may consider themselves injured by the purposes of the act, to institute in the Circuit Court a bill in equity, in the nature of a petition of right against the United States, setting forth the grounds of any claim they may consider themselves entitled to make, to be conducted according to the rules of a court of equity; the court to hear and determine upon the claim of the plaintiffs, and what portion, if any, of the money arising from the sale of the lots they may be entitled to, with a right of appeal to this court. The plaintiffs, Van Ness and wife, filed their bill against the United States and the corporation of Washington, claiming title to the lots which had been thus sold, under David Burns, the original proprietor of that part of the city, and father of one of the plaintiffs, on the ground that by the agreement between the United States and the original proprietors upon laying out the city, those reservations and streets were forever to remain for public use, and without the consent of the proprietors could not be otherwise appropriated or sold for private use; that the Act of Congress was a violation of the contract; that by such sale and appropriation for private use

the right of the United States thereto was determined, or that the original proprietors re-acquired a right to have the reservations, &c., laid out in building lots for their joint and equal benefit with the United States, or that they were in equity entitled to the whole or a moiety of the proceeds of the sales of the lots. Held, that no rights or claims exist in the former proprietors or their heirs, and that the proceedings of the corporation of Washington, under and in conformity with the provisions of the act, are valid and effectual for the purposes of the act.

A PPEAL from the Circuit Court of the District of Columbia for the County of Washington.

*The original bill in this case was filed [***233** the 16th of April, 1823. It set forth that the complainant, Marcia Van Ness, was the only child and heir-at-law of David Burns, deceased. That Burns was, in his lifetime, and particularly on the 6th of July, 1790, seized and possessed of a considerable tract of land within the limits of the present city of Washington; that a part of this land constitutes so much of the land mentioned in the second section of an Act of Congress of May 7, 1822, c. 96, as is indicated in a map annexed to the bill of complaint by the words "Reservation Nos. 10, 11, and 12, on the north side of the Pennsylvania Avenue."

That by virtue of the said Act of Congress the corporation of the city of Washington have proceeded to lay off and divide the said land into lots; that they have sold some, and are about to sell others; that the land thus disposed of is to be held by the purchasers for their own private use and exclusive benefit, and the bill complains of these proceedings as a breach of trust.

It avers that on the 6th of July, 1790, an Act of Congress passed, establishing the temporary and permanent seat of government of the United States. By this act the President was authorized to appoint commissioners who were authorized to purchase or accept such quantity of land within the district as the President might deem proper for the use of the United States, and according to such plans as the President should approve. By virtue of this act, various proposals were made concerning cessions of land for the site of the city of Washington; the substance of which proposals was that the President might retain any number of squares he might think proper for the public improvements, or other public uses, and that the lots only which should be laid off should be a joint property between the trustees on behalf of the public and each of the three proprietors, and that the same should be equally divided between the public and the individuals, as soon as might be after the city should be laid off.

For the streets the proprietors were to receive no compensation. For the squares and lands in any form which should be taken for public buildings or any kind of public *im- [***234** provement or uses, the proprietors, whose lands might be so taken, were to receive compensation, &c.

On the 28th of June, 1791, David Burns, by his deed, conveyed to Thomas Beall and John Mackall Gantt, in fee-simple, for the purposes and trusts therein mentioned, a considerable quantity of land, part of which constitutes the land described in the Act of May 7, 1822.

The whole of the land thus conveyed to Beall and Gantt was afterwards (30th of November, 1796) conveyed by them to the commissioners appointed under the act aforesaid, upon the same trusts and uses as are expressed in the deed of conveyance to them.

The plan of the city as originally projected by L'Enfant, improved and matured by Elliott, was approved and adopted in 1792 by the President of the United States. According to this plan, the land described is within the operation of the Act of the 7th of May, 1822, except so much thereof as may have been sold by virtue of an Act of February 24, 1817, entitled, "An Act authorizing the sale of certain grounds belonging to the United States in the city of Washington." The complainants are ignorant of the extent of these sales, but claim all which may thus have been disposed of.

The map referred to in the bill exhibits the division that was made under the direction of the corporation of the land in question into lots, and is the guide by which the sales have been conducted. A part of the land in question was not reserved for public improvements or other public uses, but belonged to a street called North B Street.

The complainants aver that the land in question, if sold to private individuals to be held by them for their individual benefit, will be placed entirely out of the reach of the trusts and purposes which were intended to be created and secured by the deed and agreement aforesaid. The complainants are advised this cannot be done without their consent, which they are willing to give upon the terms of the original contract. They are willing to occupy the same ground they would have occupied if what is now proposed to be done had been proposed in 1792; that is, that the land then reserved as public squares and streets, and now designed **235** to be divided into private building lots, should be divided between them and the United States, or the corporation claiming the title of the United States.

The complainants refer to an Act of May 6, 1796, authorizing a loan for the use of the city of Washington and to other acts of Congress, as uniformly holding out the idea that the land in question is not subject to congressional control. They refer also to the proceedings of the commissioners in *Davidson's* case, in January, 1794, a copy of which is annexed, and to the opinion of the Attorney-General in that case.

The complainants aver that they have presented their claim to the corporation of Washington, and to the commissioners appointed by the corporation, and urged a postponement of any further sale.

On the 19th of May, 1826, the complainants filed an amended bill, the substance of which is:

That Marcia Van Ness, the complainant, is the only child and heir-at-law of David Burns, deceased; that David Burns, in his lifetime, was lawfully seized in fee of the premises in question; that under an Act of Congress of July 16, 1790, and a supplementary Act of March 3, 1791, proposals were made by and on behalf of the President, thereto lawfully authorized, to various persons then the owners of different portions of land lying within the present limits of the city of Washington, relating to

the purchasing and accepting from the proprietors, various parts of their lands lying within the limits aforesaid. In consequence of such proposals an agreement was finally made between the proprietors, among whom was David Burns and the United States, the terms and nature of which are set forth in an entry under date of April, 1791, in a book, &c., as set forth in the original bill. On the 28th of June, 1791, David Burns, in pursuance of the agreement and arrangement as aforesaid, made and executed his deed of conveyance to Beall and Gantt, as set forth in the original bill. Beall and Gantt conveyed, as recited in the original bill (setting out the trusts). Afterwards, on the 13th of December, 1791, the President transmitted to Congress a plan of the city which had been adopted as the permanent seat of government; that subsequently, ***various alterations** [***236** were made in the same, at different times, under the authority and sanction of the President. Many buildings squares have been introduced in addition to those contained in the plan originally adopted; alterations have been made in the number and directions of the streets; in the dimensions of the building squares and public appropriations; and in all such cases, when such alterations have been made and those pieces of ground which had been at any time appropriated as streets or public reservations, have been subsequently converted, either in whole or in part, into building lots, the variations have been by the mutual consent of the United States and the original proprietors respectively; and the lots in such building squares have been uniformly divided between the United States and such original proprietors.

They insist that such mutual consent and such distribution were not only required by the true meaning and legal and equitable interpretation of the original compact and agreement, but such practice acquiesced in by both parties ought to be deemed and received as the mutual understanding and design of the parties at the time of entering into it.

In pursuance of such original agreement and of the acts of Congress, the President did select and appropriate for streets, squares, parcels and lots, for the use of the United States, all the premises hereinbefore described, lying on the north and south sides of Pennsylvania Avenue, as aforesaid; being part and parcel of the premises as hereinbefore mentioned, conveyed and transferred by the said David Burns to Beall and Gantt, upon the trusts and confidences mentioned and declared in the deed of conveyance. That for all said premises neither Burns in his lifetime, nor the complainants since his death, have received any other consideration than such as is set forth in the deed, either from the trustees or from the United States. The said parcels of land continued to be held for the use of the United States as a public street or streets, or public appropriation, according to the plan and selection, until an Act of Congress, entitled "An Act authorizing the sale of certain grounds belonging to the United States in the city of Washington," ***was passed**, February 24, 1817; which act was procured at the instance and by the consent of the corporation of the city of Washington. Under this act the commissioner of the public buildings in the city of Washington was authorized to lay off

into building lots and to sell a portion of them, being part of the premises hereinbefore described as lying on the north side of the Pennsylvania Avenue.

The residue of said premises continued to be held for the public use as aforesaid, until an Act of Congress was passed on the 22d of May, 1822, also procured at the instance and with the consent of the corporation, entitled, "An Act to authorize and empower the corporation of the city of Washington, in the District of Columbia, to drain the low grounds," &c.

These acts of Congress are charged to be a clear and manifest departure from the terms and spirit of the original agreement and compact between Burns and the United States. The object and effect of them is to divert the premises from the trusts expressed and declared in the deed; that under such deed an interest still remained and continued in David Burns, which on his death descended to and now remains vested in the complainants; and that the said acts of Congress were passed without their concurrence or consent, and that the constitutional power of Congress and the rights of complainants will not permit or sanction the sale of the premises to private parties without such assent and concurrence.

The complainants insist, and submit to the court, whether the legal operation and effect of said acts be not to determine the trusts originally created as to said premises, and to re-vest the same in them; and whether, if they choose to assent to such appropriation of the premises, the same are not thereby immediately subject to the same trusts as in and by the indenture were expressed and declared as to all those portions of the premises thereby conveyed, as were not deemed proper and necessary by the President; or whether the complainants are entitled to the whole, or simply to a moiety of the money arising from said sales.

The bill proceeds to set forth that under the **238***] Act of February *24, 1817, the commissioner was authorized to sell any number of the lots therein mentioned, not exceeding one-half; and that by the Act of May 22, 1822, the corporation of Washington was authorized to sell and dispose of the right of the United States of, in, and to the building lots therein mentioned; and if by virtue of said acts, any sales have been or shall be made previous to ascertaining and settling the rights of the complainants, much confusion, perplexity and trouble may ensue as well to the corporation and the individual purchasers as to the complainants.

Whereas, in and by the said last-mentioned act it was expressly enacted that it shall and may be lawful for the lawful representatives of any former proprietor of land directed to be sold, &c., at any time within one year from passing of the same, to institute a bill of equity in the nature of a petition of right against the United States in this honorable court, in which they may set forth the ground of their claim to the land in question, the complainants do within the terms of said act present their bill and claim such relief in the premises as may be conformable to the provisions of said acts, or agreeable to equity and good conscience.

And inasmuch as the corporation of Washington is authorized by said Act of Congress to carry the provisions of the same into effect, and

deny any right or interest to the premises, or any part thereof to be in complainants, but claim a right to sell and dispose of the entire premises, and the exclusive right to receive and appropriate all the proceeds of the sales to their own use and benefit, and give out and insist that the complainants have no claim in law or equity to the land or proceeds, and have proceeded to carry the Act of Congress into operation; they pray, &c.

To this bill the defendants filed their joint and several demurrer, plea and answer; the substance of which is, they claim the benefit of all the prior exceptions and grounds of demurrer and plea heretofore taken to the original bill, and deny the equity of the bill. They specially set forth—

1. That the subject matter of complainant, the title therein *pretended, and the [***239** entire relief prayed, are against an Act of Congress passed in the due exercise of a legislative discretion and constitutional power; and, therefore, not cognizable before any municipal court.

2. That the complainants have not shown any title or any individual and proprietary interest in themselves, but a mere participation of the general interests inherent in them as members of the community at large, in common with all the citizens of the United States in the administration of a public trust by the government.

3. They deny that the complainants have equity, and assert that if they have any title to the land it may be established at law.

4. That the bill is defective in its frame, scope and end. Because it is multifarious, and purports to have joined therein several matters and claims of different natures and repugnant characters. It is uncertain as to the nature, extent, and degree of the relief claimed and as to the party against whom it is prayed. It prays no process except an injunction against the corporation.

5. It is not in the nature of a petition of right, demanding any portion of the money arising from the sales of the lands, and merely setting forth the complainants' title to the land, to lay a foundation for their claim to the money, or to a portion thereof, as authorized by the Act of Congress; but it purports to claim against, and in derogation of the authority of said act, and to draw the United States into suit touching this claim. The United States and the corporation are joined in the suit, contrary to the design of the act, and without showing or alleging any interest in the corporation.

The defendants, by way of answer, admit that David Burns was seized, and did convey, as averred in the bill, and that the trustees conveyed to the commissioners as therein set forth; that the whole of the lands thus conveyed, except so much as from time to time has been divided and reconveyed, or has been sold or otherwise disposed of, still remains vested in the United States, or their officers or agents, absolutely and perpetually, for the use of the United States. The defendants insist that the legal as well as equitable estate has been [***240** come vested in the United States, or at all events, that the legal interest has passed to the commissioner of public buildings in trust for the United States. In either case, they insist

that the United States have the only beneficial interest and estate, and the absolute dominion and disposal of the same; and that Congress may and ought to dispose of the same on the terms and in the manner most advantageous to the general interest. They admit that about five hundred and forty-two acres were reserved for the use of the United States, and not allotted and divided; that these lands thus reserved were purchased at the rate of twenty-five pounds, or sixty-six dollars and sixty-six cents per acre, paid out of the public treasury, which price was more than threefold the market price or real value, independently of the adventitious and speculative valuation superinduced by making this the permanent seat of government. The lands thus purchased for the use of the United States, and for which there was no responsibility to the original proprietors beyond the payment of the stipulated price, were distributed throughout the city, and were commonly known and distinguished as reservations, numbered from No. 1 to 17 inclusively. Of these the commissioners accounted with David Burns in his lifetime, for about one hundred and ten acres, and paid him two thousand seven hundred and fifty pounds, or seven thousand three hundred and thirty-three dollars and thirty-three cents; but without any specification of the boundaries or lines.

All the lands described in the second section of the Act of May 7th, 1822, and which the corporation is authorized to lay out and sell, consist of parts of the reservations so purchased as aforesaid, excepting that part over which No. 10 is directed to be extended to Pennsylvania Avenue, which comprises so much of B street as lies between said avenue and said reservation, and was so taken in order to square out to said avenue the house lots into which the reservation was to be divided.

It is admitted that the part of B street (any more than the residue of the street, or the other streets) was not, when originally purchased for the use of the United States, set down **241*** at any price, specifically appropriated to such parts of the property; but was included as an appendage in the purchase of the general mass of property paid for at the rate of twenty-five pounds per acre, without being taken into the computation of the area to be paid for at that rate.

The defendants deny that there was any agreement, condition, understanding or trust, express or implied, between the United States or any of their officers, agents or trustees and the original proprietors or vendors; or that anything was given out or promulgated in the form of proposals or otherwise, either before or after the consummation of the contracts and conveyances by which the lands were sold and conveyed for the use of the United States as aforesaid, importing or implying, or in any manner holding out the idea, hope, or expectation, that the lands, or any part or parcel of the same, should be perpetually and inalienably retained as public property, or dedicated to any particular object of the public improvement; or that the general declaration of use should be limited, and restrained, so as to control the discretion of the government or Congress of the United States in the use or appli-

cation of the property; except that these defendants have heard and believe, that at a very early stage in the adjustment of the plan of the city, the two principal quarters of the city and the particular appropriations of ground for the sites of the President's house and Executive Departments and Capitol were designated, and an implied pledge of the public faith was held out, not merely to the original proprietors, but to the public in general, that those great improvements should be permanently distributed and seated; but as to all the residue of the lands so purchased for the use of the United States, it was to remain at the absolute disposal of Congress.

The defendants have been informed and believe that the intent and object for keeping such extensive reservations of land in the heart of the city unappropriated, were to leave the hands of the government unfettered, and its discretion uncontrolled to dispose of such reservations in furtherance of such future and contingent purposes and views of improvement, ornament, or utility, as were not contemplated *or provided for in the original **[*242** plan; and to leave the government at full liberty to modify and improve such plan according to such future and contingent views. That the practice of the government, its officers, agents and trustees, has always been conformable to this view of the uses and objects to which it was originally destined. If any of the reservations have received names as if appropriated to particular objects, they have been merely popular and arbitrary; and not from any authority, or founded on any pledge or trust, public or private, that they should be so appropriated. Whenever the public convenience has been thought to require it, the lands have been applied without regard to such popular and arbitrary designations, or to any such terms or conditions as the complainants pretend. That the specific purposes and objects designated in the Act of Congress for the application of the proceeds are of the first importance and highest public utility, in reference to the primary design of laying out and embellishing a splendid, populous, and well-ordered capital; which was to be reclaimed from wasted tobacco fields and noxious morasses; and that without the improvements to be accomplished by these means, the city never can fulfil the ends and purposes for which it had been selected as the permanent seat of government.

The corporation, answering for themselves, further say that without delay a board of five commissioners was organized for the purpose of carrying into execution the Act of 1822, according to certain directions in the act and in the ordinance of the corporation; that the commissioners did proceed to lay off the parcels of ground into squares and building lots, and proceeded to make sale of some of them, when they were stopped by the injunction issued at the prayer of the complainants. When the same was dissolved, they again proceeded, and have disposed of the greater part of the same, and intend with all convenient speed to dispose of the residue. Of all which actings and doings, they are prepared to render an account, when they shall be so required and directed.

The complainants filed a general replication;

and after argument, the Circuit Court dismissed the bill with costs.

The complainants appealed to this court. **243***] *The case was argued by *Mr. Coxe* and *Mr. Taney* for the appellants, and by *Mr. Berrien*, Attorney-General, for the United States; and by *Mr. Jones* and *Mr. Wirt*, with whom was *Mr. Webster*, for the corporation of Washington.

Mr. Coxe, for the appellants, stated that the claim of the appellants was founded on the admitted original right of the ancestor of *Mrs. Van Ness* in the premises, and upon the contracts and conveyances by which he parted with these lands. It is contended:

1. That these conveyances and contracts did not vest in the United States an absolute and indefeasible title, but passed an imperfect and qualified estate, to which certain trusts and conditions were annexed, intimately connected and interwoven with the title; and the condition having been broken, and the trusts violated or run out, the estate granted has terminated.

2. If such should not be deemed the legal result from the facts in the case, the complainants will contend that according to the only fair interpretation which can be given to the contracts in question, these premises must now be considered as if originally converted into building lots, and to be equally divided between the government and the original proprietor. Or,

3. That if the interest vested in the United States could not be divested without an actual sale to individuals, then, under one aspect of the case or another, the plaintiffs must be entitled to the whole or a moiety of the proceeds.

It is admitted that the soil originally belonged to *David Burns*, the father of the complainant *Marcia*. This could only be divested by his voluntary act. The right of sovereignty before the cession was in the State of Maryland.

The first article, section eighth, of the Constitution of the United States, gives to Congress the right of exclusive jurisdiction over the district, and in other cases. Under this clause the right of sovereignty over the district is in the general government, and under the second section the right is recognized to acquire real property for certain designated and stipulated purposes.

244*] *It is a fair inference from this part of the Constitution that if Congress can constitutionally acquire the ownership of property within any particular State, its rights are simply those of an individual; and the assent of the States must concur before the sovereign power can be vested. This is specifically provided for as to the District of Columbia by the cessions of Maryland and Virginia. (*Burch's Dig.*, 213, 218, 219.)

Under these acts, as sovereign, Congress has no right in or connection with private property, further than the States held which ceded their jurisdiction. The rights of the United States are derived from individual authority, and are not granted by the States.

The whole foundation, then, of the government title to the real estate in the District of Columbia, rests upon compact with individual proprietors. All the powers which can be lawfully exercised over the property, must be derived from the same source. No rights can

thus be created which the former owner did not himself possess.

The private compacts and conveyances which confer this right, must be subject to the same rules of interpretation and construction as if they were contracts between private citizens. The government, in making these contracts, descends from its sovereign elevation, lays down its privileges and prerogatives, and places itself in all respects, as to right, upon a level with the individual citizen.

2. What, then, is the character, and what the terms of the conveyance and agreement under which the controversy arises?

Under the powers reposed in him by law, President Washington, having selected a site for the contemplated city, met the proprietors of the land covered by it on the 12th of April, 1791 (*Burch's Dig.*, 332), when he made to them certain propositions, and explained his views relative to the same. The owners generally came to an agreement, which formed the basis of the various deeds of trust which were executed immediately after.

The language of this agreement is peculiar and unambiguous. The President is authorized "to retain any number of squares, &c., he may think proper for public improvements or other *public uses." The form of the convey- [***245**ance is not alluded to, neither is the extent of the estate to be granted; the object exclusively regarded is the purpose for which the land is to be retained.

This agreement may be considered, in connection with the legislative acts and the conveyances, as the contract between the parties. (4 *Wheat.*, 656.) It contains the stipulations which were to be executed by formal conveyances.

The conveyances to *Beall* and *Gantt*, the trustees, will be found to correspond with this agreement. The language of those conveyances is, "to the said *Beall* and *Gantt*, and the survivor of them, and the heirs of such survivor;" the *habendum* is in these words: "to have and to hold the hereby bargained and sold lands, with their appurtenances, unto the said *Beall* and *Gantt*, and the survivors of them, and the heirs of such survivor, to and for the special trust following, and no other, &c." And this trust is created by these words: "and the said *Beall* and *Gantt*, or the survivor of them, and the heirs of such survivor, shall convey to the commissioners, &c., and to their successors, to the use of the United States forever, all the said streets, and such of the said squares, parcels and lots as the President shall deem proper for the use of the United States.

It is obvious that the parties considered the contract as still executory; no legal title passed to the United States, or even to the commissioners; but a subsequent conveyance for this purpose was evidently contemplated. The abolition of the office of commissioner has prevented the execution of this design.

The agreement of the 12th of April, 1791, must still be considered as substantially setting out the intentions of the parties; and although wholly informal, "it is an agreement showing the intent of the parties, and therefore sufficient to declare a use." (4 *Mod.*, 264.)

The Maryland Act of Cession refers to this agreement as well as to the conveyance, and the

inquiry is, what was the intention of the parties, as the same can be gathered from the documents referred to?

It embraces three distinct species of property: 1. The *public streets. 2. The public reservations. 3. The building lots. All the ground within the limits of the city is comprehended within one or other of these descriptions.

The first were to be absolutely vested in the government without any compensation further than such as should arise from the enjoyment of this public right of way. The second was to embrace the squares, parcels, and lots, which the President might deem proper for the use of the United States; or, as the original agreement expresses it, "which the President might deem proper for public improvements or other public uses." These were to be paid for at the rate of twenty-five pounds per acre. 3. The building lots, which were to be equally divided between the United States and the original proprietors. All the premises in controversy in this case are comprehended within the two first descriptions.

If the language employed in this agreement and conveyance can receive any precise construction, it means that the parties agree to convey, and did convey "such squares, parcels and lots as the President might deem proper for the use of the United States." If this be ambiguous, all doubt will be removed by reference to the terms of the agreement, where the property, as well as the object of the conveyance, is specifically described "as lands in any form which shall be taken for public buildings, or any kind of public improvements," and "for public improvements or other public uses." These, then, are the objects of the grant.

Where an agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively; each subject being considered as forming the matter of a separate agreement after it is closed. (11 Wheat., 237, 251; cited, also, 1 Coxe, 270; Sugden, 209; 12 Johns. Rep., 436.)

It might have occurred that the land of one proprietor was appropriated to these public objects, and all that of another to building squares. The construction, then, to be given to the various matters, must be the same as if three distinct conveyances had been executed after the plan of the city had been adopted, and with a specific appropriation of each portion of the premises.

247* A conveyance, then, of a particular tract of land to the United States "for public improvements or other public uses," "for public buildings or any kind of public improvements," or "for a street," would have fixed beyond a doubt the purpose to which the subject conveyed was to be applied, and would have constituted an agreement of the most solemn obligatory character.

3. Having ascertained the substance of the agreement, it is immaterial whether we consider the contract as creating a charity, a trust, an estate upon condition, a dedication to the public, or anything else of a similar character.

In England it would have been deemed a charity. (4 Ves., 543; 7 Johns. Ch. Rep., 292; 5 Harr. & Johns., 392; 6 Harr. & Johns., 1.) It is immaterial that we have no statute similar to that of 43 Elizabeth.

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The object and effect of that statute appear to have been to give validity to certain dispositions of property which otherwise would have been void. If, in the cases put, the will required the aid of the statute, such was its operation. If in this case, the assistance of a similar statute should be deemed necessary, it must be on the principle that, at common law, the conveyance would be void. If, however, no assistance is thus required, or should the various statutes under which these arrangements have been made legalize them, the trusts designated are valid as a charity.

But a charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heirs of the donor and the donees. (4 Wheat., Ap., 15; Finch, 322; 3 Merivale, 400, 401, 417.)

Considering it as a condition annexed to the grant that the land should be appropriated to "public buildings," or "other public uses," the result would be the same.

By the disposition the government has made of the premises, the sale of all its interests to individuals, it has misapplied this property, and deprived itself of the power to perform the condition. Such a misapplication was held in *Porter's* case to give to the heir of the donor a right of entry. (1 Rep., 16.)

*The interest created is, however, as **[*248]** well from the nature of it as from the terms employed, nothing more than a trust in some of its modifications.

The contract is entirely executory in its character. It indicates the general object of a conveyance thereafter to be made. Even the deeds from the proprietors to the trustees were but a part execution of the agreement. They contemplated another instrument to convey the legal title to the United States.

The conveyance to the trustees being a deed of bargain and sale, the estate of the United States under it could be nothing more than an equitable one.

It is a settled principle that no use to be executed by the statute by force of such a conveyance can be declared, excepting to the bargainee. (3 Johns., 383; 4 Cruise's Dig., 494; 16 Johns., 302.)

To the whole extent of this controversy the contract is still executory, and completely within the control of a court of chancery; who in framing a conveyance will make it correspond with the intention of the parties.

This intention is to be collected from the original agreement. It is clearly established that without any strict adherence to the forms of instruments, the intent of the parties will operate. (4 Mod., 264; 2 Atk., 577, 582; 1 P. Wms., 123; 1 Bro. P. C., 288; 3 Bro. P. C., 31, 33; 3 Com. Dig., 587; 1 Jac. & Walk., 550; 1 Prest. on Est.)

The beneficial interest under these instruments in the United States is clearly an executory equitable interest. It rests in *fieri*, and the court will endeavor to ascertain the design of the parties in relation to the extent of this interest, and measure their rights by such intention. All trusts are, indeed, executory. (1 Cruise's Dig., 489; 1 Prest., 186.)

If the view of the intention which has been taken is the correct one, the premises in question

were to be apportioned exclusively to objects of a public character—to public improvements, or other public uses.

The property has, however, been diverted from these objects, and has been sold out to **249*** individual proprietors, and is now occupied and enjoyed by them for their private advantage. What, then, is the result of this misappropriation?

The rule of equity seems to be that when the purpose for which a trust was created either ceases or never comes into existence, it is to be considered as if it had never been contemplated. And the benefit of the estate upon which it has been charged must result to those to whom the law gives the estate, in default of disposition by the right owner. This is the whole foundation of resulting trusts.

Estates vested in trustees for the purpose of raising money, if the power is never exercised or the incumbrance is discharged, the estates granted to the trustees terminate. Estates vested in trustees to preserve contingent remainders, if the contingency never arises or the estate in the trustee is at an end before it occurs, revert to the grantor. (1 T. R., 760; 4 Ves., 60; 2 Ves., 399, 406; 7 Com. Dig., 588; 1 Cruise's Dig., 475; Prec. in Chan. 541; 2 P. W., 20; 1 Prest. on Est., 182, 183.)

This sale of the premises amounts to an abuse of the trust, and it can confer no right on the party abusing it, or on those who claim in privity with him. (7 Com. Dig., 619; 3 Maule & Selw., 574.)

No beneficial interest vested in the trustees, Beall and Gantt. They took an estate for the single purpose of conveying it to the commissioners. In the execution of this power they were bound to regard the intention of the parties, without any scrupulous adherence to the phraseology of the conveyance. Whatever might be the nature of the words of the conveyance to them, nothing more passed to them than was necessary to enable them to execute the power confided to them.

If they could now be required to execute that power, and convey the premises in pursuance of it, in framing their deed they must look to and be governed by the obvious intention of the parties. (Doug., 565, 573; 3 T. R., 665, 674.)

If the formal parts of the conveyance should be deemed immaterial, and the equitable interests of the parties alone be regarded, this may be considered as a qualified or base fee in the premises, in the United States.

250* *Qualified or base fees are, substantially, nothing more than fees upon condition. In general, the qualification is annexed to the person of the tenant; but it is not material whether it was annexed to the land or the person holding the land; whether the condition should be determined by the tenant personally, by an act different from that upon which the estate depended, or by the land being discharged of the condition.

In this case it would be equally immaterial whether the language of the conveyance made it the personal duty of the tenant to appropriate the land for the designated purposes, or whether it required the land to be so applied. (1 Prest. on Estates, 431.) The residuary estate is in the grantor. (1 Prest. on Est., 117, 156.)

Such a grant may well operate as a dedication to public uses; in which case it would also partake of the qualities of a trust, and be governed by the rules applicable to trusts. (2 Strange, 1004; 9 Cranch, 331; 2 Johns., 363; 12 Serg. & Rawle, 29.)

Upon these grounds, or some of them, it is apparent that by the operation of the acts of Congress to which reference has been made, and the sale of the individuals who have purchased, the premises have been discharged of the trust originally created. The public, to whose use they have been dedicated, have renounced the interest thus created; and the original proprietors are reinvested with their original title.

It is objected that Congress possess the powers of sovereignty, responsible to the entire people of the Union, and answerable to the nation at large for the manner in which it discharges its duties and executes its powers. This is said to exclude all claims for recompense for the exercise of these powers by individuals. To this it is answered, that such political powers may belong to Congress, and the position assumed may be true, so far as the rights of individuals are not by compact connected with the operations of government. But when it acts upon individual rights, the party whose person is violated, or whose property is invaded, is separated from the mass of the community; and if his case be one in which a court may [***251** act, he may invoke the Constitution and law for his protection and indemnity.

Compacts may be made by the government, and individuals may acquire rights under those compacts. It is incompatible with our institutions to say that holding these rights, government is acting as a sovereign, and is responsible only to the nation for its doings.

The property of individuals may be wrested from them by acts of the government; but it will not do, in a case where the law can interpose, that the citizen shall not claim its aid, because it is a sovereign act.

When government enters into contracts with individuals, it parts with its sovereignty. (9 Wheat., 907.) In the case of *The United States v. Barker*, the government was held bound in all proceeding upon bills of exchange to adhere to the same rules as govern individuals.

According to the general principles of the law of nations, the Act of Cession would not have impaired individual rights. But the peculiar provisions of the Act of Cession give this principle additional sanction; all the right of the United States to land here, depends exclusively upon the compacts made with individuals.

It is then immaterial whether it holds its powers and property in trust for the community or not. The question is, what is the extent of its property, and its rights to that property? and this cannot be affected by the inquiry for whose benefit they are holden. They cannot be enlarged or diminished by the circumstances that they are held by a sovereign power for the general good.

If the appellants are right in their view of the nature of the estate existing in the premises—if this was a charity, and the object of the donation was the public, Congress, representing that public, may renounce this beneficial interest. If it is a trust, and the public are the

cestuis que trust, Congress, representing them, may relinquish all the advantages secured to the community. If it is a dedication to the public, Congress may discharge the estate of this servitude or easement.

While it is conceded that Congress, in the exercise of their power over the public property, are absolute, and are *responsible only to the nation, the legal effect or operation of such renunciation is wholly disconnected with any question of sovereignty.

It is objected that the original proprietors have been paid a full price for the lands in controversy. It is not considered as of any moment how this fact was. In determining what was conveyed, what estate did pass, the question of what was paid for it is an immaterial one. The party was paid for what he conveyed, he received his compensation for what he granted; but the question still recurs, what did pass by the conveyance? No court can enlarge or diminish the effect of the granting part of a deed by referring to the amount of consideration, and deducting from that any rule of interpretation.

It is also insisted that the beneficial purposes to which the proceeds of these sales are applicable are fatal to this claim. These can have no effect upon the question really involved in this case. However judicious the appropriation of the proceeds arising from a violated trust, it will not influence the inquiry whether it was violated.

As to the suggestion that the remedy of the appellants was at law, and not in equity, it is answered that the Act of Congress furnishes the specific remedy by bill, in the nature of a petition of right; and if the case presents a trust, it is peculiarly within the guardianship of a court of chancery.

Whether there is in this proceeding a misjoinder of parties will depend upon the result of the case. The corporation of Washington, acting under the Act of Congress, sells the land and receives and applies the proceeds. If an account is to be directed, it is the only party which can furnish one.

It is also submitted, that the only effect of sustaining this objection would be a decree in favor of the corporation. The consequences of a misjoinder in chancery are very different from what they are at law in an action *ex contractu*.

The parties, appellants, have a beneficial interest in the continued devotion of the property to public uses which a court can notice. (4 Wheat., 630, 641, 697.) The proprietors of every lot are interested in the size of the streets **253***] and in *their direction; in the situation of public squares, and in the location of public institution and buildings.

The original proprietors are especially interested, 1. In diminishing the number of building lots thrown into market. 2. By the enhanced value of their remaining property, in consequence of its vicinity to a public square, or fronting on a commodious street.

Such was the intention of all parties to the compacts and arrangements relative to the city of Washington; and this fully appears from all the circumstances of the case, as well as from the language employed.

The Act of Congress of July, 1790, the only Peters 4. U. S., Book 7.

act passed before the execution of the instruments, did not authorize the purchase or acceptance of property in general, and without limit. The third section authorizes the commissioners to purchase or accept such quantity of land within the district as the President might deem proper for the use of the United States. The fourth section empowers the President to accept grants of money to defray the expenses of such purchases, and of erecting the necessary buildings. There is nothing in this act relating to the city, or the plan of the city, to public streets, or to reservations for city objects.

No authority is given even relative to the building lots, considered as real estate conveyed to the government. The building lots never were conveyed to the United States. They were granted to trustees, a moiety of them to be regranted to the proprietors, and the residue to be sold; and after deducting so much from the proceeds as would pay the former proprietor twenty-five pounds per acre, the residue was to go to the United States, as a donation in money; the objects to which the money was to be appropriated being specifically designated.

The Act of the Legislature of Maryland of 1791 conforms to this view of the case.

The President and the commissioners are by the Act of Congress invested with special powers which they cannot transcend, and it appears that either the estate conveyed must be strictly in accordance with those powers, or that the instruments of conveyance are void. The authority is *vested in them in affirmative words, and this is equivalent to a negation of any other authority. (2 P. Wms., 207.)

A review of the various acts of Congress passed subsequently, shows that the government never contemplated that the contract was susceptible of the interpretation now the subject of complaint. Mr. Coxe here cited and commented on the acts of May 6, 1796, April 18, 1798; April 24, 1800; January 12, 1809, and July 5, 1812; and contended that these various legislative acts conclusively settled the interpretation of the contract, and showed that the signification attached to the phrase, "use of the United States," was synonymous with "public purposes," and other similar forms of expression. A resolution of Congress in the session of 1804 is to the same effect.

But the government has in fact paid nothing for these lands. The various instruments between the parties and the various acts of Congress already cited, show that each proprietor whose lands were appropriated to public purposes was to recover the compensation of twenty-five pounds per acre, out of the proceeds of the building lots selected on his own tract. No other fund was pledged, and this was the practical construction placed upon the compact by the commissioners.

Mr. Wirt and Mr. Jones argued the case for the corporation of the city of Washington.

Mr. Wirt contended that there was but one aspect in which the bill of the appellants presents a case which is within the jurisdiction of the court. It is that in which it asks a partition of the proceeds of the sales of the lots. The only substantial defendant is the United States, and the United States being a sovereign, cannot be sued.

It is said that the Act of Congress of 1822

dispenses with this sovereignty and permits this suit. This is true, so far as the act does dispense with the sovereignty, but no further. The terms of the law are to be carefully observed. The dispensation is a limited one. It permits a suit for the proceeds, and the court cannot assume jurisdiction beyond this point. So much of the bill, therefore, as seeks to enjoin **255*** the *United States from letting lots, or asks for a decree for the land specifically, is *coram non judice*.

It did not require a plea to raise this question of jurisdiction, for the want of jurisdiction is apparent on the bill. On the face of the bill the court will see that the United States is the only material defendant, and the bill refers expressly to the Act of 1822, as the authority for the proceedings. That act thus becomes a part of the bill; it authorizes a suit for no other purpose, and to no other extent, than to ascertain whether the defendants be entitled to any part of the proceeds.

As to dismissing the bill against the United States, and retaining it against the corporation. Can this be done? The Act of 1822 declares that the proceedings shall be conducted according to the principles of equity; and can a court of equity proceed to a decree in the absence of a material party?

But it is clear that the corporation is merely the organ of the government under the Act of 1822, and thus a limited agency, confined to the selling of the lots and applying the proceeds under the sale, is in the corporation. Can the agent of a sovereign be sued for the purpose of stripping the sovereign of his rights of property.

Again, what decree could be rendered against the corporation? Could there be a decree for this property? The corporation has no right of property. It is not even an agent of the government to defend the property in a judicial proceeding; its agency being limited to the special ministerial acts designated by the law of 1822.

Under what principles, then, which regulate the proceedings of courts of equity, could a decree for this property pass against the corporation of the city of Washington? Of what avail would such a decree be against the United States? Decrees bind those only who are parties and privies; and if the bill be dismissed against the United States for want of jurisdiction, in what sense could they be said to be parties or privies to the suit which would remain against the corporation? The corporation claim no rights of property, and are entrusted with no **256*** agency to defend this suit—they are the mere servants of the government in performing the ministerial acts presented by the law of 1822.

We might well insist that the whole bill should be dismissed as not conforming in its character to the only bill permitted by the law to be settled by the appellants. But it is the interest of all parties that this controversy shall be terminated.

There is, it is repeated, but a single aspect in which this case can be regularly presented; it is that it shall be considered a bill in the nature of a partition of right, claiming the proceeds of the sales.

In deciding this question the court must nec-

essarily decide, incidentally, on the title of the complainants to the property. If they have a right to half the proceeds, it can only be because, on some principle of law or equity, they show title to half the property.

2. Are the complainants entitled to the proceeds or to any portion of them? This must depend upon the contract under which the original proprietor parted with the property and conveyed it to the United States.

If he parted with the property *sub modo*—if there was any condition in the contract that it should be applied to a specific use, and that, if not so applied, it should return to the original owner or to his heirs—then, if it has not been so applied, the claimants are entitled to the proceeds. But if the conveyance to the United States was absolute, and for a good and full consideration, and the indication of the use was referred by the terms of the contract to the pleasure of the United States; then it must be manifest that the complainants are not so entitled.

It would seem that the opinion that the complainants are entitled to some part of these proceeds has arisen from confounding the case with others reported in the books, to which it bears no just resemblance, but from which it is distinguished by circumstances which withdraw it entirely from the influence of those decisions.

Thus, cases are cited of charities which are free gifts of property dedicated on the face of the instrument itself, which made the gift to a special use—free gifts, in which the donor had *been induced to make them by no ***257** pecuniary interest, but which proceeded solely from his disinterested bounty and charity.

But these reservations were not free gifts. They were sales founded on a most valuable consideration, in which the vendor had most important pecuniary interests at stake; and this consideration was of a twofold character. 1. The establishment of the federal city on their lands, which has made the desert smile. 2. The direct consideration of twenty-five pounds paid for every acre of the reservation.

The cases of charities have therefore no application, because these were not gifts, but purchases. They have no application, because here there was no dedication on the face of the instrument to any specific use, but that was left open and was placed solely at the pleasure of the United States.

Nor is there any trust, express or implied, raised on the face of the contract in behalf of the original proprietors nor any use for them; the whole trust and use being for the benefit of the United States.

Neither is there seen in the case a single feature which brings it in any degree within the range of those cases which have been cited of estates granted on condition, or of cases of determinable fees. For here is no condition, annexed to the grant, unless it may be regarded as a condition that the property is to be applied to the use of the United States; a condition in the due performance of which the original proprietor had no other interest than any other citizen of the United States. Nor is there anything which makes this a defeasible or determinable fee, because the fee is in perpetuity to the United States.

The argument on the other side proceeds entirely on these two propositions: 1. That this was a free gift of property on the part of Mr. Burns. 2. That it was a gift for a specific purpose; and that this specific purpose having been entirely given up, Mr. Burns, or his representatives, are entitled to a return of the property.

Now, on the other hand, if it appears, 1. That this is not a free gift, but a sale for a **258*** valuable consideration which has *been received by the grantor; on this single ground, then, there must be an end of this claim.

2. If it shall farther appear that it was not even a sale for a specific use, but for the use generally of the United States, there must be an end to all pretension of claim. And the truth of these latter propositions will result from an inspection of the contract, and a steady look at the real character of the case; and at the circumstances out of which the contract grew, and with relation to which it is to be construed.

This was not a gift, but a sale for a valuable consideration which has been paid, and this consideration was twofold. 1. The establishment of a federal city on these lands. 2. The receipt of twenty-five pounds per acre for the reservation.

The establishment of a federal city on the lands. This feature alone distinguishes this case from all others which have been cited from the English or American books.

Was not this a valuable consideration? not an empty, speculative, imaginary consideration, but one real and solid; one which suddenly converted these exhausted and unproductive tobacco fields into mines of almost countless opulence.

The value which was given to the property of former owners is fully shown by the history of the period when the location of the federal city was about to be made. It was in the power of the President to fix the site of the city where he should decide. He could have put it where it now is, or have gone to Georgetown, and there erected the public buildings.

Every public body, and every private individual who in those days touched this subject, has left us proofs of the interest which the land-holders were expected to take and did take in the important question of the precise location of the city; and have thereby borne testimony of the reality and value of the consideration. (Act of Congress of the 16th of July, 1790; Burch's Dig., 226; Act of the Legislature of Maryland of the 19th of December, 1791.)

Suppose the whole of the land on which the **259*** city stands *had been purchased by the United States before the location of the city, and paid for by twenty-five pounds per acre out of the public treasury, and such a deed had been taken as that which has been executed—a conveyance in trust to the United States—could the vendor have any color of right to restrict the United States as to any use of the property thus purchased?

Suppose the property had been condemned by inquisition under the law of Maryland to the use of the city of Washington, could it possibly be contended that the former proprietor would retain any control over the property or its application, the land being paid for out of the public treasury? Now, if it be true that if Peters 4.

the property is paid for by the United States, either by voluntary contract or by writ of *ad quod damnum*, the former proprietor would cease to have any control over it; what is there in the mode of payment which was adopted, and the benefits which he received, to vary the rights of the parties?

It is urged that as the payment was made out of the funds of the ancestor of the complainants, the reservations were virtually free gifts. Now, there was nothing in the case which deserves the name of a free gift, for the establishment of the city was a consideration which produced the whole increased value of the property.

By the parties themselves it was never pretended that these reservations were a gift on the face of the deed itself; they are treated as bargained and sold to the use of the United States; and nothing is pretended to be a donation, except so much as shall remain of the proceeds of the sales of the alternate lots, after the payments for the reservations have been made.

But suppose that the money which was produced by the sales of the lots and was paid for the reservations, is to be considered as a gift of money by the original proprietors, is not money so given as absolutely the property of the United States as if it had been raised by a tax? That such gifts would be made was anticipated by Congress—gifts in consideration of the establishment of the city on the lands of the proprietors.

*But it is said that the proceeds of [***260** those lots were a gift of money for a limited purpose; that is, for the purpose of its being applied to pay for these reservations at the rate of twenty-five pounds per acre; and these were to be purchased for a specific use, from which the United States have departed by the Act of 1822. Such is not the agreement, nor the deed which was to give effect to the agreement. The agreement is to be taken all together, not distributively.

Mr. Berrien, Attorney General for the United States, stated, that by the Act of Congress of 1822, it was made his official duty to represent the interests of the United States in this case.

The act authorizes the Circuit Court to entertain jurisdiction of a bill in equity in the nature of a petition of right against the United States; to hear and determine upon the claim of the appellants, and to determine what proportion, if any, of the money arising from the sale directed by the act, they are entitled to. The purpose of the government in passing the law is fulfilled by meeting the claim on its merits.

The bill states that the United States had no right, without the consent of the complainants, to dispose of the lands directed to be sold by the law: that such a disposition of them determines the trusts and reverts the property in the original proprietors, or their representatives; or that at their option the trusts originally declared attach to the property so transferred, or to the proceeds arising from the sale.

It is not necessary in this proceeding to consider the question of forfeiture. If such an effect was produced by the Act of 1822, the complainants have their remedy against the purchasers under the act. They have, however,

relinquished that ground, and they seek relief against the United States under the special provisions of the law; thus affirming the sale and seeking a dividend of the proceeds of the sale.

But in any view of the case the Circuit Court had no jurisdiction to hear and determine such a claim, and the only question presented for the consideration of this court, and which was **261***] *properly before the court below is, whether the complainants, coming in and assenting to the appropriation of the lands made by the Act of 1822, are entitled to a moiety of the proceeds of the sales.

These propositions are maintained on the part of the United States. 1. The legal effect of the conveyance from David Burns to Thomas Beall, of George and John M. Gantt, and by the latter to the commissioners of Washington, was to divest David Burns and his heirs of all right, title, and interest in the several squares or parcels of land selected for the use of the United States.

2. The deed from David Burns to Thomas Beall and John M. Gantt conveyed the legal estate of David Burns to all the lands held by him within the limits of the contemplated city to those persons, "to have and to hold," to them and the survivor of them, and the heirs of such survivor forever, on certain special trusts, among which were the following: to convey to the commissioners of Washington, &c., and their successors to the use of the United States forever, and for the consideration of twenty-five pounds per acre, the lands which are the subject of this controversy; all which they covenanted to do.

In the execution of this trust, and in the fulfillment of their covenant, Thomas Beall and John M. Gantt did convey to the commissioners. The legal title to the lands then became vested in the commissioners, in trust, to hold that portion of them which is now in controversy, for the use of the United States.

In equity the title became absolutely vested in the United States. (1 Eden, 226.) For the limitations of trusts are to be construed the same as those of legal estates. (8 Com. Dig., 1006.)

It was in the eye of equity a grant to the United States forever. Such a grant vests the fee. A grant to the king *in perpetuum* gives him a fee without the words "heirs" or "successors," for he never dies. So, also, is the law as to a grant to a corporation aggregate. (4 Com. Dig., 12; 2 Bac. Abr., 536.)

If this were not so, the continuance of any **262***] right, title, or *interest in David Burns or his heirs was inconsistent with the authority under which the purchase was made; which, being special, created by a public law, and therefore known to the vendor, the conveyances given and received must be construed in reference to it. The Act of Congress under which the purchase was made is to be taken as part of the contract.

The commissioners were authorized to purchase or accept lands within the district for the use of the United States; they were moreover authorized to accept grants of money. Under this latter authority they entered into a contract between the United States and the original proprietors for the division of those building lots.

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But it was in the execution of their power to purchase for the use of the United States that they did purchase the reservations selected by the President, and paid for them at the rate of twenty-five pounds per acre.

These they were required to purchase for the use of the United States—for their sole use. They were not authorized in relation to these lands to admit any community of interest. They had simply the power to purchase or accept, but in either case, for the use of the United States; not for the joint use of the United States and any other persons. The preliminary agreement expressly negatives the idea of such joint use or joint property in the United States and the former proprietors.

It was a power to purchase for the use of the United States generally, without a specification of the purposes to which the land should be applied, or any limitations whatever upon the direct and absolute dominion which the United States were to acquire by the purchase.

Would an express stipulation that the United States should hold these squares in perpetuity, as such, without power to appropriate them to any purpose, have been pursuant to the authority under which the commissioners acted? They were authorized and directed to purchase such lands as the President should deem proper for the use of the United States. Can such a stipulation be implied from a grant to the use of the United States? But if it could, the implication must be *extended further. [***263** From a grant to the use of the United States without qualification, absolutely, and forever, you must imply, 1. That the United States must be forever restrained in the use of the thing granted to the specific purpose to which it was applied at the date of the grant. 2. That a breach of this condition would raise a new trust for the benefit of the United States and the original proprietors or their representatives. It would not operate as a forfeiture, but it would raise a new trust for the joint benefit of the parties, absolute in its terms.

From a grant to the United States a condition is implied, and then a breach of that condition; which, however, does not operate a forfeiture, but serves as the basis of a new trust, to be raised by implication for the joint benefit of the United States and the original proprietors.

3. Construing the contract according to its plain import and intent, there is no equity in the complainants' claim.

The proprietors conveyed to Beall and Gantt certain lands which were to be laid out as a city, with such streets or squares, parcels or lots, as the President of the United States should approve, on certain trusts. 1. To convey to the commissioners of the city of Washington and their successors for the use of the United States forever, all the streets and such of the squares, parcels, and lots, as the President should deem proper, for the use of the United States. 2. Of the residue of the lots, one-half were to be reconveyed to the original proprietors. 3. The other moiety was to be sold under the direction of the President, and the proceeds, after paying twenty-five pounds per acre for the lots, squares, and parcels taken for the use of the United States, were to be paid over to the President as a grant of money to be

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applied for purposes, and according to the Act of Congress "for establishing the temporary and permanent seat of government of the United States."

The result of this was that the land conveyed, or so much of it as was necessary, being laid out in a city, the United States were to take to their own separate use forever such squares, parcels or lots as the President should prefer, and to pay therefor twenty-five pounds per acre; the remaining **264***] ing *lots to be divided between the United States and the original proprietors. The streets were, of course, given up without compensation. One moiety of the remaining lots and any lands not included in the city to be conveyed to the original proprietors, the other moiety to be sold as has been stated.

The appellants pretend that the lots and parcels taken for the use of the United States and paid for at the rate of twenty-five pounds per acre, must be retained as squares, or as the sites of public buildings, or for other public works; and cannot be sold to individuals for building lots without entitling the appellants to a moiety of the purchase money.

It is contended that there is no equity in this claim. 1. Because excluding the adseittitious value given to the property of the original proprietors by the location of the city as the seat of government, a full price was paid by government for the land. 2. As against the United States the proprietors have no right to make any claim, on account of this factitious value. 3. Independently of the consideration paid per acre for the lands appropriated to the United States, the proprietors, by the sale of the moiety of the building lots which were reconveyed to them, were liberally compensated for their property. 4. It was expressly denied in the answer, and no contradictory testimony is offered that the lands reserved from the sale and appropriated to the use of the United States were so reserved to be appropriated, or under a pledge to appropriate them to any specific purpose whatever, except the sites of the Capitol and President's house. 5. No such pledge was necessary to secure to the original proprietors an advantageous sale of the moiety of the lots reserved to them; for the interests of the United States concurred in not overstocking the market, as they were entitled to the proceeds of the sales of the other moiety. 6. Such a pledge would have been much more strongly implied in behalf of the purchasers, or individual lot-holders, the value of whose acquisitions might be affected in various ways by laying off the reservations into building lots.

But both and all claims must yield to the right **265***] of the *United States to dispose as Congress may think proper of that to which an unconditional title had been acquired, and the interests of all were secured by the consideration that the government had a deeper interest than any individual could have in the prosperity of the city.

7. It was a fund reserved for the future improvements of the city. Improvements would be required, and the quantity reserved proves that this was the object of the reservation.

The *Attorney-General* then went into an examination of the practice which had prevailed under the acts of Congress, in relation to the city of Washington; and contended that it had Peters 4.

been in accordance with the views of the United States, as now represented by him. He denied that on any occasion a construction different from that which he had given to the contract with the proprietors, and to the laws relative to the city, had ever been assented to by the government, or by their officers.

Mr. Taney, for the appellants, in reply, contended that whatever rights Congress or the government had in the property within the city of Washington, depended on the contract with the original proprietors, and not on their rights of sovereignty. The Act of Maryland of 1791 is the act which was accepted by Congress; and all the rights of sovereignty which can be exercised are derived from that act. They cannot be greater than those which were possessed by the former sovereign who granted them. If the United States accepted a cession with limited powers of sovereignty, they are bound by the limitations. They might have refused the terms, but having accepted them, they are bound by them.

The Constitution of the United States declares that Congress shall have exclusive legislation; but it does not require that the power shall be despotic or unlimited. It merely excludes the states from all interfering legislation.

The Act of 1791, sec. 2, passed by Maryland, limits the power of Congress, and declares that the cession shall give them no other right in the land than may be transferred by the individuals. All the rights, therefore, which the United States had or have in the soil in the district must have been *acquired by contract. [**266** They can acquire none by the exercise of sovereign power, for they have surrendered that portion of sovereignty in this district by accepting it upon the terms stated.

Deriving their rights from contract with the proprietors, under no provision in the same nor under the Act of Cession could they condemn the land for public uses; for that would not be a transfer from the proprietor, but would be to acquire it without a transfer from him, and by a mere act of sovereign power.

If, however, the sovereignty of Congress is not limited by the cession, yet the exercise of despotic power on this subject is restrained by the Constitution; and if the law of 1822 was intended to seize on the private property of individuals and dispose of it for public profit merely for public gain, it would be contrary to the letter and spirit of the Constitution, and be void. For if they may take it for such a purpose, they must give the owner of it a fair compensation; and they have no right to fix that compensation at what they may sell it for.

But the seizure of the property of an individual, merely to sell it to another to raise money for any purpose, can hardly be supposed to be authorized by any principles of a free government, and is in manifest opposition to the spirit of the amendment of the Constitution. (2 Dall., 314.)

But the Act of 1822 has no such object. It proposes to sell the right of the United States, and no more. It has no terms to divest the right of the individual owners, and obviously has no such design. It submits these rights to judicial decision, to be tried by the principles of a court of equity. In submitting to such a trial and decision,

they place themselves on the ground of contract, and waive any rights their sovereignty might give. For it would be absurd, indeed, to suppose that the United States gave to the court the mere power of hearing a cause, when that hearing could produce no judicial result.

If Congress by mere despotic power might seize and sell this property, without compensation to the owner, and if their will be the only principle of equity by which it is to **267** be decided, then all this controversy authorized by law is nugatory. For in that case we have lost the land by seizure, and we are not entitled to payment for it unless they will it, and as they do not will it in the law, we are sent to this highest tribunal to show rights which have no existence, as they have been extinguished by the despotic power of the sovereignty.

The whole frame of the Act of Congress shows that such is not the meaning of the law. The court are to decide according to the principles of equity; and what the equity may be depends on contract expressed or implied. The government stands before this tribunal as a suitor; having the same rights, and subject to the same rules as an individual.

Assuming the questions in the case to depend on contract:

The agreement between the United States and the proprietors was entered into on the 12th of April, 1791. The deed of conveyance was executed in July, 1791. Before this agreement the site of the city was fixed.

There was no contract as to the location of the city with the proprietors. Everything had been done independently of the proprietors, and without their consent. The agreement was among the proprietors themselves; neither the commissioners nor the President are parties to it. It does not purport to be entered into in consideration of the fixing of the city here, that was done; but expecting immense advantages, they were willing to make liberal return.

The government are not, therefore, purchasers for this consideration. It was merely voluntary on both sides; both parties derived advantages, but not by the contract with one another; and if there was no contract, there was no purchase.

Neither does the twenty-five pounds per acre paid for the public ground constitute them purchasers. The agreement and the deed must be taken together. The United States were not the founders of the city, but the proprietors. The President was authorized by the United States to fix on this site for the seat of the government; and to accept such quantity of land as he should deem proper for the use of the United States. In the plan of the city and **268** in the regulation of the streets, he was the agent of the proprietors, not of the United States. Such was the opinion of Mr. Breckenridge, Attorney-General of the United States. (Burch's Dig. 337.) Squares, public walks, and grounds for gardens, were reserved; not necessary and proper for the use of the United States.

The deed executed by the proprietors conveyed the land absolutely and unconditionally, and without the payment of any consideration. Nothing is required in return; nothing is reserved for the land dedicated to the use of the

United States unless it shall be obtained from the sales of the lots to be disposed of under the contract. This is a deduction from the donation of the proprietors. Thus the squares cost the United States nothing.

Had the whole of the land of any of the proprietors been laid out in squares, he would have received nothing for the same. The Act of 1791 confirms this construction of the contract, and was accepted by Congress.

These being the provisions in the deed, the next question is, what is the construction of the instruments by which these contracts were made? Was the absolute and unqualified use given or conveyed; or was the use for public purposes, as distinguished from private property?

And this question mainly depends on another. What was the character of the estate conveyed to Beall and Gantt? If it was a conveyance under the statute of uses, or was an executed trust, the words must receive a technical construction. If an executory trust, it is otherwise. If it is such, is it to be construed by the principles applicable to such contracts? (Preston on Estates, 186, 187; Fearne, 136, 137.) No act of the trustees can change the character of the trust or the rule of construction.

If Beall and Gantt have conveyed a different estate from the one authorized, the conveyance gives no title beyond the trust. And the case is now to be considered as if the Court of Chancery were, in the absence of any conveyance, called on to direct the proper deeds. It is to be executed now as it would have been the day after the contract was made; lapse of time has not altered its meaning.

*Suppose chancery so called on, what **269** would be the stipulations directed in the deed? The objects in view are manifest.

Suppose the government should have abandoned Washington and fixed itself elsewhere, would they have been allowed to sell the squares? Suppose they abandon it in part instead of the whole, does it alter the principle?

Upon the point that this was an executory trust, *Mr. Taney* argued that the conveyance to the trustees, Beall and Gantt, and by them to the commissioners, did not vest the legal title to the public squares in the United States, but created a trust for their benefit. The trust being an executory trust, is to be carried into execution according to the intent of the party who created the trust. (Fearne, 124, 136, 137; Preston on Estates, 187, 188.)

The deed from Mr. Burns is not, therefore, to be construed by technical rules, nor the words of it taken according to their strict legal interpretation; if such a construction appears from the whole case to be contrary to the intention of the grantor.

The United States are not asserting a legal title in directing the squares to be sold. They are exercising a power as *cestuis que trust* over a trust fund; and the extent of their right in the fund they have submitted to judicial decision. And although the words in the deed of Mr. Burns might, in a conveyance of the legal estate under the statute, be held to pass the absolute and unqualified use in the squares, yet in the interpretation of a trust the court will look to the real intention of the parties, and are

not bound by the strict legal meaning of any particular words used in the instrument.

The United States have no rights except by transfer from individuals. (Act of 1791, sec. 3.) In submitting the right to judicial decision, they subject themselves to the rules which govern contracts with individuals.

Expounding the deed of Mr. Burns on these principles, it may be safely assumed that he intended to authorize Beall and Gantt to convey to the commissioners the squares and streets, for the purposes authorized by the act which fixed on Washington as the seat of government. He did not mean to authorize a conveyance for **270***) any other purpose, nor of any *greater estate than the United States desired; for his deed refers to and recites the title of the law of Congress.

The question then is, did the law propose to purchase or accept as a donation the absolute and unqualified interest in the land? or to obtain it for special purposes, and for certain specified uses?

The first proposition supposes that Congress looked forward to a speculation in the land, and expected to gain by the rise of property. This could not have been; and such a presumption is negated by the terms of the acts of Congress.

These different acts of Congress have expounded the meaning of the words, "proper for the use of the United States" in the Act of 1790; and show for what purposes the President was authorized to accept or purchase land. His authority to accept or purchase land being a special one, and for special purposes, he could not accept or purchase for any other purpose; and if he did, the grant would be void. He might accept donations of money, but not of land.

But the proprietor obviously intended to convey for the purposes mentioned in the law and none other.

This is shown by the argument, proposed March, 1791; accepted, April, 1791; and by the deed of June 29, 1791. The deed refers to the Act of Congress, recites its title, and uses the words of the law. Streets are associated with squares, and to be conveyed to the use of the United States.

This being an executory trust, "the court may ascertain the meaning of the grantor," from the nature of the contract and the object of the provision. (1 Prest., 187.)

The object of the proprietor would not have been to allow the President to select all or any of the building lots at this price. He was to be paid out of the sales of the lots. There might not have been lots enough to pay him. Such an intention would have been the surrender of his whole property, without compensation and without motive.

The contract then and now means the same thing; and if such a use of the power of selection, by the President, would have been at that time contrary to the intention of the grantor, it is equally so now.

Yet we are now inquiring what was the intention of the *grantor, and being a trust executory, it is to be executed according to that intention.

It is said that the United States paid its full value. There is no proof of that fact; and the fact is otherwise

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The consideration on which the squares were sold for twenty-five pounds was, that the erection of the public buildings, and the laying out of public walks, &c., would render the city a more agreeable and desirable place of residence, and enhance the price of the lots retained by the proprietor. If he was to retain no lots, or only the refuse lots, it does not by any means follow that he would have taken the twenty-five pounds.

The very case on trial proves that such could not have been the intention of the proprietor. His lots no longer front on a magnificent square. He is cut off from the most public avenue in the city.

The United States are in no sense of the words purchasers. The public squares are in truth, as has been stated, donations from the proprietors.

But if considered as purchasers, they yet purchase for a specific purpose, and having made the contract, they cannot depart from it. They cannot violate their contract. (5 Wheat., 642, 684, 695.)

The grantor is entitled to the execution of his contract, whether he does or does not receive a consideration for it. And it matters not whether his contract is express or implied; whether by way of trust or in any other manner, as by mere dedication to public uses.

In the case of a road or street, the same interest passes to the public, and the same remains in the proprietor. Whether he is paid for it or not, no more passes than the party intended to grant. And if these squares were granted for specific public uses, and not to be converted into private property, that trust, whether created for a valuable consideration or not, must be executed according to the intention of the grantor.

The contract is one entire contract; and being executed in part, must be executed throughout. Being an executory trust, it must be executed according to the intention of the parties, *whether made for a valuable [***272** consideration or not. Marriage is a valuable consideration, and is one class of the easements in which this principle is most commonly applied.

Suppose a chancery court now called on by the United States to compel the trustees to execute the legal conveyances, what would be the conditions and covenants? Would not the squares be made to revert to the grantor when the uses ceased?

The lots were pure donations, and equity would not extend the gift farther than the contract. It did not extend to squares.

Assuming that the public squares were granted for specific public purposes, as has been stated, the United States were the *cestuis que trust* for such purposes and none others. The United States had a right to erect public buildings on them, and to make them public walks or gardens; they were so far *cestuis que trust*; they were not trustees for others.

As this was a trust for the benefit of the United States, they had a right to renounce it.

The proprietors could not compel them to erect the public edifices, or to lay out and ornament the public grounds. They had not bound themselves by contract to do so; they might or might not do it at their pleasure. And they might renounce the trust intended

for their benefit, and the trust would then end; it would be extinguished.

The Act of 1822 is a renunciation of the trust. They, the *cestuis que trust*, declare that they will not use it for the specific purposes for which it was conveyed. It is not a forfeiture. It is admitted that a trust is not forfeited by its abuse; it is not claimed as a forfeiture, but having renounced it, the trust, in their favor, by directing it to be converted into private property, to whom does the property belong? It goes to the heirs of the grantor. (4 Ves., 60; 9 Ves., 399; 5 Har. & Johns., 400; 4 Wheat., 39; Append., 15.)

If the power exists anywhere, either in Congress or elsewhere, to convert these squares into building lots and private property under the provisions of the original agreement and deed, then, as soon as that power is exercised and the **273***] *property so converted, the provisions and stipulations of that agreement attach upon it, and the original proprietor is entitled to the one-half; for whether the power given to lay off the building lots was exercised sooner or later, can make no difference.

If under the agreement and deed the power can be rightfully exercised, the consequence of that exercise of power must follow; and the original proprietor is entitled to one-half of the lots so laid off, under and by virtue of his agreement. The Act of 1822 is obviously framed on this interpretation of the contract. It directs the corporation to sell the right of the United States, and then provides for a decision on these rights.

Congress obviously supposed, when passing the law, that the United States had a right in these lots. And if they had the power to convert the squares into private property under the original agreement and trust, then they would have been tenants in common with the proprietor, and entitled to sell the half and receive the proceeds.

Upon the whole, if the United States had only the right to use these squares for specified purposes, and no right to change the use, if they were merely *cestuis que trust*, they have renounced the trust, and the whole belongs to the original proprietors—it reverts to the donor or grantor.

If, on the contrary, they have the right to change the plan of the city and convert the squares into building lots, then, whenever this is done by a competent authority acting under the contract, the proprietors are entitled to a conveyance of one-half of the lots.

The relief: In either view of the case the relief is complete against the corporation.

If the United States could not sell the half, or could not sell the whole, they could give no right to the corporation to do so; and we were entitled to a perpetual injunction against them. (9 Wheat., 739.)

If the law of Congress does not authorize the court to decree against the United States as to the land itself, but only as to the money received on sale, then the bill may be dismissed **274***] *against them and a perpetual injunction decreed against the corporation.

The great object is to have the rights of the parties adjusted, and no doubt can be entertained that Congress will faithfully carry into execution the principles settled by this court.

But the law of Congress gives the court power to decree against the United States as to the land as well as the money. The Act of 1822, sec. 6, authorizes the party to set out in his bill his title to the land. His bill, therefore, brings that question directly before the court for decision, and imposes upon them the duty of deciding it; and if they must decide it, it follows that they must give the appropriate relief. And if the court come to the conclusion that Congress had no right to sell the land, they can have no right to compel the party to accept money in lieu of it.

The eighth section of the act is only an enlargement of the power of the court. The proprietors might have assented to the sale, and offered to ratify it and accept the proceeds.

The law of 1822 provided for this contingency in the eighth section. It enabled the court to dispose finally of the case, in whatever shape it should be presented to them.

Finally, it is a question between the government and an individual on a subject of the most interesting character. How far may the government, by a new act of legislation, deprive him of his rights of property, and of the remedy to assert them? On such a question it may be assumed as certain that the rights of the individual, whatever they may be, will be protected by this court. It is peculiarly one of those questions on which Congress, with the best dispositions, are most liable to error. It is out of the usual scope of legislation. They cannot be expected to engage in a minute investigation of titles. And they ought not to be held to have exercised wilfully a despotic power; even if they possess it, for the purpose of depriving a private citizen of a full and adequate remedy for the wrong done him.

The Act of 1882 is in a very different spirit, and requires the rights of the party to be decided by the terms of the contract, and not by power.

*As to the forms of this proceeding, it [**275** is hardly necessary to discuss them. It is the great object of all parties to understand their rights, and that is the great purpose of the whole proceeding. Enough appears on the record to enable the court to decide on these. There does not appear, however, any well-founded objection that can interfere with the relief we ask.

Mr. Justice STONY delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the District of Columbia, sitting at Washington, upon a bill in equity, in which the appellants were original complainants.

On the 7th of May, 1822, Congress passed an Act to authorize and empower the corporation of the city of Washington, in the District of Columbia, to drain the low grounds on and near the public reservations, and to improve and ornament certain parts of such reservations. By that act the corporations were among other things to change, by contract with the proprietors of the canal, the location of such parts of the canal passing through the city as lay between Second and Seventh streets, west, into such course as should most effectually, in their opinion, drain and dry the low ground lying on the borders of Tiber Creek; and

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to effectuate this object, the corporation were further authorized; after having extended the public reservation designated on the plan of the city as number ten, so as the whole south side should bind on the line of Pennsylvania Avenue, and after having caused to be divided the said public reservation number ten, and also the public reservations numbers eleven and twelve into building lots; to sell and dispose of the right of the United States of, in and to, the said lots, or any number thereof, laid off as aforesaid, at public sale, &c., &c. And the corporation was further authorized to cause to be laid off, in such manner as the President should approve, two squares south of Pennsylvania Avenue, &c.; and also to lay off north of Maryland Avenue two uniform and correspondent squares; and the said four squares, when so laid off, to divide into building lots; and to sell **276*** and dispose of the *right of the United States in such lots, &c., &c. The proceeds of these sales were in the first place to be applied to the purposes above mentioned, and in the next place to inclosing, planting, or otherwise improving certain public reservations, and building certain bridges, &c., &c.; and the surplus, if any, to go into the national treasury. The sixth section of the act then provides "that it shall be lawful for the legal representatives of any former proprietor of the land directed to be disposed of by this act, or persons lawfully claiming title under them, and they are hereby permitted and authorized, at any time within one year from the passing of this act, to institute a bill in equity, in the nature of a petition of right, against the United States, in the Circuit Court for the District of Columbia, in which they may set forth the grounds of their claim to the land in question." The seventh section provides for the service of process upon, and the appearance of the Attorney-General, &c. The eighth section provides "that the said suit shall be conducted according to the rules of a court of equity. And the said court shall have full power and authority to hear and determine upon the claim of the plaintiff or plaintiffs, and what proportion, if any, of the money arising from the sale of the land hereby directed to be sold, the parties may be entitled to." The ninth and last section of the act provides for an appeal to this court.

The plaintiffs filed their bill in the present case within the time prescribed by the act making the United States and the corporation of the city of Washington parties. They claim title to the lands in controversy, which have been laid off into lots for sale, under David Burns, one of the original proprietors of the city, and of whom the plaintiff Marcia is the only daughter and heir. These lots embrace part of the reservations above referred to, and also a part of the street called B, according to the original plan of the city. The ground of the bill is, that by the original contract of the government with the proprietors, upon the laying out of the city, these reservations and streets were forever to remain for public use, and were incapable, without the consent of the proprietors, of being otherwise appropriated or **277*** sold for private use; that the Act of 1822 authorizing such sale is a violation of the contract; that by such sale or appropriation for private use the right of the United States there-

to was determined; or that the original proprietors re acquired a right to consider them in the same predicament as if originally laid out for building lots; or that, at all events, they were entitled, in equity, to the whole or a moiety of the proceeds of the sale, if the Act of 1822 were valid for the purposes which it professed to have in view.

Some difficulty has arisen at the argument from the peculiar structure of the bill; it professing in some parts to seek relief under the Act of 1822, and in other parts insisting upon a title inconsistent with it, and demanding an injunction to prevent all sales of the land by the corporation. The opinion of this court certainly is, that under the Act of 1822 the plaintiffs can proceed by a bill in equity in the nature of a petition of right against these the United States only for the money arising from the sales, and cannot claim a decree for the land itself, or for any injunction against sales of it.

The view, however, of the case which we are disposed to take, renders it unnecessary to consider whether the bill is so framed that with reference to the Act of 1822 the court could pass a definitive decree against the United States upon it, from the incongruities alluded to.

As it is manifestly the interest and desire of all the parties to have an opinion upon the merits, so as to put an end to the controversy, we shall waive all consideration of minor objections and proceed at once to the consideration of the substantial ground of the claim.

Congress, by an Act, passed on the 16th of July, 1790, provided that a district of territory not exceeding ten miles square, to be located as therein directed, on the River Potomac, at some space between the mouths of the Eastern Branch and Conogochague be, and the same was thereby accepted for the permanent seat of the government of the United States. Three commissioners were by the same act to be appointed, to survey, and by proper metes and bounds to define and limit the district; and they were authorized to purchase or accept such quantity of land on the eastern side *of [**278** the said river within the said district as the President should deem proper for the use of the United States; and according to such plans as the President should approve, the commissioners were to provide suitable buildings for the accommodation of Congress and of the President and for the public offices of the government of the United States. A subsequent act, passed on the 3d of March, 1791, authorized some alterations of the limits of the district. Suitable cessions of the jurisdiction and soil of the territory, subject to the private rights of property of the inhabitants, were made by the States of Maryland and Virginia.¹ And the former act further provided for the removal of the seat of government to the district on the first Monday of December, 1800. The limits of the district were accordingly ascertained and defined, as made known by the proclamations of the President of the 24th of January and the 30th of March, 1791.

As yet no public designation had been made

1.—See Acts of Maryland of the 23d of December, 1788; 19th of December, 1791; 23d of December, 1792, and of the 28th of December, 1793. Act of Virginia of the 3d of December, 1789.

of the site of the federal city which was contemplated to be laid out within the limits of the district, nor of the places on which the public buildings should be erected; nor, indeed, had there been any purchase or donation from any of the proprietors of lands within the district, by or to the commissioners for that object. There cannot, however, be a question that various negotiations had been entered into with the proprietors, and informal proposals made by them with a view to obtain so important and valuable a boon as the location of the city within the boundaries of their estates. And it can admit of as little question, that preparatory steps had been taken on the part of the government to procure suitable plans for the laying out of the metropolis.

In this state of things nineteen of the proprietors of the land constituting the present site of the city of Washington (among whom was David Burns), on the 30th of March, 1791, entered into an agreement, which was presented **279** to the commissioners *as the basis of the terms on which they were willing to dedicate their lands for the location of the city. The agreement was accepted by the commissioners and recorded in their books. It is in the following terms: "We, the subscribers, in consideration of the great benefits we expect to derive from having the federal city laid off upon our lands, do hereby agree and bind ourselves, our heirs, executors, and administrators, to convey in trust to the President of the United States or commissioners, or such persons as he shall appoint, by good and sufficient deeds, in fee-simple, the whole of our respective lands, which he may think proper to include within the lines of the federal city, for the purposes and on the conditions following: The President shall have the sole power of directing the federal city to be laid off in what manner he pleases. He may retain any number of squares he may think proper, for public improvements or other public uses; and the lots only which shall be laid off, shall be a joint property between the trustees in behalf of the public and each present proprietor. And the same shall be fairly and equally divided between the public and the individuals, as soon as may be after the city shall be laid off. For the streets, the proprietors shall receive no compensation; but for the squares or lands, in any form, which shall be taken for public buildings, or any kind of public improvements or uses, the proprietors, whose lands are taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public." There are some minor arrangements as to growing timber, grave-yards, &c., which are not necessary to be mentioned. It is material, however, to observe that no time or mode of payment is prescribed in the agreement of the twenty-five pounds per acre; and no fund out of which it was to be paid is designated. The agreement was merely preparatory, and to be carried into effect by formal conveyances.

Now, it is upon the terms of this agreement that the plaintiffs assert their title to relief in the present case. They contend that though the whole land was to be conveyed, yet the portion of it which should be taken for streets and public reservations, according to the plan approved by the President, was clothed with a

perpetual condition or trust that *they **[280]** should forever remain streets and public reservations, and never should be liable to be appropriated to any private use, or changed from their original public purpose. That upon any such change or appropriation the title reverted to the original proprietors, or, at all events, was to be disposed of and divided between them in the manner provided for in respect to the land laid off into lots. They also contend that the land so diverted to streets and public reservations was a mere donation from the proprietors, and not a purchase by the United States; and, therefore, ought to be governed by the rules applicable to public charities, and the trust strictly construed and enforced.

It is not very material, in our opinion, to decide what was the technical character of the grants made to the government—whether they are to be deemed mere donations or purchases. The grants were made for the foundation of a federal city, and the public faith was necessarily pledged when the grants were accepted to found such city. The very agreement to found a city was of itself a most valuable consideration for these grants. It changed the nature and value of the property of the proprietors to an almost incalculable extent. The land was no longer to be devoted to mere agricultural purposes, but acquired the extraordinary value of city lots. In proportion to the success of the city would be the enhancement of its value, and it required scarcely any aid from the imagination to foresee that this act of the government would soon convert the narrow income of farms into solid opulence. The proprietors so considered it. In this very agreement they state the motive of their proceedings in a plain and intelligible manner. It is not a mere gratuitous donation from motives of generosity or public spirit; but in consideration of the great benefits they expect to derive from having the federal city laid off upon their lands. For the streets they were to receive no compensation. Why? Because those streets would be of as much benefit to themselves, as lot-holders, as to the public. They were to receive twenty-five pounds per acre for the public reservation: "to be paid" (as the agreement states it) "by the public." They understood themselves, then, to *receive payment from the public **[281]** for the reservations. It makes no difference that by the subsequent arrangements they were to receive this payment out of the sales of the lots which they had agreed to convey to the public, in consideration of the government's founding the city on their lands. It was still contemplated by them as a compensation, as a valuable consideration, fully adequate to the value of all their grants. It can, therefore, be treated in no other manner than as a bargain between themselves and the government, for what each deemed an adequate consideration. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was, in no just sense, a case of charity, and was never so treated in the negotiations of the parties. But, as has been already said, it is not in our view material, whether it be considered as a donation or a purchase, for in each case it was for the foundation of a city.

And in construing this agreement, this fact should never be lost sight of. It is obvious that the proprietors or their heirs could not be presumed for any great length of time to have any interest in the streets or public reservations beyond that of other inhabitants. If the city became populous, the lots would be sold and built upon, and in the lapse of one or two generations, at most, the title of the original proprietors might well be presumed to be extinguished by sales or otherwise; so that the interest of themselves or their heirs in the streets and reservations would not be distinguishable from that of other citizens. They must have also contemplated that a municipal corporation must soon be created to manage the concerns, and police, and public interests of the city; and that such a corporation would and ought to possess the ordinary powers for municipal purposes which are usually confined to such corporate bodies. Among these are certainly the authority to widen or alter streets, and to manage, and in many instances to dispose of public property, or vary its appropriation.

They might, and indeed must, also have placed a just confidence in the government, that in founding the city it would do no act which would obstruct its prosperity, or interfere with its great fundamental objects or **282*** interests. It could *never be supposed that Congress would seek to destroy what its own legislation had created and fostered into being.

On the other hand, it must have been as obvious that as Congress must forever have an interest to protect and aid the city, it would for this very purpose be most impolitic and inconvenient to lay any obstructions to the most free exercise of its power over it. The city was designed to last in perpetuity—*capitoli immobile saxum*. No human foresight could take in the great variety of events which might render great changes in the plan, form, and location of the city indispensable for the health, the comfort, and the prosperity of the city. Cases might easily be imagined, as in other cities, where the desolations of fire have made alterations in the streets and public squares of a city, most important and valuable to the whole community. A prohibition, which should forever close up the legislative power of Congress on such a subject, under all circumstances, ought not lightly to be presumed nor readily admitted. It should be proved by the most direct and authentic documents, before we should admit the belief that the wisdom of the first President of the United States yielded up such a valuable franchise.

If the case had stood solely upon this preparatory agreement as an executory contract, there might have been stronger grounds to impose limitations upon the grant of the streets and public reservations. The language of the instrument is, that the President may retain any number of squares he may think proper for public improvements or other public uses. Yet, even then, the appropriation of these squares for public uses would not necessarily carry with it an implied obligation that they should forever remain dedicated to those uses, and to none other. If such had been the intention of the parties, we should naturally ex-

pect to find there some direct expression of it, some acknowledgment of the obligation, or some condition carrying it to such a political mortmain. If the stipulation was so important and valuable as is now contended for, and constituted an object of permanent solicitude, it would scarcely escape the notice of the proprietors in laying down the fundamental basis of their cessions. If it did then escape them, we *should have reason to look [***283** for its incorporation into the more solemn instruments which were contemplated thereafter to be executed by the parties, and were, in fact, executed by them in fulfillment of their original agreement. But no such stipulation is there to be found.

On the 29th June, 1791, the proprietors severally executed deeds of indenture to consummate the agreement of the preceding March. They are all in the same form, and contain the same declarations of trust. That executed by David Burns conveys to Thomas Beall and John M. Gantt (the trustees designated by the president) all the lands of the proprietor within the bounds of the city upon the following trusts, viz., "that all the said lands, &c., as may be thought necessary or proper to be laid out together with other lands within the said limits for the federal city, with such streets, squares, parcels and lots as the President of the United States, for the time being, shall approve; and that the said (the trustees) &c., shall convey to the commissioners for the time being appointed by virtue of the Act of Congress, entitled, &c., and their successors for the use of the United States forever, all the said streets, and such of the said squares, parcels and lots, as the President shall deem proper for the use of the United States; and that as to the residue of the said lots into which the lands, &c., shall be divided, a fair and equal division of them shall be made; and if no other mode of division shall be agreed on by consent of the said (grantor) and the commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate, to the said (grantor) &c., and all the said lots which may in any manner be divided or assigned to the said (grantor) shall thereupon, &c., be conveyed by the said (trustees) to the said (grantor), his heirs and assigns; and that the said other lots shall and may be sold at such time, &c., &c., as the President of the United States for the time being shall direct; and that the said (trustees) &c., will, on the order and direction of the President, convey all the lots so sold, and ordered to be conveyed, to the respective purchasers in fee-simple, &c., &c.

Provision is then made that the twenty-five pounds per acre *to be paid by the [***284** United States for the squares, should be paid out of the proceeds of such sales, and the residue shall be paid to the President as a grant of money to be applied for the purposes, and according to the Act of Congress.

Provision is also made for other objects, not material to be mentioned, and for a conveyance of the trust property to such other persons as the President might thereafter direct, in fee; "subject to the trusts then remaining to be executed, and to the end that the same may be perfected." In pursuance of this last provision,

Beall and Gantt, the trustees, made a conveyance of the premises by an indenture dated the 30th of November, 1896, to certain commissioners appointed under the Act of Congress, subject to the trusts then remaining to be executed; and, among other things, conveyed to the commissioners all that part of the lands, &c., which had been laid off into squares, parcels, or lots for buildings, and now remaining so laid off in the city of Washington.

Now, it is important to observe that the object of the indenture to Beall and Gantt in 1791 was to carry into full and entire effect the preliminary agreement entered into by the proprietors. There is no pretense to say that that indenture has not fully carried that agreement into effect. There is no allegation in the bill of any mistake in the draft of the indenture, or that the instrument was not precisely what the parties intended it should be. The argument at the bar has not attempted to set up any such mistake as a ground of equity. And, indeed, after such a lapse of time and acquiescence in its legal accuracy and sufficiency by all the parties, and after so many acts done under it which have been silently confirmed by the parties, it would be impossible to insist upon any such mistake with a chance of success. We must take the indenture, therefore, as we find it, as a complete execution of the preliminary agreement, and as expressing the true intent and definitive objects of the parties. The preliminary agreement, then, became, upon the execution of the indenture, *functus officio*, and was merged in the more formal and solemn stipulations of the latter. It was no longer executory, but executed. The indenture itself contained many executory trusts; and so far as **285***] any of them *yet remain unexecuted, the instrument itself may still be denominated executory. But so far as the trusts have been fulfilled, as by the conveyance of lots to the grantors or to purchasers, and especially by the conveyance of the streets and squares, &c., to the commissioners in 1796, the indenture can no longer be deemed executory. Its functions have been final and complete.

We need not, therefore, inquire into the distinction taken in a court of chancery between executory and executed agreements, or into the extent to which its equitable jurisdiction will be interposed to reform instruments upon grounds of mistake, or to grant other relief; because the present bill presents no case falling under either predicament. Here we have a solemn instrument embodying the final intentions and agreements of the parties without any allegation of mistake, and we are to construe that instrument according to the legal import of its terms.

Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public squares are declared to be conveyed "for the use of the United States forever." These are the very words which by law are required to vest an absolute unconditional fee-simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land for any general purpose, they are the

very words which the conveyance would adopt in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument which control in any manner the natural meaning of them. There are no objects avowed on the face of it which imply any limitation. How, then, can the court defeat the legal meaning, and resort to a conjectural intent?

It has been said that by looking at the preliminary agreement the court will see that terms of a more limited nature are there used. Be it so. But will that justify the court in resorting to it to explain or limit the legal import of words in a solemn instrument which contains no reference to it? If we could resort to it, the natural conclusion would be, in the *absence of all contrary proof, that the **286*** last instrument embodied the real intent of the parties; that the preliminary agreement either imperfectly expressed their intent, or was designedly modified in the final act. The general rule of law is that all preliminary negotiations and agreements are to be deemed merged in the final, settled instruments executed by the parties, unless a clear mistake be established. In this very case it may be true, for aught that appears, that the President might have insisted upon the introduction into the trust deed of the very words in controversy—to the use of the United States forever—in order to avoid the ambiguity of the words of the preliminary agreement. He may have required an unlimited conveyance to the United States so that they might be unfettered in any future arrangements for the promotion of the health, the comfort, or the prosperity of the city. But it is sufficient for us that here there is a solemn conveyance which purports to grant an unlimited fee in the streets and squares to the use of the United States, and we know of no authority which would justify us in disregarding the terms or limiting their import, where no mistake is set up and none is established. It would, indeed, be almost incredible that any substantive mistake should have existed and never have been brought to the notice of the trustees or to that of the commissioners, upon their succeeding to the trust, or seriously insisted on by any party, down to the time of filing the present bill. The present is not a bill to reform a contract or deed, but to assert rights supposed to grow out of the trusts declared in the deed.

This view of the matter renders it unnecessary for the court to go into an examination of the facts insisted upon in the answer to repel the allegations in the bill, or to disprove the equity which it asserts. If the United States possess, as we think they do, an unqualified fee in the streets and squares, that defeats the title of the plaintiffs and definitively disposes of the merits of the cause.

It is the opinion of the court, *Mr. Justice Baldwin* dissenting, that the decree of the Circuit Court, dismissing the bill, be affirmed with costs.

Aff'g 2 Cranch, C. C., 376.
Cited—3 McAr., 573.

287*] *FRANCIS LAGRANGE, ALIAS ISIDORE, a man of color, *Plaintiff in Error*,
v.
PIERRE CHOUTEAU, JUN.

Decision of Supreme Court of Missouri—writ of Error—practice—jurisdiction.

After the decision of the case in the Supreme Court of the State of Missouri, the plaintiff presented a petition for a re-hearing, claiming his freedom under the provisions of the Ordinance of Congress of the 13th of July, 1787, for the government of the territory of the United States north-west of the River Ohio. The Supreme Court refused to grant the re-hearing, and the plaintiff prosecuted a writ of error to this court under the twenty-fifth section of the Judiciary Act of 1789. Held, that as the petition for re-hearing forms no part of the record it cannot be noticed. The jurisdiction of this court depends on the matter disclosed in the bill of exceptions.

ERROR from the Supreme Court of the State of Missouri.

An action of trespass *vi et armis* was brought in the State Circuit Court of the County of St. Louis, State of Missouri, by the plaintiff in error, a man of color, against Pierre Chouteau, the defendant, for the purpose of trying his right to freedom. The judgment of the Circuit Court was against the plaintiff; and on an appeal to the Supreme Court of Missouri, that judgment was affirmed.

The case was brought before this court by writ of error to the Supreme Court of Missouri, under the twenty-fifth section of the Act to establish the judicial courts of the United States, passed on the 29th of September, 1789.

The case is fully stated in the opinion of the court.

Mr. Kane, for the defendant in error, objected to the court taking jurisdiction of the case, as it did not come within the provisions of the twenty-fifth section of the Act of Congress.

It could not be found, on the most careful examination of the record, that the construction of any act of Congress had been brought into question in the courts of Missouri where the suit was originally entertained. All the questions in the case before those courts might have been and were decided without reference to the Act of Congress. The claim to freedom asserted by the plaintiff was left to the jury by the court before which it was tried, and if in any of the **288*]** instructions *given by the court, reference to the Ordinance of Congress of the 13th of July, 1787, can be supposed to have been made, the construction given by the court to that ordinance was in favor of the plaintiff in error.

Mr. Lawless, for the plaintiff in error, argued that as the provisions of the twenty-fifth section do not declare in what stage of the proceedings the construction of an act of Congress shall have been questioned to give this court jurisdiction; the refusal of the Supreme Court of Missouri to allow to the plaintiff a re-hearing, he having petitioned for the same, alleging his right to freedom under the ordinance, made this a case for the cognizance of this court. (Cited, *Hickie et al. v. Starke et al.*, 1 Peters, 94.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:
Peters 4.

This was an action of trespass *vi et armis* brought by the plaintiff against the defendant in the Circuit Court for the County of St. Louis, in the State of Missouri, for the purpose of trying the right of the plaintiff to freedom.

The general issue was pleaded, and a verdict found for the defendant. The judgment on this verdict was carried by appeal to the Supreme Court for the Third Judicial District, where it was affirmed. This judgment has been brought into this court by writ of error.

The pleadings do not show that any act of Congress was drawn into question, but the counsel for the plaintiff has read a petition for a re-hearing, which sets forth a claim to freedom under the Ordinance of Congress passed on the 13th of July, 1787, for the government of the territory of the United States north-west of the River Ohio. But as a petition for re-hearing forms no part of the record, it cannot be noticed. The jurisdiction of the court depends on the matter disclosed in the bill of exceptions.

At the trial the plaintiff proved that Pascal Carré, in 1816, was desirous of selling the plaintiff, who was then his slave, and the defendant wished to purchase him. The offer of the defendant was declined, because the witness was *desirous of selling the slave to some [***289** person who would take him out of St. Louis. Some time afterwards he sold the slave to Pierre Menard, a resident of Kaskaskia, in the State of Illinois, for the sum of five hundred dollars.

Pierre Menard deposed that some time in the year 1816, Pascal Carré offered to sell the plaintiff to him; which proposition was rejected because he resided in Illinois, where slavery was not tolerated. On understanding that the defendant was desirous of purchasing a slave, the witness informed him that Mr. Carré had one for sale; but the defendant replied that Carré would not sell the slave to him, because he resided in St. Louis. It was suggested by *Mr. Berthold* that the witness might purchase the slave for Mr. Chouteau; which witness declined doing, because it would be treating his friend Carré incorrectly. He, however, ultimately agreed to buy the said slave for Mr. Chouteau, take him down the river, and keep him there some months, and then deliver him to the defendant. He accordingly bought the slave, took him to St. Genevieve in Missouri, and put him to work at mine La Motte, with some other hands. Some time afterwards he was sent to Kaskaskia and put on board a keel-boat as a hand. After remaining there about two days, he went in the boat to New Orleans, whence he returned to Kaskaskia about the 30th of March, 1817, as a hand in the boat. After remaining a few days for the purpose of unlading the boat, he was sent in her to the Big Swamp in Girardeau County, State of Missouri, where he remained five or six weeks; after which he returned in the boat to Kaskaskia, from which place, after two or three days, he was sent to St. Louis and delivered to the defendant, who returned to the witness the five hundred dollars he had advanced for him. The witness stated that he purchased the said slave for the defendant, and not for himself, and that he never intended to make Kaskaskia the place of his (the slave's) residence. Some other testimony substantially proving the same fact was introduced by the parties.

Upon this testimony the plaintiff's counsel moved the court to instruct the jury:

1. That if they shall be of opinion that the plaintiff remained in the State of Illinois with **290*** the person who purchased *him, and who was a resident of the said State, they must find for the plaintiff. The instruction was refused.

2. That the right of the plaintiff to his freedom is not affected by any secret trust or understanding between the person who purchased and brought him to Illinois and any other person whatsoever. This also was refused.

3. That if the jury shall be of opinion that the plaintiff was, during any time, lawfully a resident of the State of Illinois, and in the service of a citizen of that State, claiming property in, and owner of the said plaintiff, they shall find for the plaintiff. This instruction was given.

4. That if the jury shall be of opinion that the plaintiff was sold absolutely by a citizen of the State of Missouri to a citizen of the State of Illinois, and belonged under such sale to such purchaser, no secret understanding between said purchaser and a third person shall affect the rights which the plaintiff may otherwise have to his liberty, as a consequence of his residence in the State of Illinois. The court refused to give this instruction as asked, but did instruct the jury that if they believed the plaintiff was bought by Colonel Menard for his own use, and taken to Illinois and kept there with the intention to make that his permanent place of residence, they ought to find for the plaintiff.

The counsel for the plaintiff excepted to the opinions given by the court, and to its refusal to give those which were asked.

The right of the plaintiff to liberty was supposed by the court to depend on the question of his being purchased in fact by a citizen of Illinois, and on his being carried to Illinois with a view to a residence in that State. The facts were left to the jury, and found for the defendant. It is not perceived that any act of Congress has been misconstrued. The court is therefore of opinion that it has no jurisdiction of the case.

The writ of error is dismissed; and the cause remanded to the Supreme Court for the Third Judicial District of Missouri, that the judgment may be affirmed.

Aff'g 2 Mo., 20,

291*] *JOHN CONARD, Marshal of the Eastern District of Pennsylvania, *Plaintiff in Error*,

v.

FRANCIS H. NICOLL, *Defendant in Error*.

Seizure of ships and goods by United States marshal on fieri facias—respondentia bond—Conard v. Atlantic Ins. Co. confirmed.

The principles decided in the case of Conard v. The Atlantic Insurance Company, relative to the priority of the United States, examined and confirmed. (1)

ERROR to the Circuit Court of the Eastern District of Pennsylvania.

1.—1 Peters, 386.

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The defendant in error brought an action of trespass in the court below against the plaintiff in error for a quantity of merchandise, consisting of teas, cassia, nankeens, &c., all of the value of one hundred and ninety-three thousand seven hundred and twenty-five dollars. Also for four ships, viz., the Addison, the Woodrop Sims, the Thomas Scattergood, and the Benjamin Rush, all of the value of one hundred thousand dollars.

The defendant below pleaded that he, as marshal of the district of Pennsylvania, had a writ of *feri facias* against one Edward Thomson, in favor of the United States, and that he seized the merchandise and ships as Thomson's property. The plaintiff replied, property in himself, &c., in the common form.

It was agreed between the parties to the suit that the title of Francis H. Nicoll to the property should be tried, the property having been placed in the hands of trustees to abide the event of the suit.

The case was tried in the Circuit Court before Mr. Justice Washington, and a verdict was given for the plaintiff for thirty-nine thousand two hundred and forty-nine dollars and sixty-six cents damages. The defendant in the Circuit Court excepted to the charge of the court, and prosecuted this writ of error. The whole charge delivered to the jury in the Circuit Court was brought up by the writ of error.

By direction of the court the whole of the charge delivered by Mr. Justice Washington in the Circuit Court is inserted as follows:

*This is an action of trespass brought [**292** against the marshal of this district for levying an execution at the suit of *The United States v. Edward Thomson*, on the ships Addison, Woodrop Sims, Benjamin Rush, and Thomas Scattergood, and certain parts of their cargoes, alleged to have been the property of the plaintiff. The defendant justifies his proceedings under the allegation that the property levied upon belonged to Edward Thomson, against whom the execution was sued out.

The evidence given by the plaintiff to prove his title to the property in dispute is substantially as follows: A *respondentia* bond in the usual form, dated in April, 1825, on a certain part of the outward cargo of the ship Addison, with a memorandum annexed reciting an agreement that the outward bill of lading should be indorsed to the plaintiff as a collateral security for the sum mentioned in the bond, and that the property to be shipped homeward, being the proceeds of the outward cargo, should be for account and risk of Edward Thomson, but to be consigned to order, and the bill of lading for the same to be forwarded to the plaintiff.

2. The bill of lading of the outward cargo, referred to on the bond and memorandum for account and risk of Edward Thomson, indorsed by him in blank, and delivered to the plaintiff.

3. A homeward bill of lading and invoice for account and risk of Edward Thomson, consigned to order, and indorsed by the shipper at Canton, dated in November, 1825; which, upon the arrival of the ship in the spring of 1826, were delivered by Peter Mackie, the head clerk of Edward Thomson before his failure, and

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afterwards one of his general assignees, to the plaintiff.

The title to the cargoes of the other ships is in all material respects the same with that just stated.

The title to the ships themselves is claimed under bills of sale by Edward Thomson to the plaintiff, dated on the 9th of July and 27th of October, 1825.

On the 19th of November, 1825, Edward Thomson made a general assignment of all his estate to Peter Mackie and Richard Renshaw for the benefit of his creditors.

293*] *The United States having obtained judgments against Edward Thomson to an immense amount, sued out and levied execution on these ships and their cargoes, at the moment of their respective arrivals in the spring and autumn of 1826.

In October, 1826, the whole of this property was restored by the United States to the plaintiff, under an agreement between them that it should be without prejudice to any existing right, and that the plaintiff should sell the same to the best advantage, and should immediately invest the net proceeds in the name of the Secretary of the Treasury in productive stock, and place the certificates thereof in The Bank of the United States, &c.; and that the plaintiff should institute a suit against the marshal to ascertain the right to the said proceeds; in which action, if the plaintiff in his own right, or as representing Smith and Nicoll, should establish his right thereto, then that the said proceeds should be paid to him; otherwise, the same to be paid to the United States. This agreement is recited in the condition of a bond executed by the plaintiff, with sureties to the United States.

An agreement had been previously entered into by the counsel in the cause, dated the 27th of September, 1826, stipulating that the merits only should be litigated, without regard to form.

In the case of *The Atlantic Insurance Company v. Conard*, a great variety of objections of a legal character to the title of the plaintiff in that cause, which are equally applicable to that of this plaintiff, were stated and overruled by the Supreme Court, and they have of course been abandoned by the defendant's counsel in this cause. They rely, nevertheless, upon other objections, partly legal, but mainly resting upon the particular facts belonging to this case, and which are now to be examined. The duty of the court will be to give to the jury an opinion upon every question of a legal nature which the case presents; and after laying down certain general principles of law applicable to the evidence which has been given, to leave the facts to be decided by the jury.

The first objection to the plaintiff's title is **294*]** that the transfers *executed by Edward Thomson to the plaintiff for the property in dispute were given without consideration. It is denied that anything, much less the amount stated in those transfers, was due by Edward Thomson to the plaintiff, or to Smith and Nicoll, at the time they were executed. Upon this point it is proper that the jury should be satisfied; and it is for them to decide upon the evidence whether these securities were given for value received or not; if they were given

without consideration, the plaintiff will have failed in establishing his right to the property, which they professed to transfer.

The plaintiff relies upon the following evidence to prove the consideration for which those securities were given: 1. The *respondentia* bonds and memorandum annexed, both under seal, and both of them acknowledging a loan to Edward Thomson of the sum expressed in them.

2. The negotiable notes of Edward Thomson to the plaintiff, or to Smith and Nicoll, produced in evidence by the plaintiff.

3. A settled account, signed by Mackie, on the part of Edward Thomson, and by Mr. Worthington on that of the Nicolls.

4. Sundry entries in Edward Thomson's memorandum book.

The correspondence between the Nicolls and Edward Thomson is relied upon by the plaintiff as additional proof of the fact, and by the defendant's counsel for the purpose of disproving it.

Upon this evidence the court has only to observe, 1. That even bills of exchange and negotiable notes of hand are *prima facie* evidence of value received, as well between the original parties as third persons, so as to throw upon the party who denies the fact the burden of disproving it.¹ The presumption is certainly not less strong where the acknowledgment of value received is under the seal of the party. If this be the settled law, as the authorities cited prove it to be, it is not competent to the defendant to shift the burden of proof by giving notice to the plaintiff that *he would be required [***295** on the trial to prove that the securities under consideration were given for value received.

2. That a settled account between a creditor and his debtor being proved, is *prima facie* evidence of the balance stated on it having been due; which may nevertheless be impeached and disproved by pointing out errors in the account, and maintaining their existence.

It is insisted, however, by the defendant's counsel, that the consideration for these securities, admitting it to be proved, flowed from Smith and Nicoll, and that the plaintiff has given no evidence of an assignment by them to him. But, without noticing the agreement between the plaintiff and the United States as to the interest of Smith and Nicoll, represented by the plaintiff, it may be observed, that if the Nicolls and Edward Thomson were contented, and so agreed, that these securities should be given to the plaintiff for debts originally due by Edward Thomson to Smith and Nicoll, it cannot be essential to the plaintiff's recovery in this case, that he should produce a written assignment by Smith and Nicoll to him. If the plaintiff, as between himself and Smith and Nicoll, be not entitled beneficially to the property in dispute, or to its proceeds, that is a matter to be settled between them, and can form no question in this cause. That Edward Thompson assented to this arrangement is proved, *prima facie*, at least, by the securities themselves; and the objection relied upon cannot with propriety be urged by the United

1.—*Mandeville v. Welch*, 5 Wheat., 232; *Riddle v. Mandeville*, 5 Cranch, 322; *Chitty on Bills*, note 17.

States, who claim the property in dispute as belonging to him.

The second objection to the plaintiff's title, and the one mainly relied upon, is that the transactions between the plaintiff, and Smith and Nicoll, and Edward Thomson, upon which the transfers of the property in dispute were founded, were, as they respected the United States, fraudulent and void. Whether they were so or not, will be submitted to the decision of the jury upon the evidence which has been given, after the court has stated some general principles of law to assist them in their investigation.

The first inquiry is, What is fraud? From a view of all that has been said by learned **296*** judges and jurists upon this *subject, it may be safely laid down that, to constitute actual fraud between two or more persons to the prejudice of a third, contrivance and design to injure such third person by depriving him of some right or otherwise impairing it, must be shown. In the case of *Chesterfield v. Jansen*¹, Lord Hardwicke terms it *dolus malus*. Lord Coke defines covin to be a secret assent determined in the hearts of two or more to the defrauding and prejudice of another.² The acts of 13th Eliz., ch. 5; and 27th Eliz., ch. 4, which did little more than affirm the doctrines of the common law, afford substantially the same definition. The case stated by Lord Mansfield in *Worsley, &c., v. Demattos, &c.*,³ of a person who, knowing that a creditor has obtained judgment against his debtor, buys the debtor's goods, though for a full price, with a view to defeat the execution of the creditor, is a strong illustration of the same principle; the purchase was declared to be fraudulent, not because a man may not lawfully purchase the property of a defendant against whom there is a judgment, but because of the intention with which it was made.

The question, then, for you to decide, will be whether the transactions between these parties, which are alleged to have been fraudulent, were contrived or intended to delay or defeat the United States of the debts due to them by Edward Thomson, or otherwise to prejudice their rights. How far the Nicolls might lawfully take care of their own interests, although by doing so the United States might thereby be prejudiced, will be seen when we come to consider more particularly the alleged instances of fraud which have been relied upon. But previous to this examination it may be proper to lay down the following principles, which seem to be incontrovertible:

1. That actual fraud is not to be presumed, but ought to be proved by the party who alleges it.

2. If the motive and design of an act may be traced to an honest and legitimate source, **297*** equally as to a corrupt one, *the former ought to be preferred. This is but a corollary to the preceding principle.

3. If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown

1.—2 Ves., 155.

2.—Co. Lit., 357, c.

3.—1 Bur., 474; See also *Cadogan v. Kennet, Cowp.*, 434.

to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it be connected with or form a part of them.

It may be proper in this place to observe, in relation to the frauds alleged to have been committed by Bailey and Edward Thomson to the prejudice of the United States, that they cannot affect the rights of the plaintiff or of Smith and Nicoll, unless it be proved to your satisfaction that Bailey was at the time he committed them the general agent of those parties, or that he committed them in some transaction within the scope of a special agency, and in connection with or otherwise affecting these securities.

The first instance of alleged fraud by the plaintiff or by Smith and Nicoll, is the taking of these securities from a man known by those persons to be a debtor to the United States, and believed by them to be in a state of insolvency.

But this is not a fraud even in England, unless the security be given in contemplation or on the eve of bankruptcy, and unless the assignment or transfer in favor of such preferred creditor or creditors exhaust the whole estate of the debtor, or approach so near as that the exception is merely colorable.⁴ But in a case where the bankrupt law does not apply, there can be no doubt that a debtor may lawfully give a preference to a particular creditor or set of creditors; if there be a delivery of possession where it can be done, although his other creditors may thereby be hindered or delayed in payment of their debts. The case of *Holbird v. Anderson*⁵ is a strong case in support of this principle. How far the right of preference of the United States can be affected by an assignment of their debtor for the benefit of his creditors, will be considered under another head.

*The other instances of alleged fraud [***298** are:

2. Alteration in the form of the memorandum to the *respondentia* bonds, thereby making the homeward cargoes deliverable to order.

3. Taking bills of sales of Edward Thomson's vessels by the plaintiff or by Smith and Nicoll, surrendering them on arrival of the vessels and then taking new ones; practiced by those persons in repeated instances prior to the year 1825.

4. Having on board these vessels on their arrival double papers; that is to say, a general bill of lading of the whole homeward cargo, and also several bills of lading of the parts covered by the *respondentia* bonds and outward bills of lading.

5. Upholding the credit of Edward Thomson by the Nicolls, although the desperate state of his affairs was known to them.

6. Antedating the *respondentia* bonds to make them conform to the outward bills of lading.

7. Want of possession of the vessels and cargoes covered by the plaintiff's securities.

Lastly, the persuasions used by the Nicolls to induce Edward Thomson to trade on the credit for duties allowed by the United States.

4.—1 Bur., 478-481.

5.—5 T. Rep., 235; See also 8 T. Rep., 521.

It may be sufficient for the present to observe, generally, that these acts, nor either of them, although they should be proved to the satisfaction of the jury, are or is, *per se*, fraudulent. This, it is believed, may be satisfactorily shown by a more particular consideration of these acts of alleged fraud.

1. As to the alteration in the form of the memorandum, it will be sufficient to observe that no principle of law has been referred to or case cited to countenance this objection. It would on the contrary seem to have been strictly correct to make the alteration in a case where the outward and homeward cargoes were transferred, not absolutely, but merely as collateral security, if the debt for which they were pledged should not be paid on the arrival of the vessel, or be otherwise secured according to the stipulations of the bond.

2. As to the practice of the plaintiff and of Smith and Nicoll prior to the year 1825, in 299*] surrendering the bills of sale *which they had obtained of Edward Thomson's vessels upon their arrival, and then renewing them as soon as those vessels had been entered; should it be admitted (which I am not to be understood as admitting) to have been fraudulent as it concerned the United States, it is not easy to perceive how it can be made to infect with fraud the bills of sale made to the plaintiff in July and October, 1825; which never were surrendered, but, on the contrary, were used as the foundation of the plaintiff's claim to the possession of the vessels, which they respectively conveyed immediately on their arrival in 1826. If there has been any evidence given to connect these transactions together, so as to bring them within the operation of one of the principles before mentioned, the jury will judge of it.

3. As to the double papers on board of these vessels, the question is, were they contrived with a view to defraud the United States of the duties on the cargoes of those vessels, or may not a legitimate purpose for the use of them be fairly presumed? Let it always be kept in mind that these cargoes were not sold to the plaintiff, but were merely pledged as collateral security. If on their arrival they were redeemed, they would then become the absolute property of Edward Thomson, who would be absolved from his obligation to deliver the particular bills of lading to the plaintiff, and be entitled to enter them as owner under the general bill of lading. If they were not redeemed, then the plaintiff would enter them as the owner of the bills of lading to order, and which by the agreement were to be delivered to him. There would seem, therefore, to have been a fitness to this state of things in the arrangement now complained of.

4. That a false representation by one person of the credit of another, by which a third person is deceived and injured, is a fraud upon the parties so deceived, is undeniable. A letter of credit, giving to the person in whose favor it is written a character for solidity which the writer knows to be untrue, is of this description. But to uphold the credit of a merchant by advances to any amount made by his friends or by his creditors for the purpose of preventing his failure and of enabling him to go on, 300*] under the expectation that he *may

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thereby acquire the means of discharging his debts, and of maintaining a standing in the commercial world, has never yet been decided by any English or American court, to be a fraud upon any third person, who, misled by appearances, may have dealt with and given credit to the person so assisted. No case resembling it has been produced or alluded to. There is, in fact, an absence of that kind of *suggestio falsi*, or *suppressio veri*, which the law considers as amounting to actual or even constructive fraud.

It is insisted that the conduct of the Nicolls, in this particular, was a contrivance to give a false credit to Edward Thomson at the custom-house for the purpose of enabling him to defraud the United States of their duties on the goods entered in his name. But is this likely? If the custom-house officers were faithful to the duties which the law imposed upon them, and which they had solemnly engaged to perform, how was it possible that the United States could be defrauded, or in any manner prejudiced by such a contrivance? Their duty was to retain the custody of the teas under their own lock and key until the duties were paid, or such security given as should be entirely satisfactory to them. Could it have entered into the minds of any persons that officers so bound and so confided in by their country could so far betray their trust as to open the doors of their warehouses to Edward Thomson to take out teas whenever and to whatever amount he pleased without permits, and without paying or securing the duties upon them, by giving solid and satisfactory sureties to pay them when they should become due? It is the sufficiency of the sureties, and not that of the principal, that the law looks to. I am not to be understood as saying that the conspiracy or contrivance imputed to these parties was not or could not have been in their contemplation. But when we are upon the subject of motives and intention, the improbability of their existence deserves consideration. If, indeed, the illegal abduction of the teas, with the anticipated and known connivance of the custom-house officers, formed a part of the contrivance, a case of fraud would be made out; and it will be for the jury to decide whether the participation of the plaintiff, or of Smith and *Nicoll, [301 in those disgraceful transactions, is made out by the evidence in the cause.

5. I pass over the next objection with this single observation; that the indorsement of the outward bills of lading to the plaintiff for a full consideration (if it should be the opinion of the jury that such was the fact), transferred to him the property mentioned in them; and if the bonds with the memorandum annexed were agreed by the parties to form parts of the securities to be given to the plaintiff, there was no impropriety, much less fraud, in antedating the latter so as to make them conform to the former.

6. The objection that possession of the ships and their cargoes was not delivered at the time they were transferred, was so fully refuted by the Supreme Court in the case of *Conard v. The Atlantic Insurance Company* that it would be a waste of time for this court to notice it further than by observing that the outward cargoes and their proceeds were mortgaged, not

conveyed absolutely, to the plaintiff; that the ships were at or beyond sea at the time they were conveyed; and that possession of them was demanded and refused by the officers of the United States as soon as they arrived. These facts are not disputed, and the legal result is that under these circumstances the want of possession is not a badge of fraud.

7. The last instance of fraud relied upon by the defendant's counsel is that Edward Thomson was induced by the Nicolls, contrary to his own wishes, to trade upon the credit for the duties allowed him by the United States, instead of holding his funds in order to discharge those duties when they should become payable.

To this objection it has been asked, and it seems to the court with great propriety, for what other purpose was the extended credit of two years given but to enable the owner of teas in store or on bond to trade on his capital in the meantime? If it was a fraud in him to employ his capital otherwise than in retaining it to meet the claim of the United States at the expiration of the two years, it is difficult to perceive the advantage which the credit bestowed upon him, or the policy of the law in granting it. And if **302***] it was *not a fraud in Edward Thomson so to employ his capital, it could not be so in the Nicolls to influence him to exercise the privilege to which he was legally entitled.

I now pass from the question of fraud to other objections to the plaintiff's right of recovery, which not having occurred in the case of *Conard v. The Atlantic Insurance Company*, will demand particular attention.

3. The third objection to the plaintiff's recovery is founded upon an acknowledged variance, though to a very trifling amount, in the number and description of the boxes or packages of teas between the declaration and the proof.

I do not understand the objection as being urged to the extent of defeating the action altogether; since the counsel who urged it could not but know that a mere variance as to number, magnitude, extent, &c., is immaterial, even in criminal prosecutions, unless the *quantum* be descriptive of the nature of the charge or claim.¹

The objection is no doubt intended to apply to the damages claimed by the plaintiff in case the jury may legally give any in this case. As to this view of the subject I take the rule in ordinary cases to be that the plaintiff can only recover according to his proof, where that falls short of the number, &c., stated in the declaration; but if it exceed, the plaintiff cannot recover beyond what his declaration demands.

Although the agreements between the plaintiff and the United States and their counsel might, in this case, vary this rule unfavorably to the United States, still, as the difference between the number of chests stated in the declaration and those given in evidence is trifling in amount, I shall direct the jury to adopt the rule in ordinary cases, as already mentioned.

4. The next objection is of a more serious character. It is insisted that the transfers made by Edward Thomson to the plaintiff, under which he claims the proceeds in question, devested him of all, or nearly all, of his property; and that the plaintiff, in respect to the right of

preference of the United States, is to be treated as a trustee or general assignee * of the [***303** effects of Edward Thomson, within the meaning of the sixty-fifth section of the Duty Act of the 2d March, 1799.

I take the rule as now well settled by the Supreme Court to be, that the preference of the United States does not extend to cases where the debtor has not made an assignment of the whole of his property. If the assignment leave out a trivial part of his property for the purpose of evading the act giving the preference, it will be considered as a fraud upon the law, and the court will treat it as a total divestment.²

But does this rule, or the reason upon which it is founded, apply to a mortgage of the whole of the debtor's property? I ask the question, and shall reason upon it without meaning to decide it; since it was not made or discussed at the bar. On the contrary, and for that reason, I shall instruct the jury to consider these transfers as absolute, so far as they concern the right of preference claimed by the United States.

The difference between a mortgage and an absolute conveyance of the whole of the debtor's estate and effects for the benefit of a particular creditor or set of creditors, is, that in the latter case he divests himself of the whole, not only of his property, but of his credit, and his intention to do so is apparent from the act itself. If he be a merchant, he must stop; and the conclusion is inevitable that the conveyance was made with a view to a legal insolvency.

But a mortgage does not necessarily divest the mortgagee of the whole of the property which it conveys. An equity of redemption still remains in him, which is property, worth to the owner of it all the difference between the value of the pledge and the sum for which it is pledged; which he may sell and convey, or devise; which will descend, and may be levied upon under an execution. Suppose that, from some of those circumstances which are constantly occurring to raise or depress the market for particular articles of commerce, the teas in question had been worth, at the period of importation, greatly more than the amount for which these securities were given; the excess would have belonged, not *to the plaintiff [***304** iff, but to Edward Thomson; in which event it would appear that no act of legal insolvency had been committed; and yet it was committed, if at all, at the time the securities or mortgages were given.

Neither does it follow that such a mortgage as has been spoken of destroys the credit of the debtor, compels him (if a merchant) to stop, or that it is given in contemplation of a legal insolvency. The reverse would seem to be the case, since (if the transaction be *bona fide*) the mortgage can be preferred to an absolute conveyance, for no other purpose but to avoid those consequences. I say, if made *bona fide*, because I admit that if the mode of conveyance by way of mortgage or pledge be a mere device to defeat the right of preference of the United States (a fact to be decided by all the circumstances of the case), it would be a fraud, and the mortgagee would be treated as a trustee to the extent of the claim of the United States.

I shall pursue this inquiry no farther; since,

2. *United States v. Hooe*, 3 Cranch, 91.

1. *Stark. Evid.*, 1528, 1538.

for the reason before mentioned, I shall instruct the jury to consider the securities, in reference to the question now under consideration, as if they were absolute transfers.

Evidence has been given in this case that Edward Thomson continued his commercial transactions as usual until the 16th or 17th of November, 1825; when the Nicolls entered up judgments against him, which entirely prostrated him, so that on the 19th of that month he made a general assignment for the benefit of his creditors. The questions, then, for the jury, under this head will be, 1st. Was Edward Thomson insolvent and unable to pay all his debts at the time when these securities were given to the plaintiff? And 2d. Did they divest him of all his property (or if not, was the part reserved trivial) with intent to defeat the rights of preference of the United States? If these facts are proved to your satisfaction, then the transfers are to be considered as constructively divesting Edward Thomson of all his property, so as to let in the priority of the United States against the plaintiff. The cessation from business by Edward Thomson after the transfers; an intention to make a general assignment, and to commit an act of legal insolvency at the time these securities were **305***given, may be considered, if proved, as evidence that they were colorable and fraudulent as to the United States.

But if Edward Thomson, though unable to pay all his debts, did not divest himself of all his property, either actually or constructively; and if the securities were given *bona fide* to secure debts justly due to the plaintiff in the ordinary course of business, the right of preference of the United States did not attach as a consequence of those securities, so as to defeat the right of the plaintiff to the property in question.

The facts that Edward Thomson continued to transact his mercantile business and to pay his debts as usual, and finally made a general assignment, not voluntarily, but by compulsion, may, if proved to your satisfaction, be considered as evidence that these securities were not colorable, or intended to defeat the right of preference of the United States.

5. The next subject of your inquiry is whether the homeward cargoes, forming parts of the property in dispute, were the proceeds of the outward cargoes which were pledged to the plaintiff. Unless this fact be proved to your satisfaction, the plaintiff shows no title whatever to them. The evidence relied upon by the plaintiff is:

1st. The correspondence in amount and value between the outward and homeward bills of lading and invoices; except in one instance, where it was stated by Rodney Fisher part of the outward cargo was used for the disbursements of the ship.

2d. The delivery of the homeward bills of lading to the plaintiff, immediately on their arrival, by Peter Mackie, the confidential and chief clerk of Edward Thomson before his failure and one of his general assignees, through whose hands and by whose agency, it is insisted, all these negotiations from their commencement were transacted, and who knew, better than any other person, to whom the respective bills of lading belonged.

3d. The evidence of Peter Mackie, which you have heard.

The fact must be decided by the jury upon this and any opposing evidence given on the part of the defendants.

6. It is next objected that the securities in question were *given in consideration [**306** of responsibilities entered into by the Nicolls, and not for moneys actually paid by them for, or lent to, Edward Thomson.

In *Conard v. The American Insurance Company*, it was objected that the debt for which the *respondentia* and other securities were given was of too contingent a nature to uphold a mortgage as collateral security. In answer, it was said by the judge who delivered the opinion of the court: "We know of no principle or decision to warrant this conclusion. Mortgages may as well be given to secure future advances and contingent debts as those that already exist, and are certain and due. The only question is the *bona fides* of the transaction."

I understand the objection now made to apply to the discharge by the Nicolls of Edward Thomson's *respondentia* bonds to the New York insurance offices. There is no proof, it is said, that these were paid by the Nicolls, but merely that they made themselves responsible to those offices that they should be paid.

But if you are satisfied, from the evidence before you, that the Nicolls discharged Edward Thomson from those debts by taking up and delivering over to him the evidence of them, Edward Thomson from that moment became the debtor of the person who had thus discharged him; and it is not important to the plaintiff's recovery in this case to prove how the arrangement was made with those creditors, and that actual payment was made at the time when the securities in question were given. I know of no principle which prevents a person from taking a valid security, by *respondentia* or otherwise, in consideration of responsibilities entered into by him for debts due by the person giving them, which he afterwards pays off or satisfies, and from which he had discharged such person, as against his original creditor.

7. It is objected, on the part of the defendant, that the securities in question are usurious, inasmuch as they cover interest on the debts due by Edward Thomson to the Nicolls, from a period antecedent to the loans or advances which created the debts. If this should appear to the jury to be the fact, the charge of usury it made out, and the securities *would be void, according to the law [**307** of the State of New York. But the law of this State is otherwise; it does not avoid the security, but merely prevents the creditor from recovering more than the legal interest whether more than legal interest was covered by these securities, or any, or either of them; and whether they were executed in this State or in the State of New York, are questions for the decision of the jury.

If the objection is intended to apply to the marine interests merely, it presents a different subject for consideration. Marine interest is allowable, though exceeding the rate of legal interest, as a compensation, not for forbearance, but for the risk which the lender assumes,

by which both principal and interest may be lost by the casualties of the voyage. As to that, the question turns solely upon the *bona fides* of the transaction:—whether the security given be a *bona fide* marine contract, bottomed upon property of sufficient value on board and at the risk of the lender, or is a mere device to cover an usurious transaction; and whether it was the one or the other in the present case, are questions for the jury to decide.

8. The last objection to the plaintiff's right to recover is that the conveyances and securities given by Edward Thomson to the plaintiff amounted to acts of legal bankruptcy; in consequence of which the preference of the United States attached, and the plaintiff is to be considered as a trustee to the extent of the claims of the United States. The argument is that these conveyances and securities, considering them as one transaction, would, according to the bankrupt laws of England, amount to an act of bankruptcy; and that the sixty-fifth section of the Duty Act of the 2d of March, 1799, was intended to give to the United States a right of preference from the time when, according to that law, an act of bankruptcy was committed.

This is by no means the opinion of the court. The section refers to State bankrupt laws, and perhaps to a bankrupt law of the United States, when one should pass; but could have no reference whatever to the bankrupt laws of England. Nor does it, in my opinion, refer the **308***] right of *preference of the United States to an act of bankruptcy unaccompanied by some other act.

To understand the meaning of this section we must construe the enacting clause and the proviso together. The former declares no more than that in all cases of insolvency, or where an estate in the hands of an executor, administrator or assignees, should be insufficient to pay all the debts of the deceased, the debts due to the United States should be first satisfied by those persons. It provides for only two cases, viz., a living insolvent, having an assignee, and a dead insolvent, represented by executors or administrators.

But the inquiry would naturally have arisen in the mind of the Legislature, how is the expression *insolvency* to be understood? This is explained by the proviso; for which purpose alone, it is apparent, it was introduced. It declares that the expression shall extend to the following case, viz.:

1st. Where a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof for the benefit of his creditors.

2d. Where his estate and effects have been attached on account of his being an absconding, concealed, or absent debtor.

3d. To cases in which an act of legal bankruptcy shall have been committed; that is, as the construction of the proviso in connection with the enacting clause seems necessarily to require, to cases where the property is in the hands of assignees, not by voluntary assignment only, but by assignment made in virtue of any State bankrupt law, or (possibly) of any bankrupt law of the United States which might thereafter be passed.

There must be an assignment, either volun-

tary or compulsory, or else there can be no assignee to be made liable to the United States under the enacting clause. If a mere act of bankruptcy be sufficient to give rise to the preference of the United States from the moment of its commission, where is the assignee who is first to satisfy the claims of the United States out of the estate of the debtor, under the penalty, stated in the enacting clause, of satisfying it out of his own estate.

*If it be said that when the assign- **[309]** ment of the bankrupt's estate shall be made, the preference of the United States will relate back to the Act of Bankruptcy so as to overreach intermediate *bona fide* securities given by the insolvent to creditors, I can only answer that the assumption is altogether gratuitous, and receives no countenance from any part of this or any other act on this subject.

The last question to be decided is, whether the jury are prevented by the agreement between the plaintiff and the United States or their counsel, or by the delivery of the property levied upon by the defendant to the plaintiff under the agreement, from giving damages in this case. I am clearly of opinion that they are not. As to the surrender of the property to the plaintiff, that could not, in an ordinary case, if put into the form of a plea, bar the right of the plaintiff to damages for an illegal taking, unless it were surrendered by the defendant, and received by the plaintiff in satisfaction of damages. But so far from the accord in this case having been in satisfaction of damages, the bond expressly stipulates that it is to be "without prejudice to any existing right."

The jury may, therefore, give such reasonable damages as the plaintiff has actually sustained by the seizure and detention of the property in dispute, in case they should be of opinion that the plaintiff is entitled to that property or to its proceeds. They ought not to give vindictive or speculative damages.

Upon the whole, if the plaintiff has established his right of property in the ships and cargoes claimed by him under the assignments and conveyances that have been given in evidence to establish that right, he is entitled to their proceeds and to your verdict in his favor, together with such damages as you may think him entitled to. If, on the other hand, he has failed to establish such right, or if in your opinion his title is invalidated by the objections, or some one or more of them, made to it, then the United States are entitled to the proceeds; and in that case you ought to find for the defendant."

The case was submitted to this court without argument *by Mr. Berrien, Attor- **[310]** ney-General, for the plaintiff in error, and by Mr. Sergeant and Mr. Webster for the defendant.

Mr. Justice BALDWIN delivered the opinion of the court:

This cause has been submitted without argument. It is in all its leading features, both in the points of law which arose and the evidence given at the trial, so similar to the case of *Conard v. The Atlantic Insurance Company*, decided by this court at January Term, 1828 (1 Peters, 386), that we do not think it necessary to enter into an examination of the principles

on which the judge submitted the cause to the jury. They appear to us to be in perfect accordance with the opinion delivered in that case, on great deliberation; of the entire correctness of which we do not entertain a doubt.

There is no error in the record of the Circuit Court, and the judgment is affirmed, with six per cent. interest and costs.

Cited—6 Pet., 280, 282, 716, 717; 10 Pet., 612; 12 Pet., 134, 193, 196; 14 Pet., 348; 3 Sumn., 352, 356; Bald., 139, 357.

311*] *JOHN W. KING ET AL., *Appellants*,
v.

JAMES HAMILTON, JAMES STRICKER
AND FRANCES HIS WIFE, HEZEKIAH
FULKSE, ABRAHAM HANCY, AND
JOHN HOPKINS, *Appellees*.

*Equity—specific performance—surplus of land
over that called for by patent.*

The complainants, in the Circuit Court of Ohio, filed a bill to enforce the specific performance of a contract. The bill states that there is a surplus of several hundred acres, and by actual measurement it is found to be eight hundred and seventy-six acres—the patent having been granted for one thousand five hundred and thirty-three and one-third acres—beyond the quantity mentioned in the contract.

It is a fact of general notoriety that the surveys and patents for lands within the Virginia military district contain a greater quantity of land than is specified in the grants. Parties, when entering into a contract for the purchase of a tract of land in that district, and referring to the patent for a description, of course expect that the quantity would exceed the specified number of acres. But so large an excess as in the present case can hardly be presumed to have been within the expectation of either party. And admitting that a strict legal interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows that a court of chancery will in all cases lend its aid to enforce a specific performance of such a contract. [321]

The powers of a court of chancery to enforce a specific execution of contracts are very valuable and important. For in many cases where the remedy at law for damages is not lost, complete justice cannot be done without a specific execution. And it has been almost as much a matter of course for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law where an action will lie for a breach of the contract. But this power is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case. [328]

When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. When a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. [328]

It is a settled rule in a bill for specific performance of a contract to allow a defendant to show that it is unreasonable, or unconscientious, or founded in mistake or other circumstances leading satisfactorily to the conclusion that the granting of the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for a specific execution of a contract,

should show himself ready and desirous to perform his part. [328]

If this large surplus of eight hundred and seventy-six acres in a patent for one thousand five hundred and thirty-three and one-third acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price. [329]

*When there was so great a surplus of land [*312 in the patent beyond that which it called for, nominally, as that it could hardly be presumed to have been within the view of either of the parties to the contract of sale, the court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same. [330]

A PPEAL from the Circuit Court of Ohio.

In the Circuit Court for the District of Ohio, James Hamilton, James Stricker and Frances his wife, late Frances Hamilton, heirs-at-law of Alexander Hamilton and others grantees of Alexander Hamilton, filed a bill for a specific performance of a contract entered into between Elisha King, the father of John W. King, one of the appellants, and Alexander Hamilton, on the 8th of February, 1815, for the sale of certain lands in the State of Ohio within the Virginia military district, between the Little Miami and the Scioto River.

The contract was in the following terms:

"I this day sell to Alexander Hamilton all my lands lying on the Miami River, in the State of Ohio, one thousand five hundred and thirty-three and a third acres, as by patent in my name; also, three hundred and thirty-three and one-third, taken off the lands patented in the name of Sackville King, of one thousand acres. This land of three hundred and thirty-three and one-third acres, taken from S. King's, is to be done adjoining to the entry of E. King's of one thousand five hundred and thirty-three and one-third. He, the said Hamilton, is bound to pay to Elisha King for this land nine hundred and forty-six pounds sixteen shillings of current money of Virginia, in three annual payments, beginning December 25, 1805; then to pay three hundred and fifteen pounds twelve shillings. Also, in the years of 1806 and 1807, on each Christ's day, or before, to make the full payments, as is above. The manner and agreement made by us is in payment as tenders: the said Hamilton takes to this country horses, to be sold at twelve months' credit, taking bond and good security, which bonds is lawful tenders from year to year; and, on these tenders being made, the said King is bound to give to the said Hamilton good titles to the said lands. We do bind ourselves, our heirs, executors, administrators, firmly, by these presents, in the *penalty of two thousand pounds, in [*313 this our bargain. Given under our hands and seals."

When this contract was made, Elisha King had a patent for his entry, No. 1548. Sackville King's entry, No. 1549, was held by him without any title to it; and afterwards, in 1812, Sackville King's whole entry was conveyed by him to another, who now holds the same. Alexander Hamilton entered on No. 1548 immediately after his purchase, supposed to be one thousand five hundred and thirty-three and one-third acres; and, with others holding under him, made valuable improvements on it, and still holds possession of the same.

NOTE.—As to specific performance of contracts, see note to Pratt v. Carroll, 8 Cranch, 471; note to Hepburn v. Dunlop, 1 Wheat., 179; note to Morgan v. Morgan, 2 Wheat., 290; note to Colson v. Thompson, 2 Wheat., 336; and note to Brashier v. Gratz, 6 Wheat., 528.

The bill states that Hamilton continued to make payments until the 22d June, 1809, at which time, he having paid one-half of the purchase money of the tract estimated at one thousand five hundred and thirty-three and one-third acres, King made a conveyance to him of seven hundred and sixty-six and two-third acres, supposed to be a conveyance of one-half of the same. The bill charges that there was a large surplus of several hundred acres, and that this sale was in gross; and insists on a conveyance of the whole of the lands in No. 1548. The patent to Elisha King for No. 1548 bears date the 10th of March, 1804, and is for "a certain tract of land containing one thousand five hundred and thirty-three and one-third acres," as by survey bearing date the 13th of April, 1792; and sets forth the metes and bounds according to this survey.

The bill claims an allowance for the loss of three hundred and thirty-three and one-third acres of Sackville King's entry, and proceeds to state and charge sundry payments since the conveyance of the 22d of June, 1809, the last of which was made on the 26th of March, 1818. It then admits that there was due at the time of filing the bill, on the tract of one thousand five hundred and thirty-three and one-third acres (deducting the consideration money expressed in the conveyance for seven hundred and sixty-six and two-third acres, the ratable value of the other tract of three hundred and thirty-three and one-third acres which was lost, and all the subsequent payments) the sum of **314***] one thousand seven hundred dollars yet to be paid by Hamilton to King on the contract for the one thousand five hundred and thirty-three and one-third acre tract; which sum they say they were always ready to pay since the death of Alexander Hamilton, if they could have procured a fair settlement; and also, that they are informed and believe that Alexander Hamilton, when he could have a settlement and receive a title, was always ready in his lifetime to make payments. The bill then goes on to state a number of improvements made on that part of the land not conveyed by King to Hamilton; which improvements are stated to have been made by Hamilton and the other appellees claiming by purchase under him.

The bill then prays an injunction to a judgment in ejectment recovered at June Term, 1824, for that part of the tract of one thousand five hundred and thirty-three and one-third acres not conveyed. It asks a decree for a conveyance, on payment of the balance, and for general relief.

The answer denies that the sale was in gross, and also that the complainants were at any time ready to perform the agreement, by the payment of the purchase money for the tract which was agreed to be sold; and alleges that the payment of the same was evaded and delayed, although frequent promises of performance were made. To this answer there was a general replication.

At January Term, 1826, an agreement was entered into by the parties (which being entered of record, takes the place of an interlocutory decree) in order to settle so much of the controversy; that there was then due to King, on the purchase money and interest, one thousand

eight hundred and ninety-six dollars eighty-eight cents, after deducting five hundred and sixty-six dollars sixty-six cents on account of the land sold, included in Sackville King's patent, which, with interest from that time, was all that was to be paid King, if the court decreed that the contract covered the surplus above one thousand five hundred and thirty-three and one-third acres, in the entry 1548. The times for paying that sum were agreed; and, also, that on the payment, deeds should be executed by respondents, covering the whole land, if the *contract was decreed to be [***315** in gross, and the injunction be made perpetual against the proceedings in ejectment, &c. This agreement reserved for future decision the single question whether the contract of sale was a sale in gross or by the acre, as to the land in the entry 1548; and concludes as follows: "to avoid all dispute, it is the express understanding of the parties that the whole question concerning the said surplus land is reserved for future decision; and all claims for damages respecting failure in the title for the tract of three hundred and thirty-three and one-third acres of land, in the bill mentioned, are waived."

At July Term, 1826, the court decreed that the sale by Elisha King to Alexander Hamilton was a sale of the whole of the land in No. 1548; and that the defendant, John W. King, should, within two months, convey to the complainants in fee-simple, with covenants of special warranty, the lands not already conveyed by E. King to Alexander Hamilton; that the complainants, within two months, should pay the balance agreed with interest; and that each party should pay their own costs at or before the next term. As to the other defendants, the bill was dismissed generally.

From this decree John W. King appealed to this court.

For the appellants it was contended, by *Mr. Doddridge*:

1. That, under the agreement entered into by the parties to the suit at January Term, 1826, John W. King reserved to himself the right to urge, as to the surplus land, whatever could have been urged as to the relief claimed for the land not surveyed, as well as every other separate defense which he had a right to make as to the surplus, independent of the agreement.

2. That no evidence was given in the case to establish the fact that the payments made by Hamilton were for the land not conveyed, and that the payments made were to be applied to the land which had been conveyed. So that, for the land not conveyed, nothing had been paid for a period of nineteen years.

3. No possession of the land not conveyed was delivered by King to Hamilton.

*4. That the sale was not a sale in [***316** gross; and the sale in gross having been denied in the answer and no evidence given, the court erred in finding for the appellees.

5. That the appellant ought not to be required in a court of equity to yield the title to so large a surplus without compensation, and without the clearest proof of the agreement.

The law of Virginia regulating lands under military grants declares that as to the surplus lands in a grant, anyone may give the war-

rantee notice to survey the quantity included in the grant; and if he neglects or refuses to do so, he may, after twelve months, apply to the County Court, and have a survey made for himself; and he may then enter the surplus land, and thus become the legal owner of it. This gives the original grantee a right of pre-emption to all the surplus beyond five per cent., which is allowed in every grant. This must be done during the life of the original grantee, and during the continuance of his title; after a sale, and after a descent cast, the right to the surplus is abandoned by the state to the grantee.

In Ohio there is no court to which an application for a re-survey can be addressed, and, therefore, the right to the surplus lands in the Virginia reservation of military lands in that State is complete in the grantee, unless it was so great as to amount to a fraud.

The right, therefore, of King to the whole land included in the grant, it being within the Virginia reservation, is complete. At law, it is necessarily so; and this is recognized in *Taylor v. Brown* (5 Cranch, 234, 241); and it is so in equity. (*Dunlap v. Dunlap*, 12 Wheat., 574).

The surplus lands are, therefore, to be considered as having passed to Elisha King as fully as if the whole actual quantity had been stated in the grant.

It is next assumed as a position that whenever there is an excess or deficiency of quantity of lands sold, and both parties are ignorant of the fact at the time of the sale, equity will relieve the party aggrieved by adding to or reducing the purchase money *pro rata*; and **317*** the relief given proceeds *on the ground of mistake. In support of this principle there have been decisions in the courts of Virginia. (1 Call, 301; 2 Hen. & Munf., 244; *Hall v. Cunningham*, 2 Hen. & Munf., 336). In a note to this case, authorities are referred to for the purpose of showing what relief ought to be granted under such circumstances. (2 Hen. & Munf., 161, 179, 175, 177; 1 Hen. & Munf. 201.)

These authorities establish: 1. That if the excess be considerable, and the same of a deficiency, and each party is innocent, there should be a dissolution of the whole contract. 2. If the excess or deficiency be small, and there has been no evictions, there should be an addition to or deduction from the gross sum, after the rate of the whole contract. 3. If deeds have been made and possession given, and there has been an eviction of part, compensation should be decreed according to the value at the time of the eviction. (Cited, also, 8 Cranch, 371, and note to the same case, p. 375.)

These cases show that there is a general rule to give relief where the excess exceeds five per cent.; and that this relief will be denied when the contract was for a gross sum, or where the vendor had perfect knowledge of the land and the vendee had not, but the vendee took upon himself the risk as to lines and quantity. That courts lean against the establishment of such contracts, having a gaming or immoral tendency. That whatever may be the terms of the written contract, the fact of a sale by the acre or in gross, lies in averment; and, consequently, where either of these facts is charged in the bill as a ground for relief, and

the ground is denied in the answer, the answer will prevail without proof of the fact and the bill will be dismissed, the answer being responsive to a material charge in the bill. That the words "more or less," and proof that the whole tract was sold, are not of themselves sufficient to prevent relief; and there is no adjudged case proceeding on that ground alone. An examination, with reference to these authorities, of the contract between Elisha King and Hamilton, will abundantly show that had the whole property sold been *conveyed [**318** and paid for by Hamilton, a discovery of the surplus afterwards would have entitled the vendor to relief. The situation of the country settled, and the property held by each grantee well known; the relations of the parties to it (Hamilton living on adjoining lands, and King residing at the distance of six hundred miles, and ignorant of the practice of including a much larger quantity of land in the survey than the grant called for), are circumstances which should materially operate when the transactions and the claims arising out of it are considered.

It is confidently asserted that the facts of this case will not authorize a court to decree a specific performance of the contract, independent of the principles and the rules of law which have been urged. While it is admitted that for a forfeiture occasioned by a breach of his contract the vendor may be the subject of relief in a court of equity in favor of a vendee, it is relied upon that the vendee must account for his nonperformance by circumstances which will exculpate himself. In this case, the failure of Hamilton to pay for the land according to the contract is fully proved by the whole case. (Cited, *Pickett v. Dondall*, 2 Marsh., 115.)

The counsel for the appellants also contended that the operation and just construction of the transactions between the parties were, that the payments made were to be applied to the portion of the land which had been conveyed; and that this was considered a performance of the contract so far as the purchaser was entitled to the same.

He also contended that the object of the complainant was not only to be relieved from a forfeiture, but also to ask the specific execution of a contract, certainly made under a mistake, and by which hard and unconscionable terms will be imposed on the appellant. Courts of equity are not bound to decree a specific performance in all cases; they do so only at their discretion, and they will withhold such a decree where the terms would be hard, although no fraud should be proved. (1 Wash. Rep., 270.)

Mr. J. C. Wright*, for the appellees. [319**

In 1805 the whole tract was sold by Elisha King to Hamilton, referring to the patent by number and quantity. Hamilton took possession of the land under the contract, and improved it, and in 1809 a deed was made for one-half of one thousand five hundred and thirty-three and one-third acres. Before the deed was made there had been no survey; but an estimate of the quantity was made by the parties. In 1818 Elisha King conveyed the remaining half to John W. King, according to a survey then made, and thus he took the legal estate subject to the agreement with

Hamilton, to which he had been a witness. He stands thus in the relations of his father, and the estate held by him is subject to the equities of the appellees, as he had full notice of this contract. He does not stand as an innocent purchaser and entitled to favor; but if his purchase was made to the injury of the rights of Hamilton, he is to be considered as an intruder. When he received the conveyance more than half the purchase money had been paid, or was paid before this suit. Those who purchased from Hamilton have improved the part so acquired, and these improvements are out of the seven hundred and sixty-six and two-thirds acres conveyed by King.

All the questions in the case, except that of the right to the surplus land, have been settled by the agreement of 1826. The appellees upon that question contend that the sale was in gross.

The court will go behind the deed executed by Elisha King for part of the land, to ascertain what was the intention of the parties. (1 Call's Rep., 301.)

It is denied that the rule laid down by the counsel for the appellant, as to surplus, exists. The principles which have been established are, that when a sale is made by metes and bounds, by general terms, where the whole thing is sold, as in this case, the land is described, as held under a patent, and for a sum specified in amount, and not *pro rata* as to quantity, it is a sale in gross, and the purchaser takes all the land within the boundaries. (Cited, 12 Wheat., 574; *Powell v. Clarke*, 5 Mass., 355; 1 Caines, 493; 2 Johns. Rep., 37; *Vowles et al. v. Craig et al.*, 8 Cranch, 374; also 320*) Sugden *on Vendors*, 200; 2 Bibb's Rep., 451; 1 Madd. Chan., 74, 76, 77; 1 Call's Rep., 301.)

What is the contract? "I this day sell to Alexander Hamilton all my lands lying on the Miami River, in the State of Ohio, one thousand five hundred and thirty-three and a third acres, as by patent in my name."

The case admits that the patent referred to was the one obtained on survey No. 1548; and the survey sets forth the metes and bounds of the tract within which is now the whole claim of the appellees. The contract is, therefore, one for the whole land, not by quantity, but by patent; and "all" the lands of the vendor are sold.

Mr. Justice THOMPSON delivered the opinion of the court:

This case comes up on appeal from the Circuit Court of the United States for the Seventh Circuit, in the District of Ohio.

The bill in the court below was filed for the purpose of obtaining the specific execution of a contract entered into between Elisha King, the father of John W. King, and Alexander Hamilton, the father of James Hamilton; and also to enjoin all further proceedings at law on a judgment in an action of ejectment obtained by John W. King, for the recovery of possession of a part of the land alleged to have been comprised within the contract.

The answer to this bill is very inartificially drawn, but no exceptions were taken to it, and the general replication put in. No proofs were taken upon the principal matters in dis-

pute; but the cause came on to a hearing upon the bill and answer and exhibits, and the agreement which had been entered into between the counsel for the parties in the progress of the cause. This agreement puts at rest many of the questions that might otherwise have arisen, and reduces the subject of dispute to the single inquiry respecting what is called by the parties the surplus land; and this involves the inquiries: first, whether this surplus is embraced in the original contract; and if so, then, second, whether, under the circumstances of the case, the complainants in the court below have not lost their right to call upon a court of equity to enforce a specific performance of that contract.

*The contract signed by Elisha King [321 and Alexander Hamilton bears date on the 8th of February, 1805, and is as follows: "I this day sell to Alexander Hamilton all my lands lying on the Miami River, in the State of Ohio, one thousand five hundred and thirty-three and one-third acres, as by patent in my name; also three hundred and thirty-three and one-third acres, taken off the lands patented in the name of Saekville King, adjoining to that entry of Elisha King, of one thousand five hundred and thirty-three and one-third acres. He, the said Hamilton, is bound to pay to Elisha King for this land nine hundred and forty-six pounds sixteen shillings, current money of Virginia, in three payments, beginning December 25th, 1805; then to pay one hundred and fifteen pounds twelve shillings, also, in the year 1806 and 1807, each Christmas day, or before, to make the full payments, as is above. The manner and agreement made by us is in payment as tenders: the said Hamilton takes to this country, horses, to be sold at twelve months' credit, taking bond and good security, which bond is lawful tenders from year to year; and on these tenders being made, the said King is bound to give to said Hamilton good title to said lands," &c.

The bill states that there is a surplus of several hundred acres beyond the specific quantity mentioned in the contract. The answer alleges that from actual survey, the patent is found to contain two thousand four hundred and nine and a half acres, which will leave a surplus of eight hundred and seventy-six acres; a quantity equal to more than one-half of the whole number of acres mentioned in the contract.

It may perhaps be assumed as facts of general notoriety, that the surveys and patents for lands lying within the Virginia military district, contain a greater quantity of land than is specified in the grant; and that parties would, of course, when entering into a contract for the purchase of a tract of land, and referring to the patent for a description, expect that the quantity would exceed the specified number of acres. But so large an excess as in the present case can hardly be presumed to have been within the expectation of either party; and admitting that a strict legal interpretation *of a [322 contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows that a court of chancery will in all cases lend its aid to enforce a specific performance of such a contract.

The agreement entered into by the counsel which has been hitherto, and which will be

more particularly noticed hereafter, puts an end to all questions respecting the land, to the extent of one thousand five hundred and thirty-three and one-third acres. Otherwise it might well be questioned whether the complainants in the court below could compel a conveyance for any more than has already been conveyed under the contract.

In 1809 a conveyance was given for seven hundred and sixty-six and two-thirds acres, the full consideration for which, after deducting five hundred and sixty-six dollars and sixty-six cents for defect of title in Elisha King to the three hundred and thirty-three and one-third acres of land included in Sackville King's patent, had not been paid when the bill was filed.

If the rights of these parties were to be governed and determined solely by the question whether the contract covers the surplus land, we should have no difficulty in coming to the conclusion that it does. There is nothing upon the face of the contract from which it can be satisfactorily inferred that it was intended to be a sale by the acre. The language of the contract on the part of King is, "I this day sell to Alexander Hamilton all my lands lying on the Miami River, in the State of Ohio, one thousand five hundred and thirty-three and one-third acres, as by patent in my name." Had it been intended a sale by the acre, the language would doubtless have been, one thousand five hundred and thirty-three and one-third acres of, or a part of my lands, &c.: instead of which it is "all my lands, as by patents in my name." Reference is made to the patent for a description of the land, and to ascertain the subject matter of the contract. And whatever would pass under the patent to King would be included in the sale to Hamilton. The number of acres is mentioned in reference to what appears by the patent (one thousand five hundred and **323*** thirty-three and *one-third acres, as by patent in my name), and not as designating the precise quantity sold. But admitting the contract covers the surplus land, it is contended on the part of the appellants that a court of equity will not, under the circumstances of this case, enforce a specific performance of the contract. It is insisted, however, on the part of the appellees, that all equitable considerations are precluded by the agreement entered into by the counsel, which has been referred to; and that the question is narrowed down to the single inquiry whether the surplus land is included in the original contract of 1805. If such is the construction to be given to this agreement, the question has already been answered. It becomes, therefore, very material, to examine whether this is the fair and reasonable interpretation of the agreement. It is as follows:

1. "It is agreed that the complainants are at this time (January 6, 1826) indebted to the said John W. King, one of the defendants above named, for the balance of the purchase money, including up to the date aforesaid the interest, one thousand eight hundred and ninety-six dollars and eighty-eight cents, for the one thousand five hundred and fifty-three and one-third acres mentioned in the said bill of complaint. This amount, it is agreed between the parties by their counsel, is now due to the said John W. King, after deducting from the gross sum

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agreed to be paid by the ancestor of the plaintiffs to the ancestor of the defendants, which will appear by contract, five hundred and sixty-six dollars and sixty-six cents, for the three hundred and thirty-three and one-third acres patented to Sackville King, mentioned in the contract, to which the defendants, or their ancestor, never had title. The sum of one thousand eight hundred and ninety-six dollars and eighty-eight cents is the whole amount due the said John W. King for the one thousand five hundred and thirty-three and one-third acres of land, the number of entry 1548, as mentioned in said bill; and it is hereby expressly understood between the parties, by their counsel, that the sum last mentioned, if it should be decreed by the court hereafter, or by the parties agreed to, that the surplus lands lying within entry 1548 is covered by the contract before referred to for *the gross sum named, [***324** the said sum, with interest from this time until it is paid, is the whole amount due the defendant, John W. King, upon said land contract; but it is hereby agreed between the parties, by counsel, that the question whether the said contract covers the surplus in said entry No. 1548, shall be reserved for future decision and determination; and whether the purchase for the sum mentioned in said contract does not entitle the complainants to the surplus land said to be contained in said No. 1548; and it is hereby agreed by the parties that the complainants shall now pay to the clerk for the said defendants or counsel, seven hundred and thirty dollars, part and parcel of the said sum of one thousand eight hundred and ninety-six dollars and eighty-eight cents, before admitted to be due; and that the said complainant shall pay the balance by the next term of this court, or within a reasonable time afterwards. And it is further agreed by the parties, by their counsel, that the said John W. King and the other defendants do join, if it appear necessary, shall execute to the complainants a good deed with covenants of general warranty for the land which the complainants shall be entitled to under the contract aforesaid immediately upon the payment of the purchase money. It is further agreed by the parties, by their counsel, that the complainants shall pay the cost in the action of ejectment brought in this court for the lands named in the bill, and the costs of this suit, to abide the decision of this court thereon. And it is further agreed by the parties, by their counsel, that upon the payment of the whole of the purchase money which may be due the defendants for said land, then, and in that case, the injunction is to be made perpetual. And, to avoid all dispute, it is the express understanding of the parties that the whole question concerning the said surplus land is reserved for future decision; and that all claims for damages, respecting the failure in the title for the tract of three hundred and thirty-three and one-third acres of land, are waived."

This agreement is somewhat obscurely worded, and its construction not without difficulty. Doubts have been entertained by the court whether the appellants have not thereby precluded themselves from resisting a specific performance *of the contract on the equi- [***325** table grounds that might otherwise be set up.

We have, however, come to the conclusion that the appellants, as to the surplus land, have reserved to themselves the right to set up whatever could have been urged against the relief sought, as to all the land not conveyed as if the agreement had not been entered into. And that as to the surplus land, the case is open, and to be considered entirely independent of the agreement.

Some of the leading objects of the agreement appear to have been to settle and fix the amount of payments that had been made, and the deduction to be allowed on account of the failure of title to the land patented to Sackville King; and to ascertain the balance due, which was found to be one thousand eight hundred and ninety-six dollars and eighty-eight cents, and which by the terms of the agreement is declared to be the whole amount due for the one thousand five hundred and thirty-three and one-third acres; thereby implying that the consideration agreed to be paid was for that quantity of land, and that as to that quantity no further dispute existed; but at the same time providing, that if the court should decree that the surplus land was covered by the contract, that balance should be deemed the full consideration for the whole. And then adds, "but it is hereby agreed that the question whether the said contract covers the surplus land shall be reserved for future decision and determination." If this had been the only question intended to be reserved, the agreement would have stopped here; there is no ambiguity thus far, or any necessity for putting the same question in a different shape. But the argument goes on, "and whether the purchase for the sum mentioned in the contract does not entitle the complainants to the surplus land said to be contained in No. 1548."

There would appear to be two distinct questions reserved for future determination: 1. Whether the contract covers the surplus land; and if so, 2. Whether the complainants are now entitled to it, by virtue of their original purchase. If this view of the agreement be correct, the second question reserved must have been intended to leave open all objections to the claims for the surplus lands. If, however, [326*] ever, the agreement had stopped here, there might have been serious doubts whether the question reserved was not whether the contract covered the surplus land. But the concluding clause in the agreement seems to have been added to remove all doubts upon the question. "And to avoid all dispute, it is the express understanding of the parties that the whole question concerning the said surplus land is reserved for future decision." If the only question reserved was whether the contract covered the surplus land, there was no necessity or fitness in this last provision. That question had been explicitly and in terms reserved; and to superadd to it that the whole question concerning the surplus was reserved, will admit of no other reasonable construction than that as it respected such surplus, the case was to stand as if the agreement had not been made.

This being the construction given by the court to this agreement of the counsel, it remains to inquire whether the complainants in the court below made out a case, which, according to the rules which prevail in courts of

equity, entitled them to a specific execution of the contract as to the surplus land.

This part of the case has not been much pressed upon the court, and it is difficult to perceive on what grounds it can be sustained. To have enforced a specific execution of this contract would, at any time, and under any circumstances, have been granting a strict legal right against the substantial justice and equity of the case.

To show this, it is only necessary to state some of the leading facts in this case. The contract bears date in the year 1805, and by it all the payments for the land were to be completed in December, 1807, on which the title was to have been given. Payment only of a part of the purchase money, and not even to one-half the amount, had been made when the bill was filed. No remedy at law, therefore, ever did exist. The purchaser never was in a situation when he could aver performance of the contract on his part. It is very evident that no consideration whatever has been given for this surplus land. The price was doubtless estimated by the parties upon the specific number of acres (although the sale was [*327 not by the acre], and which at that time was probably supposed to be nearly the quantity of land covered by the patent to King. This, however, turns out to be otherwise. The surplus is very large, amounting to more than one-half the number of acres mentioned in the contract. There are no grounds for charging either party with any knowledge of this fact. King manifestly could not have known it, or it would not have been entirely overlooked in the sale. And Hamilton ought not to be charged with a knowledge of it without satisfactory evidence, as it would be imputing to him a gross fraud. It is, therefore, a case of mutual mistake or ignorance of an important fact, in relation to the subject matter of the contract; and that contract still executory, and now sought to be enforced as to lands for which no consideration has been paid. It is, therefore, a case in which the parties ought to be left to their strict legal rights.

The bill alleges that Hamilton, in his lifetime, made valuable improvements on that part of the land not included in his deed of 1809. When these improvements were made does not appear. The contract is silent as to the time when the purchaser was entitled in the possession, and the bill does not allege that possession was taken, or the improvements made, with the assent of King; and the answer expressly denies that King put Hamilton in possession of any part of the land except that for which the deed was given in 1809, and alleges that the possession of any other part was without authority and unlawful.

In 1818, John W. King, one of the appellants, became the purchaser of all the lands not included in the deed of 1809. He was, it is true, a purchaser with notice of the contract between his father and Hamilton, but he also had notice of all the circumstances with respect to his failure in making payment; and that he had not at that time made payment even for the land which had been conveyed to him, and no further payments had been made when this bill was filed, or any disposition shown on the part of the appellees to perform the contract on their

part, and the bill in this case was not filed until **328***] nearly seven years from that time, *and not until a judgment in ejectment had been obtained to recover possession of the land not covered by the deed of 1809.

All the payments made upon this purchase might well be applied to the land which has already been conveyed; and was it not for the agreement entered into by the counsel, the complainants in the court below would have had no equitable ground for asking a specific execution of the contract for any portion of the one thousand five hundred and thirty-three and one-third acres not included in the deed of 1809. But that agreement has put an end to all questions in relation to the residue of the one thousand five hundred and thirty-three and one-third acres; leaving the case open, as we understand it, to all objections to a specific execution of the contract as to the surplus land, to the same extent as if the agreement had not been entered into.

Did this case, then, thus made out in the court below, entitle the complainants to a specific execution of the contract as to the surplus land? We think it did not, according to the well-settled rules of courts of equity on this subject. This branch of the powers of a court of chancery is very valuable and important. For in many cases, even where the remedy at law for damages is not lost, complete justice cannot be done without a specific execution; and it has become almost as much a matter of course for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law where an action will lie for a breach of the contract. But this power is to be exercised under the sound judicial discretion of the court with an eye to the substantial justice of the case. When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a settled rule, therefore, to allow a defendant in a bill for as specific performance of a contract to show that it is unreasonable or uncon- **329***] scientious, or founded *in mistake, or other circumstances leading satisfactorily to the conclusion that granting the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for the specific execution of a contract, should show himself ready and desirous to perform on his part. These are familiar and well-settled rules in courts of chancery, and have a strong bearing upon this case. If this contract had been carried into execution by giving a conveyance for the land, a court of chancery would not have given relief to the other party. But the contract is still executory; and the complainants, after the lapse of twenty years, seek for the specific execution of a contract which has not been performed on their part, and the execution of which would be manifestly unjust and inequitable.

If this large surplus of eight hundred and Peters 4.

seventy-six acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price.

So far, therefore, as the immediate rights of the complainants are involved, no equitable claim has been sustained for a specific execution of the contract for the surplus land. It is, however, alleged in the bill that sales have taken place, and valuable improvements made upon parts of the land not covered by the deed of 1809. This is not denied in the answer, although it is alleged that such improvements were made without the assent of King. No proofs have been taken with respect of these improvements. Their value and extent are left altogether uncertain. But the rights of third persons, who may be *bona fide* purchasers under Hamilton's supposed title, may be materially affected by dismissing the bill as to the surplus land. Some diversity of opinion has existed amongst us as to the final decree, on account of those improvements. We have, however, come to the conclusion that the complainants in the court below shall have a decree for the surplus land, at the average rate or price which the consideration mentioned in the contract bears to one thousand eight hundred and sixty-six and two-thirds acres, *the number of [***330** acres specified in the purchase; together with the interest thereon, from the 25th of December, 1807, being the time at which all the payments were to have been completed, according to the contract. The decree of the Circuit Court must be so modified. It should have required payment of the consideration money before the conveyance was to be given. Such are the terms of the original contract, and also of the agreement of the 6th of January, 1826.

The decree of the Circuit Court as to John W. King must accordingly be reversed, and affirmed as to the other defendants in the court below, and the cause sent back with instructions to cause a survey to be made to ascertain the number of acres contained in the patent; and that, on payment of the balance and interest due according to the settlement made on the 6th of January, 1826, and also a further sum for the surplus land above one thousand five hundred and thirty-three and one-third acres, according as the quantity shall be found on actual survey, at the same average rate or price as in the original contract, with the interest therefor from the 25th day of December, 1807; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance in fee simple to the complainants in the court below for all the lands contained in the patent to Elisha King mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the 22d of June, 1809. The money to be paid and the deed executed, at such time as the Circuit Court shall direct. The injunction to be continued for such time, and under such modification as shall be judged necessary by the Circuit Court for the purpose of carrying this decree into effect.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is decreed and adjudged by this court, that the judgment of the said Circuit Court in this cause

be, and the same is hereby reversed as to John W. 331*] King, and that *the said judgment in this cause be, and the same is hereby affirmed as to the other defendants in the court below. And it is further ordered and adjudged by this court, that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to cause a survey to be made to ascertain the number of acres contained in the patent; and that on payment of the balance and interest due according to the settlement made on the sixth of January, in the year of our Lord eighteen hundred and twenty-six, and also a further sum for the surplus land above fifteen hundred and thirty-three and one-third acres, according as the quantity shall be found on actual survey, at the same average rate or price as in the original contract, with the interest therefor for the twenty-fifth of December eighteen hundred and seven; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance, in fee simple, to the complainants in the court below for all the lands contained in the patent to Elisha King, mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the twenty-second of June, eighteen hundred and nine. The money to be paid and the deed executed at such time as the said Circuit Court shall direct. The injunction to be continued for such time, and under such modification, as shall be judged necessary by the Circuit Court for the purpose of carrying this decree into effect.

Cited—8 How., 161., 3 Wood. & M., 503, 510, 514.

332*] *WILLIAM T. GALT ET AL.,
Appellants.

v.

JAMES GALLOWAY, JUN., ET AL., Ap-
pellees.

*Land warrant—in whose name entry made—
boundaries—withdrawal of warrant—records
of land-office as evidence—Virginia laws regu-
lating military titles—principal and agent—
entry in name of deceased person.*

The possession of a warrant has always been considered at the land-office in Ohio sufficient authority to make locations under it. Letters of attorney were seldom, if ever, given to locators because they were deemed unnecessary. [339]

An entry could only be made in the name of the person to whom the warrant was issued or assigned; so that the locator could acquire no title in his own name except by a regular assignment. [339]

When an entry is surveyed its boundaries are designated, and nothing can be more reasonable and just than that these shall limit the claim of the locator. To permit him to vary his lines so as to affect injuriously the rights of others subsequently acquired, would be manifestly in opposition to every principle of justice. [340]

Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants,

both before and after surveys were executed. This practice is shown by the records of the land-office, and is known to all who are conversant with these titles.

The withdrawal is always entered on the margin of the original entry as a notice to subsequent locators, and no reason is necessary to be alleged as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn. This change cannot be made to the injury of the rights of others, and the public interest is not affected by it. The land from which the warrant is withdrawn is left vacant for subsequent locators, and the warrant is laid elsewhere, on the same number of unimproved lands. [341]

As the records of the land-office are of great importance to the country, and are kept under the official sanction of the government; their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated. [342]

Under the peculiar system of the Virginia land law, as it has been settled in Kentucky and in the Virginia military district in Ohio, by usages adapted to the circumstances of the country, many principles have been established which are unknown to the common law. A long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed. [343]

An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by the records, must be received as *prima facie* evidence of the right of the person at whose instance they were recorded; and as conclusive, in regard to such things, as the law requires to be recorded. [343]

*No principle is better settled than that [*333 the powers of an agent cease on the death of his principal. [344]

A location made in the name of a deceased person is void; as every other act done in the name of a deceased person must be considered. [345]

The withdrawal of an entry is liable to objection, subject to the rights which others may have acquired subsequent to its withdrawal having been entered in the land-office. This is required by principles of justice as well as of law. [347]

APPEAL from the Circuit Court of Ohio.

James Galt, as heir to his brother Patrick Galt, the ancestor of the complainants, on the 6th day of August, 1787, made an entry for military lands in the Virginia reservation, in the following words: "No. 610, James Galt (heir) enters one thousand acres on part of a military warrant, No. 194, on the Miami River, beginning at the upper corner of Francis Wheeling's entry, No. 438, running up the river five hundred poles which reduced to a straight line; thence at right angles with the general course of the river, and with Wheeling's line for quantity."

The bill of the appellants stated that this entry was valid on the 15th of November, 1796, and that a survey under the same was made thereon agreeably to its calls; that James Galt died intestate prior to the 2d of March, 1807; and that posterior thereto Elias Langham, without any authority from James Galt or from the complainants, caused an entry of the withdrawal

NOTE.—As to patents for lands and descriptions, see note to *Watts v. Lindsey*, 7 Wheat., 158; also note to *Miller v. Kerr*, 7 Wheat., 1; also note to *Newsom v. Pryor*, 7 Wheat., 7; also note to *McIver v. Walker*, 9 Cranch, 173.

As to agency and authority and liability of agent, &c., see note to *Mechanics' Bank of Alexandria v. The Bank of Columbia*, 5 Wheat., 326; note to

Jones v. LeTombe, 3 Dall., 385; note to *Leeds v. Marine Ins. Co. of Alexandria*, 2 Wheat., 380; note to *Parsons v. Armon*, 3 Pet., 413; note to *Bell v. Cunningham*, 3 Pet., 69; and note to *Massie v. Watts*, 6 Cranch, 148.

As to revocation of agency by death, see note to *Hunt v. Rousmanier*, 8 Wheat., 174.

of four hundred acres to be made in the books of the surveyor; the effect of which was to render the residue of the entry of such a shape as that it could not be legally surveyed, the law requiring that the breadth of a survey shall be one-third of its length. Subsequent to this withdrawal, the four hundred acres which Langham attempted to have left vacant thereby, were located by Galloway, by entries of three hundred acres in his own name, and one hundred acres in that of Ladd, both of which were included in one survey made on the 18th of June, 1808; but afterwards, on the 20th of July, 1809, Galloway having caused the word "error" to be entered on the face of the plats of the survey of 1808, had separate surveys executed in his own name and in that of Ladd, and also caused a survey to be made for himself of six hundred acres of James Galt's entry **334***] of August, 1787, of *one thousand acres, the part of the same, to withdraw which no attempt had been made by Elias Langham. A patent for the four hundred acres was obtained by Galloway, and he afterwards conveyed the land included in the same to different persons, who are made parties to the bill. The bill also stated that Thomas Baker resides on part of the one thousand acres, claiming title under Joshua Collet. That Collet claims title to part; that William Patterson is in possession of, claiming title to the residue; and that Galloway refuses to withdraw the four hundred acres. The complainants say they cannot procure a patent for the six hundred acres without jeopardizing their title not only to the four hundred acres, but also to the six hundred acres; and pray for particular and general relief.

The answer of James Galloway, Jun., states that Langham withdrew the four hundred acres of Galt's entry of one thousand acres; and that he believes the withdrawal was authorized, but knows not by whom; and, that since the bill was filed, he has heard the same was authorized by Westfall. The survey on the six hundred acres, the residue of Galt's entry, he says, he executed and returned, and that he was at the time he made the same, a regular deputy under Anderson. He obtained a patent for three hundred acres of the land included in the patent, and sold the same.

Joshua Collet and William Patterson, in their answers, claim to hold title under Westfall; the same having been sold as his property for his debts or responsibilities. Patterson represents, that he believes Westfall made a contract with Galt for the whole of warrant No. 194, on a part of which his claim is founded; and that Westfall obtained patents in his own name for other entries on the warrant, and sold them for his own benefit.

Elias Langham answers that, at the request of Westfall, he withdrew the four hundred acres as charged. He believed Westfall purchased the warrant No. 194 from Galt, in his lifetime. He considered himself in possession of the whole, as agent of Westfall, except one thousand acres transferred to Mallow from 1797, and never heard of complainants' claim **335***] *until after the death of Westfall. By order of Westfall, he laid off the town of Westfall, in Pickaway County, and sold several small tracts of land, part of warrant No. 194; and that he contracted with Westfall to with-

draw and re-enter other lands, which entitled him to six hundred acres.

Evidence was exhibited intended to show that an impression prevailed generally that Westfall was entitled to half of Galt's military land warrant. That Galt's warrant was put into Westfall's hands to locate land. The opinion of the court states such parts of the testimony and other facts of the case as were considered made out by proof.

The Circuit Court of Ohio gave a decree against the complainants, and they appealed to this court.

The cause was argued by *Mr. Irvin* for the appellants, and by *Mr. Doddridge*, contra.

For the appellants, it was contended:

1. That the entry in question of one thousand acres was originally good and valid.
2. That the original survey of one thousand acres included the lands embraced in said entry.
3. That James Galt, in whose name the said entry and survey were made, died intestate; and that the appellants are his heirs-at-law.
4. That on the death of said Galt, a right to three thousand acres, part of warrant No. 194, and of the lands appropriated thereby (which includes the land in question) vested in the appellants as his heirs-at-law.
5. That their right to the lands in question is not destroyed by either,

1st. Langham's attempt to withdraw four hundred acres, part thereof; or 2d. The locations made in the name of Galloway and Ladd, on the part of said entry, so attempted to be withdrawn, and the surveys and patents on said entries; or 3d. The conveyances from Galloway to Stephenson and the Gibsons, and from Ladd's executor to Wilson; or 4th. The conveyance bond executed by Westfall to Armstrong, and assigned by him to Davis, and by Davis to Patterson; or *5th. The proceedings in attachment against Westfall, and the sale and conveyance to Collet.

Mr. Irvin argued that there was no legal evidence to show that any authority had been given by Galt, the ancestor of the appellants, to anyone to withdraw his entry. The declarations of Westfall that he had received such authority were not evidence that it had been given, and the declarations of an agent cannot be used against his principal unless within the scope and purpose of his authority. A power to locate the entries did not authorize their revocation, nor did it give to the agent the right to dispose of the property or make it his own. If any power was given by James Galt to Westfall or to any other person, it should be shown. He who asserts it must make it out by evidence. If the contents of the instrument, which is said to have given the power, are to be proved by parol evidence, its nonproduction should be accounted for. (Cited, 8 East, 550; 7 Wheat., 154; Phil., 77, 79; 2 Taunt., 21.)

The removal of the warrant and entry was thus without authority. Langham acted under Westfall, and Westfall had no authority to give to Langham to do what was done by him. The whole of the proceedings of Langham were therefore void, and no titles obtained under them can be valid against those whose legal and known rights were infringed by the fraudulent contract of pretended agents.

After the survey was made, the warrants became *functi officio*; the warrant merges in the survey, if the survey was authorized, but not otherwise. (1 Ohio Rep., 225; 3 Marsh. Ken. Rep., 501, 96; 1 Marsh., 129, 144; Hardin, 567.)

Can the defendants avail themselves of want of notice? The assignee of an equity is in no better condition than the assignor, and there is no proof in the case that Westfall owned an acre of the land. (Cited, 6 Wheat., 560; 1 Marsh., 144.)

Mr. Doddridge, for the defendants, contended:

1. That upon the whole case, the complainants have shown no title in themselves.

337* 2. As to Galloway and those claiming under him, that the four hundred acres being actually withdrawn on the surveyor's books vacated that quantity of the original entry; that they were not bound to look beyond the record, and are innocent purchasers, without notice.

3. That owing to the particular position of the one thousand acre entry, the withdrawal of four hundred acres necessarily left vacant the part located by Galloway.

The appellants have slept too long on their rights, if any existed. The bill was filed in 1831, and they have suffered too long a period to elapse without complaint on their part of those proceedings which are now claimed to be void. Under those proceedings sales had been made; *bona fide* titles for a full and valuable consideration had been acquired by the defendants; all of which are to be vacated and defeated if the claims of the appellants prevail. He contended that as to the four hundred acres, the conduct of the surveyor in withdrawing this part of the survey was in accordance with a practice of universal prevalence, nor was it required by the law of Virginia that, to transfer a warrant, a regular assignment of it should be made. This principle was recognized by this court in the case of *Bouldin and Wife v. Massie's Heirs et al.* (7 Wheat., 122). It may, therefore, be well presumed that the acts of Westfall were authorized; that he had an interest in the warrants; and, therefore, what was done by Langham was correct. When an entry is made on the books of the office by the principal surveyor, it must be supposed valid; especially at a great distance of time, unless the contrary be plainly proved.

The land law of Virginia, which regulates this case, does not support the position that a warrant surrendered is *functus officio*. (7 Wheat., 23; Vir. Laws, 326, secs. 19, 24, 32, 42, 38.)

Mr. Justice McLEAN delivered the opinion of the court:

This suit is brought to this court by an appeal from the Circuit Court of the District of Ohio.

The complainants claimed through their ancestor, James Galt, one thousand acres of land **338*** under a military warrant obtained by him as heir to his brother, Patrick Galt. The entry was made on the 6th of August, 1787, as follows: "No. 610, James Galt, heir, enters one thousand acres on part of a military warrant, No. 194, on the Miami River; beginning

at the upper corner of Francis Whiting's entry, No. 438, running up the river five hundred poles, when reduced to a straight line; thence at right angles with the general course of the river, and with Whiting's line for quantity."

On the 15th of November, 1796, the entry was surveyed agreeably to its calls, and the survey was recorded on the 31st of May, 1798. James Galt died intestate in 1800. In 1805 Elias Langham (under the authority, as he alleges in his answer, of Westfall, who made the original entry) withdrew four hundred acres of the warrant, on this entry, and located the same number of acres at another place, in the name of James Galt, heir, &c.

The four hundred acres left vacant by this withdrawal were located by James Galloway, Jun.; three hundred acres of which were entered in his own name, and one hundred acres in the name of J. Ladd. These entries were surveyed on the 20th of July, 1809, after Galloway had caused to be made a survey of the six hundred acres, which remained of the entry in the name of Galt. A patent was issued on the entries and surveys of Galloway, and he has conveyed to four of the defendants, each, one hundred acres. Thomas Baker and William Patterson are in possession of, and claim title to the six hundred acres in the name of Galt. Baker's claim originated by a sale under an attachment against Westfall, and Patterson's by a purchase from him; but he does not appear, from the facts in the case, to have had any interest in the land.

There is no evidence that Galloway had any agency in the withdrawal of a part of the entry, as stated by Langham. The complainants allege that the withdrawal of the four hundred acres will invalidate the residue of the entry; as a survey, agreeably to its calls, will give the six hundred acres an illegal form. They pray for such general and particular relief as the nature and circumstances of their case may require.

*It is contended by the defendants' **339** counsel that no relief can be given against the defendants, who claim title to the six hundred acres, as by the facts stated in the bill it clearly appears they have no title either equitable or legal. That the sale under the attachment could convey no title to Collet, as Westfall had no claim whatever to the land; and that Baker and Patterson, who are now in possession, must be considered as trespassers. These occupants can be considered in no other light by the court than intruders; and the remedy against them is at law, and not in chancery. No decree could be made against them, unless it be that they should deliver possession of the premises; and to obtain this, the action of ejectment is the appropriate remedy.

Jurisdiction of this branch of the cause cannot be taken as an incident to the other, for it does not appear that the withdrawal of the four hundred acres will destroy the entry for the residue; and if it did, it would only be necessary to relieve against the defendants who held the legal title, to restore to the complainants the means of perfecting their title to the six hundred acres.

It appears that a land warrant, numbered one hundred and ninety-four, for six thousand acres, was issued to James Galt, heir-at-law and

legal representative of Patrick Galt, deceased. That this warrant was placed in the hands of Westfall, who located it on various tracts of land, including the tract in controversy.

In 1798, three thousand acres of this warrant were assigned by Galt to Westfall. The assignment was made on three surveys, which had been executed under these entries; one of these surveys was assigned by Westfall to Adam and Henry Mallow, and on all of them patents have been issued.

The possession of the warrant by Westfall is the only evidence of his right to make the locations; and this has been uniformly considered, at the land-office, as a sufficient authority. Letters of attorney were seldom, if ever, given to locators; because they were deemed unnecessary.

The entry could only be made in the name of the person to whom the warrant was issued [340*] or assigned, so that the *locator could acquire no title in his own name, except by a regular assignment.

The power of Westfall to make the location is not contested; but the validity of the withdrawal is denied by the complainants, on two grounds:

1. That the warrant had become merged in the survey, and could not be withdrawn.
2. That Langham had no power to withdraw it.

Several authorities have been referred to in support of the first position. Much reliance is placed on the decision in the case of *Estill et al. v. Hart's Heirs*, reported in Hardin, 567. In their opinion the court in that case say, that "whatever doubts might be raised as to the particular time at which the warrant shall be said to be merged in the survey, whether from the time it is approved by the chief surveyor and recorded, or from the time it was delivered out to the owner; or from the end of three months after making the survey, we conceive the case clear, that, after registering, the warrant was no longer an authority to any surveyor to receive an entry or make another survey."

The right of withdrawing a warrant, after a survey had been executed, was not involved in this case.

Two entries were made by Hart—one in 1780, the other in 1782—and both were surveyed in 1784. Boon subsequently entered land adjoining these surveys. Some years after this was done, Hart's executor and one of his heirs caused another survey to be made of the entries of his ancestor, which, varying from the former surveys, covered a part of Boon's land. The court decided, and very properly, that the second survey was void. When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just than that these shall limit the claim of the locator. To permit him to vary his lines so as to affect injuriously the rights of others subsequently acquired, would be manifestly in opposition to every principle of justice.

In the case of *Lofthus et al. v. Mitchel* (3 Marsh., 598), it is laid down by the court that a survey made by a person without the authority [341*] of the owner of the entry, does not merge the warrant. The same principle is recognized in the case of *Galloway's Heirs v. Webb* (1 Marsh., 130). In the case of *Taylor v. Alex- Peters* 4.

ander (3 Marsh., 501), the court decided that a second survey of the same entry was void.

It will be perceived that none of the authorities cited sustain the position that a warrant cannot be withdrawn after the survey has been executed and recorded. If the warrant merge in the entry, and the entry in the survey, as laid down in some adjudications, and if the warrant, being once merged, is beyond the control of the owner, an entry, equally with a survey, would prevent a withdrawal of the warrant.

Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants, both before and after surveys were executed. This practice is shown by the records of the land-office, and is known to all who are conversant with these titles.

The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn.

This change cannot be made to the injury of the rights of others, and the public interest is not affected by it. The land from which the warrant is withdrawn, is left vacant for subsequent locators; and the warrant is laid elsewhere, on the same number of acres, of unappropriated land.

In the case of *Taylor's Lessee v. Myers*, reported in 7 Wheat., 23, one of the questions considered and settled was, "can the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, abandon his survey after it has been recorded?" The *Chief Justice*, who delivered the opinion of the court, says: "It seems to be an ingredient in the character of property that a person who has made some advances towards acquiring it may relinquish it, provided the rights of others be not affected by such relinquishment. This general principle derives great strength from the usage which [342*] has prevailed among these military surveys. The case states that it has been customary, ever since the year 1799, to withdraw surveys after they have been recorded. The place surveyed has, of course, been considered as having become vacant; and has been appropriated by other warrants, which have been surveyed and carried into grant."

In that case the court did not decide (because it was unnecessary to do so) that the warrant thus withdrawn could again be located; but this would follow as a matter of course. If the withdrawal leave vacant the land entered, the warrant remains unsatisfied, and may be again located on any other unappropriated land.

It appears, therefore, that the right of the owner to withdraw his warrant after the survey has been executed and recorded, is clear, both on principle and authority.

The power of Langham to make the withdrawal is the next point to be considered.

Possession of the warrant, as has been shown, is a sufficient authority to make the location, and it will not be questioned that the locator may amend his entry by changing its calls. If he may do this, he may withdraw it, and make

a new location. The control which he must necessarily exercise over the warrant cannot, consistently with the interest of the owner, be limited to the first attempt at making an entry. If that attempt be imperfect, or if the selection of the land be less advantageous to his employer than it might be, there is no reason why he should not change the entry. The authority necessarily extends to the withdrawal, as fully as to the location, and such has been the uniform construction of the power of the locator. Confidence is reposed in his knowledge and discretion, and he has only to act in good faith to bind his principal.

The register of the land-office keeps a record of all entries and surveys, and on his official certificates patents are issued by the government. His records are always under his control; and all entries made in them are made by himself, or by a person authorized to act for him.

As the records of this office are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated.

If a different rule were now to be established, and every act of the locator, in making an entry or withdrawing it, must be shown to have been done under a formal letter of attorney, it would destroy, in all probability, a majority of the titles not carried into grant.

Under the peculiar system of the Virginia land law, modified as it has been in Kentucky and in the Virginia military district in Ohio by usages adapted to the circumstances of the country, many principles have become established which are unknown to the common law. A long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed.

An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by these records, must be received as *prima facie* evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded.

It will be in the power of an individual to rebut this presumption of authority in a person whose acts have been injurious to him and were unauthorized, by an exhibition of facts and circumstances.

In the case of *Moore et al. v. Dodd et al.*, reported in 1 Marsh., 140, the withdrawal of an entry by administrators was declared to be void; as the right had descended to the heir, and the administrators had no control over it. That the withdrawal in that case was made at the instance of the administrators, appeared from the entry on the record.

Langham, in his answer, states that he made the withdrawal of the four hundred acres by the authority of Westfall. This withdrawal was made eighteen years after the date of the

entry, and nine years after the survey was executed. So great a lapse of time from the entry to the withdrawal is a circumstance which must be considered as shaking the right of the locator; which depends, alone, upon his having located the warrant. In this case there is no positive evidence that Westfall, after the entry, exercised any agency over the land in the payment of taxes or in any other manner, until this withdrawal took place on the application of Langham.

The survey, which was executed by O'Connor in 1796, does not appear to have been done at the instance of Westfall; though, from his having made the entry, he may be presumed to have directed the survey.

From the answer of Patterson it appears that Westfall sold the three hundred acres claimed by him to one Davis, in the year 1806, and gave a bond with security for a title. It is now apparent that he had no claim to any part of the land in controversy. The right to the warrant for six thousand acres, by assignments on the surveys for three thousand acres, which seems to have been urged in the court below, is abandoned by the counsel in the argument here; and the power to withdraw the four hundred acres is rested on the first location of the warrant.

In the absence of any proof of right, the sale of a part of this tract by Westfall is an evidence of bad faith on his part; and tends to throw suspicion over the act of withdrawal. It is a well-settled principle that the locator, as such, has no right to sell the land.

It is in proof that James Galt, to whom the warrant issued, and in whose name the locations under it were made, died in 1800. The withdrawal was made in 1805, and the question is presented whether the decease of the owner of the warrant puts an end to the power of the locator.

No principle is better settled than that the powers of an agent cease on the death of his principal. If an act of agency be done subsequent to the decease of the principal, though his death be unknown to the agent, the act is void.

On the death of James Galt the land in controversy descended to his heirs, and there is no proof that they authorized Westfall to act in their behalf. If he had the power to withdraw any part of the warrant, it must have been derived from the single circumstance of his having had the control of the warrant when the entry was made.

Under ordinary circumstances, this power, as has been shown, would be sufficient. But it is a power which may be revoked or terminated by circumstances. The possession of the warrant is tantamount to a letter of attorney to make the entry, to alter or withdraw it, and to direct the survey; but is there no limitation when this authority under the warrant shall cease? Can it be safely considered as investing the locator with a higher power than a letter of attorney?

If the authority be in the nature of a power of attorney, and subject to the same principles of law, it ceased on the death of Galt. On that event, new interests sprung up which could not be controlled by the agent of the deceased. In the case of *Hansford v. Minor's*

Heirs (reported in 4 Bibb, 385), the court decided that, "after the death of Minor, as the law then stood, it was clearly irregular to survey the entry and obtain the grant in his name; but as he at that time had a devisable interest in the land, upon his decease that interest passed to Nicholas, the father of the appellees, and consequently the title ought regularly to have been perfected in his name."

By a statute of Kentucky, passed in 1792, lands granted to deceased persons descended to their heirs or devisees. This statute is not in force in Ohio, so as to give validity to the location in the name of James Galt of the four hundred acres withdrawn by Langham. This location having been made in the name of a deceased person, is believed to be void; as every other act done in the name of a deceased person must be considered.

An entry made in the name of a dead man is a nullity; as appears from the decision in the case of *McCracken's Heirs v. Beall and Bowman* (reported in 3 Marsh., 210); but such an entry in Kentucky, under the statute of 1792, enures to the benefit of the heirs of the deceased.

There is no pretense that the withdrawal **346*** was made under *any authority from the heirs of Galt; such a presumption would be rebutted by the subsequent location of the four hundred acres in the name of the deceased. An attempt has been made to show that the heirs of James Galt claim all the lands in Ohio entered in his name; and among other tracts, the four hundred acres located by the withdrawn warrant. But no other proof of the fact has been adduced except the vague declarations of David Collens, an alleged agent of William T. Galt, who acted for the other heirs; and these are not evidence. If the heirs had sanctioned the withdrawal by claiming the new location, it would render the act valid; and if such evidence be in the power of the defendants, it should have been produced.

As the heirs are residents of another State, the lapse of time does not raise a very strong presumption against them.

No doubt can exist that Langham, in making the withdrawal, acted without authority; and the question is presented whether an act thus done shall bind the owners of the entry.

There is much plausibility and force in the argument that the entry of a withdrawal on the record, being notice to subsequent locators, must be held valid, though done without authority in favor of rights subsequently acquired, without notice of the improper withdrawal.

The law requires the principal surveyor to record entries and surveys; these, and any other matters which the law requires to be recorded, must be received as conclusive of the facts; and parol evidence cannot be received to invalidate them, unless fraud be shown. But the law does not require the withdrawal of an entry to be recorded. This is an act of the party, rendered essentially necessary to the regularity of entries; but it cannot be considered of as high validity as the record of an entry or survey.

It operates as a notice to subsequent locators, and must be received as *prima facie* evidence of the right of the person who caused Peters 4.

the withdrawal to be made. But unless the law had required the principal surveyor to judge of the authority by which the warrant is withdrawn, and to make *the with- **[*347]** drawal on his record, can it be considered as conclusive?

The principal surveyor may enter a withdrawal, as was done in the case under consideration, at the instance of an individual who has not the shadow of authority. If entries and surveys may be destroyed in this manner, they must be considered of little value. On the other hand, if the authority of a person who withdraws the warrant may be contested under any circumstances, entries subsequently made may be annulled.

In the latter case, however, it is always in the power of the locator, when he is about to enter a tract from which a warrant has been withdrawn, to ascertain at whose instance the withdrawal was made; and this fact will enable him to investigate the authority under which the act was done. If the withdrawal was made by the owner of the warrant or the person who located it, the authority would be unquestionable. In the latter case, a great lapse of time might create doubts whether the power of the locator had not terminated, and this would lead to particular inquiry.

If it appeared that the warrant had been withdrawn by a stranger, should not that circumstance put the subsequent locator on strict inquiry? He has the means of guarding his interests by reasonable diligence; and this the law always imposes.

But the owner of the original entry, if it may be withdrawn without authority, has no means by which his interests can be protected. The principal surveyor is not under his control; nor, by the usages of the office, is he answerable to him for damages. It seems, therefore, that the principles of justice, as well as of law, require the act of withdrawal to be liable to objection, within the limits above prescribed.

As the withdrawal in this case was without authority, it was a void act, and, consequently, no right was acquired by the subsequent location.

The decree of the Circuit Court must be affirmed, so far as relief is denied against Baker and Patterson, who are in possession of the six hundred acres; and reversed as to the *other defendants; and the cause is **[*348]** remanded to the Circuit Court, with instructions to decree that William Wilson, Andrew Gibson, Matthew Gibson, and William Stephenson, do, on or before the first day of November next, execute to the complainants, jointly or severally, a release of their interests in the premises; provided before that time they shall have been paid for their improvements, under the statute of Ohio. And the Circuit Court is hereby directed to proceed to ascertain the value of such improvements, agreeably to the above statute, each party to pay his own costs in this court.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this

court that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, so far as relief is denied by the said court against Baker and Patterson, who are in possession of the six hundred acres of land; and that the said decree of the said Circuit Court in this cause be, and the same is hereby reversed as to the other defendants. And it is further ordered by this court that this cause be, and the same is hereby remanded to the said Circuit Court, with instructions to decree that William Wilson, Andrew Gibson, Matthew Gibson, and William Stephenson, do, on or before the first day of November of the year of our lord eighteen hundred and thirty, execute to the complainants, jointly or severally, a release of their interest in the premises; provided, that before that time they shall have been paid for their improvements, under the statute of Ohio. And that the said Circuit Court be, and the same is hereby directed to proceed to ascertain the value of such improvements, agreeably to the above statute. And that the said court do and act further in the premises as to law and justice may appertain. And it is further ordered by this court, that each party respectively in this court pay his own costs accruing in this court.

Cited—6 Pet., 261; 12 Pet., 298; 7 How., 268, 270; 13 Wall., 427; 9 Otto, 667; 1 McLean, 100; 4 McLean, 184; 4 Dill., 466.

349*] *MARY RONKENDORFF, Plaintiff
in Error,

v.

JAMES N. TAYLOR'S LESSEE, Defendant
in Error.

Official tax books as evidence—tax sales—Act of Congress authorizing such sales—sale of part of lot—tenants in common—insufficient advertisement.

The official tax books of the corporation of Washington, made by the register from the original returns or lists of the assessors laid before the Court of Appeals, he being empowered by the ordinances of the corporation to correct the valuations made by the assessors, are evidence; and it is not required that the assessor's original lists shall be produced in evidence to prove the assessment of the taxes on real estate in the city of Washington. [359]

In an *ex-parte* proceeding, as a sale of land for taxes under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cure any radical defect in his proceedings; and the proof of regularity devolves upon the person who claims under the collector's sale. [359]

Proof of the regular appointment of the assessors is not necessary. They acted under the authority of the corporation, and the highest evidence of this fact is the sanction given to their returns. [360]

The Act of Congress under which the lot in the city of Washington in controversy was sold, required that public notice of the time and place of sale of lots, the property of nonresidents, should be given by advertising "once a week" in some newspaper in the city, for three months. Notice of the sale of the lot in controversy was published for three months; but in the course of that period,

eleven days at one time, at another ten days, and at another eight days transpired, in succeeding weeks, between the insertions of the advertisement in the newspapers. "A week" is a definite period of time, commencing on Sunday and ending on Saturday. The notice was published Monday, January 6th, and was omitted until Saturday, January 18th, leaving an interval of eleven days. Still the publication on Saturday was within the week preceding the notice of the 6th, and this was sufficient. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of the week. If published once a week for three months, the law is complied with and its object effectuated. [361]

No doubt can exist that a part of a lot may be sold for taxes where they have accrued on such part. [361]

The lot on which the taxes were assessed belonged to two persons as tenants in common. The assessment was made by a valuation of each half of the lot. To make a sale of the interest of one tenant in common for unpaid taxes valid, it need not extend to the interest of both claimants; one having paid his tax, the interest of the other may well be sold for the balance. [361]

The advertisement purported to sell "half of lot No. 4, in square No. 491," and the other half was advertised in the same manner, as belonging to the other tenant in common. This was not a sufficient advertisement, and a sale made under the same was void. [362]

It is not sufficient that in an advertisement of land for sale for unpaid taxes, such a description is given as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry; nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property would the sale be valid unless the same information had been communicated to the public in the notice. [362]

The tenth section of the act of Congress provides that real property in Washington, on which two or more years' taxes shall be due and unpaid, may be sold, &c. In this section a distinction is made between a general and a special tax. Property may be sold to pay the former as soon as two years' taxes shall be due; but to pay the latter, property cannot be sold until the expiration of two years after the second year's tax becomes due. The taxes for which the property in controversy was sold became due, by the ordinance of the corporation, on the 1st day of January, 1821 and 1822. The special tax for paving was charged against the lot in 1820 and became due on the 1st of January, 1821; but the ground on which it was assessed was not liable to be sold for the tax until the 1st of January, 1823. The first notice of the sale was given on the 6th of December, 1822, nearly a month before the lot was liable to be sold for the special tax of 1820. Held, that the whole period should have elapsed which was necessary to render the lot liable to be sold for the special tax, before the advertisement was published. [364]

FROM the Circuit Court of the District of Columbia, for the County of Washington.

This was an ejectment, brought by the defendant in error in the Circuit Court for the recovery of an undivided moiety of a lot of ground in the city of Washington, No. 4, in square No. 491.

The lessor of the plaintiff in the ejectment claimed to be entitled to the lot of ground as tenant in common with the heirs-at-law of Henry Toland, deceased; and on the 10th of March, 1823, the half of the lot so held by the lessor of the plaintiff was set up and exposed to public sale as assessed to James N. Taylor, for taxes due to the corporation of Washington for the years 1820 and 1821, amounting in the whole, including the expenses of the sale, to the sum of forty-seven dollars and ninety-one cents; and Henry T. Weightman became the purchaser of the same. Mary Ronkendorff, the plaintiff in error, holds as lessee under the purchase at the tax sale.

NOTE.—As to sales of lands for taxes, and execution of powers in regard to same, see note to *Williams v. Peyton*, 4 Wheat., 77; and note to *Clark v. Graham*, 6 Wheat., 577.

In the Circuit Court the jury returned a verdict for the plaintiff in the ejectment, upon which judgment for his unexpired term in an undivided moiety of the lot as tenant in common was rendered in his favor under the instructions of the court, to which several exceptions were taken.

351 *] The plaintiff in the Circuit Court made out his title under the commissioners of the city of Washington, by regular conveyances to himself and Henry Toland, deceased; and it was agreed that the plaintiff's lessee and Toland's heirs were under the same seized in fee as tenants in common of the premises before the sale of the half lot for taxes.

The defendant proved the assessment of the taxes on the lot by the production of the regular evidence, and that the taxes were assessed and the assessments were entered in the tax books, according to the forms usually pursued and authorized under the charter and ordinances of the corporation of Washington.

In the tax book of 1820, the assessment of lot No. 4, in square No. 491, appears arranged in columns in the established and accustomed forms, in which are placed the name and residence of the owner of the property, the number of the square, the number of the lot, its contents in square feet; the rate of assessment, the valuation, the valuation of the improvements and the amount of the tax. The lot in controversy was entered in the tax book of 1820 thus:

| Names. | No. of square. | No. of lot. | No. of square feet. | Rate of assessment. | Valuation. | Total amount. | Amount of Tax. |
|------------------|----------------|-------------|---------------------|---------------------|------------|---------------|----------------|
| Taylor, James N. | 491 | ½ 4 | 4202 | 40 | 1680 | 1680 | |
| Paving tax, | | | | | | 8 40 | |
| Toland's heirs, | | | | | | 23 46 | 31 86 |
| Henry, | 491 | ½ 4 | 4202 | 40 | 1680 | 1680 | 8 40 |

In the tax book for 1821, the assessments of the lot were entered as follows:

| | | | | | | | |
|------------------|-----|-----|------|----|------|------|------|
| Taylor, James N. | 491 | ½ 4 | 4202 | 40 | 1680 | 1680 | 8 40 |
| Toland's heirs, | | | | | | | |
| Henry, | 491 | ½ 4 | 4202 | 40 | 1680 | 1680 | 8 40 |

It was also proved, on the part of the defendant in the ejectment, that the persons appointed to take the value of the property liable to assessments for taxes in the city of Washington usually perform the duty in October in each **352** *] year, and make out annual lists of the same and of its assessed value; which, after being laid before the board of appeal empowered to correct the valuations, are returned to the register of the corporation with the corrections, if any, in whose custody and office the original books containing such lists and valuations are preserved; and the register, by the authority of the corporation, then proceeds to digest the tax books, year by year, in the form described, and transfers into such tax books, from the original assessment books so returned by the assessors through the board of appeal, the lists of the several species, descriptions and parcels of property on which such taxes are

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imposed, and the assessed valuation of the same, as corrected by the board of appeal; extending in the proper column prepared for the purpose, the amount of the taxes imposed upon the same respectively; which tax books, given in evidence by the defendant, were so made up and arranged by the register in the years 1820 and 1821 respectively; the general taxes therein respectively assessed becoming due and payable, according to the laws of the corporation, on the first day of January of each year then next ensuing; that is to say, the general tax (exclusive of the special tax for paving) for the year 1820, on the 1st of January, 1821; and that for the year 1821, on the 1st of January, 1822.

The court, on the motion of the plaintiff, instructed the jury that the tax books so given in evidence by the defendant were not competent evidence to prove the assessments of the lot for the years 1820 and 1821, unless the defendant first proved the regular appointment and authority of the assessors whose books and returns were used in making up and arranging the tax books as aforesaid; and also produced the original books so returned by the assessors, through the board of appeal, in each year respectively; to which opinion and instruction of the court the defendant in the Circuit Court excepted.

It was further proved on the part of the defendant that the collector of the taxes imposed by the corporation in third and fourth wards, who was authorized to advertise and sell all property in those wards liable to be sold by taxes, on Monday, *the 6th of Decem- **[353]** ber, in the year 1822, the taxes on the lot in controversy being unpaid, caused to be inserted in the National Intelligencer, the following advertisement:

“ Will be sold at public sale on Monday, the 10th of March next, at 10 o'clock, A. M., at the City Hall, the following described property, to satisfy the corporation of Washington City for taxes due thereon up to the year 1821, inclusive, with costs and charges; unless previously paid to the subscriber, to wit:” (and amongst others are the following):

| To whom assessed. | No. of square. | No. of lot. | Amount. |
|----------------------------|----------------|-------------|---------|
| James N. Taylor, | 491 | ½ of 4 | \$16 80 |
| Paving tax, in'st 10 p. c. | | | 23 46 |
| Henry Toland's heirs. | 491 | ½ of 4 | 16 80 |

This advertisement was repeated and republished by the direction of the collector, on the several days following:

Friday, December 6th, 1822; Saturday, December 14th, 1822; Monday, December 16th, 1822; Tuesday, December 17th, 1822; Wednesday, December 25th, 1822; Saturday, January 4th, 1823; Monday, January 6th, 1823; Saturday, January 18th, 1823; Tuesday, January 21st, 1823; Saturday, February 1st, 1823; Tuesday, February 4th, 1823; Thursday, February 6th, 1823; Saturday, February 8th, 1823; Tuesday, February 11th, 1823; Wednesday, February 12th, 1823; Thursday, February 13th, 1823; Friday, February 14th, 1823; Saturday, February 15th, 1823; Monday, February 17th, 1823;

Tuesday, February 18th, 1823; Wednesday, February 19th, 1823; Saturday, March 1st, 1823; Monday, March 3d, 1823; Tuesday, March 4th, 1823; Wednesday, March 5th, 1823; Monday, March 10th, 1823.

The tenth section of the Act of Congress of the 15th May, 1820, "to incorporate the inhabitants of the city of Washington, and to repeal all other acts heretofore passed," requires that real estate upon which two years' taxes are unpaid and in arrear, shall be advertised "once a week" for three months.

In pursuance of his authority and duty, and according to the tenor of the advertisement, the **354** collector, on the 10th of *March, 1823, set up at public sale one-half of the lot No. 4, in square No. 491; and the same having been purchased by Henry T. Weightman, he paid the amount of the purchase money on the 11th of March, 1823, to the collector, who thereupon executed and delivered to him a certificate under his hand and executed in the presence of a witness, stating, that "at a sale made by me, as collector of taxes for the third and fourth wards of the city of Washington, on the 10th of March, 1823, after due notice given as required by the acts of the corporation of said city, I set up and exposed to public sale, half of lot No. 4, in square No. 491, assessed to James N. Taylor, for taxes due the said corporation on the same for the years 1820 and 1821, amounting in the whole, including the expenses of sale, to the sum of forty-seven dollars and ninety-one cents; when a certain Henry T. Weightman, being the highest bidder, became the purchaser thereof, at and for the sum of forty-seven dollars and ninety-one cents; the receipt of forty-seven dollars and ninety-one cents is hereby acknowledged, subject, however, to redemption, as provided for by law."

The collector made a return of the sale in the following form:

| Sqr. | Lot. | To whom assessed. | Purchaser. |
|------|------|-------------------|------------------|
| 491 | ½ 4 | James N. Taylor. | H. T. Weightman. |

| Tax. | Expen. | Am. sold for. |
|-------|--------|---------------|
| 45 33 | 2 58 | 47 91 |

Mr. Weightman entered upon the half lot so sold to him, and was possessed thereof more than two years after the day of sale; and afterwards, on the 5th of October, 1826, received in due form a conveyance in fee-simple of the said half lot, which deed was duly recorded; the plaintiff's lessor, James N. Taylor, or any person for him or in his behalf, or any person whatever, not having at any time paid or in any manner tendered to Mr. Weightman, or deposited in the hands of the mayor or other officer of the corporation, the money paid to the collector or any part thereof.

The court, on the motion of the plaintiff, instructed the jury that the advertisement of the property was defective and illegal in the several instances and particulars following, to wit:

*1. That being published and re-**355** published as aforesaid, on the several days aforesaid, from the 6th of December, 1822, to the 17th of March, 1823, both inclusive, was not an advertisement "once a week" for three months within the meaning of the tenth section of the Act of Congress passed on the 15th of May, 1820, "to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose."

2. That the said corporation or its collector of taxes acting under its authority was not competent to advertise and sell any part of the said lot No. 4, in square No. 491, less than the entire lot, for the taxes so assessed on the same and due to the said corporation.

3. That the entire lot should have been assessed to the two tenants in common, Taylor and Toland, and accordingly advertised and sold as assessed to them.

4. That the said advertisement did not sufficiently designate what half of the said lot was charged with the said taxes, and was to be sold for the same; and did not purport to be an advertisement of an undivided moiety of the same for sale.

5. That the said corporation or its said collector had no power or authority to advertise the said lot for sale till the last of the two years' taxes, for which the same was advertised for sale, had remained unpaid and in arrears for two years.

6. That the said advertisement does not purport to advertise the said lot for two years' taxes unpaid and in arrears.

7. That the said property so attempted to be sold was not described with sufficient certainty, either in the advertisement or at the sale.

For which several defects in the process of the assessment, advertisement and sale of the said lot, the said sale is illegal and void.

The defendant excepted to all these instructions and opinions of the court, and prosecuted this writ of error.

The case was argued by *Mr. Jones* for the plaintiff in error, and by *Mr. Barrell* and *Mr. Key* for the defendant.

Mr. Jones*, for the plaintiff in error, **356 contended that the objections to the sale which had been made for taxes of the moiety of the lot were untenable.

The taxes for which the sale had been made had been regularly assessed under the authority of the corporation of Washington, and in conformity to law; all the forms of the law and ordinances had been complied with in this assessment—the registering of the taxes, the advertisement, and the sale. He cited the charter and ordinances of the corporation in support of that position.

Mr. Barrell and *Mr. Key*, for the defendant, contended that no proof had been made on the trial in the Circuit Court of the assessment of the taxes. The original books of the assessors should have been produced, and not the statements or abstracts from them made by the register. There may have been alterations made on appeals, and the original books of the assessors were the only legal evidence.

Laws for the sale of lands for taxes should be construed strictly, and their provisions should be strictly pursued. They are penal in their nature and effects. They go to wrest the

property of the owner out of his hands by act of law; and every form which the law directs must be entirely and fully answered. (8 Wheat., 682.)

The description of the property was imperfect; it did not designate the part of the lot to be sold with sufficient, if with any precision. If the corporation could divide a lot (which is denied) in order to comply with the law, there should have been an assessment of a half lot, and a description of it as such. To show that such a description was insufficient, cited, 1 Har. & Gill., 172.

The publication of the advertisement was not made in conformity with the provisions of the charter. The tenth section directs that the advertisement shall be inserted once a week for three months, but the case shows that this was not done. A period of twelve days had elapsed between the days on which the advertisement appeared, and no more than seven days should have passed. Once a week means once in every seven days—from one day, a **357*** particular day, to ^{*}another, a corresponding day in the succeeding week. In every period of seven days the insertion of the notice was not sufficient. If the advertisement commenced on one day in a week it should have been repeated on the following corresponding day in the succeeding week; and so on until it had been inserted for three months.

The stipulation to pay rent quarterly, and the construction given to such covenants, illustrate and explain the position of the defendant in error. Would it be a compliance with an agreement to pay two quarters' rent, quarterly, to make the payment at any time within six months, being two quarters? The payments are to be made under such covenant from quarter-day to quarter-day; and there is a breach, if the corresponding and succeeding quarter-day is suffered to pass without payment being made.

It was also contended that the corporation had no authority to advertise the lot for sale until the last of the two years' taxes were due, for which the sale was to be made, and that the advertisement does not purport to expose the property to be sold for two years' taxes unpaid and in arrears.

Mr. Jones, in reply, argued that the books of the assessors were not the original records of the assessment of the taxes. The returns are made to the register and are entered by him, and his books exhibit regular and proper evidence of the charges and assessments on property in the city.

The register is a public, sworn officer, and the duties he performs are official acts, which are shown by his books.

The advertisement was inserted in every succeeding period of seven days, and this was a compliance with the law. It was a publication in every succeeding week, or space of seven days; and this was according to the letter of the charter.

When a term is fixed for the performance of an act, the whole time is allowed to do it; even to the last minute. So, to require advertising once a week, gives all the next week for the next advertising. On what succeeding day in the hebdomadal division of a week the advertisement shall appear is not required; the name

of the day of the week on which it must be published is of no moment, as the names of ^{*}the days of the week are arbitrary. [**358** It is the period of seven days which the law regards as the space of a week, and in this case, as there was no period of fourteen days in which the notice of the sale was omitted, no longer period than twelve days having passed during the three months in which the advertisement did not appear, all was regular. As to the objection that the property sold had not been sufficiently described; as the powers of the corporation are to tax all interest in lands, the right to assess the tax on an undivided moiety of a tenant in common cannot be denied. Such was this case, and the advertisement described sufficiently an undivided half of the lot of which Taylor was the owner with Toland's heirs.

Mr. Justice M'LEAN delivered the opinion of the court:

This writ of error is prosecuted to reverse a judgment of the Circuit Court for the District of Columbia.

The defendant in error brought an action of ejectment in the Circuit Court, to recover possession of lot 4, in square No. 491, in the city of Washington, half of which had been sold for taxes; and under the special instructions of the court recovered a verdict and judgment. Several exceptions were taken to the competency of the evidence admitted on the trial, all of which appear in the bill of exceptions.

The first objection was taken to the competency of the proof of the assessment of the lot for taxation: the legality of the tax is not disputed.

To show the taxes assessed on the lot for the years 1820 and 1821, the defendant below produced in evidence the official tax books of the corporation, regularly made up by its officers, from which it appeared that the plaintiff stood charged for 1820 with thirty-one dollars eighty-six cents for the tax on the half of lot No. 4, which contained four thousand two hundred and two square feet, valued at one thousand six hundred and eighty dollars. For the year 1821, he stood charged with eight dollars forty cents tax on the same lot. It appeared in proof that the assessors appointed by the authority of the corporation make a valuation of ^{*}property within the city [**359** about the month of October, annually, and a return of their proceedings, which are laid before the board of appeal empowered to correct the valuations of the assessors according to the laws and ordinances of the corporation. The assessment lists are then returned to the register of the corporation. The register then proceeds to make out the tax books from the original assessment lists returned by the assessors and corrected by the board of appeal. But it was contended that the original lists of the assessors must be produced, and also proof of their appointment.

The court recognize the correctness of the principle contended for by the counsel for the plaintiff in error—that in an *ex-parte* proceeding of this kind, under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have

been complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceeding, and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale.

In this case, was it necessary to exhibit proof of the regular appointment of the assessors? They acted under the authority of the corporation, and the highest evidence of this fact is the sanction which it has given to their return. This return has been examined and corrected by the board of appeal, and was then handed over to the register. What better proof can be required of the assessor's authority to act?

The municipal powers of the corporation are conferred by a public law, and all courts are bound to notice them. Is it necessary in any case to go into the proof of the election of the mayor, or any of the other officers of this corporation? This has not been contended, nor can it be necessary to prove the appointment of an officer of the corporation who has acted under its authority, and whose proceedings, as in the present case, have received its express sanction.

Did the court below err in requiring the original assessment lists to be produced?

These lists, under the law, were not conclusive **360*** on the *corporation or on the person whose property was assessed. They were laid before the Court of Appeal for their correction and sanction, and they were then passed to the register.

If the assessment was not conclusive, or indeed binding on either party until sanctioned by the board of appeal, then, without this sanction, the assessment lists could not be received as evidence. These lists being handed over to the register, the law requires him to furnish a tax book to the collector from the original assessment lists on file in his office, according to a prescribed form. This was done in the case under consideration; and is not this book evidence?

It was made out and arranged by an officer, in pursuance of a duty expressly enjoined by law. This not only makes the tax book evidence, but the best evidence which can be given of the facts it contains. In this book are stated the name of the owner of the property and his residence, if known; the number of the square, the number of the lot, the square feet it contains; the rate of assessment, the valuation, and the amount of the tax. Only a part of these appear upon the assessment list.

This court think that the Circuit Court erred in their instructions to the jury on both of the points stated. 1. In deciding that the proof was not competent to show the authority of the assessors, and 2. That the official tax book certified by the register did not prove an assessment of the property.

The next point presented by the bill of exceptions is as to the legality of the notice of sale given by the collector.

The court instructed the jury that the advertisement was defective in several particulars.

By the tenth section of the Act of Congress, which directs this proceeding, the collector is required to give public notice of the time and place of sale by advertising once a week in some newspaper printed in the city of

Washington for three months, when the property is assessed to a person who resides within the United States, but without the District of Columbia.

Notice of the sale of the lot in controversy was given by the collector; first, in a newspaper published the 6th of December, *1822, [**361**] and last in the same paper of the 10th of March, 1823. These periods embrace the time the advertisement is required to be published; but it is contended that the notice was not published once in each week, within the meaning of the Act of Congress.

In examining the dates of the publications, it appears that eleven days at one time transpired between them, and at another time ten days, at another eight.

These omissions, it is contended, are fatal: that the publication being once made, it was essential to the validity of the notice that it should be published every seventh day thereafter.

The words of the law are, "once a week." Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication as if it had been made on the following Monday.

A week is a definite period of time—commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the sixth.

It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week for three months, the law is complied with and its object effectuated.

The Circuit Court erred on this point in their instructions to the jury.

The court below also instructed the jury "that the corporation, or its collector of taxes acting under its authority, was not competent to advertise and sell any part of said lot No. 4 for the taxes assessed on the same."

By the law, not less than a lot, when the property upon which the tax has accrued is not less than that quantity, may be sold for the taxes due thereon.

*No doubt can exist that a part of a [**362**] lot may be sold for taxes where they have accrued on such part; it appears, therefore, that the Circuit Court have also erred on this point.

It is again objected "that the entire lot should have been assessed to the two tenants in common, Taylor and Toland, and accordingly advertised and sold, as assessed to them.

The same valuation was placed on each half of this lot; so that so far as the assessment goes, it did not substantially differ from the instruction given. But the sale, to be valid, need not extend to the interest of both claimants. One having paid his share of the tax, the interest of the other may well be sold for the balance. The court therefore erred in their instructions on this point also.

In their fourth instruction the court say to the jury "that the advertisement did not sufficiently designate what half of the said lot was charged with the said taxes, and was to be sold for the same, and did not purport to be an advertisement of an undivided moiety."

The law requires "the number of the lots (if the square has been divided into lots), the number of the square or squares, or other sufficient or definite description of the property selected for sale, to be stated in the advertisement."

Congress had two objects in view in requiring this notice to be given: 1. To apprise the owner of the property, and 2. To give notice to persons desirous of purchasing. These objects are important. It is necessary for the interest of the owner that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it was of equal, if not greater importance, that the property should be so definitely described that no purchaser could be at a loss to estimate its value.

It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of **363***] the *property to be sold, cannot be cured by any communication made to bidders on the day of sale by the auctioneer.

What was the description given in the advertisement of the property in controversy? It was described to be half of lot No. 4 in square No. 491, and the other half was advertised at the same time under the same description, as belonging to Toland's heirs.

What would be understood by such a description? Suppose half a square had been advertised, it not having been divided into lots, would it convey that certainty to the public as to the precise property about to be sold that would enable anyone to form an opinion of its value? No one could suppose that an undivided half of the square was to be sold under the notice, and which half was offered could not be determined from the advertisement. Would this be a notice under the requisites of the law?

The value of a lot or half lot depends upon its situation. If one of the half lots front two streets in a populous part of the city, it is of much higher value than the other half. And this difference in value may still be greater if the lot be situated near the middle of a square, fronting the street, and it be divided so as to cut off one-half of it from the street.

It will thus be seen that it is not a matter of small importance to the person who wishes to purchase to know which half of a lot is offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner that the description should be definite. That an undivided moiety of a lot may be sold for taxes has already been stated. But would anyone understand that one half of lot No. 4 means an undivided moiety?

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In all cities half lots are as common as whole ones, and when a half lot is spoken of, we understand it to be a piece of ground half the size of an entire lot, and of as definite boundaries.

The illustrations given show how great a difference in value may exist between halves of the same lot. And would not the preferable half be of much higher value than an undivided moiety of the entire lot?

*In every point of view in which [***364** this notice can be considered, under the act of Congress, it was radically defective. The property should have been described as an undivided half of lot No. 4. Under such a description no one could be at a loss as to its situation and value. The instructions of the Circuit Court on this point are not erroneous.

In their fifth instruction the court say "that the corporation, or its collector, had no power or authority to advertise the said lot for sale till the last of the two years' taxes for which the same was advertised for sale had remained unpaid and in arrear for two years."

The tenth section of the Act of Congress which governs this subject provides "that real property, whether improved or unimproved, in the city of Washington, on which two or more years' taxes shall have remained due and unpaid; or on which any special tax, imposed by virtue of the authority of the provisions of this act, shall have remained unpaid for two or more years after the same shall have become due, may be sold, &c."

In this section a distinction is made between a general and a special tax. Property may be sold to pay the former, so soon as two years' taxes shall be due; but to pay the latter, property cannot be sold until the expiration of two years after the second year's tax becomes due.

The taxes for which the lot in controversy was sold were assessed in 1820 and 1821; and by the ordinance of the corporation they became due on the 1st of January succeeding the assessment.

A special tax for paving was charged against Taylor in 1820, and composed a part of the sum for which the property was sold.

This special tax became due on the 1st of January, 1821; but the ground on which it was assessed was not liable to be sold for the tax until the 1st of January, 1823. On the 1st of January, 1822, the same property was liable to be sold under the assessments of the years 1820 and 1821, for a general tax.

The first notice of the sale was given on the 6th of December, 1822, nearly a month before the lot was liable to be *sold for the [***365** special tax of 1820. Does this render the notice invalid?

This court think that the whole period should have elapsed which was necessary to render the lot liable to be sold for special tax before the advertisement was published. That the owner of the lot, by paying the tax at any time before the 1st of January, 1823, would save it from the liability of being sold; and that until this liability had attached he could not be chargeable with the expense of notice, nor could it legally be given.

The Circuit Court, therefore, did not err in their instruction to the jury on this point.

The court also instructed the jury that the advertisement was defective, as it "does not

purport to advertise the said lot for two years' taxes unpaid and in arrear." It states that the lot was offered for sale "for taxes due thereon up to the year 1821." This was sufficient; for if the taxes were due, and the property was liable to be sold for them, it can be of no importance to the purchaser to have a more technical description of the tax than the notice contained.

The seventh instruction, "that the said property attempted to be sold was not described with sufficient certainty either in the advertisement or at the sale," is substantially embraced by the fourth instruction, which has been considered.

For the errors specified the judgment of the Circuit Court must be reversed, and the cause removed to that court for further proceedings, in conformity to this opinion.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that the cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein, according to law and justice.

Cited—9 How., 260; 16 How., 618; 1 McLean, 328; 4 McLean, 332.

366*] *THE BANK OF THE UNITED STATES, *Plaintiffs in Error*,

v.

LEVI TYLER, *Defendant in Error*.

Promissory note, law of Kentucky as to assignment of—liability of indorser—judgment—when lien attaches to land—equitable interest, how reached by legal process—negligence of holder of note—case of Bank v. Weisiger confirmed.

Action by the indorsces against the indorser of a promissory note drawn and indorsed in the State of Kentucky.

The statute of Kentucky authorizing the assignment of notes is silent as to the duties of the assignee or the nature of the contract created by the assignment. It only declares such assignments valid, and the assignee capable of suing in his own name. But the courts of that State have clearly defined his rights, duties and obligations resulting from the assignment. The assignee cannot maintain an action on the mere nonpayment of the note and notice thereof until the holder of the note has made use of all due and legal diligence to recover the money from the drawer; whose engagement is held to be that he will pay the amount, if after due and diligent pursuit the maker is found insolvent. [380]

The principles of the law of Kentucky relative to the liability of indorsers of promissory notes, and proceedings to establish the same, as settled by the decisions of the courts of Kentucky. [381]

A judgment does not bind lands in the State of Kentucky. The lien attaches only from the delivery of the execution to the sheriff. It then binds real and personal property held by legal title. An execution returned is no lien on any property not levied on, and no new lien can be acquired, until a new execution is put into the hands of the sheriff; and none can issue while a former levy is in force. Any delay, then, by the assignee, enables the debtor to alienate his property in the interval between

judgment and the execution reaching the sheriff, as well as between the return of one and the lien acquired by a new execution. [383]

By the law of Kentucky, no equitable interest in real or personal property, unless it is held by mortgage, deed of trust, or other incumbrance, can be taken in execution. A *capias ad satisfaciendum* is the only mode by which the equitable estate of a debtor or his choses in action can be in any way reached by any legal process. It may be the means of coercing the payment of the debt, and it must therefore be used. The return of *nulla bona* to an execution is in that State the only evidence of there being no property of the debtor on which a levy can be made. It is not evidence of there being no equitable interest which is beyond the reach of such process, or of his not having that kind of property on which a levy can be made. [383]

After judgment obtained in the Circuit Court of the United States against the drawer of the note, a *capias ad satisfaciendum* was issued against him by the holder, and he was put in prison. Two justices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors; and the jailer permitted him to leave the prison. The jailer made himself and his securities liable for an escape, by permitting the prisoner to leave the prison. Held, that the neglect of the holder of the note to proceed against the jailer and his securities, prevents his making of the indorser liable for the amount of the note. [388]

*The court find no express decision of the [*367 courts of Kentucky enjoining a plaintiff who has sued the drawer of a promissory note and intends to charge the indorser, to proceed against a jailer and his sureties when the defendant has been suffered to escape; yet by the spirit of all the decisions he is bound to do so. The general principle of all the cases is that a plaintiff must pursue with legal diligence all his means and remedies, direct, immediate or collateral, to recover the amount of his debt from the drawer of the note or of anyone else who has put himself, or has by operation of law been put in his place. [390]

The decision of this Court in the case of *The Bank of the United States v. Weisiger*, examined and confirmed.

ERROR to the Circuit Court of Kentucky.

This was an action by The Bank of the United States against Levi Tyler upon two promissory notes—one for three thousand nine hundred dollars, dated the 2d of May, 1821, and payable sixty days after date, drawn by Anderson Miller in favor of John T. Gray. It was negotiable and payable without defalcation at the office of discount and deposit of The Bank of the United States at Louisville, Kentucky, for value received. John T. Gray assigned the note to Levi Tyler, and Levi Tyler assigned it to the bank.

The other note was of the same date, for three thousand eight hundred dollars, payable to Samuel Vance; assigned by said Vance and by the defendant. In all other respects it was like the note above stated.

On the 24th of September, 1821, suit was brought by the bank against the drawer, Anderson Miller, in the Circuit Court of the United States for the District of Kentucky, for the first-mentioned note; and judgment was obtained at the November Term, 1821.

On this judgment a *fiery facias* issued, bearing date the 29th of December, 1821, returnable on the first Monday of March, being the 4th day of the month following, which was in the hands of the marshal on the 19th of January, 1822; and the plaintiffs introduced as a witness the clerk of the court, who stated that it had been his uniform habit, before and since the obtention of the said judgment, to issue executions on all judgments obtained at the last preceding

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term and place them in a window of his office, from whence it was the habit and custom of the marshal to take them. That it generally required from twelve to sixteen days after the **368*** rising of the court to prepare and issue the executions of the preceding term. That at the November Term of the court at which the before-mentioned judgment was obtained, the court adjourned on the 17th of December.

To this *fiery faeias* the marshal returned a levy, and that he had not time to sell before the return day. The return was filed the 28th of March, 1822. On the 3d of April, 1822, a *venditioni exponas* issued, returnable the first Monday in June. It was returned on the 17th day of June, "unsold for want of bidders," and the sale was postponed; and alias *venditioni exponas* issued, tested the 17th of June, returnable on the first Monday in September, returned on the 13th. The sales, amounting to ten dollars and fifty cents, were credited to another execution.

The 26th of September, 1822, another *fiery faeias* issued, which was levied on slaves, and sale made. It was returned the 9th of December, 1822. The proceeds of the sale were one thousand three hundred dollars.

The 19th of December, 1823, another *fiery faeias* issued, and returned, "levied on property mentioned, and not sold for want of time." This was returned on the first Monday in March, 1823.

The 20th of March, 1823, a *venditioni exponas* issued, and was returned "unsold for want of bidders." The return was filed on the 30th of June, returnable the first Monday in June.

The 1st of July, 1823, another *venditioni exponas* issued, and was returned "unsold for want of bidders." The return was filed the 12th of September, 1823.

The 19th of September, 1823, another *venditioni exponas* issued, and the property was sold. The proceeds amounted to four dollars and fifty cents. It was returned the 19th of December, 1823.

The 19th of December, 1823, another *fiery faeias* issued to March, 1824, and was returned, "no property found to satisfy the execution or any part thereof." Returned the 16th of March, 1824.

The 16th of March, 1824, a *capias ad satisfaciendum* issued, under which the defendant **369*** was committed, and so *returned on the 26th of April, 1824. The commitment was to March, 1824.

The proceedings in the suit against Anderson Miller on the other note were also given in evidence. They also terminated in his committal to prison.

On the 27th of March, 1824, two justices of Kentucky discharged Anderson Miller from prison.

Upon this evidence the court instructed the jury to find for the defendant; and the jury found accordingly. The plaintiffs excepted, and the judge signed a bill of exceptions.

The plaintiffs offered witnesses to prove that Anderson Miller was notoriously insolvent when the note fell due, and had so continued ever since. The court rejected the evidence and the plaintiffs excepted. This exception is stated in the bill.

The plaintiffs contend that the court erred in Peters 4.

charging the jury to find for the defendant, because they say it was fully proved that due diligence was used against the drawer; and the remedies afforded by the law were exhausted without obtaining the money, and therefore they were entitled to recover from the indorser.

They contend, also, that under the circumstances of this case, the evidence offered of Miller's insolvency ought to have been received.

The case was argued by *Mr. Sergeant* for the plaintiffs in error, and by *Mr. Wickliffe* and *Mr. Bibb* for the defendant.

Mr. Sergeant stated that the first question was, whether due diligence had been used.

The second, whether the proceedings have been carried so far as to establish the right of holders to sue the indorser or assignor of the note.

1. The principles of the case were settled at the last term, in the case of *The Bank of the United States v. Weisiger* (2 Peters, 331). They decide this point, at all events, and, it is thought, the whole case.

It is to be remarked that it appears on the face of these notes that they were drawn for the same purpose of discount; *they [**370**] were indorsed for the same purpose, and they were discounted for Levi Tyler for value received by him.

The diligence used in the commencement of the suit appears from the statement of the case. It was brought to the first term, and in time to obtain a judgment at that term. No case in Kentucky requires more than this. The holder is not obliged to run a race against time, nor to sue the first term, if judgment could not be obtained. The general phrase is, "it must be in reasonable time." (*Trimble v. Webb*, 1 Monroe, 100; *Oldham v. Bengan*, 2 Litt., 132; *Collyer v. Whitaker*, 2 Marsh., 197.)

Bail was demanded, which would be necessary if *non est inventus* was returned (1 Bibb, 542), but not otherwise. (2 Marsh., 197.) Tyler was the bail.

2. Judgment was obtained the first term, and a *fiery faeias* issued on the same day, and was on the same day in the hands of the sheriff. (2 Peters, 333, 348, 349.)

The *fiery faeias* in the second case is said not to have been in the marshal's hands until the 9th of January; but this is probably a mistake; and if it was not, it was in good time. (2 Peters, 348.) It was also immaterial, because the other *fiery faeias* covered the whole property, as the return shows, and there was nothing to levy upon.

Was it necessary to issue two writs of *fiery faeias*? From that time forward there was unceasing diligence, the process being followed up as fast as it was returned. It is true that the marshal returned he had not time to sell; but this is not because the writ came too late: it was because he found nothing to levy upon until the 27th of September, 1822, or perhaps it is the ordinary course. Tyler was connusant of all this, for he was one of the defendants in one of the three executions.

Suppose, however, the officer did wrong; are the plaintiffs responsible for that? It has never been so settled. (*Postlethwaite v. Garrett*, 3 Monroe, 346.) Nothing was lost by it; for the property was secured, such as it was, and a *venditioni* issued immediately in each case. The

proceedings went on until the drawer was committed to prison, and that was all that could be done, and no more was required. (*Young v. 371** *Cosby*, 3 Bibb, 227.) Here the diligence was fairly exhausted and at an end. The bail was discharged by this commitment, and there was no recourse to him.

Have the proceedings been carried so far as to entitle the holder to sue the indorser or assignor?

It is contended that there is an immediate right of action against the indorser by the holder, after the confinement of the drawer, which cannot be devested but by his own act or consent. He is not bound to take a single step to keep the drawer in prison. (*Young v. Cosby*, 3 Bibb, 227.) Authorities upon this principle, 1 Marsh., 535; 2 Bibb, 34.

All this has been done, and the burden of proof that anything has been omitted is thrown upon the defendant. The plaintiffs are not bound to protract the imprisonment one moment. (*Bank of the United States v. Weisiger*, 2 Peters, 331.) In Virginia the requirements are far short of this. (*Violett v. Patton*, 5 Cranch, 142.)

Ought the law of Kentucky, which professes to be the law of Virginia, to be carried further than judicial decisions in that State have carried it? The point to be established is the insolvency of the drawer or his inability to pay, to a reasonable extent. Not that every possible chance of getting the money by any means is exhausted. That point was reached.

But it is insisted that a new career was to be begun. It is founded upon this argument—that the justices had no authority to discharge; that it was therefore an escape, and the jailer and his sureties are liable.

Supposing all this to be correct, is it necessary for the plaintiffs to proceed? It will be recollected that there was no request to this effect. There is no decided case which gives any countenance to the position. The case of a replevy bond has no analogy.

But this proceeding would be collateral to the suit. It would be a new departure on a different line of operations, the first suit being only the base.

Were the jailer and his sureties liable by the Kentucky law? This cannot be decided for want of evidence. Were there any sureties of *372** the jailer, and to what amount? *Were they responsible men, or were they insolvent? Was the pursuit worth the cost? The defendant should have shown this by evidence. He was to ask the pursuit to be undertaken at his cost and for his account. The claim on the plaintiffs seems wholly inadmissible.

But the question presented is one of some peculiarity. Is there an escape, and who is liable for it? This is a new question, considering the circumstances. The United States have no prison in Kentucky, nor is the marshal furnished with any place of imprisonment in Kentucky, under his own jurisdiction. The jailer is not of his appointment. The moment he delivers a prisoner to the jailer, his authority is at an end.

The matter depends on the resolutions of Congress and the acts of Kentucky. (Resolution of September 23d, 1789, Ing. Ab., 489; of March 3d, 1791, Ing. Ab., 496; of March 3d,

1821, Ing. Ab., 507; Acts of Kentucky, 2 Litt., 57, 369.) The marshal, therefore, cannot be liable. Is the jailer? He derives his authority from the State of Kentucky, and this discharge is under the law of Kentucky. It is a complicated question?

Two questions present themselves:

1. Is it required by the obligation of due diligence in Kentucky to issue a *capias ad satisfaciendum* for the purpose of imprisonment since the act abolishing imprisonment for debts? Does the law require that to be done which the same law declares ought not to be done?

2. Can a citizen of Kentucky, and one of the law makers, insist that this ought to be done? Suppose it to be clear that the plaintiffs had a right of action, were they bound to pursue it?

This is a question of evidence in the case, and it is contended the evidence was inadmissible. (*Violett v. Patton*, 5 Cranch, 142; 2 Marsh., 255; 2 Bibb, 34; 3 Bibb, 227.)

Mr. Wickliffe and *Mr. Bibb*, for the defendant.

This court has uniformly expressed its disposition to adopt the construction which the courts of a State have given of the laws of the State. (*Elmendorf v. Taylor*, 10 Wheat., 160.)

*In this opinion the principle is clear. *[373]* ly recognized that the judicial department of every government is the appropriate expounder of the legislative acts of the government.

The law of Kentucky in relation to promissory notes is applicable to those notes which are the foundation of this action; for the notes were drawn and executed in that State, and there assigned. The law of Kentucky is different from the usual commercial law. The responsibility of an assignor is to accrue after due diligence by suit against the drawer. (*Smallwood v. Woods*, 1 Bibb, 544; *Drake v. Johnson*, Hard., 223; *Duncan v. Littell*, 2 Bibb, 35, 290.)

The statute of Kentucky which authorizes the assignment of such notes, omits the words “in the same manner as bills of exchange” contained in the statute of Anne. (1 Dig. Laws of Kentucky, 99.)

The declaration in this case treats the notes as assigned under the law of Kentucky, and the attempt of the plaintiff has been to make out a case of diligence under the Kentucky law, and this is essential to a recovery.

By the decisions of the Supreme Court of Kentucky, the responsibility of an assignor of a bond or note is made to depend upon due diligence by suit against the maker to compel payment. The assignor must use every compulsory process afforded by law, and he must use it until the insolvency of the maker of the note is established, until the suit and all the incidental remedies, however ramified, prove insufficient. (*Smallwood v. Woods*, 1 Bibb, 542; *Hogan v. Vance*, 2 Bibb, 35; 4 Bibb, 287; Marsh., 523; 3 Marsh., 60; 1 Mon., 103; 5 Litt., 331; 3 Bibb, 7; 1 Marsh., 230.)

From these cases the consequences are inevitable that a failure to sue out successive executions in due time until the officer returns “no property” is negligence; that the first and every successive process must be diligently pursued until the property is exhausted and the body taken, and all the remedies have been employed and have failed.

Due diligence is a question of law to the
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court, when the facts are ascertained. (*McKenney v. McConnell*, 1 Bibb., 239; *Smallwood v. Woods*, 544.)

374* In the case before the court, the facts were ascertained by the plaintiffs' evidence upon which the motion for instructions which prevailed was founded; the plaintiff produced none. The rules of the law of Kentucky being fully established upon the authorities cited, the principles they enforce will be applied to this case.

1. By showing that the plaintiffs as assignees have not used due diligence against the maker between the judgment and the *capias ad satisfaciendum*.

2. That the plaintiffs having failed to proceed against the jailer for an escape, cannot have recourse to the assignor.

1. The plaintiffs have been guilty of *crassa negligentia* between the judgment and the *capias ad satisfaciendum*.

If suit must be brought to the first term (4 Monroe, 15), why so? Because execution would otherwise be delayed. Not only suit, but execution must be sued in due time; and although a *feri facias* was sued in due time, yet a delay in pursuing the execution by *capias ad satisfaciendum* was adjudged negligence. (2 Marsh., 523.) What is due diligence? what is negligence in proceedings under executions must be tested by the properties and effects which the law gives to executions in respect to three subjects:

1. As to priority between creditors, where all cannot be satisfied.

2. In overreaching alienations by the debtor to *bona fide* purchasers.

3. As to the command to the officer to levy or compel the debtor, or the obedience due by the officer to the precept.

1 and 2. As to priority of lien amongst creditors and the lien which overreaches alienations by the debtor, the statutes of Virginia and of Kentucky declare that the property shall be bound only from the delivery of the execution to an officer; and to that end he is required to indorse the time of delivery. (Laws of Virginia, 1748, p. 276, sec. 10; Laws of Kentucky, 1 Dig., 513, 483.)

The common law doctrine of relation to the beginning of the term by judgments is abolished, and the lien commences as has been stated.

375* By the express provisions of the statutes, and decisions under them, it appears:

That if several executions issue at the same time against the same debtor, and are delivered to the same officer, that which comes first to the officer's hands must be first satisfied, and it does not bind until delivery.

An execution issued and delivered creates no lien after the return day, except upon such property as may have been seized. (*Tabb v. Harris*, 4 Bibb, 29; *Daniel v. Cockpen's Executors*, 4 Bibb, 532.)

Thus, diligence in delivering the execution to the officer is of the highest importance. In the exercise of the federal jurisdiction of the courts of the United States, the obligation to pursue with the utmost diligence the delivery of the execution is more important; for between conflicting jurisdictions, the officer who first levies has the right to retain the property.

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Due diligence, then, enjoins a speedy delivery of the process to the officer, and that the lien shall be preserved by keeping the execution in the hands of the officer until a return of the property.

By the statutes of Virginia and Kentucky, one execution can be sued after another, if the first be not returned and executed. The great object of this law is that the plaintiff may maintain a continued and unbroken lien upon the debtor's property.

The laws of Virginia and Kentucky upon these points are the same, and the practice in the Circuit Court of the United States has been to mould their executions so as to embrace lands as well as goods and chattels; and this is shown by the decisions of this court in *Wyman v. Southard*, 10 Wheat., 1; *The Bank of the United States v. Halstead*, 10 Wheat., 57. The question is, therefore, disentangled of any difficulties in the forms of the execution.

To apply these principles to the facts of the case, and first, as to the note for three thousand nine hundred dollars.

In the executions against Miller the plaintiffs were guilty of gross negligence.

The first execution is tested the 29th of December, 1822, and there was a delay of twenty-one days between the test and the delivery; [*376] and during this delay, other creditors might have come in, and the debtor might have aliened his property. This execution was levied on specified property, without any return that there was no other; and a subsequent execution was levied on other property than that, which was sold for one thousand three hundred dollars. Had the execution been issued earlier, the officer might have sold before the return day.

Although the *feri facias* was returnable the first Monday in March, the *renditioni* to compel the officer to sell was delayed until the 3d of April, 1822. When that was delivered does not appear.

That *renditioni exponas* was returned "not sold for want of bidders, and sale postponed by agreement," indorsed on execution No. 2130; but when that was returned does not appear.

The next *renditioni exponas* to compel the sale was not issued until the 17th of June, 1822, and the property was sold on the 1st and 2d of July.

From the time of this sale (2d July) the plaintiff delayed to put another *feri facias* into the officer's hands until the 1st day of October: ninety days were suffered to elapse without any effort.

Had the plaintiff been vigilant, he would immediately after the sales in July have issued another *feri facias* to bind the debtor's property.

That there was other property appears by the execution and sale on this second *feri facias*, and also by the levy on the third *feri facias*.

These delays were so great, there was such a want of vigilance and due superintendence; such was the careless manner in which the executions were suffered to limp and halt and drag, by intervals, between the one execution and another, that it has taken from the 29th of December, 1821, to the 16th of March, 1824, a

period of twenty-six months and upwards, before the *capias ad satisfaciendum* issued.

During these twenty-six months there were three levies and three sales, and the process upon which these three levies and sales were compelled, were at intervals which evince a total inattention on the part of the plaintiffs.

377*] *His own testimony shows that he relied on the clerk and the marshal.

Neither clerk or marshal have, by law, authority to issue executions unless ordered.

They are not, *virtute officii*, bound to act as agents of the plaintiff in ordering and delivering executions. If they do so, it must be by special authority given by the plaintiff beforehand, or by adopting their acts afterwards. If the plaintiff has chosen to rely on the clerk and the marshal to do that for him which it was his duty to do, he must abide the loss by such delays as have been suffered. The clerk is to issue execution, when ordered, and of the kind directed—whether *feri facias* or *capias ad satisfaciendum* or *elegit* or *levari facias*—the marshal is bound to receive such when offered to him. It is the business of the plaintiff to direct the clerk to issue, and it is the business of the plaintiff to deliver to the marshal the execution when issued. It is no excuse for the delays which have happened for the plaintiff to say, it was the clerk's habit to issue executions and put them into a window in his office, and it was the habit of the marshal to call and get them. A reliance upon such habits shows the want of that superintendence and vigilance which was due from an assignee who expects recourse against the assignor.

It is no excuse for the lapse of time between the return day of one execution and the teste of the ensuing execution to say that the marshal did not return the execution at the return day. He was bound to return the execution according to the command of the precept, and was subject to a fine and penalty for failing to return the precept at the day appointed.

At each rule day on which the process was returnable, the plaintiff had a right to call for it, to demand it; to proceed against the officer for a failure to return the precept according to its mandate. Moreover, whether returned or not, he had the right by law on the rule day, and even before, to sue out any other execution and deliver it, so as to preserve his lien. The officer, upon such second execution, would, of **378***] *course, regulate his conduct by what he had done on the previous execution.

So much for the delay between judgment and *capias ad satisfaciendum* on the note of three thousand nine hundred dollars by Miller to Gray, who assigned to Tyler, who assigned to the bank.

The two notes, and the process upon them, cannot be brought to the aid of each other. The parties are different, and each must be pursued independently. (2 Marsh., 523, 198, 199.) Upon the principles already stated and supported by authorities, the proceedings against the maker of the note for three thousand eight hundred dollars are liable to charges of the most gross and entire negligence.

The *feri facias* issued on the 29th of December, 1821, and did not come to the hands of the marshal until the 19th of January, 1822—nearly one month after its issue. From the return

day (the first Monday in March) until the 3d of April, 1822, there was no movement, when a *venditioni exponas* issued, returnable in June; and then there was no sale; but this was postponed by agreement. The next *venditioni* was issued on the 17th of June, and sales were made on the 1st and 2d of July; and from that time the process was suffered to sleep until the 28th of December, 1822—a period of one hundred and seventy days. Even between the return day in September and the teste of the next execution in December, there was an interval of one hundred and eleven days.

2. The defendant having failed to proceed against the jailer for the escape, cannot have recourse to the assignor.

The cases before cited are adjudicated upon the principle that not only the direct remedy by suit, but the incidental remedies and securities given by law, and arising in the course of the suit, must all be resorted to. The remedy must be pushed in all its ramifications. (*Owings v. Grimes*, 5 Litt., 331; *Parker v. Owings*, 3 Marsh., 60; *M'Ginnis v. Burton*, 3 Bibb, 7; *Campbell v. Hopson*, 1 Marsh., 230.)

That the jailer and his sureties are liable for an escape cannot be denied. The discharge was altogether unlawful; the jailer should have resisted, or have refused to obey *the [**379** order to discharge the drawer. (Cited, *Hubbard v. Newhouse*, 1 Bibb, 555.)

The law of Kentucky gives the use of the prisons of the State to the United States, and declares it to be the duty of the jailer to receive persons committed under the authority of the United States, and to keep them until discharged according to law (2 Dig., 679); and the jailer gives bond with sureties.

The statute of Kentucky abolishing imprisonment for debt does not operate upon the process of the courts of the United States. The justices had no color for the jurisdiction they assumed.

The plaintiffs have a remedy for the escape, and no person but the plaintiffs can pursue it. It is a remedy incidental to the action against the drawer, and they should have employed it before they instituted this suit.

The case of *The Bank of the United States v. Weisiger* has no analogy to this. There the complaint against the plaintiff was that he had been too swift.

Mr. Sergeant, in reply, said it was admitted that the suits had been regularly brought, and in good time; and the only question upon this point was whether the subsequent proceedings were also in time. He contended that they were, upon the authority of adjudged cases in Kentucky, and it is not necessary to go further than the judicial decisions of that State had gone. As to the obligation to pursue the officer for an escape, the claim is ungracious, after charging the plaintiff with the length of his pursuit.

No decision was ever yet made upon which the position assumed rests. If there is no decision, there is no such obligation. The law of the case is out of judicial proceedings. No law exists, unless found in these decisions. But it has been decided that the holder of a note is not bound to pursue extraordinary remedies. This is an extraordinary remedy.

And why should it be required? The officer

380*] is guilty of *no injury, for the insolvency of the drawer of the note is manifest. It cannot be doubted.

Mr. Justice BALDWIN delivered the opinion of the court:

In this case the plaintiffs sue, not as the indorsers of two notes negotiable under the statute of Anne, which has never been adopted in Kentucky, but as assignees for a valuable consideration of promissory notes, which are assignable by the laws of that State, and on which the assignee may sue in his own name. (1 Kentucky Digest, 99.)

The first note was drawn by Anderson Miller, dated at Louisville, May 2, 1821, for three thousand nine hundred dollars, in favor of John T. Gray, negotiable and payable sixty days after date at the office of discount and deposit of The Bank of the United States, Louisville, Kentucky, for value received. The note was assigned in the following manner: "For value received, I assign the within note to Levi Tyler or order, John T. Gray, by Levi Tyler, his attorney." "For value received, I assign the within to the president, directors and company of The Bank of the United States, Levi Tyler."

As this note was drawn, assigned, and payable in Kentucky, the obligations and rights of the parties must depend on the laws of that State.

The statute authorizing the assignment of notes is silent as to the duties of the assignee or the nature of the contract created by the assignment. It only declares such assignment valid, and the assignee capable of suing in his own name, but the courts of that State have clearly defined the rights, duties, and obligation resulting from the assignment.

The assignee cannot maintain an action on the mere nonpayment of the note and notice thereof, or of a protest to the assignor, until the holder of the note has made use of all due and legal diligence to recover the money from the drawer. But if this fails, then the assignor may be resorted to on his assignment; which is held to be an engagement to pay the amount of the note if, after due and diligent pursuit, the maker is insolvent. This contract results from the act of assignment without any express **381*]** agreement to be answerable; *the law is the same, whether this contract is expressed in terms, or is implied from the assignment; the rights and duties of the parties are the same in both cases. (4 Bibb, 286; 1 Marsh., 229.) This case may, then, be considered as an assignment of a promissory note, with an express promise by the assignor to pay if by legal process and due diligence the assignee is unable to recover the amount due from the drawer. Viewed in this light the case is more readily comprehended.

The means which the assignee is bound to use, the time within which he must commence, and the diligence with which he must pursue his legal remedies against the maker, and the extent to which he must carry them, have been the subject of much litigation and discussion in the courts of Kentucky; they have, however, adopted the following as principles, which must be taken to be the law of the State:

That the assignee is not bound to run a race against time, or to use extraordinary means; Peters 4.

that he is not required to prosecute a drawer or obligor further than a man of ordinary prudence and diligence would do in a case were he was solely and exclusively interested. But in order to bring himself within these rules, he must commence a suit against the drawer at the first term after the note becomes due, if a judgment could be obtained then. He must sue within such time before the term as will authorize him to procure judgment. After suit is brought he must prosecute it to judgment without delay or giving time to the maker of the note. Though he is notoriously insolvent, and dies on the third day of the first term after the note becomes due, and no administration is taken out on his estate, the assignor is discharged, if no suit has been brought. After judgment, there must be the same diligence in purchasing the debtor's property by execution as in the commencement of the suit. There must be no delay in putting the execution into the hands of the sheriff, or in making sale of the property levied on; he must continue the process of execution until the property of the drawer is exhausted, and the sheriff returns *nulla bona* to the last execution; and after his insolvency is thus ascertained, a *capias ad satisfaciendum* must be taken for his body; *and if he [**382** is committed, the assignee must show what has become of the debtor, and how he has been discharged.

If the debtor assigns property, it must be sold. If property is taken in execution and replevin bond given, the bond must be put in suit; if there is bail to the action, and the principal cannot be taken on a *capias ad satisfaciendum*, the bail must be pursued, and all incidental and collateral remedies which may accrue to the assignee must be adopted and prosecuted; and the discharge of the drawer by the Insolvent Act at the suit of a third person will be no excuse for any relaxation in the diligence required to fix the assignor, who is suable only after the exhaustion of all legal means of obtaining payment.

The cases on this subject have been collected in a note in 2 Peters, 338, 339, 340; and were all cited and ably commented on by the counsel on both sides.

It is believed that the principles which exact such an unusual degree of vigilance from the assignee are peculiar to the jurisprudence of Kentucky, but they have been established by a long series of cases adjudged in their highest courts for many years; they have long formed the law of that State as to notes and bonds assigned under their statute, and the Legislature has not thought proper to change it. The courts in Virginia have given a very different construction to their statute on the same subject, and there are no decisions in any State which have extended the rule of diligence so far. But this court has always felt itself bound to respect local laws, however peculiar, in all cases where they do not come in collision with laws of higher authority and more imposing obligation. Such a case is not presented in the record now under our consideration.

These are the duties imposed by the law of Kentucky on the assignees of promissory notes before they can commence a suit against the assignor on his promise. These rules are the law of this case, and although in our opinion

they carry the doctrine of diligence to an extent unknown to the principles of the common law or the law of other States where bonds, notes, and bills are assignable, we must adopt them as the guide of our judgment. They must **383**]* be considered with *a reference to the laws of Kentucky respecting judgments and executions, in order to form a correct opinion of their true character. A judgment does not bind land in that State; the lien attaches only from the delivery of an execution to the sheriff; it then binds real and personal property, held by a legal title. An execution returned is no lieu on any property not levied on, and no new one can be acquired until a new execution is put into the hands of the sheriff; and none can issue while a former levy is in force. (6 Kentucky Digest, 485, sec. 8.) Any delay, then, by the assignee enables the debtor to acquire, hold or alienate his property in the interval between judgment and the execution reaching the sheriff; as well as between the return of one and the lien acquired by a new execution. There is, therefore, more reason in exacting strict diligence on the part of the assignee, than in those States where real estate is bound by a judgment without an execution. On general principles, it is certainly a rule of very great rigor to require a *capias ad satisfaciendum* to be issued and served after a return of *nulla bona*. But as, by the law of Kentucky, no equitable interest in real or personal property (except where it is held or covered by mortgage, deed of trust, or other incumbrance) can be taken in execution, a *capias ad satisfaciendum* is the only mode by which the equitable estate of the debtor or his choses in action can be in any way reached by any legal process. (1 Ken. Dig., 504, sec. 5, 505, sec. 6.) It may be the means of coercing the payment of the debt, and it must, therefore, be used. The return of *nulla bona* to an execution, is, in that State, evidence only of there being no property of the debtor on which a levy can be made. It is not evidence of there being no equitable interests, which are beyond the reach of legal process, or of his not having that kind of property on which no levy can be made. A debtor, confined by an execution from the federal courts, can only be discharged under the Insolvent Act of Congress, passed January, 1800, the provisions of which are effectual to compel a disclosure of all his property. In the language of this court, "the coercive means of this law are to be found in the searching oath to be administered, and in the fear of a pros- **384**]* ecution *for perjury and recommitment in the same action. (*The Bank of the United States v. Weisiger*, 2 Peters, 352.)

The creditor has a right to use these coercive means, and where he intends to make the insolvency of the debtor the ground of a resort to the assignor of the note on which the judgment was obtained, he is by the principles of the Kentucky decisions bound to use them to the full extent authorized by the laws of that State as expounded by its highest judicial tribunals.

In discarding from our minds all considerations unconnected with the peculiar local law which governs this case, and considering it in all its bearings on both parties, we are not prepared to say that either has any right to complain of the severity of the rules which impose

on them their respective obligations. If the law merchant were to govern, the plaintiff would be without remedy.

Suing as the indorser of a negotiable note, he must fail for want of protest or demand of payment of the drawer, and notice to the indorser. The diligence exacted of him is quite as extreme, if not more so, as when he sues as assignee. He must not give the drawer time for one day beyond the days of grace, or what local usage permits. His notorious insolvency, his being discharged as an insolvent debtor or a certified bankrupt, will not excuse the holder. This court have decided at this term, in the case of *The Bank of the United States v. Magruder*, that where a drawer of a note dies before it becomes due, and the indorser administers on his estate, demand of payment and notice to the indorser are indispensable. No decisions in Kentucky on assigned notes establish a more rigid doctrine than is applicable to indorsers by the law merchant. In such cases demand and notice are required to fix the indorser, because the debtor may pay by the interference of friends; not because he is supposed to have the means of doing it otherwise. It is too late to inquire into the reason of these rules, which have become settled and established as the general law of negotiable notes in the commercial world, and of assignable notes in Kentucky. They must be submitted to as the law of the contract into which *the parties respectively [**385** enter, on becoming indorsers in the one case, and assignees in the other. If it is not going beyond the principles of the common law of England and this country, it is at least extending them to their utmost limits, to say that the assignor of a note, without fraud, or a promise to pay in the event of the insolvency of the drawer, should be liable by the mere effect of the assignment; and that there is no difference between his assigning with or without an express promise. It is at least testing the contract of assignment by the rules of the *summum jus*. Neither the statute of Anne or of any of the States of this Union making notes assignable (so far as is known) expressly impose on the assignor any obligation which did not attach to the assignment of a chose in action at common law. Such assignments are recognized; and though the assignee cannot sue in his own name, his rights are as much protected in courts of law as those of assignees, by virtue of the statute. (3 Bibb, 293; 4 Bibb, 557.) It is not easy to assign any sound reasons for construing the assignment as, *per se*, importing a higher obligation in the one case than the other. But the law of Kentucky has given this effect to assignments of notes under the statute of that State, and as the plaintiffs cannot sustain this action in their own name without the aid of the law, they must submit to the conditions which the settled judgments on the action have imposed on them. If, in availing themselves of this strict obligation imposed on the assignor they find themselves compelled to use a corresponding degree of vigilance on their part exceeding that which is required in other States under similar statutes, this court cannot afford them an exemption from its exercise. The local law is clearly settled, and we must submit to it, however we might be inclined to construe the law, if it were now open to a construction more

consistent with that which has been uniformly given to statutes authorizing the assignment of bonds, bills and notes.

In the application of these rules to the first note which is the subject of this action, the defendant admits that up to the time of issuing the first execution there has been no want of due diligence on the part of the plaintiff; but he alleges that from that time there was unnecessary delay in various particulars, which have been pointed out and dwelt upon with much earnestness. As the statement of the case contains the teste, the return day, the day of the return of each execution, and the time of their coming to the hands of the marshal, it is unnecessary to examine in detail the alleged instances of negligence by the lapse of time: but there is one rule for which the defendant contends, which deserves some more particular notice.

By the fifth section of a law of Kentucky passed in 1811, it is made the duty of the courts of that State to appoint by rule of court some day in each month as a general return day of execution. The provisions of this law having been carried into effect, the defendant insists that in the exercise of the legal diligence incumbent on the plaintiff, he was bound to take out his execution returnable on some rule day, and attend at the office to watch its progress and effect. We think this would be applying the doctrine of diligence with unreasonable strictness. We find no decision which warrants the extension of it to so extreme a point, and we are not disposed to go one step in advance of the principles heretofore adopted. The case of *The Bank v. Weisiger* is conclusive on this part of the defendant's case; it was there settled that a lapse of thirty-six days between the judgment and the delivery of the execution to the marshal did not amount to that want of diligence which exonerated the assignor of the note on which the judgment was obtained.

We have been furnished with no adjudged cases in Kentucky which fix any definite time within which an execution must be made returnable. On examining the executions which have issued on the judgment on the first note, they are all returnable within three months from their teste; and no period of three months has been suffered to elapse, within which an execution has not been in the hands of the marshal, unless when writs of *venditioni exponas* were out, and they appear to have issued in all instances within that period. The greatest time which has intervened between the issuing of an execution and placing it in the hands of the marshal appears to be thirty-one days, and from the return of one execution or *venditioni* until the issuing of another, thirty **387*** days; and we are not aware that in any of these cases there is any decision that this would be a want of diligence in the assignor. In the absence of any such decision, and feeling at liberty to decide upon them as open questions, we are of opinion that the plaintiff, in the proceedings subsequent to the judgment, has at no time omitted to pursue the maker of this note with all the diligence which the law required of him. On this part of the case, we think the decision of this court in the case of *The Bank of the United States v. Wei-*

siger is strongly applicable. This was a case of the assignee against the assignor of a promissory note. Judgment was entered November Term, 1821. Execution issued on the 29th of December; was placed in marshal's hands on the 19th of January, thirty-six days from the entry of judgment; returned *nulla bona*, at March Term, 1822, the 3d day of the month, and a *capias ad satisfaciendum* issued on the 11th of April, 1822, thirty-eight days from the return day of the *fiery facias*. This was held not to be such a want of diligence as exonerated the assignor. This decision seems to us to cover all the ground assumed by the plaintiff up to the time of the discharge of Miller from his imprisonment on the *capias ad satisfaciendum*; and thus far we think he has done or omitted no act which has impaired his right of action.

It remains now to consider the last allegation of the want of diligence imputed to the plaintiff, and its effect on the suit. Miller was arrested and imprisoned on the 27th of March, 1824, and on the same day was discharged by the jailer on the order of two justices of the peace, acting or pretending to act under a law of Kentucky, passed in 1820 (1 Ken. Dig., 503, secs. 1 and 3), abolishing imprisonment for debt, and authorizing a justice of the peace, on application of any person in jail or in prison bounds, on reasonable notice to the party at whose suit he has been committed, to issue an order for his discharge.

It is not necessary to inquire whether this law would apply to process from the federal courts so as to legalize the discharge of a prisoner from the execution issued in this case, and protect the jailer and his sureties from an action by the plaintiffs for an escape. The laws of Kentucky on this subject are too **[*388]** clear to admit of a doubt: they authorize the discharge of a debtor from imprisonment on making a schedule of his property, surrendering it to the use of his creditors, and taking the oath prescribed. (1 Ken. Dig., 490, 491, 492, Act of 1819; 564, Act of 1821.)

It was under this law that the justices acted in issuing the order of discharge. But it could not apply to a commitment by the marshal under an execution from the federal courts, because an express provision was made by prior laws which made it the duty of the jailer to safely keep such prisoners until they shall be discharged according to the laws of the United States. (2 Kentucky Digest, 676.) The Act of 1798 provides that jailers shall receive into their custody all persons committed under the authority of the United States, and keep them safely, until discharged by the due course of the laws of the United States; and the jailer is subject to the same pains and penalties for neglect of duty as if the commitment had been by State authority. By the Act of 1800, the marshal of the United States has a right to use any prison for the imprisonment of any one by legal process in the same manner as the sheriff of a county may, if the prisoner was delivered by him; and this law was unrepealed and in force at the time of Miller's discharge. To entitle a debtor to a discharge under the insolvent law of January, 1800, he must give the creditor thirty days' notice of his application, and take an oath that he is not worth thirty dollars, &c.

The jailer was bound to take notice of this law, and of the laws of Kentucky, which required him to detain the prisoner until he complied with these provisions: he knew the conditions of his bond, and acted at his peril in releasing him without one day's confinement, without notice, oath, or the order of the district judge. The discharge was wholly unauthorized and illegal; the order of the justices did not protect the jailer; and he was liable to the plaintiff in an action for the escape to the full amount of the execution.

The Act of 1812 (2 Ken. Dig., 679) requires all jailers to execute in their County court a bond, with one or more approved sureties, in at least the sum of one thousand dollars, *and as much more as the court may deem proper, payable to the commonwealth, and conditioned for the faithful discharge of the duties of the office of jailer, which may be put in suit by any person injured by his acts. And the Act of 1811 enacts that where a bond is given by any public officer to the commonwealth, the recovery against the principal and his sureties shall not be limited to the penalty, but they shall be liable according to law, and to the full extent of the official obligations of such officer, as the same are enumerated in the condition of such bond. (2 Ken. Dig., 978.)

The remedy thus afforded to the plaintiff was a substantial one; extending to his whole claim, if the jailer or his securities were solvent. It was not indirect, remote, or doubtful. He had acquired a new security, of which the assignor had a right to claim the benefit; but which he could not use for his protection: the plaintiff could alone sue for the escape, or bring an action on the jailer's official bond, which enured to his use, but not to the use of the defendant. If this new security had been a bond for the prison bounds, there would be no doubt that it would be his duty to pursue the parties to it before resorting to the defendant; and it was equally his duty to pursue the jailer and his securities on his bond of office.

The jailer had violated his duty; his bond became forfeited; he and his securities had put themselves in the place of the debtor who was permitted to escape, and they thus assumed all his responsibility to the plaintiff. No event could arise by which they could be discharged. A voluntary return or a recaption of the prisoner would not avail them; they were under a stronger and more direct obligation to pay the money than special bail; against whom, it is admitted, that legal proceedings must be used with due diligence before resorting to the assignor.

Although we find no express decision by the courts of Kentucky enjoining on a plaintiff the necessity of suing a jailer and his securities for the escape of a prisoner, yet it seems to us that, in the spirit of them all, he is bound to do so. The general principle of all the cases is that a plaintiff must pursue, with legal diligence, all his means and *remedies, direct, incidental or collateral, to recover the amount of his debt from the defendant or anyone who has put himself, or has by operation of law been put in his place. This the plaintiffs in this case have wholly omitted, with a plain, undoubted cause of action against the

jailer and his sureties; with legal means of compelling them to pay to the whole extent of their estates, and, for aught which appears, to the full amount of his claim against Miller, the maker of the note in question. They have made no attempt to assert their rights against either. According to the spirit and principle of the Kentucky decisions, we are constrained to say this is not due diligence; but that kind of legal negligence which entitled the defendant to a judgment in his favor in the Circuit Court.

This view of the case renders it unnecessary to consider the effect of the proceedings on the second note, which were conducted with less diligence than those on the first.

Having thus disposed of the first error assigned by the plaintiff, it remains to consider the second, which is that the Circuit Court erred in rejecting the evidence offered of Miller's notorious insolvency at the time the note became due.

If the court are correct in overruling the exception taken to the charge of the Circuit Court, we cannot reverse their judgment for overruling this evidence. It did not conduce to prove any fact material to the issue between the parties, which was not whether Miller was in fact insolvent, but whether the plaintiff had by due diligence ascertained his insolvency by legal process commenced in time, diligently conducted till its final consummation, and by the exhaustion of all incidental and collateral remedies afforded by the law, without obtaining the debt. The proof, or the admission of actual insolvency, would in no wise relieve the plaintiffs from the duty imposed on them; it would not accelerate their right to sue the defendant or enlarge his obligation to pay, which did not arise by the mere insolvency of the maker of the note, but by its legal ascertainment in the manner prescribed by the judicial law of Kentucky. That law has been recognized by this court in the case of *Weisiger*, as applicable *to cases of this description. [*391] To decide now that the plaintiffs could avail themselves of the insolvency of the maker, unaccompanied with the diligent use of all legal remedies, and in a case where we are of opinion that the plaintiffs have not made use of the diligence which under the circumstances of this case it was incumbent on them to use, would be to disregard all the principles of Kentucky jurisprudence, as evidenced by the received opinion, general practice, and judicial decisions of that State.

We think it is not an open question whether these principles shall be respected by this court, and cannot feel authorized to depart from them in a case to which their application cannot be questioned.

The judgment of the Circuit Court is therefore affirmed with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Seventh Circuit and District of Kentucky, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—2 Curt., 494.

392*] *OLIVER SAUNDERS, *Plaintiff in Error*,
v.
BENJAMIN GOULD.

Practice—Rhode Island law of descent—case of Gardner v. Collins.

Where the whole cause, and not a point or points in the cause, has been adjourned from the Circuit Court to this court, the case will be remanded to the Circuit Court.

The case was admitted to be essentially the same with that of *Gardner v. Collins* (2 Peters, 58), but the counsel for the plaintiff relied on evidence adduced to show a settled judicial construction of the act of the Legislature of Rhode Island relative to descents, different from that which had been made in this court. "The court is not convinced that the construction of the act which prevails in Rhode Island is opposed to that which was made by this court."

THIS case came before the court on a certificate of a division of opinion by the judges of the Circuit Court for the District of Rhode Island.

It was submitted, without argument, by *Mr. Coxe* for the plaintiff in error, and *Mr. Whipple* for the defendant.

Mr. Chief Justice MARSHALL stated:

When this case was brought before the court, it was admitted by the counsel to be essentially the same with *Gardner v. Collins*, reported in 2 Peters's Rep., 58; but he relied on certain evidences which he exhibited of a settled judicial construction of the act on which the cause depended, different from that which had been made by this court. Had the court been satisfied on this point, that settled construction would undoubtedly have been respected. But the court was not convinced that the construction which prevails in Rhode Island is opposed to that which was made by this court. On communicating this decision to the bar, counsel declined arguing the cause; and a certificate, similar to that which was given in the former case, was about to be prepared: but on inspecting the record, it was perceived that the judges of the Circuit Court, instead of dividing on one or more points, had divided on the whole cause; and had directed the whole case to be certified to this court. Considering this as irregular, the court directs the cause to be remanded to the Circuit Court, that further proceedings may be had therein according to law.

Cited—7 How., 192; 2 Black, 435; 1 Bald., 284.

393*] *SARAH SPRATT, Administratrix of JAMES SPRATT, *Appellant*,
v.
THOMAS SPRATT, *Appellee*.

Naturalization—act of court of record regarding same—Maryland act as to alien heirs.

The second section of the Act of Congress "to establish a uniform system of naturalization," passed in 1802, requires that every person desirous of being naturalized shall make report of himself to the clerk of the District Court of the district where he shall arrive, or some other court of record

in the United States, which report is to be recorded, and a certificate of the same given to such alien; and "which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of the act, on his application to be naturalized as evidence of the time of his arrival within the United States." James Spratt arrived in the United States after the passing of this act, and was under the obligation to report himself according to its provisions. The law does not require that the report shall have been made five years before the application for naturalization. The third condition of the first section of the law, which declares that the court admitting an alien to become a citizen "shall be satisfied that he has resided five years in the United States," &c., does not prescribe the evidence which shall be satisfactory. The report is required by the law to be exhibited on the application for naturalization, as evidence of the time of arrival in the United States. The law does not say the report shall be the sole evidence; nor does it require that the alien shall report himself within any limited time after arrival. Five years may intervene between the time of the arrival and the report, and yet the report be valid. The report is undoubtedly conclusive evidence of the arrival, but it is not made by the law the only evidence of that fact. [406]

James Spratt was admitted a citizen of the United States by the Circuit Court for the County of Washington in the District of Columbia, and obtained a certificate of the same in the usual form. The act of the court admitting James Spratt as a citizen was a judgment of the Circuit Court, and this court cannot look behind it and inquire on what testimony it was pronounced. [406]

The various acts on the subject of naturalization submit the decision upon the right of aliens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. If their judgment is entered on record, in legal form, it closes all inquiry; and, like any other judgment, is complete evidence of its own validity. [408]

The Act of the Legislature of Maryland of 1791, which authorizes the descent to alien heirs of lands held by aliens under "deed or will" in that part of the District of Columbia which was ceded to the United States by the State of Maryland, does not authorize the descent to such heirs of land in that part of the district which was purchased by an alien at a sale made under an order of the Court of Chancery, and for which no deed was executed before the purchaser became a citizen of the United States, or before his decease. [408]

THIS case came before the court from the Circuit Court for the County of Washington in the District of Columbia, on a case stated in that court.

*The plaintiff, Thomas Spratt, instituted in the Circuit Court an action of replevin, the defendant, as the administratrix of James Spratt, having levied a distress on the property of the plaintiff for rent claimed to be due for a house occupied by him in the city of Washington, and to which he claimed title in himself, and in the brothers and sisters of James Spratt, deceased. It was agreed by the counsel that the title to the house and lot of ground upon which the same is erected, should be determined upon the following stated facts:

Thomas Spratt, Andrew Spratt, Sarah Spratt and Catharine Spratt, are brothers and sisters of the whole blood of James Spratt, the intestate, and are natives of Ireland, and subjects of the King of Great Britain, and were not, before the institution of this suit, naturalized as citizens of the United States; and but one of them, Thomas Spratt, and the deceased, James Spratt, ever came to the United States. James Spratt was also a native of Ireland, and came to the United States some time before the 18th of June, 1812; from which time he continued to reside in the United States until March, 1824, when he died

NOTE.—As to alienage, and effect as to title to real estate, and descent, see note to *Gouverneur v. Robinson*, 11 Wheat., 332.

Peters 4. U. S., Book 7.

without issue, leaving Sarah Spratt, his widow, who became the administratrix to his estate.

James Spratt, on the 17th of May, 1817, appeared in the Circuit Court of the District of Columbia, for the County of Washington, and before the court made the declaration on oath required by the first condition of the first section of the act to establish an uniform system of naturalization, &c., passed the 14th of April, 1802; which proceeding was recorded in the minutes of the court's proceedings, and a certificate thereof, under the hand of the clerk and seal of the court, on the same day given to James Spratt; he having, on the 14th of April then next preceding, made report of himself to the Clerk of the Circuit Court, as stated in the certificate; which report was recorded in the office of the said clerk, and the certificate of such report and registry, and of the declaration on oath, having been granted by the clerk to him. On the 11th of October, 1821, James Spratt made application to the said Circuit Court to be admitted a citizen of the United States; and was, on the same day, admitted by **395***] the court to become a citizen of the United States, as appears by the record of the proceedings of the court, upon the matter of the said application: a certificate whereof, under the hand of the clerk, and the seal of the court, was afterwards given by the clerk to him, and is part of the case.

Sarah Spratt was also a native of Ireland, and a native-born subject of the King of England; she emigrated to the United States before James Spratt, and has continually, from the time of her emigration, resided in the United States; and before his naturalization was lawfully married to him, and lived with him as his lawful wife from their marriage till his death in March, 1824, and was his wife at and before the time of his said naturalization; but has not been naturalized as a citizen of the United States pursuant to the Act of Congress, unless so naturalized by the naturalization of her husband.

On the 9th of June, 1825, the plaintiff and his brothers and sisters, claiming as heirs-at-law of James Spratt, brought their action of ejectment in this court against Sarah Spratt to recover possession of sundry of the lands and tenements whereof James Spratt died seized in fee, not including the messuage and tenement in this suit: in which suit (the same having been duly prosecuted and put to issue) such proceedings were had, that the title of Thomas Spratt was duly submitted to the consideration and judgment of the court, upon a case agreed and stated between the parties, to be taken and considered as a special verdict; upon which the court gave judgment for Sarah Spratt; whereupon a writ of error was sued out to the Supreme Court of the United States, where the judgment was re-examined, as appears in 1 Peters, 343, which is part of the case.

In the matter of a suit in the Circuit Court of the County of Washington, by one of the creditors of Simon Meade, deceased, Joseph Forrest was appointed to make sale of certain real estate of Simon Meade, and after having set up the same for public sale, to return the sale to the court for confirmation; and having **396***] on the 21st day of May, 1821, set up the estate on terms specified, by which the pur-

chase money was to be paid in four installments, at six, twelve, eighteen, and twenty-four months, and that a conveyance of the property should be made to the purchaser on the ratification of the sale by the court. The house and lot in question in this case were purchased by James Spratt, and on the 21st October, 1821, the trustee returned the sale to the court. On the 24th of December, 1822, an interlocutory order was made for the ratification of the report of the sale; and in January, 1824, a final ratification of the sale was passed by the court.

James Spratt, after his naturalization, and not before, paid the purchase money for the property by the installments, with interest; but no deed of conveyance of the same was ever executed to him, and he died invested with no other title to the premises in controversy but what he acquired by the sale at auction, the written memorandum, report and ratification thereof, and the payment of the purchase money.

In the statement of the case thus agreed, there was inserted the following memorandum, which was signed by the counsel for the parties in the cause:

"It is understood, however, that the plaintiff does not admit, but denies, that the proceeding and evidence touching the naturalization of James Spratt, or any part of the same, do purport to be or to show a due and legal naturalization of James Spratt as a citizen of the United States; and maintains that the manner and process of such pretended naturalization appears from such proceedings and evidence to have been irregular and void, unless such proceedings and evidence, or any part of the same, be held by the court to be conclusive in this case that he was duly and legally naturalized as such citizen: while the defendant and avowant, on the other hand, maintains that no defect or irregularity appears in the manner and process of such naturalization; that the manner and process of the same in its preliminary stages are not examinable in this case, but that the admission of James Spratt to become a citizen of the United States, as it appears in the record and certificate thereof, is, either substantively or in connection with the other evidence *thereof, conclusive of his due [**397** naturalization as such citizen: all which matters are understood and agreed to be involved in the question of title, and to be accordingly reserved for the consideration and judgment of the court upon the premises."

The declaration for naturalization made by James Spratt was in the following terms:

"James Spratt, a native of Ireland, aged about twenty-six years, bearing allegiance to the King of Great Britain and Ireland, who emigrated from Ireland, and arrived in the United States on the 1st of June, 1812, and intends to reside within the jurisdiction and under the government of the United States, makes report of himself for naturalization according to the acts of Congress in that case made and provided, the 14th of April, Anno Domini 1817, in the clerk's office of the Circuit Court of the District of Columbia for the County of Washington: and on the 14th of May, 1817, the said James Spratt personally appeared in open court, and declared on oath that it is *bona fide* his intention to become a

citizen of the United States, and to renounce all allegiance and fidelity to every foreign prince," &c.

W. BRENT, Clerk.

The record of the proceedings of the Circuit Court on the naturalization of James Spratt is in the following terms:

"At a Circuit Court of the District of Columbia, begun, and held in and for the County of Washington, at the city of Washington, on the first Monday of October, being the 1st day of the same month, in the year of our Lord 1821, and of the independence of the United States the forty-sixth.

"James Spratt, a native of Ireland, aged about thirty years, having heretofore, to wit, on the 14th of May, 1817, declared on oath in open court that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the King of the United Kingdom of Great Britain and Ireland.

"And it now appearing to the satisfaction **398***] of the court by *the testimony of two witnesses, citizens of the United States, to wit, Samuel N. Smallwood, and Jonathan Pront, that the said James Spratt hath resided within the limits and under the jurisdiction of the United States for five years at least last past, and within the County of Washington one year at least last past, and that during the whole of that time he hath behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same—the said James Spratt is thereupon admitted a citizen of the United States; having taken the oath 'that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever; and particularly to the King of the United Kingdom of Great Britain and Ireland, to whom he was before a subject.' 11th of October, 1821."

A certificate in due form, corresponding with this record, was given to James Spratt.

For the appellant, it was contended,

1. That the admission of said James Spratt to citizenship, as stated in the record, was legal.

2. That whether regular or not, it is conclusive as the judgment of a court upon a subject within its jurisdiction.

3. That whether so or not, the parties are concluded by the admission in the former case stated.

4. That no deed or conveyance having ever passed to James Spratt in his life, the appellees could not inherit under the act of Maryland.

5. That if the Maryland law would entitle the appellees to inherit any estate but one executed by an actual conveyance, and the time when he acquired a right to the estate should be thought material, then it will be contended that he acquired such a right, not at the time of bidding, but either on his paying the purchase money, or on the ratification of the sale; both which events occurred after his naturalization.

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Mr. Key and Mr. Jones*, for the ap- **399pellant, argued that the naturalization of Thomas Spratt had been regular, according to the requirements of the act of Congress.

The law does not make the report made by the alien, and the register of his arrival, the only evidence of the period and fact of his arrival in the United States. (Acts of Congress, 22d of March, 1816; July 30th, 1813). The court are to be satisfied of the facts, and are not excluded from receiving other evidence than the register. While it is admitted that this is the best evidence, it does not follow that it is the only evidence which can be received. The court are authorized to act on such evidence as will enable them to decide on the application for naturalization. One objection which is made is, that the place of the residence of Thomas Spratt is not stated in the proceedings. To this it is answered that such proceedings are not to be examined critically. It would be dangerous to the property of numbers if exceptions of this character were encouraged. But no part of the law makes the place of the residence of the alien material, except that he shall have resided for one year preceding the application in the State where he shall apply to be naturalized.

The act of admission to citizenship by a court authorized to admit to naturalization, is of itself sufficient evidence of citizenship, without looking behind it. It is a judicial act of a court of competent jurisdiction, and upon which it has adjudicated. If, in the proceedings of the court, in a matter necessarily judicial in which testimony has been adduced upon which it has passed a judgment, and of which a record has been made by the proper officers, there has been anything erroneous, the court should itself correct it; but until this is done, it is binding on all the world. (Cited, 7 Co., 420; 2 Peters, 157; 5 Cranch, 174.) But a fair and full examination of the different provisions of the laws relative to naturalization, will show that the proceedings of the Circuit Court were entirely correct and legal.

The property in controversy, although purchased by Thomas Spratt before his naturalization, was not held by deed; no conveyance having been made to him of the same, even up to the time of his death.

*The right of a foreigner thus to take **400**lands, depends on the particular words of the statute; and the case must be one within its provisions or it will not operate. The terms of it are in reference to lands within that part of the District of Columbia which was ceded to the United States, held by aliens "under deed or will, hereafter to be made." Thus the provisions are limited to lands acquired or held by one of this description of titles.

The bid of Thomas Spratt acquired for him an equitable interest in the property, and he became a trustee, not for his foreign heirs, but for his wife, who, by his subsequent naturalization, became a citizen. The law did not intend that such an interest should go to his foreign heirs.

There is good reason why the law of Maryland should confine the mode of taking to an actual, executed, legal title. Equitable interests in land are sources of infinite confusion. In Maryland, in 1793, they were not subject to

execution for debt, and have been made so in 1810. Thus, a foreigner, under the construction claimed, would take an equitable title to land, having all the benefits of it, and it would not be subject to the claims of his creditors.

As to the liability to execution of equitable interests in lands, cited, 3 Johns. C. R., 316; 1 Caines' Cases, 46; 1 Murph. Rep., 383; 18 Johns., 94; 4 Har. and M'Hen., 533; 5 Johns., 335; 4 Johns., 41; 7 Johns., 206.

By the bid for the property no absolute title was acquired. The whole proceedings of the trustee were subject to examination by the court, and required its confirmation. Thus, by the case, until 1824, when the sale was finally ratified, the title of the purchaser was not complete, and the deed, then to be executed according to the decree, would not relate back to the time of the sale.

Mr. Core, for the defendant.

Whether James Spratt was actually naturalized depends upon a proper construction of the Act of April 14th, 1802.

It is contended that the certificate is essentially defective under the provisions of this law.

401* § 1. It does not ascertain the place of his intended settlement.

2. It was not made five years anterior to the 11th of October, 1821. The act requires every person being an alien, who may arrive in the United States subsequent to its passage, to report such his arrival.

This certificate is to be exhibited by such alien on his application to be naturalized, as evidence of the time of his arrival within the United States. It is not required that the certificate should set forth the period of his arrival; but the meaning of the act is, that the date of such certificate shall be considered as that of the arrival.

The Act of 1790 contained no provision for a previous declaration of an intention to become a citizen. All that was to be done, was to be done at the time of naturalization. The Act of 1795 required such a declaration; it was to be made three years before he could be naturalized, and must set forth a residence of five years.

The Act of 1798 required this declaration to be made five years before the admission, and that he should make an averment of fourteen years' residence before his application. The Act of 1802 is applicable to those who were then within the United States, and had taken the preliminary steps. This act has been much considered here, as well as elsewhere. In this district, after solemn argument, the point has been ruled in accordance with the present judgment of the court. The Circuit Court of Pennsylvania gave the same construction to the law. (1 Peters's C. C. R., 457.)

As to the argument that the record is conclusive as to the right: It may be urged that several of the acts of Congress expressly negative this; if the prerequisites of the statute are not complied with, the certificate is a nullity.

There is great danger in considering these certificates as conclusive, from the number of courts who are authorized under the law to issue them. If those who are to issue them may omit any one of these requisites, they may

omit all. Persons who have never been in the United States may obtain them. Persons may procure them immediately on their arrival here.

*This is not a judicial act, but one [***402** purely ministerial. (3 T. R., 126; Toller, 128.)

The powers to admit to the rights of citizenship have been uniformly vested in and exercised by State courts under the authority of Congress. But Congress cannot vest any part of the judicial power of the United States in State Tribunals. (1 Wheat, 304, 330; *Martin v. Hunter's Lessee*, 5 Wheat., 27.)

There are no parties. All is *ex-parte*. No one can remove the proceedings by writ of error, *certiorari*, or in any other manner. No one can oppose the act of granting the evidence of naturalization. If ministerial, the proceedings must, on the face of them, show that they were correct. If the exercise of a judicial power, still it must appear that the court had jurisdiction, not only over the subject matter, but over the party, in the circumstances in which he stood.

This doctrine is fully laid down in *Rose v. Himely* (4 Cranch, 268), and the case of *Griffith v. Frazier* 8 Cranch, 1, 22, 8; *Walker v. Turner*, 9 Wheat., 541; cited, also, 1 Paine, 55).

The next objection is that the plaintiff cannot recover, because this is a mere equitable estate.

It cannot be questioned but that as well by the common law as by the general statutes of descent of Maryland, equitable estates descend precisely as do legal.

Is this equitable estate embraced within the sixth section of the Act of Maryland of December 19, 1791? (Burch's Dig., 221.) It provides "that any foreigner may, by deed or will, hereafter to be made, take and hold lands," &c. The law recognizes two modes of acquiring lands—descent and purchase. In general, the only modes of acquiring lands by purchase, are by deed or will. When an agreement of purchase is made, the party is considered in equity as the owner, because he is in equity entitled to a deed. Whether the deed be, or be not in fact executed, it is by and through the deed that the estate is his. A deed actually executed under one law passes no title unless recorded within the time stipulated; but it confers upon the grantee a right to come into chancery to have it recorded, which, when obtained, relates *back, as between the parties, to [***403** the date of the agreement (Md. Laws, 1766, c. 14, sec. 2; 1785, c. 72, sec. 12.)

In equity, James Spratt was entitled to a deed from the moment the sale was made, provided it was ratified. Equity will consider that as done which ought to have been done. (Sugd., 40, 353; 13 Ves., 517; 2 Cox, 231.)

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This case depends entirely on the title of the defendant in error to the premises in the avowry mentioned, who is one of the brothers and heirs of James Spratt, deceased.

James Spratt was a native of Ireland, who arrived in the United States previous to the 18th of June, 1812, and resided therein until his death. On the 14th of April in the year 1817, he made report of himself to the clerk of the Circuit Court of the United States for the Dis-

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trict of Columbia, in the County of Washington, which report was recorded; and, on the 17th of May thereafter, he appeared in the same court and made the declaration on oath required by the first condition of the first section of the act "to establish a uniform rule of naturalization," &c., passed the 14th of April, 1802; which proceeding was recorded, and a certificate thereof granted in the following words:

"District of Columbia, to wit: James Spratt, a native of Ireland, aged about twenty-six years, bearing allegiance to the King of Great Britain and Ireland, who emigrated from Ireland and arrived in the United States on the 1st of June, 1812, and intends to reside within the jurisdiction and under the government of the United States, makes report of himself for naturalization according to the Acts of Congress in that case made and provided, the 14th of April, Anno Domini 1817, in the clerk's office of the Circuit Court of the District of Columbia for the County of Washington: and on the 14th of May, 1817, the said James Spratt personally appeared in open court, and declared on oath that it is his intention to become a citizen of 404*] the United States, and to *renounce all allegiance and fidelity to every foreign prince," &c.

This certificate was given under the hand and seal of the clerk. On the 11th of October, 1821, James Spratt again appeared in open court, and took the oath required by law, and was admitted as a citizen. The certificate of his admission states that the three first conditions required by the Act of the 14th of April, 1802, had been complied with.

The said James Spratt intermarried with the plaintiff in error, Sarah Spratt, and departed this life in March, 1824, without issue, and intestate. The plaintiff in replevin is a native-born subject of the King of Great Britain and Ireland, and was not naturalized at the time of the institution of this suit.

In the year 1791 the State of Maryland passed an Act entitled "An Act concerning the territory of Columbia and the city of Washington;" the sixth section of which provides, "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within this State, in the same manner as if he was a citizen of this State; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this State."

This act continues in force.

A decree was made by the Circuit Court for the sale of the estate of Simon Meade, deceased, to satisfy his creditors, on certain conditions therein specified. In pursuance of this decree, Joseph Forrest, who was appointed to carry the same into execution, did, on the 21st of May, 1821, offer the real estate of the said Simon Meade for sale on the terms and conditions following, to wit: that the purchase money should be paid in four equal installments, at six, twelve eighteen, and twenty-four months, respectively, from the day of sale, with interest; and that a conveyance of the property in fee simple should be made to the purchaser upon the ratification of the sale by the court, and the payment of all the said installments of the purchase money, with interest. At this sale the said *James Spratt became the purchaser of the lot in the avowry mentioned. On the 15th of October, 1821, the said Joseph Forrest made his report to the court, and on the 24th of December, 1822, an interlocutory decree was made for confirming the sale; and on the 26th of January, 1824, the final decree of confirmation was passed. No deed was executed during the lifetime of the said James Spratt. The bidding at the sale was made while the said James Spratt was an alien, but before any other step was taken he became a citizen. Upon this state of facts the Circuit Court gave judgment for the plaintiff in replevin; which judgment has been brought before this court by writ of error. The cause has been argued very elaborately by counsel. It appears to the court to depend essentially on two questions:

1. Was James Spratt a citizen of the United States?

2. If he became a citizen, did the premises in the avowry mentioned pass to his alien relations who are his next of kin?

The first question depends on the Act of 1802 for establishing a uniform rule of naturalization. The act declares that an alien may be admitted to become a citizen of the United States "on the following conditions, and not otherwise." The act then prescribes four conditions, the three first of which were applicable to James Spratt, and were literally observed.

The 2d section enacts "that in addition to the directions aforesaid, all free white persons, being aliens, who may arrive in the United States after the passing of this act, shall, in order to become citizens of the United States, make registry and obtain certificates in the following manner, to wit: every person desirous of being naturalized, shall, if of the age of twenty-one years, make report of himself, &c." The law then directs what the contents of the report shall be; orders it to be recorded, and that a certificate thereof shall be granted to the person making the report: "which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of this act, on his *application to [*406 be naturalized, as evidence of the time of his arrival within the United States.

As James Spratt arrived within the United States after the passage of the Act of 1802, he is embraced by the second section of that act, and was under the necessity of reporting himself to the clerk, as that section requires. Must this report be made five years before he can be admitted as a citizen?

The law does not in terms require it. The third condition of the first section provides "that the court admitting such aliens shall be satisfied that he has resided within the United States five years at least," but does not prescribe the testimony which shall be satisfactory. This section was in force when James Spratt was admitted to become a citizen, and was applicable to his case. But the second section requires, in addition, that he shall report himself in the manner prescribed by that section; and requires that such report shall be exhibited, "on his application to be naturalized, as evidence of the time of his arrival within the

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United States." The law does not say that this report shall be the sole evidence, nor does it require that the alien shall report himself within any limited time after his arrival. Five years may intervene between his arrival and report, and yet the report will be valid. The report is undoubtedly conclusive evidence of the arrival, and must be so received by the court; but if the law intended to make it the only admissible evidence, and to exclude the proof which had been held sufficient, that intention ought to have been expressed. Yet the inference is very strong from the language of the act, that the time of the arrival must be proved by this report; and that a court, about to admit an alien to the rights of citizenship, ought to require its production.

But is it anything more than evidence which ought, indeed, to be required to satisfy the judgment of the court, but the want of which cannot annul that judgment? The judgment has been rendered in a form which is unexceptionable. Can we look behind it, and inquire on what testimony it was pronounced?

407* The act does not require that the report shall be mentioned in the judgment of the court, or shall form a part of the certificate of citizenship. The judgment and certificate are valid, though they do not allude to it. This furnishes reason for the opinion that the act directed this report as evidence for the court; but did not mean that the act of admitting the alien to become a citizen should be subject to revision at all times afterwards, and to be declared a nullity, if the report of arrival should not have been made five years previous to such admission.

The Act of 1816, sec. 6, has, we think, considerable influence on this question. That act requires that the certificates of report and registry required as evidence of the time of arrival in the United States and of the declaration of intention to become a citizen, "shall be exhibited by every alien, on his application to be admitted a citizen of the United States, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th day of June, 1812; and shall each be recited at full length in the record of the court admitting such alien; and any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States since the said 18th day of June, 1812, to be a citizen, and after the promulgation of this act, without such recital of each certificate at full length, shall be of no validity."

James Spratt arrived within the United States previous to the 18th day of June, 1812, and is, consequently, not within the provisions of the Act of 1816.

This act is not intended to explain the Act of 1802, but to add to its provisions. It prescribes that which the previous law did not require; and prescribes it for those aliens only who arrive within the United States after the 18th day of June, 1812. It annuls the certificates of citizenship which may be granted to such aliens, without the requisite recitals; consequently, without this act, such certificates would have been valid. The law did not require the insertion of these recitals in the certificate of James Spratt.

The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They [***408** are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity.

The inconvenience which might arise from this principle, has been pressed upon the court. But the inconvenience might be still greater if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property on the faith of his certificate, an individual might be exposed to the disabilities of an alien, on account of an error in the court not apparent on the record of his admission. We are all of opinion that James Spratt became a citizen of the United States on the 11th of October, 1821.

2. Did the property mentioned in the avowry descend to his alien relations?

Since aliens are incapable of taking by descent, the answer to this question depends on the Enabling Act of the State of Maryland in the year 1791. That act does not enable aliens who may come into the District of Columbia to transmit all real estate, however acquired, to their alien relations by descent; but such lands only as shall be thereafter acquired by deed or will. This is a qualification of the power which cannot be disregarded. The words are not senseless, and would not, we must suppose, have been inserted had they not been intended to operate. They limit the capacity of an alien to inherit from his alien ancestor residing within this district to lands which he had taken by deed or will. It is not for us to weigh the reasons which induced the Legislature to impose this limitation. It is enough for a court of justice to know that the Legislature has imposed it, and that it forms part of the law of the case.

If any equivalent act might be substituted for a deed, no such equivalent act can be found in this case. The auction at which this property was sold certainly took place while James Spratt was an alien; but that the sale was entirely conditional, and the purchase depended on the payment of the installments, on the confirmation of the court, and the final decree of the court. Before the first installment became due, before even the report was returned to the court, James Spratt became a citizen. He did not, therefore, while an alien, hold this land by a deed or by any title equivalent to a deed.

In a controversy between the alien heirs of James Spratt and Sarah Spratt (1 Peters, 343) this court determined that land which James Spratt took and held under the Enabling Act of Maryland descended to his alien heirs, but, that land which he took and held as a citizen did not pass to those heirs.

The lot mentioned in the avowry comes, we think, within the last description; and did not descend to the plaintiff in replevin.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to enter judgment for the avowant.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Circuit Court with instructions to enter judgment in the said court for the avowant in said cause.

Cited—2 Cnrt., 100, 2 Abb. U. S., 444.

**410*] *HIRAM CRAIG, JOHN MOORE
AND EPHRIAM MOORE**

v.

THE STATE OF MISSOURI.

Missouri act for the establishment of loan-offices—bills of credit—defense to assumpsit on promissory note that U. S. Constitution prohibits the act forming the consideration.

On the 27th day of June, 1821, the Legislature of the State of Missouri passed an Act, entitled "An Act for the establishment of loan-offices;" by the third section of which the officers of the treasury of the State, under the direction of the governor, were required to issue certificates to the amount of two hundred thousand dollars of denominations not exceeding ten dollars nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan-offices in the State of Missouri in discharge of taxes or debts due to the State, for the sum of ——— dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers in payment of taxes or moneys due or to become due to the State, or to any town or county therein, and by all officers, civil and military, in the State in discharge of salaries and fees of office; and in payment for salt made at the salt springs owned by the State, and to be afterwards leased by the authority of the Legislature. The twenty-third section of the act pledges certain property of the State for the redemption of these certificates, and the law authorizes the governor to negotiate a loan of silver or

gold for the same purpose. A provision is made in the law for the gradual withdrawal of the certificates from circulation, and all the certificates have since been redeemed. The commissioners of the loan-offices were authorized to make loans of the certificates to the citizens of the State, assigning to each district a proportion of the amount of the certificates to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent. per annum, and the loans on personal property to be for less than two hundred dollars. Held, that the certificates issued under the authority of the law of Missouri were "bills of credit," and that their omission was prohibited by the Constitution of the United States, which declares that no State shall "emit bills of credit."

A promissory note given for certificates issued at the loan-office of Chariton, in Missouri, payable to the State of Missouri, under the Act of the Legislature "establishing loan-offices," is void.

The action was *assumpsit* on a promissory note, and the record stated "that neither party having required a jury, the cause was submitted to the court, and the court having seen and heard the evidence, the court found that the defendants did assume as the plaintiff had declared, that the consideration for the note and the *assumpsit* was for loan-office certificates loaned by the State of Missouri at her loan-office in Chariton, which certificates were issued under "an Act for establishing loan-offices, &c." Held, that it could not be doubted that the declaration is on a note given in pursuance of the Act of Missouri; and that under the plea of *non assumpsit*, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record thus exhibiting the case gives jurisdiction to this court over the case on a writ of error prose. [*411 cited by the defendants to this court from the Supreme Court of Missouri, under the provisions of the twenty-fifth section of the Judiciary Act of 1789.

Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of *assumpsit*. [426]

In its enlarged and perhaps literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the

NOTE. "Bills of Credit," what are within the Constitution.

No State shall emit bills of credit. Const. of U. S., Art. 1, Sec. 10, 1.

The term "bills of credit," in its mercantile sense, comprehends a great variety of evidences of debt, which circulate in a commercial country.

To constitute a bill of credit within the Constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate as money, on the credit of the State, in the ordinary uses of business. Notes issued and payable in gold and silver by a bank, created by a law of the State, having capital for payment of its notes, containing no promise by the State, are not bills of credit within the Constitution. *Briscoe v. Bank of Commonwealth of Ky.*, 11 Pet., 257; *Darrington v. State Bank of Alabama*, 13 How., 12.

To "emit bills of credit" means to issue paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. Contracts by which a State bind itself to pay money at a future day for services performed, or for money borrowed for present use, are not "bills of credit" within the inhibition of the Constitution. *Craig v. State of Missouri*, *supra*; followed in *Byrne v. State of Missouri*, 8 Pet., 40.

Certificates issued by the auditor and treasurer of a State, receivable at the treasury or loan-office Peters 4.

of the State, for taxes or debts due the State, and other public payments, for the redemption of which a fund was constituted, and for which the faith of the State was pledged, are "bills of credit" within the meaning of the Constitution. *Idem: idem*.

Bills made and issued by a bank, incorporated by a State, managed by directors, having a capital stock paid in and liable for its debts, and subject to be sued for nonpayment, are not "bills of credit" issued by a State, though the State owns the entire stock; the Legislature elects the directors, the faith of the State is pledged for their redemption, and they are receivable for public dues. *Darrington v. State Bank of Alabama*, 13 How., 12.

A State may grant acts of incorporation for the attainment of those objects which are essential to the interest of the society. This power is incident to sovereignty, and there is no limitation on its exercise by the States, in the Constitution, in respect to the incorporation of banks. *Briscoe v. Bank of Kentucky*, 11 Pet., 257.

The Constitution of the United States does not forbid States or counties from borrowing money and giving proper securities therefor; and such securities are not bills or credit within the meaning of the Constitution. *McCoy v. Washington County*, 3 Phila., 290.

"Confederate treasury notes" were not "bills of credit;" but they were, nevertheless illegal, because issued in aid of rebellion. *Bailey v. Milner*, 1 Abb., U. S., 261.

community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood. [431]

The Constitution considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. [434]

It has been long settled that a promise made in consideration of an act which is forbidden by the law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. [436]

WRIT of error to the Supreme Court of the State of Missouri.

In 1823 an action of trespass on the case was instituted in the Circuit Court for the County of Chariton, in the State of Missouri, by the State of Missouri, against Hiram Craig and others. The declaration sets forth the cause of action in the following terms:

"For, that whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the County of Chariton aforesaid, the said Craig, John Moore, and Ephraim Moore, made their certain promissory note in writing, bearing date the day and year aforesaid, and now to the court here shown, and thereby, and then and there, for value received, jointly, and severally, promised to pay to the State of Missouri on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars **412***] and ninety-nine cents, and the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October, 1821. Nevertheless, the said Hiram Craig, John Moore, and Ephraim Moore, did not on the 1st day of November, or at any time before or since, pay to the State of Missouri, at the loan-office in Chariton, the said sum of one hundred and ninety-nine dollars and ninety-nine cents, or the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October, 1821, but the same to pay, &c."

To this declaration the defendants pleaded the general issue; and neither party requiring a trial by jury, the case was submitted to the court on the evidence and the arguments of counsel. The record contained the following entry of the proceedings of the court:

"And afterwards, at a court began and held at Chariton, on Monday, the 1st day of November, 1824, and on the second day of said court, in open court, the parties came into court by their attorneys, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matter and things and evidences being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiffs, by their counsel, allege: and the court also find that the consideration for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates loaned by the State at her loan office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of the said State of Missouri, approved the 27th day of June, 1821, entitled, 'An Act for the establishment of loan

offices, and the acts amendatory and supplementary thereto.' And the court do further find that the plaintiff hath sustained damages by reason of the nonperformance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents. Therefore, it is considered, &c."

The defendants in the Circuit Court of the County of Chariton appealed, in 1825, to the Supreme Court of the State of *Mis- [**413** souri, the highest tribunal in that State, where the judgment of the Circuit Court was affirmed.

The defendants prosecuted this writ of error under the twenty-fifth section of the Judiciary Act of 1789.

The Act of the Legislature of Missouri under which the certificates were issued which formed the consideration of the note declared upon, was passed on the 27th of June, 1821. It is entitled "An Act for the establishment of loan-offices, &c." The provisions of the third, thirteenth, fifteenth, sixteenth, twenty-third and twenty-fourth sections of the act are all that have a connection with the questions in the case which were before the court.

"Sec. 3. Be it further enacted, That the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates signed by the said auditor and treasurer to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe) in the following form, to wit: This certificate shall be receivable at the treasury or any of the loan-offices of the State of Missouri in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the — day of —, 182 .

"Sec. 13. Be it further enacted, That the certificates of the said loan-office shall be receivable at the treasury of the State and by all tax-gatherers and other public officers in payment of taxes or other moneys now due or to become due to the State or any county or town therein; and the said certificates shall also be received by all officers civil and military in the State, in discharge of salaries and fees of office.

"Sec. 15. Be it further enacted, That the commissioners of the said loan-offices shall have power to make loans of the said certificates to citizens of this State residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof, secured by mortgage or personal security: Provided, That the sum loaned on mortgage shall *never exceed one half [**414** the real unincumbered value of the estate so mortgaged: Provided, also, That no loans shall ever be made for a longer period than one year, nor at a greater interest than at the rate of six per cent. per annum, which interest shall be always payable in advance, nor shall a loan in any case be renewed unless the interest on such re-loan be also paid in advance: Provided, also, That the commissioners aforesaid shall never make a call for the payment

of an installment at a greater rate than ten per centum for every six months; and that whenever any installment to a greater amount than at the rate of ten per centum per annum be required, at least sixty days' previous notice shall be given to the person or persons thus required to pay: And provided, also, That all and every person failing to make payment shall be deprived in future of credit in such office, and be liable to suit immediately for the whole amount by him or them due.

"Sec. 16. Be it further enacted, That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient for sums less than two hundred dollars, which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon, under the regulations contained in the preceding section of this act."

"Sec. 23. Be it further enacted, That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto given by Congress to this State to be leased out, and it shall always be the fundamental condition in such leases that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interests accruing to the State, and all estates purchased by officers of the several offices under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued; and the faith of the State is hereby also pledged for the same purpose.

"Sec. 24. Be it further enacted, That it shall be the duty of the auditor and treasurer to withdraw annually from circulation **415*** one-tenth part of the certificates which are hereby required to be issued, &c."

The case was argued by *Mr. Sheffey* for the plaintiffs in error, and by *Mr. Benton* for the State of Missouri.

Mr. Sheffey, for the plaintiffs in error, contended,

1. That the record shows a proper case for the jurisdiction of this court, within the provisions of the twenty-fifth section of the Judiciary Act of 1789.

2. That the Act of the Legislature of Missouri, entitled "An Act for the establishment of loan-offices," is unconstitutional and void; being repugnant to the provision of the Constitution of the United States, which declares that no State shall emit bills of credit.

3. That the State of Missouri has no right to recover on the promissory note which is the foundation of this suit, because the consideration was illegal.

He argued that this case comes fully within the purpose, spirit, and letter of the twenty-fifth section of the Judiciary Act of 1789. The purpose of that section was to place within the revising, controlling, and correcting power of the Supreme Court of the United States, any violations of the Constitution of the United States or of treaties by State legislation. The harmony of the government, its equal operation,

the preservation of its fundamental principles, the peace of the nation, rest securely upon the execution of this power of the Supreme Court. While this power would be cautiously used, it would be fearlessly asserted and employed when it was required of the court and enjoined on the judges. The government of the United States was one for the whole of "the people of the United States." It was formed for "the people;" and its solemn and impressive preamble contains the declaration that "we, the people of the United States, in order to form a more perfect union," "do ordain and establish this Constitution of the United States."

To keep the Constitution perfect, and preserve it as a government for "the whole people" the twenty-fifth section of the judiciary law of 1789 was enacted. This law *brought into exercise the constitu- **416** tional powers of the court, but it created no new powers.

In the case of *Martin v. Hunter's Lessee* (1 Wheat., 304, 330), this court have said, "the twenty-fifth section of the Judiciary Act of September 24, 1799, is supported by the letter and spirit of the Constitution." And in the same case (p. 324) they say, "the Constitution of the United States was ordained and established," not by the United States in their sovereign capacities, but, as the preamble declares, "by the people of the United States."

That a tribunal should exist before which questions of a constitutional character may be brought, is not denied by anyone, and the Constitution itself has provided that which now entertains such questions. It has given to this court the powers which they exercise—great, extensive, superior and responsible as they are—that this court may stand forth as the guardians of the rights of the people claimed and declared in the Constitution, and that those rights may be protected from encroachment and destruction. To this court "the people" look for this protection; and when the invader of their rights is a sovereign State, they have not the less confidence and assurance that the principles of the government will be preserved. This court know no parties to the cases which come before them for decision. It is the principles which are to govern their decisions in those cases to which the court look, and they leave to those from whom their powers are derived—to "the people of the United States"—to decide, not upon their rightful and constitutional exercise of those powers, for to the Constitution they are answerable only for their exercise, but whether they shall continue so to use them. The whole people of the United States have given these powers, and they only, by a majority, and not a portion of them less than this constitutional whole, can nullify those powers or interrupt the exercise of any which are regularly applied under the Constitution. The Constitution must be changed by the whole people before the exercise of this power of revision can cease.

This court have never been willing to employ its powers of inquiring into the constitutionality of laws but where the *obligation was **417** imperative, and the case was one clearly within their duties. In the case of *Fletcher v. Peck* (6 Cranch, 128), the court declared, "the question whether a law be void for its repugnancy to the

Constitution, is a question which ought seldom, if ever, to be decided in a doubtful case. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

To present the question in the case now before the court no plea was necessary; the defense arises under the general issue.

The record shows that this was a case in the courts of the State of Missouri in which the constitutionality of a law of that State was brought into question. The cause of action is stated to be promissory notes given for certificates issued under the Act of the Legislature of Missouri establishing loan-offices, and the validity of these certificates must have been the whole subject of inquiry in the State courts. Their validity depended solely on the harmony of that act with the federal compact, and the courts of Missouri could only have affirmed their validity by affirming the act under which they were issued to be constitutional and valid, or, in other terms, not repugnant to the Constitution of the United States.

This is not a new question. It has been frequently presented to this court, and has been uniformly decided according to the views of the plaintiffs in error. (*Martin v. Hunter's Lessee*, 1 Wheat., 355; *Miller v. Nicholls*, 4 Wheat., 311; *Williams v. Norris*, 12 Wheat., 117.) In *Wilson v. The Black Bird Creek Marsh Company* (2 Peters, 251), the court say: "It is sufficient to bring the case within the provisions of the twenty-fifth section of the Judicial Act if the record shows that the Constitution or a law or a treaty has been misconstrued, or the decision could not be made."

2. The certificates issued by the State of Missouri under the law are "bills of credit," and thus the law conflicts with the Constitution of the United States. They are issued under the authority of the State, and put into circulation by the State as the representative of **418***] money: as a substitute *for it; to perform the functions of money, by becoming the medium of circulation.

The prohibition of the Constitution is in these terms, and every word in the clause is important and emphatic: "No State shall" "coin money," "emit bills of credit," "make anything but gold and silver coin a tender in payment of debts."

What is the form and meaning of these bills? They purport to be receivable at the treasury, or any loan office of the State, in discharge of taxes or debts due to the State. They are issued of different denominations, from two hundred dollars to fifty cents, payable to no particular person; they are, by the twenty-third section of the law, to be received for salt by the lessees of the property of the State; by the officers of the State in discharge of their salaries and fees of office. They pass, by delivery, with every characteristic of money. It is only necessary to state these, the purposes of their issue, the character and form of the certificates; the obligation imposed on the citizens of Missouri to receive them; to establish that they are "bills of credit," "emitted" "by the State" of Missouri, or "coined" money: and that, not being "gold or silver," they are "a tender in payment of debts."

The sufferings of the people of the United States from the issues of paper money, or "bills of credit," during the Revolution, were yet in full operation when the Constitution was formed. While it might be dangerous to deny that many of the means of the war were procured by the emission of that money, the exigencies of the country, struggling for existence, were the only safe apology for their use. When the confederated States were about to become a nation which should owe its prosperity to sound and just and equal principles, the opportunity to reproduce the same state of things—the same wide and wasteful ruin by the acts of any of the members of the confederacy—was at once decisively and explicitly prohibited by those who formed the Constitution. But, if it is contended that the certificates issued by the State of Missouri were not "bills of credit," because it is said they are not declared by the act which directs their emission to be "a legal tender," it is asserted *that if even they are not [**419** such, it is not essential to "a bill of credit" that it shall have that incident. (*The Federalist*, No. 44.) Many of the bills issued by the States during the war were not made a legal tender; but they circulated widely, and with equally disastrous consequences. (9 Va. Stat. at large, 67, 147, 223, 480, &c.)

In relation to money as a circulating medium, the States are one. All and each have one and the same interest in a sound currency. These interests are a unit—not only from the neighborhood of the States to each other, the identity of their interests, and their free and unrestrained intercourse, but because the regulations of the Constitution embrace the whole subject of money as a circulating medium.

To the existence of the government (certainly to its convenient fiscal operations) a uniform currency is important, if not essential; and if the principles which may be fairly drawn from a sound construction of the provision in the Constitution under examination extend to bring into doubt the legality of bank notes circulated as money under the charters granted to banks by State laws, these principles may not be the less true or their importance of the less magnitude.

3. If the certificates for which promissory notes were given are void, and the act of the Legislature of Missouri on which they are founded was against the Constitution of the United States, the note upon which this action was brought in the Circuit Court of Missouri was without consideration, and void. The State cannot receive upon such notes.

Mr. Benton, for the defendant in error.

The State of Missouri has been "summoned" by a writ from this court under a "penalty," to be and appear before this court. In the language of the writ, she is "commanded" and "enjoined" to appear. Language of this kind does not seem proper when addressed to a sovereign State, nor are the terms fitting, even if the only purpose of the process was to obtain the appearance of the State. They impute "a fault" in the State; they imply an omission or neglect by the State. *The language [**420** of "commanding and enjoining" would only be well employed if these had occurred.

The State of Missouri has done no act which was not within the full and ample powers she

Peters 4.

possesses as a free, sovereign, and independent State. She has passed a law which she considers in the proper and beneficial exercise of her legislative functions, and which had for its object the promotion of the interests of her citizens.

Mr. Benton said that he did not appear in this case for the State of Missouri as in ordinary cases depending in this court, not as the advocate of the State; for her acts did not require the efforts of an advocate to vindicate them; he appeared rather as a "corps of observation," to watch what was going on.

The State had passed a law authorizing the governor to employ counsel, and he had been called upon to represent the State. He had listened to what had been going on before the court, and he found a gentleman from another State imputing to Missouri an act fraught with injustice and immorality.

Such a course was not calculated to promote harmony and to secure a continuance of the Union. If, in questions of this kind, or if in any cases, the character of a sovereign State shall be made the subject of such imputation, this peaceful tribunal would not be enabled to procure the submission of the States to its jurisdiction; and contests about civil rights would be settled amid the din of arms, rather than in these halls of national justice.

The Act of the Legislature of Missouri "establishing loan-offices" had no purposes to accomplish by which injury could be sustained by anyone. The deticiency of currency in the State, and the expenses which attended its new organization, made the arrangements proposed and authorized by the act convenient and beneficial to the citizens of the State. The State, when it directed that the certificates should be issued, made sufficient and certain provision for their redemption and payment. The permanent continuance of the circulation of the certificates was prohibited by an effective regulation in the bill: the twenty-fourth section of **421*** the law provided for the gradual extinction of the certificates as they should come in; and power was given to the governor, by the twenty-ninth section of the law, to negotiate a loan of gold and silver for their redemption. Thus, the certificates were issued upon ample means for their discharge, and their discharge to their full value must soon take place.

These certificates were not made a legal tender. They are not directed to pass as "money;" and while there is no obligation imposed by the law that they shall be taken by the citizens of the State, it declares that the State shall take them in payment for taxes, for salt, and for fees of office.

When examined, these certificates will be found to be nothing more than evidences of loans made to the State, and for the payment of which she has given specific and available pledges.

It will not be contended that the States have not power to borrow money; and what other form of certificate of a loan than that which was adopted by the State of Missouri can be devised, when this power is exercised. In every State of the Union loans have been negotiable, and certificates of the amount due by the State to the individual lenders are issued.

The certificates which were the consideration Peters 4.

of the note were, therefore, not "bills of credit," in the constitutional acceptation of such instruments.

An examination of the legislation of the States in which such bills were issued, and the proceedings under those laws, will clearly show that the condition of things in the view and recollection of the convention which formed the Constitution was different, in every essential feature, from that which was created by the law of Missouri. Massachusetts, in 1690, issued bills of credit to pay taxes and other debts due to the State treasury; but the soldiers, to whom they were offered, would not receive them. (1 Hutchinson's Hist., 402, 404.) In 1714 and 1716 other issues were made, and they were directed to pass as money, and made a tender. In 1749 the issuing of such bills was discontinued.

During the Revolution, the "bills of credit" which were issued by the authority of **422** the States and by that of Congress, were in most cases made a tender; and this was the objectionable feature in them. So long as no objection to receive them is imposed by the law which directs or authorizes their emission, they can injure no one. Free to refuse them, the citizen may protect himself from loss by their depreciation by rejecting them.

The bills issued under the Missouri law have not this vice. That part of the law which obliges the officers of the State to receive them for salaries and fees, is not before the court. The notes in this suit were given voluntarily; and thus, in reference to the case of the plaintiffs in error, it cannot be said that the certificate given for the note had the character of "a legal tender."

In reference to the duty imposed on the lessees of the salt springs owned by the State, it should be known to the court that when the "act for the establishment of loan offices" was passed no leases had been given for those salt springs. If it was to be made a condition of the lease (to which the lessee would consent) that these certificates should be received for salt, it cannot therefore be said that any obligation was imposed on him of which he could complain.

While, therefore, in every aspect of this case, those who consented to take these certificates could not be affected to their injury by their depreciation, they might be benefited by it; they could pay them to the State for taxes, for fees of office, and for salt at their nominal or par value.

An examination of the proceedings of the convention which formed the Constitution of the United States will show that the prohibition which is now supposed to operate on the law of Missouri was carried by a majority of one vote. (Journal of the Convention, 302.) It should not be presumed that this clause of the Constitution was intended to extend to such issues as those authorized by the act of Missouri. The language of the Constitution should be strictly construed, as it is a limitation on the sovereignty of a State.

All bank notes issued under State charters are equally within the constitutional prohibition, if the construction assumed by the counsel of the plaintiffs in error is correct. *The **423** "wolf scalp" certificate, by which the flocks

and herds of the west are protected from the devastations of those destructive and numerous animals; the "crow certificates," the rewards of those who save the fields of the husbandman from the spoils of their worst enemies, are all receivable for taxes, and all are equally obnoxious to the exceptions taken to the certificates issued under the law of Missouri.

The consideration for the note which is the subject of this suit was a good and valuable consideration, and the note is binding on the parties to it by the express terms of the sixteenth section of the law. The note furnished the parties with the means of paying their taxes, and was a benefit to them. All the certificates have been redeemed by the State.

Congress is not authorized to issue bills of credit. The States may do all that is not prohibited, while Congress can do nothing which is not granted by the Constitution. Congress had no express authority to issue treasury notes, but they were issued. These notes were precisely like the Missouri certificates.

The treasury notes were not bills of credit; for they were not made, by the act under which they were issued, a legal tender. They were freely circulated throughout the United States without objections, and they were most useful instruments in the financial operations of the government during the last war.

This court has not jurisdiction of the case. It is not within the requirements of the twenty-fifth section of the Judiciary Act. The validity of the State law was not drawn in question before the courts of Missouri, and no decision was made in those courts upon the validity of the objection now set up under the Constitution of the United States.

The pleadings do not show that the law was drawn in question; they only deny the promise charged in the declaration. Upon the matters thus presented, and on no others, did the courts of Missouri decide.

Mr. Sheffey, in reply. The whole argument on the part of the State of Missouri in founded **424*** on the assumption that "the certificates are not bills of credit, because they are not made a legal tender."

The provision of the Constitution was introduced to prevent a mischief; one of the most fatal effects on the property of the citizens of the United States; and thus considered, it is to be construed liberally. A strict construction, and particularly one which would render it inoperative, or feeble in its influence, would not be justifiable.

The evils are the same, and the notes will circulate as freely and as extensively whether they are made a tender or not. Whatever paper promise is circulated on the credit of the State is a bill of credit, and is within the sense of the Constitution.

This provision in the Constitution was introduced to prevent the States from resorting to State necessity as an apology for the issue of paper. The States are not allowed to "coin money," and the object clearly was to prevent anything being made by the States which would serve as a circulating medium.

The word "emit" is a peculiar expression. The States may borrow money and give notes, but that is not coining money, nor is it emitting bills of credit; and so "wolf and crow

scalp certificates" are only evidence that the counties in the States which authorize them owe so much money for meritorious and beneficial services.

It is denied that the power of the United States to issue bills of credit is the same which has been claimed by the State of Missouri under this law. It does not follow that because the United States may issue such bills the states may do so. The States are specially prohibited such issues by the Constitution.

The proposition which was made in the convention to give to Congress the power to issue bills of credit may have been rejected because that power had been already given in the power to coin money, and regulate its value. Congress has this power, as an incident, like the power to issue debentures; which is exercised as an incident to the power to regulate commerce.

Mr. Chief Justice MARSHALL* deliver- [425** ed the opinion of the court, *Justices THOMPSON, JOHNSON, and M'LEAN* dissenting:

This is a writ of error to a judgment rendered in the Court of Last Resort in the State of Missouri, affirming a judgment obtained by the State in one of its inferior courts against Hiram Craig and others on a promissory note.

The judgment is in these words: "And afterwards at a court," &c., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form, as the plaintiff by her counsel alleged. And the court also find that the consideration for which the writing declared upon and the *assumpsit* was made was for the loan of loan-office certificates, loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of the said State of Missouri, approved the 27th day of June, 1821, entitled 'An Act for the establishment of loan-offices,' and the acts amendatory and supplementary thereto: and the court do further find that the plaintiff has sustained damages by reason of the nonperformance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents, and do assess her damages to that sum. Therefore, it is considered," &c.

The first inquiry is into the jurisdiction of the court.

The twenty-fifth section of the Judicial Act declares "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined, and reversed or affirmed in the Supreme Court of the United States."

To give jurisdiction to this court, it must appear in the **record*, 1. That the valid- [**426** ity of a statute of the State of Missouri was drawn in question on the ground of its being

repugnant to the Constitution of the United States. 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the State was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court.

The declaration is on a promissory note, dated on the 1st day of August, 1822, promising to pay to the State of Missouri on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars ninety-nine cents, and the two per cent. per annum, the interest accruing on the certificates borrowed from the 1st of October, 1821. This note is obviously given for certificates loaned under the Act "for the establishment of loan-offices." That act directs that loans on personal securities shall be made of sums less than two hundred dollars. This note is for one hundred and ninety-nine dollars ninety-nine cents. The act directs that the certificates issued by the State shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum, with the two per cent. interest accruing on the certificates borrowed, from the 1st day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted that the plea of *non assumpsit* allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of *assumpsit*. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated.

Have they done so?

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of Assembly in pursuance of which the note was given was repugnant to the Constitution of the 427*] United States, *and to except to the charge of the judges if in favor of its validity: or a special verdict might have been found by the jury stating the act of Assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of Assembly was drawn into question on the ground of its repugnancy to the Constitution, and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy, on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the State has adopted it, this court cannot give up substance for form.

The arguments of counsel cannot be spread on the record. The points urged in argument Peters 4.

cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court, which was substituted for the jury, has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record which, connected with the pleadings, show that the act in pursuance of which this note was executed was drawn into question on the ground of its repugnancy to the Constitution?

After finding that the defendants did assume upon themselves, &c., the court proceeds to find "that the consideration for which the writing declared upon and the *assumpsit* was made was the loan of loan-office certificates loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out *by an [*428 Act of the Legislature of the said State of Missouri, approved the 27th of June, 1821, entitled," &c.

Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional, and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide?

Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to the court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act as well as its construction directly before the court? We think it would: such a verdict would find that the consideration of the note was loan-office certificates issued and loaned in the manner prescribed by the act. What could be referred to the court by such a verdict but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that the contract was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested, but its repugnancy to the Constitution of the United States? No other is suggested. At any rate, it is open to that objection. If it be in truth repugnant to the Constitution of the United States, that repugnancy might have been urged in the State, and may consequently be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt that, in point of fact, the constitutionality of the act under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and, as it does not state in express terms that this point was made, it has been contended that this court

cannot assume the fact that it was made or determined in the tribunal of the State.

429*] *The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court as exhibiting the foundation of its judgment contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone. If, in such a case, the mere omission of the court of Missouri to say, in terms, that the act of the Legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the Constitution and of an act of Congress may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred, and has, we think, been frequently decided in this court. *Smith v. The State of Maryland* (6 Cranch, 286), *Martin v. Hunter's Lessee* (1 Wheat., 355), *Miller v. Nicholls* (4 Wheat., 311), *Williams v. Norris* (12 Wheat., 117), *Wilson et al. v. The Black Bird Creek Marsh Company* (2 Peters, 245), and *Harris v. Dennie*, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the Judicial Act. That construction is, that it is not necessary to state, in terms, on the record, that the Constitution or a treaty or law of the United States has been drawn in question, or the validity of a State law, on the ground of its repugnancy to the Constitution. It is sufficient if the record shows that the Constitution, or a treaty or law of the United States must have been construed, or that the constitutionality of a State law must have been questioned, and the decision has been in favor of the party claiming under such law.

We think, then, that the facts stated on the record presented the question of repugnancy between the Constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire,

2. Was the decision of the court in favor of its validity?

The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, **430*]** and, consequently, of *the validity of the law by the authority of which the contract was made.

The case is, we think, within the twenty-fifth section of the Judicial Act, and, consequently, within the jurisdiction of this court.

This brings us to the great question in the cause: Is the act of the Legislature of Missouri repugnant to the Constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the Constitution, because its object is the emission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The Act under the authority of which the certificates loaned to the plaintiffs in error were issued was passed on the 26th of June, 1821, and is entitled "An Act for the establishment of loan-offices." The provisions that are material to the present inquiry are comprehended

in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the act, which are in these words:

Section the third enacts "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the— day of — 182 ."

The thirteenth section declares "that the certificates of the said loan-office shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the State or to any county or town therein, and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office."

The fifteenth section provides "that the commissioners *of the said loan-offices [**431** shall have power to make loans of the said certificates to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

Section sixteenth. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," &c.

Section twenty-third. "That the General Assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by Congress to this State, to be leased out, and it shall always be the fundamental condition in such leases that the lessee or lessees shall receive the certificates hereby required to be issued in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth. "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation one-tenth part of the certificates which are hereby required to be issued," &c.

The clause in the Constitution which this act is supposed to violate is in these words: "No State shall "emit bills of credit."

What is a bill of credit? What did the Constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent, and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution we were driven to this expedient, and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a State government for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State are to be issued by those officers to **433*** the *amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan-office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes or debts due to the State, or any county or town therein; and of all salaries and fees of office to all officers, civil and military, within the State, and for salt sold by the lessees of the public salt-works. It also pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the Legislature in passing this act, or to mistake the character of these certificates, or the

office they were to perform. The denominations of the bills—from ten dollars to fifty cents—fitted them for the purpose of ordinary circulation and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution.

And can this make any real difference? Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended that though these certificates should be *deemed bills of credit, [***434** according to the common acceptance of the term, they are not so in the sense of the Constitution, because they are not made a legal tender.

The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender, and that, therefore, the general words of the Constitution may be restrained to a particular intent.

Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves

either, that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutcheson's History of Massachusetts (Vol. I., p. 402), that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada (which had proved as disastrous as the plan was magnificent) found the government ^{435*}totally unprepared to meet their claims. Bills of credit were resorted to for relief from this embarrassment. They do not appear to have been made a tender, but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender, but they circulated together; were equally bills of credit, and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776, an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences.

Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States. In May, 1777, the Legislature of Virginia passed an Act for the first time making the bills of credit issued under the authority of Congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an Act making all the bills of credit which had been emitted by Congress, and all which had been emitted by the State, a legal tender in payment of debts. Yet they were, in every sense of the word, bills of credit previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition ^{436*}that the history of our country furnishes any just argument in favor of that restricted construction of the Constitution for which the counsel for the defendant in error contends.

The certificates for which this note was given, being in truth "bills of credit" in the sense of the Constitution, we are brought to the inquiry:

Is the note valid of which they form the consideration?

It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now, the Constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices, but the issuing of them, the putting them into circulation, which is the act of emission—the act that is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in State courts of great respectability, and in this court. In the case of *The Springfield Bank v. Merrick et al.* (14 Mass. Rep., 322), a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would consequently have been equally void.

In *Hunt v. Knickerbocker* (5 Johns. Rep., 327), it was decided that an agreement for the sale of tickets in a lottery not authorized by the Legislature of the State, although instituted under the authority of the government of another State, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, ^{437*}abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given on a consideration which is prohibited by law, is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that State on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the Constitution to be held less sacred than those of a State law?

It had been determined, independently of the acts of Congress on that subject, that sailing under the license of an enemy is illegal. *Patton v. Nicholson* (3 Wheat., 204) was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain, but the license was procured without any intercourse with the enemy. The judgment of the Circuit Court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such

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a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed of course that the note was void.

A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the Constitution of the United States.

In the argument we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity: by the other, of the still superior dignity of the **438***] people of the United States, *who have spoken their will in terms which we cannot misunderstand.

To these admonitions we can only answer, that if the exercise of that jurisdiction which has been imposed upon us by the Constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it shall be indispensable to the preservation of the Union, and consequently, of the independence and liberty of these States, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri for the First Judicial District is reversed, and the cause remanded, with directions to enter judgment for the defendants.

Mr. Justice JOHNSON.

This is a case of a new impression and intrinsic difficulty, and brings up questions of the most vital importance to the interests of this Union.

The declaration is in the ordinary form, and the part of the record of the State court which raises the questions before us, is expressed in these words: "At a court, &c., came the parties, &c., and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular, the matters and things, and evidences, being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in the manner and form as the plaintiffs by their counsel allege; and the court also find that the consideration for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of Missouri, approved, &c. And the court do further find that the plaintiff hath sustained damages by reason of the nonperformance of the assumptions and undertakings aforesaid, of them the said **439***] defendants, *to the sum, &c.; and therefore it is considered that the plaintiff recover," &c.

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In order to understand the case, it may be proper to premise that the territory now occupied by the State of Missouri having been subject to its Spanish government, was at the time of its cession governed by the civil law as modified by the Spanish government; that it so continued, subject to certain modifications introduced by act of Congress, until it became a State; when the people incorporated into their institutions as much of the civil law as they thought proper: and hence, their courts of justice now partake of a mixed character, perhaps combining all the advantages of the civil and common law forms. By one of the provisions of this law the trial by jury is forced upon no one; is yet open to all, and when not demanded, the court acts the double part of jury and judge.

It is obvious, therefore, that the matter certified from the record of the State court before recited is in nature of a special verdict, and the judgment of the court is upon that verdict, and in this light it shall be examined.

The purport of the finding is that the vote declared upon was given "for a loan of loan-office certificates loaned by the State under certain State acts, the caption of which is given."

Some doubts were thrown out in the argument whether we could take notice of the State laws thus found without being set out at length; but in this there can be no question; whatever laws that court would take notice of, we must of necessity receive and consider, as if fully set out.

By the acts of the State designated by the court in their finding, the officers of the treasury department of the State were authorized to create certificates of small denominations—from ten dollars down to fifty cents—bearing interest at two per centum per annum, and to loan these certificates to individuals; taking in lieu thereof promissory notes, payable not exceeding one year from the date, with not more than six per cent. interest, and redeemable by installments not exceeding ten per cent. every six months, giving mortgages of landed property for security.

*These certificates were in this form: [**440** "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due the State, for the sum of \$——, with interest for the same, at the rate of two per centum per annum from this date, the —— day of ——, 182 ;" which form is set out in and prescribed by the act designated in the finding of the court.

This writ of error is sued out under the twenty-fifth section of the Judiciary Act, upon the supposition that the State act is in violation of that provision in the Constitution which prohibits the States from emitting bills of credit; and that the note declared on is void, as having been taken for an illegal consideration, or without consideration.

As a preliminary question, it has been argued that the case is not within the provisions of the twenty-fifth section; because it does not appear from anything on the record that this ground of defense was specially set up in the courts of the State. But this we consider no longer an open question; it has repeatedly

been decided by this court, that if a special verdict or the instruction of a court involve such facts as that the judgment must necessarily affirm the validity of the State law, or invalidity of a right set up under the laws or Constitution of the United States, the case is sufficiently brought within the provisions of the twenty-fifth section.

The judgment of the court in this case affirms the validity of the contract on which the suit is instituted. And this could not have been affirmed unless on the assumption that the act in which it had its origin was constitutional.

In the argument of counsel the objections to this contract were presented in the form of objections to the consideration. But this was unnecessary to his argument, since even a valuable consideration will not make good a contract in itself illegal. These notes originate directly under the law of Missouri; they are taken in pursuance of its provisions; have their origin in it; and rest for their validity upon it: and if that law be void, must fall **441** with it. Whether, therefore, *the bills for which they were given be void or valid, if the law be void, the notes would be so.

There are some difficulties on the subject of consideration, for which I would reserve myself until they become unavoidable. But it is not one of those difficulties that, as a guide for the State, the power of the States over the law of contracts will legalize a contract made, under whatever law, or for whatever consideration. That argument makes the act to justify itself, and is a direct recurrence to that exercise of sovereign power which it was the leading principle of the Constitution that each should renounce, so far as it was incompatible with the provisions of the Constitution; the objects of which were the security of individual right and the perpetuation of the Union.

The instrument is a dead letter, unless its effects be to invalidate every act done by the State in violation of the Constitution of the United States. And as the universal *modus operandi* by free States must be through their Legislature, it follows that the laws under which any act is done, importing a violation of the Constitution, must be a dead letter. The language of the Constitution is, "no State shall emit bills of credit;" and this, if it means anything, must mean that no State shall pass a law which has for its object an emission of bills of credit.

It follows that when the officers of a State undertake to act upon such a law, they act without authority; and that the contracts entered into, direct or incidental to such their illegal proceedings, are mere nullities.

This leads us to the main question: "Was this an emission of bills of credit in the sense of the Constitution?" And here the difficulty which presents itself is to determine whether it was a loan or an emission of paper money; or, perhaps, whether it was not an emission of paper money, under the disguise of a loan. There cannot be a doubt that this latter view of the subject must always be examined; for that which it is not permitted to do directly, cannot be legalized by any change of names or forms. Acts done *in fraudem legis*, are acts in violation of law.

The great difficulty, as it is here, must ever be to determine, *in each case, whether [**442** it be a loan, or an emission of bills of credit. That the States have an unlimited power to effect the one, and are divested of power to do the other, are propositions equally unquestionable; but where to draw the discriminating line is the great difficulty. I fear it is an insuperable difficulty.

The terms, "bills of credit," are in themselves vague and general, and, at the present day, almost dismissed from our language. It is, then, only by resorting to the nomenclature of the day of the Constitution, that we can hope to get at the idea which the framers of the Constitution attached to it. The quotation from Hutchinson's History of Massachusetts, therefore, was a proper one for this purpose; inasmuch as the sense in which a word is used by a distinguished historian, and a man in public life in our own country, not long before the Revolution, furnishes a satisfactory criterion for a definition. It is there used as synonymous with paper money; and we will find it distinctly used in the same sense by the first Congress which met under the present Constitution.

The whole history and legislation of the time prove that by bills of credit, the framers of the Constitution meant paper money, with reference to that which had been used in the States from the commencement of the century down to the time when it ceased to pass, before reduced to its innate worthlessness.

It was contended, in argument for the defendant in error, that it was essential to the description of bills of credit in the sense of the Constitution that they should be made a lawful tender. But his own quotations negative that idea; and the Constitution does the same in the general prohibition in the States to make anything but gold or silver a legal tender. If, however, it were otherwise, it would hardly avail him here, since these certificates were, as to their officers' salaries, declared a legal tender.

The great end and object of this restriction on the power of the States, will furnish the best definition of the terms under consideration. The whole was intended to exclude everything from use as a circulating medium except gold and silver, and to give to the United States the exclusive *control over the coining and [**443** valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it.

Now, if a State were to pass a law declaring that this representative of money shall be issued by its officers, this would be a palpable and tangible case; and we could not hesitate to declare such a law, and every contract entered into on the issue of such paper purporting a promise to return the sum borrowed, to be a mere nullity. But suppose a State enacts a law authorizing her officers to borrow a hundred thousand dollars, and to give in lieu thereof certificates of one hundred dollars each, expressing an acknowledgment of the debt; it is presumed there could be no objection to this. Then suppose that the next year she authorizes these certificates to be broken up into ten, five, and even one-dollar bills. Where can be the objection to this? And if, at the institution of the

loan, the individual had given for the scrip his note at twelve months, instead of paying the cash; it would be but doing in another form what was here done in Missouri; and what is often done, in principle, where the loan is not required to be paid immediately in cash.

Pursuing the scrutiny farther, and with a view to bringing it as close home to the present case as possible: a State having exhausted its treasury, proposes to anticipate its taxes for one, two, or three years; its citizens, or others, being willing to aid it, give their notes payable at sixty days, and receive the scrip of the State at a premium for the advance of their credit, which enables the State, by discounting these notes, to realize the cash. There could be no objection to this negotiation; and their scrip being by contract to be receivable in taxes, nothing would be more natural than to break it up into small parcels in order to adapt it to the payment of taxes. And if in this State it should be thrown into circulation by passing into the hands of those who would want it to meet their taxes, I see nothing in this that could amount to a violation of the Constitution. Thus far the transaction partakes of the distinctive features of a loan; and yet it cannot be denied that its adaptation to the payment of taxes does give it one **444***] characteristic of a circulating *medium. And another point of similitude, if not of identity, is the provision for forcing the receipt of it upon those to whom the State had incurred the obligation to pay money.

The result is, that these certificates are of a truly amphibious character; but what, then, should be the course of this court? My conclusion is, that as it is a doubtful case, for that reason we are bound to pronounce it innocent. It does indeed approach as near to a violation of the Constitution as it can well go without violating its prohibition, but it is in the exercise of an unquestionable right, although in rather a questionable form; and I am bound to believe that it was done in good faith, until the contrary shall more clearly appear.

Believing it, then, a candid exercise of the power of borrowing, I feel myself at liberty to go further, and briefly to suggest two points, on which these bills vary from the distinctive features of the paper money of the Revolution.

1. On the face of them they bear an interest, and for that reason vary in value every moment of their existence: this disqualifies them for the uses and purposes of a circulating medium, which the universal consent of mankind declares should be of an uniform and unchanging value, otherwise it must be the subject of exchange, and not the medium.

2. All the paper medium of the Revolution consisted of promises to pay. This is a promise to receive, and to receive in payment of debts and taxes due the State. This is not an immaterial distinction; for the objection to a mere paper medium is, that its value depends upon mere national faith. But this certainly has a better dependence; the public debtor who purchases it may tender it in payments; and upon a suit brought to recover against him, the Constitution contains another provision to which he may have recourse. As far as the feeble powers of this court extend, he would be secured (if he could ever need security) from a violation of his contracts. This approximates them

to bills on a fund, and a fund not to be withdrawn by a law of the State.

Upon the whole, I am of opinion that the judgment of the State court should be affirmed.

**Mr. Justice THOMPSON.*

[***445**

This case comes up by writ of error from the State court of Missouri, on a judgment recovered against the plaintiffs in error in the highest court in that State; and the first question that has been made here, is whether this court has jurisdiction of the case, under the twenty-fifth section of the Judiciary Act of 1789.

If the construction of this twenty-fifth section was now for the first time brought before this court, I should entertain very serious doubts whether this case came within it. The fair, and, as I think, the clear import of that section is, that some one of the cases therein stated did, in point of fact, arise, and was drawn into question, and did receive the judgment and decision of the State court. It is not enough that such question might have been made. A party may waive the right secured to him under this section. This would not in any manner affect the jurisdiction of the State court, and might of course be waived. In the present case, there is no doubt but the facts which appeared before the State court presented a case which might properly fall within this section. The defendants might have insisted that the State law was unconstitutional, and that the certificates issued in pursuance of its provisions were void. And if the court had sustained the act, it would have been one of the cases within the twenty-fifth section. But the court was not bound to call upon the party to raise the objection for the purpose of putting the cause in a situation to be brought here by writ of error. It cannot be doubted but that there might have been an express waiver of this right, and I should think an implied waiver would equally preclude a review of the case by this court; and that such a waiver ought to be implied in all cases where it does not appear that in point of fact the question was made, and received the judgment of the State court. But to entertain jurisdiction in this case is perhaps not going farther than this court has already gone; and I do not mean to call in question these decisions; but have barely noticed the question for the purpose of stating the rule by which I think all cases under this section should be tested.

*The more important question upon [***446** the merits of the case is, whether the Constitution of the United States interposes any impediment to the plaintiff's right of recovery in this case. And this question has been presented at the bar under the following points:

1. Whether the certificates issued under the provisions of the law of the State of Missouri are bills of credit, within the sense and meaning of the Constitution.

2. If so, whether, as they formed the consideration of the note on which the judgment below was recovered, the note was rendered thereby void and irrecoverable.

The first is a very important question, and not free from difficulty; and one upon which I have entertained serious doubts: but looking at it in all its bearings, and considering the consequences to which the rule established by a

majority of the court will lead when carried out to its full extent, I am compelled to dissent from the opinion pronounced in this case.

The limitation upon the powers of the State of Missouri, which is supposed to have been transcended, is contained in the tenth section of the first article of the Constitution of the United States. "No State shall emit bills of credit." Are the certificates issued under the authority of the Missouri law, bills of credit, within this prohibition?

The form of the certificate is prescribed in the third section of the act (Act 27th of June, 1821) as follows:

"This certificate shall be receivable at the treasury or any of the loan-offices of the State of Missouri in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same at two per centum per annum from this date," &c. And the thirteenth section declares, "that the certificates of the said loan-office shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due, or to become due to the State, or any county or town therein; and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office." It is proper here to notice that if the latter branch of this section should be considered as conflicting with that **447** *] prohibition in the Constitution which declares that no State shall make anything but gold and silver coin a tender in payment of debts, no such question is involved in the case now before the court, and the law may be good in part, although bad in part.

The precise meaning and interpretation of the terms *bills of credit* has nowhere been settled; or if it has, it has not fallen within my knowledge. As used in the Constitution, it certainly cannot be applied to all obligations, or vouchers, given by, or under the authority of a State for the payment of money. The right of a State to borrow money cannot be questioned; and this necessarily implies the right of giving some voucher for the repayment; and it would seem to me difficult to maintain the proposition that such a voucher cannot legally and constitutionally assume a negotiable character; and as such, to a certain extent, pass as, or become a substitute for money. The act does not profess to make these certificates a circulating medium or substitute for money. They are (except as relates to public officers) made receivable only for taxes and debts due to the State, and for salt sold by the lessees of salt springs belonging to the State. These are special and limited objects, and these certificates cannot answer the purpose of a circulating medium to any considerable extent.

A simple promise to pay a sum of money, a bond or other security given for the payment of the same, cannot be considered a bill of credit within the sense of the Constitution. Such a construction would take from the States all power to borrow money or execute any obligation for the repayment. The natural and literal meaning of the terms import a bill drawn on credit merely, and not bottomed upon any real or substantial fund for its redemption. There is a material and well-known distinction between a bill drawn upon a fund and one

drawn upon credit only. A bill of credit may therefore be considered a bill drawn and resting merely upon the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill. Thus, the Constitution vests in Congress the power to borrow money on the credit of the United States. A bill drawn under such authority would be a bill of credit. And this idea is more fully expressed in the old confederation (Art. 9): "Congress shall have power to borrow money or emit bills on the credit of the United States." Can the certificates issued under the Missouri law, according to the fair and reasonable construction of the act, be said to rest on the credit of the State? Although the securities taken for the certificates loaned are not in terms pledged for their redemption, yet these securities constitute a fund amply sufficient for that purpose, and may well be considered a fund provided for that purpose. The certificates are a mere loan upon security in double the amount loaned. And in addition thereto (section 29), provision is made expressly for constituting a fund for the redemption of these certificates. These are guards and checks against their depreciation, by insuring their ultimate redemption.

The emissions of paper money by the States previous to the adoption of the Constitution, were, properly speaking, bills of credit; not being bottomed upon any fund constituted for their redemption, but resting solely for that purpose upon the credit of the State issuing the same. There was no check, therefore, upon excessive issues; and a great depreciation and loss to holders of such bills followed as matter of course. But when a fund is pledged, or ample provision made for the redemption of a bill or voucher, whatever it may be called, there is but little danger of a depreciation or loss.

But should these certificates be considered bills of credit? Under an enlarged sense of such an instrument, it does not necessarily follow that they are bills of credit within the sense and meaning of the Constitution. As no precise and technical meaning or interpretation of a bill of credit has been shown, we may with propriety look to the state of things at the adoption of the Constitution to ascertain what was probably the understanding of the convention by this limitation on the power of the States. The State emissions of paper money had been excessive, and productive of great mischief. In some States, and at some times, such emissions were, by law, made a tender in payment of private debts: in others not so. But the great evil that existed was, that creditors **449** were compelled to take such a depreciated currency and articles of property in payment of their debts. This being the mischief, is it an unfair construction of the Constitution to restrict the intended remedy to the acknowledged and real mischief. The language of the Constitution may perhaps be too broad to admit of this restricted application. But to consider the certificates in question bills of credit within the Constitution, is, in my judgment, a construction of that instrument which will lead to serious embarrassment with State legislation, as existing in almost every member of the Union.

If these certificates are bills of credit, inhib-

ited by the Constitution, it appears to me difficult to escape the conclusion that all bank notes, issued either by the States, or under their authority and permission, are bills of credit falling within the prohibition. They are, certainly, in point of form, as much bills of credit; and if being used as a circulating medium, or substitute for money, makes these certificates bills of credit, bank notes are more emphatically such. And not only the notes of banks directly under the management and control of a State (of which description of banks there are several in the United States), but all notes of banks established under the authority of a State, must fall within the prohibition. For the States cannot certainly do that indirectly which they cannot do directly. And, if they cannot issue bank notes because they are bills of credit, they cannot authorize others to do it. If this circuitous mode of doing the business would take the case out of the prohibition, it would equally apply to the Missouri certificates; for they were issued by persons acting under the authority of the State, and, indeed, could be issued in no other way.

This prohibition in the Constitution could not have been intended to take from the States all power whatever over a local circulating medium, and to suppress all paper currency of every description. The power is given to Congress to coin money, and the States are prohibited from coining money. But to construe this as embracing a paper circulating medium of every description, and thereby render illegal ^{450*} the issuing of all bank notes by or under the authority of the States, will not, I presume, be contended for by anyone. And I am unable to discover any sound and substantial reason why the prohibition does not reach all such bank notes, if it extends to the certificates in question.

The conclusion to which I have come on this point renders it unnecessary for me to examine the second question made at the argument. I am of opinion that the judgment of the State court ought to be affirmed.

Mr. Justice McLEAN.

Several cases, depending upon the same principles, were brought into this court from the Supreme Court of the State of Missouri by writs of error.

In the case of Hiram Craig and others, the declaration sets forth the cause of action in the following terms, viz.: "For that whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the county, &c., the said Craig, John Moore, and Ephraim Moore, made their certain promissory note in writing, bearing date, &c., and then and there, for value received, jointly and severally, promised to pay to the State of Missouri, on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars and ninety-nine cents, and the two per centum per annum, the interest accruing on the certificates borrowed from the 1st day of October, 1821, nevertheless," &c.

The general issue of *non assumpsit* having been pleaded in each case, the Circuit Court of Chariton, in which the suits were commenced, rendered judgments in favor of the plaintiff.

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The following entry, in the case of Craig and others, was made on the record: "And afterwards at a court begun and held at Chariton, on Monday, the 1st of November, 1824, and on the second day of said court, the parties, by their attorneys, appeared, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things and evidences being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in manner and form as the plaintiff's counsel allege; and the court also find that the consideration *for which the writing declared upon and the *assumpsit* was made, was for the loan of loan-office certificates, loaned by the State, at her loan-office at Chariton; which certificates were issued, and the loan made in the manner pointed out by an Act of the Legislature of the State of Missouri, approved the 27th day of June, 1821, entitled 'An Act for the establishment of loan-offices, and the acts amendatory and supplementary thereto.' And the court do further find that the plaintiff hath sustained damages, by reason of the nonperformance of the assumptions and undertakings of the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents. Therefore, it is considered," &c.

An appeal was taken to the Supreme Court of Missouri, in which this judgment and the others were affirmed.

The first question which this case presents for consideration, arises under the twenty fifth section of the Judiciary Act of 1789; which provides "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity," may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

Had not the point been settled by several adjudications in similar cases, I should entertain strong doubts whether it sufficiently appeared on the record that the validity of the statute of Missouri was drawn in question, on account of its repugnance to the Constitution. In the finding of the Chariton Circuit Court the act is referred to and the consideration of the note is stated; but it nowhere appears in the record that the validity of the statute was contested. And as this is the only ground on which this court can take jurisdiction of the case, it would seem to me that it should not be left to inference, but be clearly stated in the proceeding.

In the Supreme Court of Missouri the judgment of the Circuit Court was affirmed; but it does not appear what objections *to the ⁴⁵² affirmation were urged before the court. This question, however, seems not to be open, and I yield to the force of prior adjudications. Two points must necessarily be considered in the investigation of the merits of this case.

1. Are the certificates authorized to be issued by the law of Missouri, bills of credit, within the meaning of the Constitution?

2. If they are bills of credit, is the note on which this suit was brought void?

It is contended by the counsel for the plaintiffs in error that any paper issued by a State that contains a promise to pay a certain sum, and is intended to be used as a medium of circulation, is a bill of credit, and comes within the mischief against which the Constitution intended to guard. In illustration of this position, a reference is made to the depreciated currency of the Revolution.

During that most eventful period of our history, bills of credit formed the currency of the country; and every thing of greater value was excluded from circulation. These bills were so multiplied by the different States and by Congress that their value was greatly impaired. This loss was attempted to be covered, and the growing wants of the government supplied, by increased emissions. These caused a still more rapid depreciation, until the credit of the bills sunk so low as not to be current at any price. Various statutes were passed to force their circulation and sustain their value, but they proved ineffectual. For a time, creditors were compelled to receive these bills under the penalty of forfeiting their debt; losing the interest; being denounced as enemies to the country, or some other penalty. These laws destroyed all just relations between creditor and debtor; and so debased a currency produced the most serious evils in almost all the relations of society. Nothing but the ardor of the most elevated patriotism could overcome the difficulties and embarrassments growing out of this state of things.

It will be found somewhat difficult to give a satisfactory definition of a bill of credit. In what sense it was used in the Constitution, is the object of inquiry.

453* Different nations of Europe have emitted, on various emergencies, three descriptions of paper money: 1. Notes stamped with a certain value, which contained no promise of payment, but were to pass as money. 2. Notes receivable in payment of public dues, with or without interest. 3. Notes which the government promised to pay at a future period specified, with or without interest, and which were made receivable in payment of taxes and all debts to the public.

Bills of the last class were issued during the Revolution; and in some of the colonies they had been emitted long before that time. In 1690 bills of credit were for the first time issued, as a substitute for money, in the Colony of Massachusetts Bay, as stated in Hutchinson's History. In 1716 a large emission was made and lent to the inhabitants, to be paid at a certain period; and in the meantime to pass as money. For forty years, the historian says, the currency was in much the same state as if an hundred thousand pounds sterling had been stamped on pieces of leather or paper of various denominations, and declared to be the money of the government, without any other sanction than this: that when there should be taxes to pay, the treasury would receive this sort of money, and that every creditor should be obliged to receive it from his debtor.

The bills issued during the Revolution were denominated bills of credit. In 1780 the United States guaranteed the payment of bills emitted by the States. They all contained a

promise of payment at a future day; and where they were not made a legal tender, creditors were often compelled to receive them in payment of debts, or subject themselves to great inconvenience and peril.

The character of these bills, and the evils which resulted from their circulation, give the true definition of a bill of credit, within the meaning of the Constitution, and of the mischiefs against which the Constitution provides.

The following is the form of the bills emitted in 1780, under the guarantee of Congress: "The possessor of this bill shall be paid — Spanish milled dollars by the 31st day of December, 1786, with interest, in like money, at the rate of five per cent. per annum, [***454** by the State of —, according to an act," &c.

Bills of credit were denominated current money, and were often referred to in the proceedings of Congress by that title, in contradistinction to loan-office certificates. It is reasonable to suppose that in using the term "bills of credit" in the Constitution, such bills were meant as were known at the time by that denomination. If the term be susceptible of a broader signification, it would not be safe so to construe it; as it would extend the provision beyond the evil intended to be prevented, and instead of operating as a salutary restraint, might be productive of serious mischief. The words of the Constitution must always be construed according to their plain import, looking at their connection and the object in view. Under this rule of construction, I have come to the conclusion that to constitute a bill of credit, within the meaning of the Constitution, it must be issued by a State, and its circulation as money enforced by statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future period, on a time fixed, or resting in its own discretion, will provide for the payment.

If a more extended definition than this were given to the term, it would produce the most serious embarrassments to the fiscal operations of a State. Every State in the transactions of its moneyed concerns has one department to investigate and pass accounts, and another to pay them. Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit? And may not this warrant be negotiated, and passed in ordinary transactions, as money? This is very common in some of the States, and yet it has not been supposed to be an infraction of the Constitution.

Audited bills are often found in circulation, in which the State promises to pay a certain sum, at some future day specified. If these are inhibited by the Constitution, can a State make loans of money? Can there be any difference between borrowing money from a creditor, [***455** itor, and any other person who does not stand in that relation? The amount cannot alter the principle. If a State may borrow one hundred thousand dollars, she may borrow a less sum; and if an obligation to pay with or with-

out interest may be given in the one case, it may in the other.

Where money is borrowed by a State, it issues scrip which contains a promise to pay, according to the terms of the contract. If the lender, for his own convenience, prefers this scrip in small denominations, may not the State accommodate him? This may be made a condition of the loan. If a State shall think proper to borrow money of its own citizens in sums of five, ten, or twenty dollars, may it not do so? If it be unable to meet the claims of its creditors, shall it be prohibited from acknowledging the claims, and promising payments with interest at a future day? The principles of justice and sound policy alike require this; and unless the right of the State to do so be clearly inhibited, it must be admitted.

In the adjustment of claims against a county, orders are issued on the county treasury; and it is common for these to circulate, by delivery or assignment, as bank notes or bills of exchange.

May a State do, indirectly, that which the Constitution prohibits it from doing directly? If it cannot issue a bill or note which may be put into circulation as a substitute for money, can it, by an act of incorporation, authorize a company to issue bank bills on the capital of the State? It will thus be seen that if an extended construction be given to the term "bills of credit," as used in the Constitution, it may be made to embrace almost every description of paper issued by a State.

The words of the Constitution are, that "no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts; or grant any title of nobility."

456* Under the statute of Missouri, certificates in the following forms were issued: "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of _____ dollars, with interest for the same, at the rate of two per centum per annum, from this date, the _____ day of _____. 182 .

It appears by the third section of the act, that two hundred thousand dollars were authorized to be issued of the above certificates, each not exceeding ten dollars, nor less than fifty cents. By the thirteenth section, these certificates were made receivable at the State treasury by tax-gatherers and other public officers, in payment of taxes or money due to the State, or any county or town therein; and they were made receivable by all officers in payment of salaries and fees of office.

Under the fifteenth section, commissioners were authorized to loan these certificates to the citizens of the State; apportioning the amount among the several counties according to the population, on mortgages or personal security. The act provides the means by which these certificates shall be paid, and the fact is admitted that at this time they are all redeemed by the State.

The design in issuing these certificates seems Peters 4.

to have been to furnish the citizens of Missouri with the means of paying to the State the taxes which it imposed, and other debts due to it. It was, in effect, giving a credit to the debtors of the State, provided they would give good real or personal security. Had the arrangement been confined to those who owed the State, and had certificates been required of them, promising to pay the amount, with interest; no objection could have been urged to the legality of the transaction. And even if the State, in the discharge of its debts, had paid such certificates, the act would not have been illegal.

The State of Missouri adopted no measures to force the circulation of the above certificates. No creditor was under any obligation to receive them. By refusing them, his debt was not postponed, nor the interest upon it suspended. The *object was a benign one, to [***457** relieve the citizens from an extraordinary pressure produced by the failure of local banks, and the utter worthlessness of the currency. Without aid from the government, the citizens of Missouri could not have paid the taxes or debts which they owed to the State, in a medium of any value. At such a crisis the law was enacted; and, as contemplated in its passage, so soon as the necessary relief was afforded, the paper was withdrawn from circulation. The measure was only felt in the benefits it conferred. No loss was sustained by the public or by individuals, unless, indeed, the State shall lose by the unconscionable defense set up to these actions.

It is admitted that the expediency or inexpediency of a measure cannot be considered, in giving a construction to the Constitution. But when, in giving a construction to that instrument, it becomes necessary, as it does in some instances, to look into the mischiefs provided against; and the application becomes, to some extent, a matter of inference, the question of expediency must be considered.

If the act of Missouri conferred benefits upon the people of the State, and was so guarded in its provisions as to protect them from all possible evil, no court would feel inclined to declare it to be unconstitutional and void, unless it was directly opposed to the letter and spirit of the Constitution. As the spirit of that provision was to protect the citizens of the States against the evils of a debased currency, and as the act under consideration, so far as it operated upon the people of Missouri, had no tendency to produce this evil, but to relieve against it, the spirit of the Constitution was not violated. Was the act of Missouri against its letter? Were the certificates issued by the State "bills of credit?" They were not, if the definition of a bill of credit, as now given, be correct. Their circulation was not forced by statutory provision, in any form; there was no promise on their face to pay at any future day: in their form and substance they bore little or no resemblance to the continental bills. They were calculated, from the manner in which they were created and circulated, to introduce none of the evils so deeply felt from the currency of the revolution.

*Suppose the State of Missouri had [***458** stamped certificates with a certain value, and provided that they should be received as money, according to the denominations given them,

could they have been called bills of credit? Certainly not; for they contained no promise of payment, to which the holder could give credit. Such an act by a State would most clearly be void; but not under the provision of the Constitution, which prohibits a State from issuing "bills of credit."

Can any certificate or bill be considered a bill of credit, within the meaning of the Constitution, to which the receiver must not give credit to the promise of the State? Must it not, literally, be a "bill of credit?" Not a bill which will be received in payment of public dues when presented, but which the State promises to redeem at a future day.

A substitution of the credit of the State for money, may be considered as an essential ingredient to constitute a "bill of credit." When this is wanting, whatever other designation may be given to the thing—whether it be called paper money or a State bill—it cannot be called a "bill of credit." The credit refers to a future time of payment and not to the confidence we feel in the punctuality of the State, in paying the bill when presented. A bill, therefore, which is payable on presentation, is not a bill of credit, within the meaning of the Constitution; nor is a bill which contains no promise to pay at a future day, but a simple declaration, that it will be received in payment of public dues.

If this course of argument appears somewhat technical, it must be recollected that the question under consideration involves the validity of an act of a State, which is sovereign in all matters, except where restrictions are imposed, and an express delegation of power is made to the federal government. The solemn act of a State, which has been sanctioned by all the branches of its power, cannot, under any circumstances, be lightly regarded. The act of Missouri having received the sanction of the legislative, executive, and judicial departments of the government, cannot be set aside and disregarded under a doubtful construction of the Constitution. Doubts should lead to an acquiescence in the act. The power which declares it null and void should be exercised only where the right to do so is perfectly clear.

That such a power is vested in this tribunal by the Constitution, which received the sanction of all the States, can only be doubted by those who are incapable of comprehending the plainest principle in constitutional law. It is a question arising under the Constitution, and all such questions of power, whether in the general or State governments, belong to this tribunal. The policy of this investiture of power may be questioned; but the fact of its existence cannot be. Believing that in every point of view in which the paper issued by the State of Missouri may be considered, it is at least doubtful whether it comes within the meaning of a "bill of credit" prohibited by the Constitution; I am inclined to affirm the judgment of the State court. But if this ground of the defense be admitted, does it follow that the judgment must be reversed. This presents for consideration the second proposition stated.

If the certificates under consideration were "bills of credit" within the meaning of the Constitution, is the note on which this suit is brought void?

The position assumed in the argument that no contract can be valid that is founded upon a consideration which is contrary to good morals, against the policy of the law, or a positive statute, cannot be sustained to the extent as urged. The ground is admitted to be correct, generally; but there are exceptions which it becomes important to notice.

In the State of Pennsylvania usury is prohibited under the sanction of certain penalties, but usury does not render the contract void; a recovery may be had upon it, with the legal rate of interest. It is competent for a State to prohibit gambling by a severe penalty; and yet to provide that an obligation given for money lost at gambling shall be valid. It may declare, by law, that all instruments for the payment of money, signed by the party, shall be held valid without reference to the consideration. The legislative power of a State over contracts is without restriction by the Constitution of the United States; except that their obligation cannot be impaired. With this single exception, a State Legislature may regulate contracts, both as to their form and substance, as may be thought advisable.

Suppose the constitution of Missouri had prohibited the emission of bills of credit without going further; might not the Legislature provide by law that obligations given on a loan of such bills should be valid? There would be no more inconsistency in this than in the law of Pennsylvania, which forbids usury, and yet holds the instrument valid. If the Constitution of the United States had provided that all obligations given for bills of credit, or where they formed a part of the consideration, should be void, there could have existed no doubt on the subject. But there is no such provision; and if the obligation be held void, its invalidity is a matter of inference, arising from the supposed illegality of the consideration. The Constitution prohibits a State from "emitting bills of credit." The law of Missouri declares, substantially, that obligations given, where these bills form the consideration, shall be held valid. Is there an incompatibility in these provisions? Does the latter destroy the former, or render it ineffectual?

Suppose a State should coin money, would such money not constitute a valuable consideration for a promissory note? Would not the intrinsic value of the silver, as bullion, be a sufficient consideration? Would such a construction conflict with the Constitution?

A State is prohibited from coining money; consequently the money which it may coin cannot be circulated as such. A creditor will be under no obligation to receive it in discharge of his debt. If any statutory provision of the State should be formed, with a view of forcing the circulation of such coin, by suspending the interest or postponing the debt of a creditor where it was refused, such statute would be void, because it would act on the thing prohibited, and come directly in conflict with the Constitution. Such would not be the case in reference to the obligation given for this coin.

In the first place, the act would be voluntary on the part of the purchaser; and in the second, the consideration would be a valuable one. The statute sanctions not the coin, but the obligation which was given for it. The

act of creating the consideration may be denounced and punished, as in the case of usury in Pennsylvania, and yet the obligation held good. Would this construction render ineffectual the prohibition of the Constitution? This may be answered by considering how ineffectual this provision must be, if its efficacy depend on making void the contract.

The loaning of this coin is only one of many modes which a State might adopt to circulate it. In the payment of its creditors, and in works of improvement, the State could always find the most ample means of circulation.

Effect is given to this provision of the Constitution by limiting it to the thing prohibited. If a State emit bills of credit, or coin money, neither can pass as money, whatever may be the regulation on the subject. No penalties have been provided to prevent such a circulation; no sanctions to enforce it would be valid.

But, it is contended that the offense consists in circulating the bills; that being the meaning of the word "emit." Congress may issue bills of credit, and perhaps have done so in the emissions of treasury notes: is a State prohibited from circulating them? If not, it must be admitted, the violation of the Constitution consists, not in the circulation of such bills, but in their creation.

The prohibition of the Constitution was intended to act on the sovereignty of a State in its legislative capacity. But there is no power in the federal government which can act upon this sovereignty. It is only when its inhibited acts affect the rights of individuals, that the judicial power of the Union can be interposed.

If a State Legislature pass an *ex post facto* law, or a law impairing the obligation of contracts, it remains a harmless enactment on the statute book until it is brought to bear, injuriously, on individual rights. So, if a State coin money or emit bills of credit, the question of right must be raised before this tribunal, in the same manner.

The law of Missouri expressly sanctions the obligations given on a loan of these certificates. Had not this been done, and if the certificates **462***] were bills of credit within the *meaning of the Constitution, the obligations might have been considered void, as against the policy of the supreme law of the land.

There is no pretense that there has been a failure of consideration for which the notes in controversy were given. The certificates have long since been received by the State as money, and the promisors have realized their full value. If they can avoid the payment of their notes, as they wish to do by the defense set up, it must be alone on the ground of the illegality of the consideration. Suppose the notes had been given, under the same circumstances, payable to an individual, from whom the consideration had been received; could the defense be sustained?

In such a case there could be no allegation of a failure of consideration. The Constitution prohibits the State from issuing the certificates; but the law of Missouri declares, that obligations given for these certificates shall be valid. These notes, being given for a valuable consideration, may be enforced, unless the Constitution makes them void. This it does not do by express provision; and can they be avoided by inference? An inference which does not necessarily follow, as has been shown, from the prohibition; because such a consequence is prevented by the act of Missouri. This act may be void as to the emission of the bills, but it does not follow that the part which relates to the notes must also be void. It would seem, therefore, that effect may be given to the provision of the Constitution so as to prevent the mischief, by operating upon the circulation of the bills, without extending the consequence so as to make void the contract expressly sanctioned by the law of Missouri. And if such a construction may be given, will not the court incline to give it, in order that both laws may be carried into full effect, where their provisions do not come directly in conflict?

The passing of counterfeit money is prohibited under severe penalties by the laws of every State; and is it not in the power of a State to provide by law, that every obligation given for counterfeit paper, known to be such by both parties, shall be valid. This will scarcely be denied. And if *a State may do this, [**463** under its sovereign power to regulate contracts, may it not give validity to the notes under consideration. Had not the State of Missouri a right to provide that every citizen who should voluntarily execute an obligation for the payment of money to the State, should be held bound to pay it, although given without consideration. If this do not come within the province of legislation in a sovereign State, I know not where its powers may not be restricted. And if this may be done, can the notes under consideration be held void? If the certificates were illegally created, they were of value, and under the law of Missouri constituted a valuable consideration for the notes given. In any view, the notes which were executed being sanctioned by law, and consequently valid even without consideration, cannot be less so when given for the certificates. I am, therefore, inclined to say, not without great hesitation, as I differ with the majority of the court, that the judgment should be affirmed on this ground.

In the first place, then, from the consideration which I have been able to give this case, I am not convinced that the certificates issued by the State of Missouri were bills of credit, within the meaning of the Constitution. And unless my conviction was clear on this point, my duty and inclination unite to sustain the judgment of the Supreme Court of Missouri. And second, as has been shown, it appears to me that the contract on which this action is founded is not void; even admitting that the certificates were bills of credit.

All questions of power arising under the Constitution of the United States, whether they relate to the federal or a State government, must be considered of great importance. The federal government being formed for certain purposes, is limited in its powers, and can in no case exercise authority where the power has not been delegated. The States are sovereign, with the exception of certain powers, which have been invested in the general government, and inhibited to the States. No State can coin money, emit bills of credit, pass *ex post facto* laws, or laws impairing the obligation of contracts, &c. If any State violate a pro-

vision of the Constitution, or be charged with **464***] such violation to the injury of *private rights, the question is made before this tribunal; to whom all such questions, under the Constitution, of right belong. In such a case, this court is to the State what its own Supreme Court would be, where the constitutionality of a law was questioned under the constitution of the State. And within the delegation of power, the decision of this court is as final and conclusive on the State as would be the decision of its own court in the case stated.

That distinct sovereignties could exist under one government, emanating from the same people, was a phenomenon in the political world which the wisest statesmen in Europe could not comprehend; and of its practicability many in our own country entertained the most serious doubts. Thus far the friends of liberty have had great cause of triumph in the success of the principles upon which our government rests. But all must admit that the purity and permanency of this system depend on its faithful administration. The States and the federal government have their respective orbits, within which each must revolve. If either cross the sphere of the other, the harmony of the system is destroyed, and its strength is impaired. It would be as gross usurpation on the part of the federal government to interfere with State rights by an exercise of powers not delegated, as it would be for a State to interpose its authority against a law of the Union.

The judiciary of a State, in all cases brought before them, have a right to decide whether or not an act of the federal government be constitutional, the same as they have a right to determine on the constitutionality of an act under the State constitution; but, in all such cases, this tribunal may supervise the decisions. It is often a difficult matter to define the limitations of the legislative, the executive, and the judicial powers of a State; and this difficulty is greater in defining the limitations of the federal government. In both cases, the respective constitutions must be looked to as the source of power; but in the latter, it is often necessary to determine not only whether the power be vested, but whether it is inhibited to the State. Some powers in the general government are exclusive; others concurrent with the States. The experience of many years may be necessary to establish, **465***] by practical illustrations, the exact boundaries of these powers, if, indeed, they can ever be clearly and satisfactorily defined. Like the colors of the rainbow they seem to intermix, so as to render a separation extremely difficult, if not impracticable. By the exercise of a spirit of mutual forbearance, the line may be ascertained with sufficient precision for all practical purposes. In a State where doubts exist as to the investiture of power, it should not be exercised, but referred to the people; in the general government, should similar doubts arise, the powers should be referred to the States and the people.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri for the First Judicial District, and was argued by counsel; on consideration whereof, this court is of opinion that there is error in the rendition of the judgment

of the said court in this, that in affirming the judgment rendered by the Circuit Court for the County of Chariton, that court has given an opinion in favor of the validity of the Act of the Legislature of Missouri, passed on the 27th of June, 1821, entitled "An Act for the establishment of loan-offices," which act is, in the opinion of this court, repugnant to the Constitution of the United States; whereupon it is considered by the court, that the said judgment of the said Supreme Court of the State of Missouri for the First Judicial District ought to be reversed and annulled; and the same is hereby reversed and annulled, and the cause remanded to that court, with directions to enter judgment in favor of the defendant to the original action.

Cited—6 Pet., 48; 8 Pet., 42; 10 Pet., 397; 11 Pet., 313, 323, 328, 329, 332, 333, 340, 341; 12 Pet., 723; 7 How., 853; 13 How., 197; 1 Black, 203; 6 Wall., 384; 12 Wall., 619, 678; 18 Wall., 249; 3 Otto, 267; 3 Wood. & M., 501; 2 McLean, 277; 1 Abb. U. S., 263; 1 Woods, 447; 1 Bank. Reg., 421; 15 Blatchf., 87.

***HENRY HOLLINGSWORTH, Heir [*466**
of LEVI HOLLINGSWORTH, *Appellant,*

v.

PHILIP BARBOUR ET AL., *Appellees.*

Purchase of land warrants by parol agreement—bill in equity against "unknown heirs" of vendor—Kentucky laws as to absent defendants—claim of a "locator."

H. entered, with the proper surveyor for the District of Kentucky, forty-five thousand acres of land, in the County of Washington in that State, by virtue of treasury warrants. A survey was made thereon in 1786, and a patent for the land issued to H. in 1797. The warrants were purchased by the ancestor of the complainant by a parol agreement with H. previous to their entry. Before this agreement, H., in connection with a person who owned other warrants, had made an agreement with S. to locate their respective warrants, which agreement was ratified by the complainant, who paid a sum of money to S. for fees of patenting, and agreed to make S. a liberal compensation for his services; and S. located and surveyed under the warrants, forty-five thousand acres, returned the surveys to the office, and paid the fees of office. The locating and surveying of the warrants, and all the necessary steps for completing the title, were done by S., who was employed first by H., and afterwards by the complainant, who paid in money for the same. H. being deceased, and having made no conveyance of the legal title to the lands, the complainant filed a bill in the County of Washington "against the unknown heirs of H.," and in 1815 a decree was made by that court, for a conveyance of the lands by the unknown heirs, or in their default by a commissioner, appointed in the decree to make the same. Held, that the conveyance was not authorized by the laws of Kentucky in force at the time of the decree.

By this general law of the land, no court is authorized to render a judgment or decree against anyone, or his estate, until after due notice by service of process to appear and defend. [472]

The acts of the Assembly of Kentucky authorizing proceedings against absent defendants referred to and examined. [472]

The statute under which the proceedings of the complainants in this case were instituted, authorized the court to make a decree for a conveyance in a suit for such a conveyance, only in the case in which the complainant claims the land as locator, or by bond or other instrument in writing. [473]

The claim of "a locator" is peculiar to Kentucky, and has been universally understood by the people of the country to signify that compensation of a portion of the land located, agreed to be given by the owner of the warrant, to the locator of it for his services. [473]

The record of proceedings against "unknown Peters 4.

heirs" is no evidence that any such heirs existed; and the decree and deed made in pursuance of it, cannot avail to pass any title without some evidence that there were some heirs. [477]

APPEAL from the Circuit Court of the District of Kentucky.

The case is fully stated in the opinion of the court.

The cause was argued by *Mr. Sheffey* for the appellants, and by *Mr. Wickliffe* for the appellees.

467* *Mr. Justice BALDWIN* delivered the opinion of the court.

This was a bill filed on the equity side of the court by the appellants, setting forth that on the 21st of February, 1784, a certain John Abel Hamlin entered, with the proper surveyor for the District of Kentucky, forty-five thousand acres of land lying in the County of Washington, by virtue of sundry treasury warrants issued by the State of Virginia. That a survey was made thereon on the 13th of April, 1786, and a patent issued the 8th of June, 1798, to the said John Abel Hamlin. That previous to the date of such entry the complainant had purchased from the said Hamlin the warrants on which the entry and surveys had been made, for the sum of three thousand seven hundred dollars, which he paid. That although the entries, survey and patent were in the name of said Hamlin, they were for the benefit of the complainant, who alleged the equitable title thereto as belonging to him. That Hamlin being dead, without having made a conveyance, the complainant in 1814 exhibited his bill in chancery in the Circuit Court for the County of Washington against the unknown heirs of said Hamlin, and obtained a decree of said court, ordering them to convey to him the legal title of said lands, by a day named in said decree; in default whereof the court appointed a commissioner for that purpose, who, by deed approved by the court, conveyed the same to the complainant on the 15th of August, 1815: by virtue of which decree and conveyance he became vested with the right, title and interest of said Hamlin to all the lands embraced in the patent of the commonwealth to him.

The bill then sets forth that the defendants, sixty-six in number, had obtained grants of various portions of the land patented to Hamlin, and were in possession of the same, by virtue of warrants, entries and surveys adverse to his; and concludes with a prayer against the appellees, the respondents below, that they may be compelled to convey to the complainant the land claimed by them respectively under their patents, which were elder than the one to Hamlin.

In support of the allegations of his bill, the

complainant produced the entries, survey and patent before mentioned, but offered no evidence of any contract, written or parol, between *him and Hamlin for the sale of [*468 these lands; and did not attempt to rest his claim to hold the title of Hamlin on any other authority than the decree of the Circuit Court of Washington County, and the deed of the commissioner appointed to execute the conveyance to him of the lands included in the patent. In the court below, the defendants, in their answers, made various objections to the entries on Hamlin's warrants; set up title in themselves by the patents under which they claimed and their long possession of the lands within their respective surveys, for a period in many of the cases exceeding, and in few falling short of the period prescribed by the act of limitation.

If this court entertained a doubt of the validity of the decree rendered by the Circuit Court of the County of Washington, ordering a conveyance of the title of Hamlin in the lands in question to Hollingsworth, we should feel it our duty to enter into the consideration of all the questions arising on the bill, answer, and exhibits in this case.

When the case was first reached on the calendar, no counsel appeared on the part of the appellants. The counsel of the appellees brought the case before the court, and presented the various points which arose at the hearing in the Circuit Court; beginning with the first in order, the right of Hollingsworth to put himself in place of Hamlin, as to a remedy against the appellants. He was informed by the court that, as then advised, they did not wish to hear him on the other points. Counsel afterwards appearing for the appellants and requesting to be heard, the court directed an argument on what then appeared to them the turning question on the whole case. We have carefully weighed the reasons urged for a reversal of the decree of the court below on that ground, and still retain the opinion formed on the *ex-parte* argument—that the decree in the case of *Hollingsworth* against the unknown heirs of Hamlin, and the deed executed by the commissioners pursuant thereto, was void, and wholly inoperative to transfer any title; and that Hollingsworth, or his heir, had no right to call on the appellees to transfer their prior legal title to him, as representing Hamlin or his heirs: that be the title of the *appellees [*469 good or bad, the complainant had no equity against them. Being a stranger to Hamlin's title, he had no right to any conveyance to himself, or any relief sought for by the bill now under the consideration of the court.

The original bill against the unknown heirs of Hamlin thus deduces the complainant's right

NOTE.—Judgments, service of notice to appear and defend, when necessary to their validity.

A judgment *in personam*, recovered without any notice, and without any attachment of property on *mesne* process, though authorized by a law of the territory in one of the courts in which it was rendered, is a nullity. *Webster v. Reid*, 11 How., 437.

The rule that a judgment or decree of one State must receive full faith in the courts of another State, does not apply to judgments rendered in proceedings instituted without personal notice to

the defendant. Such judgments, though they may be authorized by statutes of the States in which they are rendered, are not within the meaning of the rule. To render a judgment binding outside the State, it must be founded on personal notice to the party to be affected. *Gurner v. United States*, 11 How., 163; *D'Arcy v. Ketchum*, 11 How., 165; *Harris v. Hardeman*, 14 How., 334; *Warren Manufacturing Co. v. Aetna Ins. Co.*, 2 Paine, 501.

That a decree, obtained without service, may be impeached, and to what extent the jurisdiction of the court rendering a judgment may be inquired into collaterally, see note to *Mills v. Duryee*, 7 Cranch, 481.

to a decree for the conveyance of the legal title vested in Hamlin or his heirs by the entries, survey, and patent before referred to: that Hamlin was indebted to the complainant in the sum of about four thousand dollars by book account; that he had absconded, and complainant took a writ of attachment against his effects, out of the Court of Common Pleas of the County of Philadelphia, of September Term, 1784; that in execution of that writ the sheriff broke open the counting-house of Hamlin, but found no property therein except thirty-nine Virginia warrants for ninety thousand acres of land, of which he took possession, but made no return of them on the writ: that Hamlin some time afterwards returned to Philadelphia, being wholly insolvent, and proposed to complainant that he should take the warrants for the sum of three thousand seven hundred dollars, to which he assented, and gave Hamlin a credit to that amount on the account; that the warrants were accordingly delivered to the complainant, but without any transfer or assignment in writing. That before the circumstances of Hamlin became desperate, he had, in co-operation with a person who owned some Virginia warrants, made an agreement with Benjamin Stevens, of New Jersey, to locate their respective warrants; which agreement was ratified by the complainant, who paid to Stevens one hundred and twenty-three pounds eight shillings and nine pence, Pennsylvania currency, for fees of patenting, &c., and further agreed to make Stevens a liberal compensation for his personal labor; and he then commenced the business of locating, surveying, &c.: that Stevens made entries and executed surveys of forty-five thousand acres (the lands in controversy), returned the plats and certificates of survey to the register's office, and paid the fees of office.

It thus appearing from the complainant's **470*** allegations in *his* bill that the locating and surveying of the warrants, and all the steps necessary to the completion of the title were done by Stevens, who was employed for that purpose, first by Hamlin and afterwards by himself, and that his services were compensated by money, it becomes unnecessary to consider the other matters set forth by the complainant. Not being a "locator" of these lands, and showing the location to have been made by another, he excluded himself from all pretense of claiming a right to proceed as such against the unknown heirs of Hamlin.

The Circuit Court of Washington County could take cognizance of the case presented to them by the complainant by no principle of the common law, or rule of the court of equity. Their powers to do so must be conferred by some law of Kentucky within which the complainant must have brought himself, or the proceedings would be void for want of jurisdiction in the court. As this court fully concurs with the views taken of this course by the late learned and lamented *Mr. Justice Trimble*, who pronounced the decree of the Circuit Court in a very lucid and elaborate opinion returned with the record, we deem it wholly unnecessary to do more than to refer to it as containing the reasons of the decree, which we unanimously approve.

"This is a controversy for land under con-

flicting adverse titles. The complainant claims the land by virtue of two entries made with the surveyor of Washington County on the 23d of February, 1784, in the name of John Abel Hamlin; an inclusive survey of these entries made on the 12th day of April, 1786; a grant issued thereon to John Abel Hamlin on the 8th day of June, 1797; and a deed of conveyance made by a commissioner on behalf of the unknown heirs of John Abel Hamlin to the complainant, in obedience to and in pursuance of a decree of the Circuit Court for the County of Washington. The defendants claimed the land under and by virtue of sundry entries, surveys and grants, elder than the grant to John Abel Hamlin. The defendants, in their answers, controvert the validity of John Abel Hamlin's entries; insist that John Abel Hamlin and his heirs, if he left any, were aliens, incapable of taking, holding, or conveying **real estate*; deny that John Abel Ham- [**471** lin left any heirs to inherit his title, and deny that the complainant has any interest in or title to the estate of John Abel Hamlin in the premises. They further rely on their elder legal titles; insist upon the validity and superiority of the several entries under which they hold; and in bar of the relief sought by the bill, allege they have had upwards of twenty years' adverse possession of the land in controversy, prior to the institution of this suit.

"It is argued for the defendants that the decree of the Washington Circuit Court is void, and that no title passed by it and the commissioner's deed made in pursuance of it to the complainant.

"It must be conceded that if the decree is void, the commissioner's deed, made by its authority, can pass nothing to the complainant.

"This court disclaims all authority to revise or correct the decree, on the ground of supposed error in the court who pronounced the decree. The principle is too well settled, and too plain to be controverted, that a judgment or decree pronounced by a competent tribunal against a party having actual or constructive notice of the pendency of the suit, is to be regarded by every other co-ordinate tribunal; and that if the judgment or decree be erroneous, the error can be corrected only by a superior appellate tribunal. The leading distinction is between judgments and decrees merely void, and such as are voidable only—the former are binding nowhere, the latter everywhere, until reversed by a superior authority. Upon general principles, the decree of the Washington Circuit Court must have the same force and effect, and none other in this court, than it would or ought to have in any circuit court of the State. Although these principles are unquestionable, the correct application of them to this case is attended with no little difficulty.

"The suit and decree is against the unknown heirs of John Abel Hamlin. Instead of personal service of process upon the defendants in the suit, an order of publication was made against them; and upon a certificate of the publication **of* this order for eight [**472** weeks successively in an authorized newspaper being produced and filed in the cause, the bill was taken *pro confesso*; and at the next succeed-

ing term the final decree was entered, directing the conveyance of the land to the complainant.

"The counsel for the defendants in this cause have suggested several irregularities in the proceedings in that cause; and insist the court had no legal authority to pronounce any decree therein. The complainant's counsel contend that the proceedings were had in pursuance of the several acts of Assembly concerning absent defendants, and that if any irregularities have intervened in the progress of the suit, the proceedings and decree are at most only erroneous; but that the court, having jurisdiction and authority by the laws of the State to pronounce a decree for a conveyance of land lying within the county, the decree, however irregular it may be, is not void.

"This argument renders it necessary to examine the several acts of Assembly authorizing proceedings against absent defendants: for, by the general law of the land, no court is authorized to render a judgment or decree against anyone or his estate, until after due notice by service of process to appear and defend. This principle is dictated by natural justice, and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule.

"The first Act of Assembly is the Act of the 19th of December, 1726, copied from the pre-existing laws of Virginia. That act provides for the case where a suit in chancery is commenced 'against any defendant or defendants, who are out of this commonwealth, and others within the same having in their hands effects of, or otherwise indebted to the absent defendant,' &c.; and the second section authorizes the court, in such cases, to have publication made two months successively in an authorized newspaper, and if the absentee still fails to appear, to proceed to decree, &c. This act manifestly applies only to cases of debt or duties personal, for the satisfaction of which the debts or effects of the absent debtor are attached, or enjoined in the hands of the resident party. The next Act of Assembly, in order of 473*] time, is *the Act of the 16th of December, 1802. The third section of this act provides that 'where any person or persons, their heirs or assigns, claim land as locator, or by bond or other instrument in writing, they may institute a suit in equity, having jurisdiction in such cases; and where the party having died, and the legal title descended to his heirs, the complainant may proceed to obtain a decree for the land, though the particular names of the heirs be unknown and not particularly named in the suit, although they may be residents of this commonwealth or not; but in such cases it shall be advertised eight weeks in one of the gazettes of this State, requiring such heirs or representatives to appear and make defense.' This statute authorizes the court to proceed to decree after publication only in the cases in which the complainant claims the land sued for in his bill as locator only, or by bond or other instrument in writing.

"We must, then, look into the bill of Hollingsworth against the unknown heirs of John Abel Hamlin, to see if the complainant in that case claimed the land as locator, or by bond or Peters 4.

other instrument in writing. Upon an inspection of the bill it is manifest that the complainant in that case did not claim the land by bond or other instrument in writing. The bill does not pretend that the complainant held, or ever did hold, any instrument of writing; on the contrary, he shows, negatively, that he did not. He alleges that he made a parole agreement with Hamlin for the warrants, after the return of his attachment against Hamlin to the court in Philadelphia, in 1784; and that the warrants were afterwards delivered to him in pursuance of that agreement, by the sheriff, who had seized them at the time he levied the attachment on some of Hamlin's effects, but that the warrants were not returned as levied on. The bill shows he did not claim as locator, in the sense of the term. The claim as locator, and the terms in which it is expressed, are peculiar terms in Kentucky. In early times, many contracts were made between warrant holders and others, by which those others agreed to locate the warrants for a portion of the land secured by location; and in many other cases, one man located the warrants of another without any special agreement as to compensation, *but with an expectation of receiving as compensation the portion of land usually given for such services. The phrase, 'claim as locator,' grew out of this state of things, and has been universally understood by the people of the country to signify the compensation of a portion of the land located and agreed to be given by the owner of the warrant to the locator of it for his services. The term is believed never to have been used in any other sense, or as signifying the acquisition of property by any other species of contract, than a contract to locate for a portion of the land. According to well-settled rules of construction, the language of the statute must be understood in this its popular acceptance.

"The order of publication in the case of Levi Hollingsworth against the unknown heirs of John Abel Hamlin, was made at the November Term of the Washington Circuit Court, in the year 1813; proof of the publication of the order, eight weeks successively in the *Bardstown Repository*, was made on the 4th of April, 1814; and at the August Term, in the year 1814, the final decree was rendered in the cause. These dates are important, because they show that the only remaining act upon which reliance was placed, and which passed on the 6th of February, 1815, is subsequent to the decree, and cannot apply to the case. The Acts of 1796 and of 1802, already noticed, were the only statutes existing at the time of the proceedings and decree in the suit of Hollingsworth against the unknown heirs of John Abel Hamlin, which authorizes the courts of the State to proceed upon orders of publication to decree against absent defendants.

"It appears clear to my mind that the case was not within the provisions of either of the statutes; and that the order of publication, and the proceedings and decree thereupon, were wholly unauthorized and unwarranted by the law of the land. The question is, is the decree therefore erroneously, or is it simply void?

"It seems difficult to escape from the conclusion that if the order of publication was wholly unwarranted by law, the publication is

as if it had never been made. Even in cases expressly authorized by the statute, a publication is only a constructive notice to the party; 475*] but if the publication in *the particular case be unauthorized, no principle is perceived upon which it can be regarded as constructive notice.

"It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right. This opportunity is afforded (or supposed in law to be afforded) by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceeding in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to this rule.

They are not properly exceptions; the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But, if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court. The case under consideration is not properly a proceeding *in rem*; and a decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principle of proceedings *in rem*, so far as to dispense with the service of process on the party. There is no seizure nor taking into the custody of the court the land, so as to operate as constructive notice. Constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders of publication, and providing that the publication, when made, shall authorize the courts to decree. It has already shown that this case is not within the provisions of any statute.

"It would seem to follow that the court acted without authority, and that the decree is void for want of jurisdiction in the court. But if not void, as being *coram non judice*, it is void and wholly ineffectual to bind or prejudice 476*] the *rights of Hamlin's heirs, against whom the decree was rendered, because they had no notice, either actual or constructive.

"The principle of the rule that decrees and judgments bind only parties and privies, applies to the case; for though the unknown heirs of Hamlin are affected to be made parties in the bill, there was no service of process, nor any equivalent to bring them before the court, so as to make them, in the eye of the law and justice, parties to the suit.

"The case of *Hynes v. Oldham* (3 Monroe's Reports) was cited to prove that the proceedings in the case of *Hollingsworth v. Hamlin's Heirs* were regular; but if not so, that they were at most only erroneous and not void. The cases appear to me to be essentially different. That was a case within the jurisdiction of the statutes authorizing publications; the

publication had been made, and the only objection was, that it did not appear that an affidavit had been filed by the complainant that the particular names of the heirs were unknown to him before making the order of publication. It was decided that that omission might have been a cause of revision, or of reversal upon appeal to the appellate court, but that the decree was not therefore void.

"In the case under consideration, the law did not authorize publication at all. It is a case in which the court had no authority to pronounce any decree until the party was served with process. It is not a case like the one cited, where there is an irregularity merely in the manner of issuing or awarding the notice by publication, but a case in which notice by publication is wholly unauthorized. In the case cited, the Court of Appeals admit that a judgment or decree rendered against a party without notice is void, and an unauthorized publication cannot be regarded as notice; and the case under consideration is as if no attempt to give notice had been made.

"There is an obvious distinction in reason between this case and the case where there has been personal service of irregular or erroneous process. In that case the party has notice in part, and may, if he will, appear and object to or waive the irregularity; in this, the publication, being unauthorized, *is not even [*477 constructive notice; and unless the proceedings are considered as void, the injured party may be remediless.

"There is another ground on which it may well be questioned whether the complainant has made out such a case as will enable him to set up and assert the entries, survey and patent of John Abel Hamlin against the defendants. The Act of Assembly of 1802 authorizes a decree upon an order of publication against heirs, where the particular names of the heirs are unknown. But the acts of Assembly do not declare that it shall be taken for granted that there were heirs, and that the title passed by descent to them; and by the decree and commissioners' deed should pass to the complainant, whether any such heirs existed or not. The manifest object of the statute was to dispense with the necessity of inserting the particular names in the proceedings, and to substitute in the stead of the particular names their characteristic description of heirs of the decedent. But it is apprehended the record of the proceedings against the unknown heirs, &c., is no evidence that any such heirs existed, and that the decree and deed, made in pursuance of it, cannot avail to pass any title to the complainant without some evidence that John Abel Hamlin left heirs, upon whom his estate descended, and from whom it could pass by the commissioners' deed to the complainant. There is no evidence in this case conducing in the slightest degree to show that John Abel Hamlin left any heirs capable of inheriting his estate. There is nothing for the complainant to rest upon but presumption. Although it may sometimes be presumed that a decedent left heirs rather than that he left none, it is not clear to my mind that the presumption should be indulged in a case like this, so far as to uphold the title of the complainant. It is but a presumption of fact in any case, and like other

presumptions, may be repelled by countervailing facts and presumptions.

"It appears that John Abel Hamlin was a foreigner from France, and died in the city of Philadelphia about the year 1788. The complainant's own bill against the unknown heirs of John Abel Hamlin contains no allegations in terms that he left any heirs capable of inheriting; on the contrary, *it expressly alleges that he left neither wife nor child; and that after much inquiry, no person could be found who could give any account of his heirs. Twenty-five years intervened between the death of John A. Hamlin and the exhibition of the complainant's bill against his unknown heirs in the Washington Circuit Court; and although it appears that he, until his death, and the complainant resided in the city of Philadelphia, and were personally known to each other, no heir ever appeared to claim his estate, nor did Hollingsworth ever ascertain the existence of any such heir. Nearly forty years have transpired since the death of Hamlin, and no heir has yet been heard of. Under such circumstances, if the presumption that Hamlin left heirs is not absolutely repelled, I think it so weakened that the court ought not to rest upon it as sufficient to sustain the complainant's title against the defendants, who have the legal title, and have been long in the possession and enjoyment of it. Even the indulgence of a general presumption that Hamlin left kindred, who, if citizens of the United States or of France, could inherit his estate, would not avail the complainant, without going the full length of presuming also that such kindred were in fact citizens or Frenchmen. The presumption that Hamlin left any kindred, citizens of the United States, is strongly repelled by the statements of Hollingsworth's bill in the Washington Circuit Court, and by all the circumstances of the case. There is nothing to found the presumption upon that he left heirs who were French citizens in 1788, when he died, but the circumstance that he had emigrated from Brittany about, or previous to 1779—a circumstance too feeble to justify this court in finding the fact to be so.

"If Hamlin left kindred who were aliens, and belonging to any other nation, they could take nothing by descent, and nothing could pass from them to the complainant. The objection of the alienage of Hamlin and his heirs, regarding him and them as French citizens or subjects, has not been considered, deeming it unnecessary to express any opinion on that point. Entertaining the opinion, as the foregoing observations have shown, that the complainant has failed to show himself legally inheriting [*479] vested with the claim and *title of John Abel Hamlin, or of his heirs, if he left any, so as to enable him to set up the entries, surveys and patent, in the name of John A. Hamlin against the legal title and long possession of the defendants, all investigation of the relative merits of the original claims is necessarily superseded."

The decree of the Circuit Court dismissing the bill of the complainant is affirmed, with costs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky, Peters 4.

and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

Cited—14 How., 343; 24 How., 205; 1 Otto, 508; Bald., 284; 1 Sawy., 330; 3 Biss., 270; 1 Bank. Reg., 449, 453.

*THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS, *Plaintiffs*,

v.

THE TOWN OF PAWLET AND OZIAS CLARKE.

Ejectment—effect of pleading to the merits—foreign corporation—Vermont statute of limitation—mesne profits.

Ejectment to recover a lot of land, being the first division lot laid out to the right of the society in the town of Pawlet. The plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England within the dominions of the King of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king." The defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued.

If the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. The general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring.

In the record there is abundant evidence to establish the right of the corporation to hold the land in controversy. It is given to them by the royal charter of 1761, which created the town of Pawlet. The society is named among the grantees as "The Society for Propagating the Gospel in Foreign Parts," to whom one share is given. This is a plain recognition by the crown of the existence of the corporation, and of its capacity to take. It would confer the power to take the land, even if it had not previously existed.

The statutes of limitation of Vermont interpose no bar to the institution by the Society for the Propagation of the Gospel, &c., of an action for the recovery of the land in controversy.

The plaintiffs are a foreign corporation, the members of which are averred to be aliens, and British subjects; and the natural presumption is that they are residents abroad.

The Act of the Legislature of Vermont, which prohibits the recovery of mesne profits in certain cases applies to the claims to such profits by the plaintiffs in this suit, and the provisions of the Treaty of Peace of 1783, and those of the Treaty with Great Britain in 1794, do not interfere with the provisions of that act. The law has prescribed the restrictions under which mesne profits shall be recovered, and these restrictions are obligatory on the citizens of the State. The plaintiffs take the benefit of the statute remedy to recover their right to the land, and they must take the remedy with all the statute restrictions.

THIS cause was certified to this court from the Circuit Court of the United States for the District of Vermont; the judges of that court being opposed in opinion on certain questions of law which arose at the trial.

The action was an ejectment, brought to recover "the *first division lot laid out [*481

NOTE.—As to mesne profits, and when recoverable, see note to Green v. Biddle, 8 Wheat., 1.

to the right of said society in Pawlet, containing fifty acres."

The cause was tried at October Term, 1828, and after the testimony on both sides was closed the jury were discharged upon the disagreement of the judges of the court on the several points herein stated, arising upon the facts agreed in the case, and stated by the counsel for the parties. The facts agreed were:

On the 26th day of August, 1761, George III., then King of Great Britain, by Benning Wentworth, Esq., Governor of the then Province of New Hampshire, made the grant or charter of the town of Pawlet aforesaid, particularly describing the boundaries thereof to the grantees, whose names are entered on said grant, their heirs and assigns forever; to be divided to and among them into sixty-eight shares. Among the grantees whose names are entered in the said charter, is 'one whole share for The Society for the Propagation of the Gospel in Foreign Parts.' A copy of the charter was filed among the proceedings.

And afterwards, on the 16th of April, 1795, Ozias Clarke executed the counterpart of a lease to the selectmen of the town of Pawlet, for the time being, for and on behalf of said town, his heirs, executors, administrators and assigns, of the tract of land mentioned in the plaintiffs' declaration, described as follows, to wit: all that tract of land situate, lying and being in Pawlet aforesaid, known and distinguished by being the first division fifty-acre lot laid out to the right known by the name of the Society, or Propagation Right, to have and to hold the demised premises, with the privileges and appurtenances thereto belonging, &c., from the 16th of April, 1795, and onwards as long as trees grow and water runs—his yielding and paying yearly, and at the end of every year, the sum of seven pounds, lawful money, &c. A copy of the lease was annexed and made part of this case. And thereupon Ozias Clarke entered into the immediate possession and occupancy of the said lot of land, and has been ever since in the possession and occupancy of the same; and has paid the rent aforesaid to the town of Pawlet, yearly and every year since, at the rate of seven pounds, **482*** equal to twenty-three dollars and thirty-four cents for each year; and the town of Pawlet have received the said sum as rent yearly from Ozias Clarke, and have applied the same for the benefit of schools in the town of Pawlet. And Edward Clarke, the father of Ozias Clarke, went into the possession of the lot in the spring of the year 1780; it not appearing that he had purchased any title thereto, and so continued in the possession thereof till the defendant entered.

The case agreed contains extracts from the minutes of the society, stating the proceedings thereof at their meetings in London relative to the land in Vermont, granted by Governor Wentworth to the society. The first meeting was held on the 16th of July, 1762, and these minutes show the measures adopted by the society relative to the lands from that period down to 1810.

The proceedings on the 16th of July, 1762 and the 16th of March, 1764, show an acceptance of the donation, and a resolution that agents be appointed to take charge of the

patents and warrants for the land, and for such other purposes as the interests of the society may require.

At a meeting of the society held December 17th, 1773, the society agreed that it be recommended to the society to empower Mr. Cossitt to see that justice be done to the society in the allotment of glebes, &c., in New Hampshire.

The society resolved to agree that a letter of attorney be sent to the Governor of New Hampshire, empowering Mr. Cossitt to act in behalf of the society with regard to these lands, and leaving blanks for other persons whom the governor may think proper to insert.

On the 20th of May, 1785, a report was made to the society relative to their lands, and the meeting resolved that the secretary do write to some one or more members of the Church of England in each of the States of America in which the society has any property, to take all proper care in securing said property; and further to inform such persons that it is the intention of the society to make over all such property to the use of the Episcopal Church in that country, in whatever manner and form, after communication with the *several **483** governments, shall appear to be most effectual for that purpose.

On the 16th of May, 1794, an application was made to the society through the Bishop of New York, by the Episcopal Convention of Vermont, requesting the society to convey, for the support of the Episcopal Church of that diocese, the land held by the society in Vermont under grants from New Hampshire. The committee of the society made a report as follows:

The committee agreed in opinion that the Bishop of New York be assured of the society's readiness to concur in any measures which can forward the establishment of an Episcopal Church. But having considered that former applications have been made from the State of Vermont, differing in their intentions from the present, which were rejected by the society in May, 1790; and at the same time, Mr. Parker, of Boston, when he obtained a deed from the society for the conveyance of their lands in New Hampshire, had signified that he should not trouble them respecting Vermont till he should know the operation of that deed; and having never since heard from Mr. Parker on that subject, are of the opinion that there is not sufficient ground for the society to execute the present deed.

At a meeting of the society on the 16th of November, 1810, the secretary of the society was directed to obtain the fullest and most particular information respecting the nature and value of the rights of the society to the lands in Vermont, with the best means of recovering and rendering the same available.

In consequence of certain votes of the society expressive of their intention to appropriate the avails of their lands in the State of Vermont for the use of the Protestant Episcopal Church in that State, the Convention of the Church in that State made application to the society for the power of attorney: and the said society executed to the Right Rev. Alexander V. Griswold, Bishop of the Eastern Diocese, and the other agents therein named, the power of attorney, dated December 5th, 1816; a copy of which was annexed to the case.

484*] *The Act of the Legislature of Vermont, passed October 27th, 1785, entitled "An Act for settling disputes respecting landed property;" an act entitled "An Act for the purpose of regulating suits respecting landed property, and directing the mode of proceeding therein," passed November 5th, 1800; also the several acts to keep the acts last aforesaid in force for later periods than those contained in said act; an Act passed November 15th, 1820, entitled "An Act for the purpose of regulating suits respecting landed property, and directing the mode of proceeding therein;" and all the statutes ever passed in Vermont, for the limitation of actions, and all the additions thereto, as found in the several statute books, including the Act passed November 16th, 1819, entitled "An Act repealing parts of certain acts therein mentioned," an Act passed October 26th, 1787, authorizing the selectmen of the several towns to improve the glebe and society's lands, and an Act in addition thereto, passed October 26th, 1789; an Act passed October 30th, 1794, entitled "An Act directing the appropriation of the lands in the State, heretofore granted by the British government to the Society for the Propagation of the Gospel in Foreign Parts;" and all other statutes of said State, that either party considers applicable to this case, are to be considered as a part of this case.

Upon the foregoing case, the opinions of the judges of the Circuit Court were opposed upon the following points:

1. Whether the plaintiffs have shown that they have any right to hold lands.

2. Whether the plaintiffs are barred by the three years' limitation in the Act of the 27th of October, 1785, or any other of the statutes of limitation.

3. Whether, under the laws of Vermont, the plaintiffs are entitled to recover mesne profits; and if so, for what length of time.

The case was argued by *Mr. Webster* for the plaintiffs, and by *Mr. Doddridge* for the defendants. *Mr. Doddridge* also presented the written argument of *Mr. J. C. Wright*, for the defendants; as did *Mr. Webster* an argument for the **485*]** *plaintiffs, prepared by the counsel in the Circuit Court of Vermont.

For the plaintiffs, it was argued that it was not a point in issue, or on which the court divided in opinion, whether the plaintiffs were a corporation capable of suing in this form, that being admitted by the plea of the general issue. (Cited, 10 Mod., 207; 1 Bos. & Pull., 10; 10 Co. Rep., 122, 126; 1 Saund. Rep., 340, 342; *Atlantic Insurance Company v. Conard*, 1 Peters's Rep., 395, 408, 460.)

1. The plaintiffs contend that if they are a corporation capable of suing, they must be capable of taking and holding land.

2. That the right to take and hold lands is incident to a corporation. (Com. Dig., 258, F. 18, 260, F. 18, 19; Co. Lit., 2 a, 2 b; Sid., 162; Co. Rep., 30-36; Sir William Jones' Rep., 168.)

3. That the corporation existed at and prior to the date of the charter of Pawlet, 1761.

It being admitted by the pleadings that the plaintiffs are a corporation, there is no presumption against its prior existence, at any period within the time whereof the memory of

man runneth, &c. Its prior existence is matter of general history, of which the court will take notice as matter of law.

The extracts from the records prove the existence of the corporation in 1762, by acts which refer back to the New Hampshire charters, as grants made to the corporation then existing. The preamble of the Act of 1794, under which the defendants claim, recognizes all grants made to the society as made to an existing corporation:

Whereas, The Society for the Propagation of the Gospel in Foreign Parts is a corporation created by, and existing within a foreign jurisdiction, to which they alone are amenable; by reason whereof, at the time of the late revolution of this and of the United States from the jurisdiction of Great Britain, all lands in this State granted to the Society for the Propagation of the Gospel in Foreign Parts became vested in this State," &c. The lease of the tenant admits that the land in question was granted by said charter to the society. *The New Hampshire charter of the [**486** town, of 1761, recognizes the plaintiffs as then being an existing corporation. That charter, being a royal grant, by granting the lands to the plaintiffs, made them a corporation capable of taking and holding the lands thus granted, if they were not so before. (Cited, Dyer, 100, pl. 70; *The Aldermen of Chesterfield's case*, Cr. Eliz., 35; 10 Mod. Rep., 27, 208.) By the Act of 1794, all grants of land to the society are recognized as grants originally valid, and so continuing until the Revolution; by reason of which, the act declares the lands became vested in this State.

The State claims the right of the society as forfeited to the State, and grants the right to the town; and the tenant, in 1795, acknowledges the right of the town by his lease, &c., and both are in under the act.

The plaintiffs contend that the defendants have admitted the right of the plaintiffs (see *Atlantic Insurance Company v. Conard*, 1 Peters' Rep., 450), and are estopped from denying the original right of the plaintiffs at any time prior to the Revolution. (Cited, 10 Johns., 353, 358, 292, 223; 12 Johns., 182; 3 Caines, 188; 2 Schf. & Lef. 73, 109.)

The plaintiffs are not barred by the Act of Limitation of 27th October, 1785.

1. The plaintiffs contend that the statute gives no title; that it bars only the action, and not the right of entry; and that the bar has been avoided by entry of the town, and the leases between the defendants.

Clarke, the father of the defendant, entered before the 1st of October, 1780, without color of title, and (without considering the exception to the clause) the action was barred in 1788. In 1795 Clarke permitted the town to enter (which the execution of the lease supposes), accepted a lease from the town (this he acknowledges in the counterpart executed by him, and by the payment of rent), and thereby acknowledged the right of the town.

The statute bars only the remedy therein named. (Bal. on Lim., 59; 2 Salk., 422; Bro. Parl. Cas., 67; Lord Raym. Rep., 741.)

2. The defendants are estopped by their leases from *setting up this defense [**487** under this statute. The tenant, by accepting a

lease, acknowledges the title of the landlord, and disclaims his own; and the town enter and lease expressly in virtue of their title under the Act of 1794: both parties recognize that as the only existing title.

The case must now rest on the title of the landlord; and he cannot set up this title, as it would show title out of the landlord and in the tenant, which would be repugnant to the effect of the lease. And the tenant can set up no title against his landlord on the ground that he can have no such title. (*Blight's Lessee v. Rochester*, 7 Wheat., 547; 6 Johns. Rep., 34; 1 Caines's Rep., 444; 2 Caines's Rep., 215; 3 Caines's Rep., 188; 2 Camp. Rep., 12, and notes.) The plaintiffs' rights are saved by the ninth section of the act: "provided always, and it is hereby further enacted by the authority aforesaid, that this act shall not extend to any person or persons settled on lands granted or sequestered for public, pious, or charitable uses."

1. The plaintiffs contend that the words "this act," *ex vi termini*, extend to the whole act. 2. That the proviso can only be limited by construction; and that statutes of limitations are construed strictly to save the rights of the legal owner, especially an act limiting actions to two years and eight months, without any saving clause in favor of persons beyond seas. The statute 12th of Hen. VIII., c. 2, enacted that formedons in remainder and reverter should be brought within fifty years. It was holden not to extend to formedons in descender. (Co. Lit., 115; Hargrave's Notes, 148.) 3. The restrictive construction would be unreasonable. The effect would be to give the settler no improvements, if sued for public lands on the 30th of June; but would give him the land, together with the improvements, if sued the next day. 4. No inference can be drawn from the location of this section; for if it were conceded that the proviso of the fourth section extended only to the parts of the act relating to improvements, it would furnish no reason why a subsequent section of provisos should not extend to the whole act.

The fourth section is placed in the middle of those respecting improvements, and therefore **488***] must apply to what follows, *as well as what precedes it. Besides, it will be found that this section applies to the clause of limitation also.

The counsel then went into a particular examination of the statutes of Vermont on the subject of limitations, and contended that the construction of the whole Act of the 27th of October, 1785, is, that when a person entered into possession of lands of another, to which he had purchased a title, supposing at the time of the purchase such title to be good in fee, he shall be entitled to recover of the owner the value of the improvements and one half of what said lands are risen in value; and shall be quieted in possession of the lands if he remains till after the 1st of July, 1788, without suit against him.

That if he entered without a supposed title, he shall be entitled to recover the value of his improvements; but he shall have no allowance for the rise of the land. But if, by the proviso in the fourth section, he entered after the 1st day of October, 1780, he shall not be entitled

to recover for his improvements, nor be protected by the clause of limitation. And if he entered after the 1st day of July without legal title, he could not recover improvements, nor be protected by the clause of limitation.

And if he got possession at any time by actual ouster of the legal owner, according to the fourth section, or had "settled on lands granted or sequestered for public, pious, or charitable uses," or had got the possession of lands by virtue of any contract with the legal owner, according to the ninth section, he could not recover for improvements, nor be protected by the clause of limitations.

He denied that the construction contended for by the defendant was correct.

1. From the history of the act. 2. That it is contrary to the intention of the Legislature, as shown by a particular examination of the laws relative to limitations. 3. From the acts of the Legislature exempting the public rights from the grand list of the State, from which all annual taxes are made up for the support of government, schools, highways, the poor, &c.

*2. The defendants are not protected [***489** by the general statute of limitations passed the 10th of March, 1787. This statute has no operation upon any case where the cause of action has accrued before the passing thereof. The words of the statute are: "No act of ejectment, &c., shall hereafter be sued, &c., for the recovery of any lands, &c., where the cause of action shall accrue after the passing of this act; but within fifteen years next after the cause of action shall accrue to the plaintiff or demandant, &c." (Has. Ed. of the Stat., 100, 101.)

But what is very decisive of this question is, that both the general statutes of limitations above referred to contain a proviso in favor of infants, &c., and persons beyond seas. The statutes, therefore, have never commenced running against the plaintiffs in this case, they having always been beyond seas.

The plaintiffs then contend that they are entitled to recover the seisin and possession of the lands, because, 1. The cause of action had accrued before either of the statutes of limitation had passed, and is therefore not with the enacting clauses. 2. If it was, still the right of the plaintiffs is saved under the proviso to protect the lands granted for public, pious, or charitable uses. 3. Because the plaintiffs always have been, and still are, beyond seas.

The plaintiffs are entitled to recover for mesne profits.

At common law, an action of trespass, after recovery in ejectment, was the proper action to recover the mesne profits and such other damages as the plaintiffs had sustained. (Run. on Eject., 156, 157; Bul. N. P., 87; 3 Wil. Rep., 121.) An action for the mesne profits was consequential to the recovery in ejectment. (*Aslin v. Parker*, 2 Bur. Rep., 668.)

The common law of England was adopted by statute so far as is not repugnant to the constitution, or to any act of the Legislature. (See Has. Ed., 28.) The form of the English action was adopted by statute, and was the only form used till the statute of 1797. (Has. Ed., p. 196.) And upon recovery, the action of trespass was the only action used to recover mesne profits and any other damages: for in the action of trespass, the plaintiff was not confined to the

490*] mesne *profits only; he was entitled to recover for any damages which the defendant had done to the premises—such as cutting timber, or injuring or pulling down buildings, or removing fixtures, &c. Costs in ejectment were recovered as damages in the action of trespass. (2 Bur. Rep., 665.)

The court say that damages may be recovered to four times the amount of the mesne profits. (3 Wils. Rep., 121.)

It remains to inquire for what length of time we are entitled to recover.

1. We contend that as the action itself is within provisos protecting the plaintiffs from the operation of the statutes of limitations, it extends to all the incidents of the action in which the land itself is recovered, and, consequently, will go back to the first entry of the defendant.

2. If not, the plaintiffs are entitled for fifteen years before the commencement of the suit. The action of ejectment generally is limited to fifteen years, and that time in all cases would regulate the other incidents of the action.

The reason why (that at common law there could be no recovery beyond six years) is because the damages must be recovered in an action of trespass, and that action was limited to six years.

The statute of 1797 merely changed the remedy to the form now used. (Comp. L., 84; Toll. Ed., 90, 91.) By this statute the plaintiff is entitled to recover as well his damages, as the seisin and possession of the premises. Under this statute the plaintiff is entitled to recover for the same injuries, and to the same amount, as before the alteration he was entitled to recover in the action of trespass. The first restriction upon such recovery was introduced by a statute passed November 5th, 1800 (Toll. Ed., 211; Comp. L., 176), by the third section of which it is enacted "that in all actions of ejectment which now are, or hereafter may be brought, the plaintiff, &c., shall recover nothing for the mesne profits, except upon such part of said improvements as were made by the plaintiff or plaintiffs, or such person or persons under whom he, she, or they hold." By the fifth section it is provided "that this act shall not extend to any person or persons in **491***] possession of any lands granted for *public or pious uses;" and by the eighth section "this act shall not extend to any person or persons who shall enter upon and take possession of lands after the passing of this act."

It follows, therefore, that as the defendants are upon lands appropriated to public, pious, and charitable uses, that they are not entitled to the benefit of this provision of the act. It follows, also, that, as this provision of the act can operate only upon cases that had taken place before the passing of the act, it is wholly retrospective and void. (See 2 Gall. Rep., 139; 7 Johns. Rep., 477.)

Mr. Doddridge, for the defendants, argued:

1. The plaintiffs have shown no capacity to recover these lands, or to hold them. They have offered no evidence of a charter of incorporation, constituting them a body politic, or any act of incorporation authorizing them to institute this suit. This is essential to the commencement of the suit; and the plaintiffs, for Peters 4.

want of such proof of their existence as a corporation, have failed *in limine*.

The rule of law is that every person, natural or artificial, who would avail himself of a deed or take any benefit by it, must produce the deed itself. (10 Coke, 92, *a, b.*) And this rule prevails, without exception, in relation to charters or other acts erecting bodies politic. Without such a charter they can have no legal existence. (*Page's case*, 1 Coke, 52; *Rea v. Passmore*, 3 Term Rep., 247; 8 Coke, 8; Coke Lit., 225; 8 Johns. Rep., 295; Lord Raym., 1535; Kyd on Corp., 292; Bul. *Nisi Prius*, 107.)

Before any corporate act can be given in evidence, its charter must be produced. (*United States v. Johns*, 4 Dall., 412.)

It has been supposed that the existence of the society having become matter of history, it is unnecessary to show the court its corporate character and capacity by producing the act of incorporation.

The distinction between such facts as may or may not be proved by history is well settled. Those which are of *general concern, [**492***] which affect nations, as the revolutions of governments and the succession of princes, may be proved by history. But the evidence of a private right, as a custom, or of a corporation, which is of much less notoriety than a custom, cannot be so proved. (1 Salk., 281.)

Is it assumed by the plaintiff that the existence of this society as a corporation is acknowledged by the royal grant of the town of Pawlet, made by Governor Wentworth in 1761?

Is it true that a royal grant of land to an indefinite number of individuals, by a general description, is of itself to be received against strangers as evidence of the corporate capacity of the individuals? This court, in *Pawlet v. Clarke et al.* (9 Cranch, 172), determined such a grant to be void.

The doctrine urged by the plaintiff is conceived to be without authority, and contrary to the whole theory of "king's grants." The king's grants shall not enure to any other intent than that which is precisely expressed in the grant. (2 Bl. Com., 347.)

Is it true that the right to hold lands is legally incident to a corporation? This is denied. A corporation can only act up to the end or design, whatever that may be, for which it was created by the founder. (1 Bl. Com., 480.) Corporations cannot be seized of lands for the use of another. (Bacon on Uses, 347; 1 Bl. Com., 477.) The cases cited for the plaintiffs, of the effect of a grant of lands by the king to a corporation, do not sustain the principle.

It is alleged that the General Assembly of Vermont, by several legislative acts, have recognized all grants made to the society as made to an existing corporation.

None of the acts of the Legislature recognize the right of any foreign company to take or hold land. The interference of the Assembly was for purposes entirely distinct, if not adverse to such recognition.

The acts of Vermont are founded on the supposition that these lands are vacant, and in default of ownership needed the care of the Legislature. Even the last act, which grants the lands to the towns in which they lie for the use of schools, although it mentions them as hav-

493*] ing been granted to "The *Society for Propagating the Gospel in Foreign Parts," does not recite, affirm, or admit the fact of the incorporation of such society; much less its capacity to hold lands in perpetual succession.

But if it had done so, it would have left the question, for every practical purpose, where it found it. The State has no power over any foreign society or body whatsoever.

It is denied that an express declaration by the Legislature that the plaintiffs are a corporation and competent to sue would have any operation. It has been settled in Vermont, on solid grounds, that it is not competent for the Legislature to supply evidence to a party in a particular case. (1 Chip. Rep., 237.) What is legal or pertinent evidence, is a question exclusively for the court to determine.

The Legislature has power to create a corporation; but it has no power to create one within the realm of Great Britain.

Neither the people of Vermont nor the defendants have ever known anything of the society but its name. Nearly seventy years ago the charter of this town of Pawlet, containing the lands sued for, was issued in the name of the king.

The town has been divided among the grantees. The forest has been felled, and the soil made fruitful by its owners. For fifty years the defendant and his ancestors have peaceably possessed this land, now claimed by a supposed body of men of whom nothing is known—men who have never attempted to locate the lands, who never improved it, possessed it, or ever claimed to possess it.

Recently, certain persons in this county, not pretending to be of the society, have required the occupant of the soil, who has so long cultivated and improved the lands, to yield them to a foreign corporation of whose capacity or right they knew nothing, and of which they pertinaciously refuse to exhibit any evidence. May not the validity of a claim so circumstanced be well doubted? Does not the legal suspicion attach to the withholding of the charter that if it was exhibited it would develop circumstances fatal to the claim of the society?

Again, it is insisted that the defendants cannot **494***] not require *the production of this charter, because the town of Pawlet has taken possession of this property as having been the property of the society, and so continued until the Revolution; described it as known by the name of "the society right," and now claim it as forfeited by the Revolution.

Where a party resorts to the admissions of his adversary, the whole admission must be taken together. Adopt this rule, and the title of the defendants is indisputable. If it is admitted that the land once belonged to a body corporate, the same statement asserts that it no longer belongs to it, but has been forfeited.

As to a legislative recognition, it cannot avail, if to enact facts for a particular case is contrary to law, and this is certainly so.

If it be said that if the lands were not the property of the society there would be nothing for the statute of Vermont to operate on, the answer is that the words of the statute which refer to "the society land" are descriptive, and no more.

It is not well supposed that the defendants

hold or claim to hold under a grant from Vermont. They are in peaceable possession of the land, and have held it for nearly half a century under a legal and a fair title, as they believed; and on this they have a right to rest until a better right shall be made to appear by legal, competent and appropriate testimony.

It is an indispensable rule in ejectment that the plaintiff must entitle himself to recover by the force of his own legal title, and he can derive no support from the weakness of his adversaries.

Evidence of title consists, 1. In showing possession and acts of ownership, from which the legal title may be presumed.

2. In proving a particular title. (2 Stark. on Ev., 514.) He who claims as heir must prove the seisin of his ancestor, and afterward that he is heir. A guardian in socage, who has an interest in the land, must in ejectment prove that his ward is heir; that he is guardian; that his ward is then under the age of fourteen. (2 Stark. on Ev., 521.) These *authorities show [***495** the error of the assumption that the defendants, having pleaded the general issue, admitted the right of the plaintiffs to sue as a corporation.

"The general issue," says Sir William Blackstone, "is what traverses and denies at once the whole declaration." (3 Com., 306.) How the denial of the whole can be construed an admission of a part, or any part of the right of the party, is not perceived.

It is agreed that temporary disabilities, which delay the suit only, cannot be relied upon under the general issue. It is only an admission that the party named may sue, not that he has a right to recover what he sues for, either in the way he sues or in any other. His title to recover in all such cases depends on his proof. The nonjoinder of all the parties in interest in a suit is fatal; and yet the principle which is claimed for the plaintiff negatives this well established and proper rule. It is not an answer on the trial to the objection of want of parties, when the evidence of the plaintiff is given, showing that he is not the only party who can claim to recover; that the general issue has been pleaded, and that all such objections have been waived. The spirit of the rule which is claimed in this case should go further to protect a plaintiff showing some right, although not the whole right, than to maintain that one can sue who has shown no right at all.

The case of *Conard v. The Atlantic Insurance Company* (1 Peters, 450), when examined, asserts nothing contrary to the principles which are now stated. In that case, it is said by the distinguished and lamented judge who tried the case at the Circuit Court of Pennsylvania, Judge Washington, that the object of the suit "was to try the merits of the case;" and a technical objection taken to defeat the declared purpose of the parties came in under no favor.

If one sues as guardian, executor, or in any fiduciary character, the general issue does not confess his character, and he must prove it. So if an assignee sue, he must, on the general issue, prove the assignment. In this case the plea does not question the right of the plaintiff to sue; but as the plea denies every material allegation in the declaration, it *cannot [***496** admit they have title to the thing demanded, or

capacity to acquire it, or any matter or thing touching the title.

It is urged that the defendants are estopped by the lease from disputing the capacity of the plaintiffs to take the land. A tenant, it is well said, is estopped to deny the title of his landlord; but the defendants are not tenants to the society. They have shown no title but possession, nor are they bound to exhibit any other, until some title is exhibited by the plaintiffs.

There is no privity of contract, action or interest, or relation between the plaintiffs and the defendant; and the doctrine of estoppels applies to such cases. What privity or relationship exists between the defendants and the pretended corporation? The very fact of capacity (which it is the object of the reasoning of the plaintiffs' counsel to infer or assume) should be proved by proper evidence, before any foundation is laid for inferences. It is required first to assume the corporate capacity of the plaintiff, then the relationship of the defendants to it, to estop the defendants' denial. Such assumptions are not warranted by the law, or by the facts of the case.

If the facts were as the plaintiffs assume, they do not form a legal estoppel and prevent the defendant from a denial of the capacity of the plaintiffs to sue for these lands or to hold them.

Every estoppel ought to be reciprocal; that is, to bind both parties. (3 Coke, 352.)

The name given to the land in the lease "known by the name of the society or propagation right," is not the name in which the plaintiffs declare; it may be as well appropriated to one society as to another.

Upon the statutes of limitations it is contended that the plaintiffs are barred of their right of action, should the court consider that they have established a capacity to maintain their suit.

Under the provisions of the Act of 1785 the defendant is fully protected. The record shows that the father of the defendant entered on the **497***] land in the spring of 1780, and *continued in possession until April, 1795, when his son entered, and has ever since continued in the possession of the land. It is fairly to be inferred that Ozias Clarke came into possession under his father. And thus a possession of upwards of forty years is made out—a length of possession undisturbed, which entitles the party to the most favorable consideration. On the 10th of March, 1787 the Legislature passed the Quiet- ing Act; which, it is admitted, does not embrace this case; but it is referred to in order to show the existence of a general disposition in the Legislature to impose limitations on all titles derived from the mother country. It was doubtless the intention of the Legislature that the alarm as to titles growing out of the revolutionary struggle should be allayed, and that the holders and occupants of lands so situated should be speedily quieted in their titles, and their titles made complete, under the special legislation growing out of the exigencies of the times. The rights of these parties, we therefore contend, vested under these laws, and no subsequent laws can divest them. The laws thus made constituted a contract on the part of the State; so far, at least, as that the title vested under the laws should not be divested by a repeal or change of the law of limitations.

The plaintiffs contend that the last proviso, Peters 4.

save one, in the Quiet- ing Act, exempts the society from the limitations of the last section.

On the part of the defendants, it is urged that this proviso applies only to the previous part of the law; and by its position, as well as its purpose, is so restricted. Should it have the operation claimed for it by the plaintiffs, it will entirely defeat the purposes of the statute.

The Act of 1795 consists of two distinct and independent parts, the subjects of which bear to each other no affinity or connection; no more than if the legislation upon them was in two distinct laws. A particular examination of the sections of the law fully supports this position.

Sound principles of construction, and the requirements of justice determine, in order to attain the intention of the Legislature, that the two parts of the statute be treated as separate *and distinct; as much so as if con- [**498** tained in two statutes.

Separate statutes, or several statutes upon the same subject, are to be considered as one subject, for the purpose of interpretation. (1 Burr., 447.) So if two distinct matters be embraced in one statute, they shall be considered as two acts. (7 Bac. Abr., 551; Hob., 226; Perkins, 13, 14.)

The Act of Limitations of 1785, it is contended, is the only one applicable to the case; and it has no exception in favor of persons "beyond sea." Those words in the law of 1787 have nothing to do with this controversy.

But if they had, this is in the nature of an exception to the statute, and it is to be proved by him who would take advantage of it. That these corporations were beyond sea is not proved, and it is not to be presumed.

This court has determined that to give the court jurisdiction you may look back of the corporation, and must find, in case the jurisdiction is claimed between citizens of different States, that none of the corporators are citizens of the same State with that of the adverse party.

It is contended that the statute of limitations does not apply, because the entry of the defendants, and those under whom they claim, was upon a supposed title. This is denied. The defendant, Clarke, is in possession; and this is all that can be required of him until the plaintiffs have shown their title. The terms of the act clearly embrace the case of the defendants, and the plaintiffs have made out no case of exception. It is understood that the decisions of the courts of Vermont on this statute have always been according to the literal meaning of the law.

It is denied that the Act of 1801, by excepting lands of the description of those claimed by the plaintiffs, reserves the remedy for the recovery of these lands. The argument that no subsequent statute could affect rights acquired under a precedent law has already been submitted, and it is also said with confidence, that the court will not admit that a repeal of the prior law was intended by implication. The Act of 1805 is considered as in full force in Vermont, and many titles depend upon it.

*Are the plaintiffs entitled to recover [**499** mesne profits, and for what time?

There is a strong analogy between the limitation of actions for the recovery of the land, and for the recovery of mesne profits. At common

law there could be a recovery for a longer period than six years.

In England, where the right to recover for mesne profits was first established, the defendants had probably been, in all the cases, occupants of improved land. In this case the claim of the plaintiffs is for the mesne profits of land which, when first possessed, was in a state of nature, and which has been made productive by the industrious improver. Every principle of justice would require that a claimant under a long dormant title, should not have a compensation for an occupancy which had conferred upon the property such additional value.

In accordance with these principles the Legislature of Vermont have acted, and while on the one hand they have secured to the occupant the value of his improvements, on the other they have denied to the successful claimant any supposed profits of lands, unimproved when the occupation of the defendant commenced. (Act of the Legislature of Vermont, the 15th of November, 1820.)

This action was commenced in 1824, and is clearly within the provisions of this act, and there is nothing in the distinction as to the title under which the defendants held.

It would seem to have been the manifest intention of the Legislature of Vermont, while it denied the occupants without supposed title the value of their improvements, to relieve them from liability for mesne profits; to which, being benefited by the improvements which the party recovering the land takes without compensation, he could have no just claim.

Mr. Webster, in reply:

As to the capacity of the plaintiffs to take and hold the lands. The capacity in which they act is admitted in the pleadings. They sue as a corporation, and they are by the plea of the general issue admitted to be such, and so to **500*** be taken. The capacity of the corporation to hold lands is sufficiently proved by producing a grant of lands to it by the king himself. The difference between this case and that of *The Town of Pawlet v. Clarke*, in 9 Cranch, is that the grant was there to the Church of England, and not to a corporation.

The defendants claim under the Act of 1794, which act admits the existence of the corporation, and of their capacity to take the lands.

The lease to the defendant from the town of Pawlet shows that he claims under the crown. The town claims under the State, and the State claims under the society, and the society hold under the crown. The State assert their right as successors to the society on the occurrence of the Revolution. Thus all parties claim under the crown, and all are bound by their acts.

As to the statute of limitations, he said that the act only barred the action, not the entry; and in 1794 the town of Pawlet actually entered in this very right. They entered as having acquired the right of the society, and holding under it.

The defendant, Clarke, admitted this right; he now holds the lands under it, and he cannot

dispute the right, although he may deny that the right belongs to the plaintiffs, and may contend that it has passed to the town.

The defendant cannot set up any title but that under which he entered; and having entered under the town, that title and that alone can he set up; on that title only can he stand.

Mr. Justice STORY delivered the opinion of the court; *Mr. Justice BALDWIN* dissenting on the first point:

This cause is certified to this court from the Circuit Court for the District of Vermont, upon certain points upon which the judges of that court were opposed in opinion.

The original action was an ejectment in the nature of a real action, according to the local practice, in which no fictitious persons intervene; and it was brought in May, 1824, to recover a certain lot of land, being the first division lot *laid out to the right of a society [**501** in the town of Pawlet. The plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England, within the dominions of the King of the United Kingdom of Great Britain and Ireland, the members of which society are aliens and subjects of the said king." The defendants pleaded the general issue, not guilty, which was joined; and the cause was submitted to a jury for trial. By agreement of the parties at the trial, the jury were discharged from giving any verdict, upon the disagreement of the judges upon the points growing out of the facts stated in the record. Those points have been argued before us, and it remains for me to pronounce the decision of the court.

The first point is whether the plaintiffs have shown that they have any right to hold lands.

In considering this point, it is material to observe that no plea in abatement has been filed, denying the capacity of the plaintiffs to sue; and no special plea in abatement, or bar, that there is no such corporation as stated in the writ.¹ The general issue is pleaded, which admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. (*Conard v. The Atlantic Insurance Company*, 1 Peters's Rep., 386, 450.)²

But the point here raised is not so much whether the plaintiffs are entitled to sue generally as a corporation, as whether they have shown a right to hold lands. The general issue admits not only the competency of the plaintiffs to sue, *but to sue in the particular [**502** action which they bring. But in the present case, we think, there is abundant evidence in the record to establish the right of the corporation to hold the lands in controversy. In the first place, it is given to them by the royal charter of 1761, which created the town of

1.—Comyn's Dig., Abatement, E. 16; Mayor, &c., of Stafford v. Bolton, 1 Bos. & Pull., 40; 1 Saunders's Rep., 340; Williams's Notes; 6 Taunt. Rep., 467; 7 Taunt., 546.

2.—See the case of Sutton Hospital, 10 Co., 30, b;

Comyn's Dig.; Franchise, F. 6, 10, 11, 15; Capacity, A. 2; see also Proprietors of Kennebeck Purchase v. Call, 1 Mass. Rep., 482, 484; Mayor, &c., of Stafford v. Bolton, 1 Bos. & Pull., 40; 1 Saunders's Rep., 340, note by Williams.

Pawlet. Among the grantees therein named is "The Society for the Propagation of the Gospel in Foreign Parts," to whom one share in the township is given. This is a plain recognition by the crown of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed. And the other proceedings stated on the record, establish the fact that the society had received various other donations from the crown of the same nature, and had accepted them. Besides, the Act of 1794, under which the town of Pawlet claims the lands, distinctly admits the existence of the corporation, and its capacity to take the very land in controversy.

"Whereas," says the act, "The Society for the Propagation of the Gospel in Foreign Parts is a corporation created by and existing within a foreign jurisdiction, to which they alone are amenable; by reason whereof, at the time of the late revolution of this and of the United States from the jurisdiction of Great Britain, all lands in this State, granted to The Society for the Propagation of the Gospel in Foreign Parts, became vested in this State," &c.

And the act then proceeds to grant the right of the State, so vested in them, to the various towns in which they are situated. So that the title set up by the State is under the society, as a corporation originally capable to take the lands, and actually taking them; and their title being divested, and vesting in the State by the Revolution. In the latter particular the Legislature were mistaken in point of law. This court had occasion to decide that question in *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven* (8 Wheat., 464); where it was held that the Revolution did not divest the title of the society, although it was a foreign corporation. That case came before us upon a special verdict, which found the original charter of the society **503***] granted by William III., and *its power to hold lands, &c. We do not, however, rely on that finding, as it is not incorporated into the present case. But we think the other circumstances sufficient, *prima facie*, to establish the right of the society as a corporation to hold lands; and particularly the lands in question. In *Conard v. The Atlantic Insurance Company* (1 Peters's Rep., 386, 450), the court held evidence far less direct and satisfactory, *prima facie* evidence of the corporate character of the plaintiffs. A certificate ought accordingly to be sent to the Circuit Court in answer to the first question; that the plaintiffs have shown that they have a right to hold the lands in controversy.

The second point is, whether the plaintiffs are barred by the three years' limitation in the Act of the 27th of October, 1783, or any other statute of limitations of Vermont.

The Act of 1785 recites in the preamble that many persons have purchased supposed titles to lands within the State, and have taken possession and made large improvements, &c. It then proceeds to provide in the first eight sections for the allowance of improvements, &c., to the tenants, in cases of eviction under superior titles. There is a proviso which prevents these sections from extending to anything future. The ninth section is as follows: "Pro-

vided always, and it is hereby further enacted by the authority aforesaid, that this act shall not extend to any person or persons settled on lands granted or sequestered for public, pious, or charitable uses; nor to any person who has got possession of lands by virtue of any contract made between him and the legal owner or owners thereof." The tenth section provides that nothing in the act shall be construed to deprive any person of his remedy at law against his voucher. The eleventh and last section is as follows: "That no writ of right or other real action, no action of ejectment or other possessory action of any name or nature soever, shall be sued, prosecuted or maintained for the recovery of any lands, tenements or hereditaments, where the cause of action has accrued before the passing of this act; unless such action be commenced within three years next after the 1st of July in the present year of our Lord, 1788."

*Now, in order to avail themselves [**504** of the statute bar under this last section, it is necessary for the defendants to show that the cause of action of the plaintiffs accrued before the passing of that act. To establish that, it is necessary to show that there had been an actual ouster of the plaintiffs by some person entering into possession adversely to the plaintiffs. No such ouster is shown upon the facts. It is, indeed, stated "that Edward Clarke, the father of the said Ozias Clarke, went into possession of the said lot in the spring of the year 1780, it not appearing that he had purchased any title thereto; and so continued in possession thereof until the said defendant entered as aforesaid;" that is, under the lease of the town. Edward Clarke is, therefore, to be treated as a mere intruder, without title; and no ouster can be presumed in favor of such a naked possession. And it is not unworthy of notice that the fourth section of the Act of 1785 provided "that no person, who hath ousted the rightful owner, or got possession of any improved estate by ouster, otherwise than by legal process, shall take any advantage or benefit by this act." So that a plain intention appears on the part of the Legislature not to give its protection to mere intruders who designedly ousted the rightful owners.

It is also to be considered that the defendants do not assert any claim of title under him or in connection with him; and the other circumstances of the case lead to the presumption that he never set up any possession adverse to the society's rights; for the possession was yielded without objection to the town when the Act of 1794 enabled the town to assert a title to it.

The Act of 1785, being then in terms applicable only to cases where the cause of action accrued before the passing of that act, cannot govern this case where no such cause existed. There is, moreover, another difficulty in setting it up as a bar, if the proviso of the ninth section extends, as we think it does, to every section of the act. It has been argued by the counsel for the defendants that the ninth section ought to be restricted in its operation to the eight preceding sections. But we see no sufficient reason for this. The words are "that this act shall not extend," &c.; not *that [**505** the prior section of this act shall not extend, &c. It would be strange, indeed, if the Legislature should interfere to prevent any im-

provements being paid for in cases of lands granted or sequestered for public, pious, or charitable uses; and yet should allow so short a period as three years to bar, forever, the right of the grantees for charity. There are good grounds why statutes of limitation should not be applied against grants for public, pious, and charitable uses, when they may well be applied against mere private rights. The public have a deep and permanent interest in such charities; and that interest far outweighs all considerations of mere private convenience. The Legislature of Vermont has thought so; for we shall find, in its subsequent legislation, that it has by a similar provision excepted from the operation of all the subsequent statutes of limitation, grants to such uses. There is, then, no reason why the court should construe the words of the ninth section as less extensive than their literal import. The ease ought to be very strong which would justify any court to depart from the terms of an act, and especially to adopt a restrictive construction which is subversive of public rights, and justified by no known policy of the Legislature. We feel compelled, therefore, to construe the words, that "this act shall not extend, &c.," as embracing the whole act, and carving an exception out of the operation of the eleventh section of it.

Let us then see how far any subsequent statute of limitations of the State applies to the ease. The next statute in the order of time is the Act of the 10th of March, 1787, which provided as follows: "That no writ of right or other real action, no action of ejectment, &c.," shall "hereafter be sued, &c., for the recovery of any lands &c., where the cause of action shall accrue after the passing of this act, but within fifteen years next after the cause of action shall accrue to the plaintiff or demandant, and those under whom he or they may claim. And that no person having a right of entry into any lands, &c., shall hereafter thereinto enter but within fifteen years after such right of entry shall accrue." This act contained no provision excepting grants for public, pious, or charitable uses from its operation. But it contained a **506*** proviso that the act should not extend to bar any infant, person imprisoned, or beyond seas, without any of the United States. The act was prospective, and applied only where the cause of action accrued after the passing of it. This act was superseded and repealed by another Act of the 10th of November, 1797, which constitutes the present governing statute of limitations of the State. It contains, however, a proviso (see. 13) that the act shall not be construed to extend to or affect any right or rights, action or actions, remedies, fines, forfeitures, privileges, or advantages, accruing under any former act or acts, clause or clauses of acts falling within the construction of that act, in any manner whatsoever; but that all proceedings may be had, and advantages taken thereon, in the same manner as though that act had not been passed; and that the former act or acts of limitation, clause or clauses of acts, which are or were in force at the time of passing the act, shall, for all such purposes, be and remain in full force. This proviso preserved the operation and force of the Act of 1787, as to causes of action accruing in the intermediate period between the Act of 1787 and the Act of 1797.

In this view of the matter, it is important to consider the entry of the defendant under the lease of the town, on the 16th of April, 1795. If that entry was adverse to the title of the plaintiffs, then the Act of 1787 began to run upon it from that period; for the cause of action of the plaintiffs then accrued to them by the ouster.

It has been contended by the plaintiffs' counsel that the entry of Clarke under the lease in 1795 was an entry for the plaintiffs, and in virtue of their title, and not adverse to it. We do not think so. The town of Pawlet claimed the right to the property, not as tenants to, or subordinate to the right of the plaintiffs, but as grantees under the State. Their title, though derivative from, and consistent with the original title of the plaintiffs, was a present claim in exclusion of, and adverse to the plaintiffs. They claimed the possession, as their own, in fee-simple; and not as the possession of the plaintiffs. A vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor. [**507** He enters and holds possession for himself, and not for the vendor. Such was the doctrine of this court in *Blight's Lessee v. Rochester*. (7 Wheat. Rep., 535, 547, 548.) The lessee in the present case did not enter to maintain the right of the plaintiffs, but of the town. He was not the lessee of the plaintiffs, and acquired no possession by their consent, or with their privity. This entry, then, was adverse to any subsisting title in them, and with an intention to exclude it. It was, therefore, in every just sense, an entry adverse to, and not under the plaintiffs.

The case then falls within the Act of 1787; and unless the plaintiffs are "beyond seas" within the proviso of that act, they would, upon the mere terms of that act, be barred. The facts stated upon the record do not enable us to say whether there is absolute proof to that effect. The plaintiffs are a foreign corporation, the members of which are averred to be aliens and British subjects; and the natural presumption is, that they are resident abroad. If so, there cannot be a doubt that they are within the exception. If any of the incorporators were resident in the United States, then a nearer question might arise as to the effect of the proviso: whether it applied to the corporation itself, or to the incorporators, as representing the corporation. But this it is unnecessary to devise, and on this we give no opinion.

There is the less reason for it, because, by a subsequent Act, passed on the 11th of November, 1802 (long before the fifteen years under the Act of 1787 had run), it was provided "that nothing contained in any statute of limitations heretofore passed shall be construed to extend to any lands granted, given, sequestered or appropriated to any public, pious, or charitable uses; or to any lands belonging to this State. And any proper action of ejectment or other possessory action may be commenced, prosecuted, or defended for the recovery of any such land or lands, anything in any act or statute of limitations heretofore passed to the contrary notwithstanding." This act of course suspended the Act of 1787 as to all cases within its purview. That the grants to the society for the propagation of the gospel were deemed to be grants for pious and charitable uses within it,

508*] is apparent *from the subsequent legislation of the State, as well as from the objects of the institution. In November, 1819, the Legislature passed an Act repealing this exception, so far as related to the rights "of lands in the State granted to The Society for the Propagation of the Gospel in Foreign Parts," thus plainly declaring that they were previously protected by it. This repeal cannot have any retrospective operation, as to let in the general operation of the statute of limitations in the intermediate period between 1802 and 1819; but must upon principle be held to revive the statute only in future. The present suit was brought in 1824, and the statute period of fifteen years had not then run against the plaintiffs.

It is unnecessary to enter upon the consideration of the statute of limitations of 1797, which contains similar provisions as to this subject with that of 1787, and the exception of persons "beyond seas." Charitable and pious grants were not excepted from its operation: but that defect was cured by an Act passed on the 26th of October, 1801, in terms similar in substance to those of the Act of 1802, already referred to. The Act of 1797 applies in terms only to future causes of action, to causes of action accruing after the passing of the act; and limits the action to the period of fifteen years. If it had applied to the present case, it would have been open to the same reasoning upon the exceptions which have been already suggested in reference to the Act of 1787.

Upon this second question our opinion is that a certificate ought to be sent to the Circuit Court that the plaintiffs are not barred by the three years' limitation, in the Act of the 27th of October, 1785, or by any other of the statutes of limitations of Vermont.

The next point is, whether, under the laws of Vermont, the plaintiffs are entitled to recover mesne profits; and if so, for what length of time.

Previous to the year 1797, the English action of ejectment was in use in Vermont, and the common law applicable to it, as well as the action for mesne profits consequential upon recovery in ejectment. By an Act passed on the 2d of March, 1797, the mode of proceeding **509***] was altered. *The suit was required to be brought directly between the real parties, and against both landlords and tenants; and by that and a subsequent act, the judgment was made conclusive between the parties. It was further provided that in every such action, if judgment should be rendered for the plaintiff, he should recover as well his damages as the scisin and possession of the premises. This provision has ever since remained in full force, and has superseded in such cases the action for mesne profits. In November, 1800, an Act was passed declaring, "that in all actions of ejectment which now are, or hereafter may be brought, the plaintiff shall recover nothing for the mesne profits, except upon such part of said improvements as were made by the plaintiff, or plaintiffs, or such person or persons under whom he, she, or they hold." The act contained a proviso that it should not extend to any person or persons in possession of any lands granted for public or pious uses. This act continued in force until November, 1820, when an Act passed containing the same general

provision as to the mesne profits; but the proviso in favor of lands granted to pious and charitable uses was silently dropped, and must be deemed to be repealed by implication.

The question, then, is, whether the Act of 1820 does not take away the right to mesne profits in this case; for the state of facts does not show that any improvements have ever been made by the plaintiffs. The Treaty of Peace of 1783, the British Treaty of 1794, do not apply to the case. The right of action, if any, of the plaintiffs, did not accrue until the year 1795. The entry then made by the defendants was the first ouster; and at that time, in the action of ejectment, the plaintiffs could not have recovered any damages; but would have been driven to an action of trespass for mesne profits. The Legislature was competent to regulate the remedy by ejectment, and to limit its operation. It has so limited it. It has taken away by implication the right to recover mesne profits, as consequential upon the recovery in ejectment, and given the party his damages in the latter action. It has prescribed the restrictions upon which mesne profits shall be recovered, and these restrictions are obligatory *upon the citizens of the State. [**510** The plaintiffs have not, in this particular, any privileges by treaty beyond those of citizens. They take the benefit of the statute remedy to recover their right to the lands; and they must take the remedy with all the statute restrictions.

Upon this last question our opinion is that it ought to be certified to the Circuit Court, that under the laws of Vermont the plaintiffs are not entitled to recover any mesne profits; unless so far as they can bring their case within the provisions of the third section of the Act of the 15th of November, 1820.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Vermont, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which points or questions were certified to this court for its opinion, in pursuance of the act of Congress for that purpose made and provided, and was argued by counsel; on consideration whereof, it is ordered by this court that it be certified to the said Circuit Court on the points aforesaid, that this court is of opinion, 1. That the plaintiffs have shown that they have a right to hold lands, and especially the lands in controversy. 2. That the plaintiffs are not barred by the three years' limitation in the Act of the 27th of October, 1785, or by any other of the statutes of limitations of Vermont. And, 3. That under the laws of Vermont, the plaintiffs are not entitled to recover any mesne profits, unless so far as they can bring their case within the provisions of the third section of the Act of Vermont of the 15th of November, 1820. All of which is accordingly hereby certified to the said Circuit Court of the United States for the District of Vermont.

Cited—5 Pet., 355, 439; 6 Pet., 743; 9 Pet., 735; 12 Pet., 456; 16 Pet., 54; 3 How., 690; 2 Wall., 349; 5 Wall., 287; 8 Wall., 603; 22 Wall., 101; 6 Otto, 329; 9 Otto, 199; 3 Wood. & M., 483; 2 Curt., 210; 5 McLean, 115; 4 Dill., 556; 17 Bank. Reg., 489.

511*] *JULIE SOULARD, Widow, ET AL.,
Appellants,

v.

THE UNITED STATES.

JOHN T. SMITH, Appellant,

v.

THE UNITED STATES.

Louisiana treaty—what is property in lands.

In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.

The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory, as well as those which are executed. In this respect the relations of the inhabitants of Louisiana to their government is not changed. The new government takes the place of that which has passed away.

THESE cases came before the court on appeals from the District Court of the United States for the District of Missouri.

In the District Court of Missouri, the appellants, under the Act of Congress of the 26th of May, 1824, instituted proceedings to try the validity of their claims to certain lands in Missouri, the titles to which they claimed to derive under the former Spanish government.

The District Court gave a decree against the claimants.

The cases were argued by *Mr. Benton* for the appellants, and by *Mr. Wirt* for the United States.

The facts of the cases and the arguments of the counsel are not reported, as the court held the causes under advisement.

Mr. Chief Justice MARSHALL stated:

The court have held the two cases of Souldard and John T. Smith against the United States under advisement. After bestowing upon them the most deliberate attention, we are unable to form a judgment which would be satisfactory to ourselves, or which ought to satisfy the public.

In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.

The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.

In the full confidence that this is the sentiment by which the government of the United States is animated, and which has been infused into its legislation, the court have sought sedulously for that information which would enable it to discern the actual rights of the parties, and to distinguish between claims founded on legitimate contracts with those authorized to make them on the part of the crown, or its immediate agents, and such as were entirely dependent on the mere pleasure of those who might be in power such as might be rejected without giving just cause of imputation against the faith of those in office. The search has been unavailing.

When Louisiana was transferred to the United States very few titles to lands, in the upper part of that province especially, were complete. The practice seems to have prevailed for the deputy-governor, sometimes the commandants of posts, to place individuals in possession of small tracts, and to protect that possession without further proceeding. Any intrusion upon this possession produced a complaint to the immediate supervising officer of the district or post, who inquired into it, and adjusted the dispute. The people seem to have remained contented with this condition. The colonial government, for some time previous to the cession, appears to have been without funds, and to have been in the habit of remunerating services with land instead of money. Many of these concessions remained incomplete.

*If the duty of deciding on these various titles is transferred by the government to the judicial department, the laws and principles on which they depend ought to be supplied. The edicts of the preceding governments in relation to the ceded territory; the powers given to the governors, whether expressed in their commissions, or in special instruction; and the powers conferred on and exercised by the deputy-governors and other inferior officers who may have been authorized to allow the inception of title, are all material to a correct decision of the cases now before the court, and which may come before it. We cannot doubt the disposition of the government to furnish this information if it be attainable. We are far from being confident that it is attainable, but have determined to hold the cases which have been argued under advisement until the next term, in the hope that in the meantime we may be relieved from the necessity of deciding conjecturally on interests of great importance.

The *Chief Justice* added: Since the determination which has been communicated had been agreed upon, the court has been informed that the Edict of August the 24th, 1770, is in the office of the Secretary of State.

Had that edict been sufficient for the decision of the court, they would have disposed of the cases at this term. But other information is required, which has been referred to in the opinion. It is therefore considered proper to hold the cases under advisement.

See S. C., 10 Pet., 100.

Cited—10 Pet., 330; 12 Pet., 436; 14 Pet., 390, 398, 409; 8 How., 304, 331; 10 Wall., 242; 21 Wall., 672.

514*] THE PROVIDENCE BANK, *Plaintiffs in Error,*
v.

ALPHEUS BILLINGS AND THOMAS G. PITTMAN.

Charter of bank by a State—contracts between a State and individuals—State power of taxation, relinquishment of not to be presumed—incorporation in general—State legislation.

In 1791 the Legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated for the purpose of banking. They were incorporated by the name of the president, directors, and company of the Providence Bank, with the ordinary powers of such associations. In 1822 the Legislature passed an act imposing a tax on every bank in the State except the Bank of the United States. The Providence Bank refused the payment of the tax, alleging that the act which imposed it was repugnant to the Constitution of the United States, as it impaired the obligation of the contract created by the charter of incorporation. Held, that the Act of the Legislature of Rhode Island, imposing a tax, which, under the law, was assessed on the Providence Bank, does not impair the obligation of the contract created by the charter granted to the bank.

It has been settled that a contract entered into between a State and an individual is as fully protected by the prohibitions contained in the tenth section, first article of the Constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract.

The power of taxing moneyed corporations has been frequently exercised, and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.

The great object of an incorporation is to bestow the character and properties of individuality on a

collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.

However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused, but the Constitution of the United States was not intended to furnish the correction *of every abuse of [*515 power which may be committed to the State governments. The intrinsic wisdom and justice of the representative body and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.

THIS was a writ of error to the Supreme Judicial Court of the State of Rhode Island, and the question which was presented for the consideration of the court was the constitutionality of an Act passed by the Legislature of the State of Rhode Island, in January, 1822, entitled "An Act imposing a duty upon licensed persons and others, and bodies corporate within this State;" alleged to be a violation of the contract contained in the charter of the bank. Under the provisions of this act, and in conformity with them, a tax was imposed on the Providence Bank; and the bank having refused payment thereof, a seizure was made for the amount of the tax in the banking house, by Alpheus Billings, the sheriff of the County of Providence, and by Mr. Pittman, the general treasurer of the State of Rhode Island. The bank instituted an action of trespass for this taking against the sheriff and the treasurer in the Court of Common Pleas of the County of Providence; to which action the defendants pleaded in their defense the act im-

NOTE.—Taxation of stock of, or shares in, corporation, does not impair obligation of contracts—taxation of shares in National banks, and of other corporations.

The power of a sovereign government to impose taxes extends to all the persons and property belonging to the body politic, and has its foundation in the nature of society itself. It is granted by all for the benefit of all, and resides in the government as part of itself. Charles River Bridge v. Wanar Bridge, 11 Pet., 420, 546, 547.

The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government, and may be exercised at the discretion of the State. Nathan v. Louisiana, 8 How., 73.

Property of every description, under the jurisdiction of a State, is subject to taxation, except the stock of the United States held by its citizens. Carroll v. Perry, 4 McLean, 25.

A tax laid by a State on banks, on a valuation equal to the amount of their capital stock, is a tax on the property of the institution; and when that property consists of stocks of the United States, the law laying the tax is void. Bank Tax Case, 2 Wall., 200.

The Act of June 3, 1864 (13 Stat. at L., 99), "to provide a national currency," &c., subjects the shares of the banking associations authorized by it, and in the hands of shareholders, to taxation by the States, under certain limitations (set forth Peters 4.

in sec. 41), without regard to the fact that a part of the whole of the capital of such association is vested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under State authority." Van Allen v. The Assessors, 3 Wall., 573; People v. The Commissioners, 4 Wall., 244.

The act thus construed is constitutional. Van Allen v. The Assessors, 3 Wall., 573.

An Act of a State Legislature imposing taxes on the shares of stock owned in national banking institutions, which omitted to provide, according to sec. 41 of the Act to provide for a national currency, that such taxes should not exceed the rate imposed on shares of banks organized under the State authority, is unconstitutional; it appearing that, under the State legislation, no tax was laid on the shares of State banks, although there was a tax on the capital of such banks. Van Allen v. The Assessors, 3 Wall., 573; Bradley v. The People, 4 Wall., 459.

No greater proportion or percentage of tax on the valuation of shares held by an individual in a national bank can be assessed by a State than is assessed on other moneyed capital in the hands of individual citizens of the State. 13 Stat. at L., 99; People v. Commissioners, 4 Wall., 244.

Where a State Legislature has, by contract relinquished its power of taxation with reference to the property of a banking corporation, a subsequent law which violates this contract by an imposition of taxes, is unconstitutional and void. Jefferson Branch Bank v. Skelly, 1 Black, 436; Franklin Branch Bank v. Ohio, 1 Black, 474.

A provision of a State constitution authorizing

posing the tax, and the amendments thereto; and that in pursuance of the provision of the same a warrant was issued, and the proceedings which were the subject of the action were done.

To this plea the bank filed a general and a special demurrer. Among the causes of demurrer, the repugnancy of the acts of the General Assembly imposing the tax to the Constitution of the United States, inasmuch as they violate the contract set forth in the declaration (the act incorporating the bank), and, inasmuch as they authorize private property to be taken for public purpose, without providing any compensation, are distinctly stated.

A judgment against them was submitted to by the bank in the Court of Common Pleas; and they appealed to the Supreme Judicial Court, where the judgment of the inferior court was confirmed by submission on the part of the **516***] bank,*and they prosecuted this writ of error, under the twenty-fifth section of the Judiciary Act of 1789.

The Providence Bank was chartered by the Legislature of Rhode Island in October, 1791. The preamble of the act states:

"Whereas, the president and directors of a bank established at Providence, on the 3d of October last, have petitioned this General Assembly for an act to incorporate the stockholders in said bank; and whereas, well regulated banks have proved very beneficial in several of the United States, as well as in Europe: therefore, be it enacted by the General Assembly, and by the authority thereof it is hereby enacted, that the stockholders in said bank, their successors and assigns, shall be, and are hereby created and made a corporation and body politic, by the name and style of the President, Directors and Company of the Providence Bank, and by that name shall be, and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy, and retain to them and their successors, rents, tenements, hereditaments, goods, chattels, and effects of

what kind or nature soever, and the same to sell, grant, devise, alien or dispose of, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever; and also to make, have and use a common seal, and the same to break, alter and renew at their pleasure, and also to ordain, establish and put in execution such by-laws, ordinances and regulations, as shall seem necessary and convenient for the government of the said corporation, not being contrary to law, or the constitution of said bank, and generally to do and execute all and singular acts, matters and things, which to them it shall or may appertain to do.

"And whereas, the stockholders, on the said 3d day of October, formed and adopted a constitution for said bank, in the words following, viz.:

"Taught by the experience of Europe and America that well regulated banks are highly useful to society by promoting punctuality in the performance of contracts, increasing the medium of trade, facilitating the payment of taxes, *preventing the exportation of [***517** specie, furnishing for it a safe deposit, and by discounts rendering easy and expeditious the anticipations of funds on lawful interest, advancing at the same time the interest of the proprietors; we, the subscribers, desirous of promoting such an institution, do hereby engage to take the number of shares set against our names respectively, in a bank to be established in Providence, in the State of Rhode Island, on the following plan." &c.

The plan of the association is set forth in the act, and is made a part of the charter. It provides for the opening of subscriptions for the stock of the bank, to consist of six hundred and twenty-five shares of four hundred dollars each, making a capital of two hundred and fifty thousand dollars; and for the organization of the bank. The act gives to the corporation the usual powers necessary to carry into effect

taxes to be imposed on banks, cannot be applied to a bank which received its charter before the adoption of such constitution, in such way as to impose on the bank a higher tax than is stipulated in the charter. *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

Where the charter of a bank, incorporated by a State, provides that no more than a specified amount of taxes shall be levied on its property, the Legislature of the State has not power subsequently to pass a law impairing the obligation of such contract. *Ohio Life & Trust Co. v. DeBolt*, 16 How., 416.

The constitutional prohibition upon State laws impairing the obligation of contracts restricts the State from passing laws to impose taxes which will violate existing contracts. *Murray v. Charleston*, 6 Otto, 432.

It does not forbid a subsequent Legislature from imposing a tax on a corporation, merely because a prior Legislature assumed to give the corporation an exemption which it had not power to confer in perpetuity. *Railroad Companies v. Gaines*, 7 Otto, 697.

Shares of Stock in a national bank, in New York State, should be assessed for taxation, at their true value, notwithstanding that may be more than their par value. *People v. Commissioners of Taxes*, 4 Otto, 415; see *St. Louis Nat. Bank v. Papin*, 4 Dill., 29.

But should only be assessed at the same percentage, or in the same proportion as other property; and where they were assessed at their full value, while other property was only assessed at 30 or 40 per cent. of its true value, the bank was al-

lowed to maintain an action to restrain collection of the tax beyond a fair share. *Merchants' Bank of Toledo v. Cumming*, 17 Alb. L. J., 345; 5 Reporter, 680; *City National Bank of Paduech v. Paduech*, 5 Cent. L. J., 347.

As to power and extent, of taxation of shares of National banks and corporations. See further *Tappan v. Merchants Nat. Bank*, 19 Wall., 490; *National Bank v. Commonwealth*, 9 Wall., 353; *Waite v. Dowley*, 4 Otto, 327; *Adams v. Nashville*, 5 Otto, 19; *Hepburn v. The School Districts*, 23 Wall., 480; *National Bank of Hamden v. Pierce*, 18 Alb. L. J., 16; 5 Law & Eq. Reporter, 682; *Collins v. Chicago*, 4 Biss., 472; *St. Louis Nat. Bank v. Papin*, 4 Dill., 29; *First National Bank v. Douglass County*, 3 Dill., 330; 7 Wall., 262; *Jackson v. Northern Central Railway*, Chase Dec., 268; *Morgan v. Louisiana*, 3 Otto, 217; *Union National Bank v. Chicago*, 3 Biss., 82.

The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation. Rule of valuation of capital stock and franchise. *State Railroad Tax Cases*, 2 Otto, 575; *Huntington v. Central Pacific R. R. Co.*, 2 Sawyer, 503; *St. Louis National Bank v. Papin*, 22 Int. Rev. Rec., 343; *Bailey v. McGuire*, 22 Wall., 215; *Olcott v. The Supervisors*, 15 Wall., 678; *Minot v. Phil. R. R. Co.*, 18 Wall., 206; 6 Wall., 594, 611, 632.

An Act of the Legislature exempting property of a Railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. An agreement where there is no consideration is a nude pact; the promise of a gratuity which may be kept changed or recalled, at pleasure. *West Wisconsin R. R. Co. v. Supervisors*, 3 Otto, 595.

the objects of its formation, and makes provisions for the transaction of the business of the company. Amendments to this act were afterwards passed by the Legislature.

The case was argued by *Mr. Whipple* for the plaintiffs in error, and by *Mr. Hazzard* and *Mr. Jones* for the defendants.

Mr. Whipple, for the plaintiffs in error, said: as this case involves constitutional principles of great delicacy and importance, it may be not useless to advert to the principles established by this court.

At no period in the political or civil history of England or of this country, has it been admitted that the Legislature possessed unlimited or absolute power. Under the British government, the rights of private property were respected, long antecedent to emigration to this country; although violence to the political rights of the subjects of the crown are frequently recorded in history. The immunities of private property, and the inviolability of vested rights, have been asserted by political and legal writers, and established by judicial decisions for three centuries past.

The assertion of a limit to legislative authority was constant during the colonial existence of this country; and the principle was afterwards inserted in the bills of rights and in the constitutions of States. At a very early period **518*** after the establishment of the government of the United States, it became necessary to give to these received opinions the sanction of judicial authority; and this was done by this court in 1798, in the case of *Calder v. Bull*. (3 Dall. Rep., 386; 1 Condensed Rep., 172). The principles of that case, so far as they declare the obligation of a contract to be superior to the power of the Legislature, were re-asserted in *Fletcher v. Peck* (6 Cranch's Rep., 88). Again these principles were maintained in the cases of *The State of New Jersey v. Wilson* (7 Cranch, 104); *Terrett v. Taylor* (9 Cranch, 43); *The Town of Pawlet v. Clarke et al.* (9 Cranch, 202); *Sturges v. Crowninshield* (4 Wheat., 122); *McCulloch v. Maryland* (4 Wheat., 316); *The Dartmouth College v. Woodward* (4 Wheat., 518); *Weston v. The City Council of Charleston* (2 Peters, 450).

The cases which have the strongest bearing, and which are thought to decide the present case, are *Fletcher v. Peck*, *McCulloch's* case, the *Dartmouth College* case, and the case of *The City Council of Charleston*. *Fletcher v. Peck* establishes the principle that a State cannot invalidate its own grant; that in making a grant it acts as a party, and is bound as a party, "Every grant (say the court) is, in its own nature, an extinguishment of the right of the grantor, and implies an obligation not to re-assert that right."

The *Dartmouth College* case puts an end to all discussion of the question whether a charter is a contract, and whether the public benefit derived from them is not a sufficient consideration. The language of the courts is so full and clear upon those points, that it is believed that no doubt will be entertained upon them.

Mr. Whipple then went into a particular examination of the case. He said the bank was incorporated in 1791 with the usual powers of a corporation. The motives of the Legislature in granting the charter, which was the legal

consideration of the grant, are declared in these terms:

"Taught by the experience of Europe and America that well regulated banks are highly useful to society by promoting punctuality in the performance of contracts, increasing the medium of trade, facilitating the payment of taxes, *preventing the exportation of [***519** specie, furnishing for it a safe deposit, and by discounts rendering easy and expeditious the anticipations of funds on lawful interest, advancing at the same time the interest of the proprietors," &c.

The first and seventh sections of the charter evidently contemplate the ownership of property by the bank in its corporate capacity. The real estate and the profits of the capital stock, previous to a dividend, may be considered as belonging to the bank. But the capital stock itself is as much the property of a stranger as of the bank. There cannot well be two entire owners to the same property. The stockholders have the property, and the corporation the management of it. The corporation is not even the trustee, for it has not the legal estate, and no power to sell. It has merely the naked possession, with the perpetual legal right of using the funds for the benefit of the legal and equitable owners.

The stock was subscribed for at a very early period, and the bank went into successful operation. The capital was subsequently increased to five hundred thousand dollars. For many years past the shares have sold from fifteen to twenty-five per cent. advance, owing, in part, to the belief that the charter was perpetual, and that the Legislature had no power over it. No power to repeal or to modify, by subsequent law, was reserved, and none was believed to exist until January, 1822.

Most of the present owners purchased their stock at an advance, a part of which will be lost to them, if the power recently claimed by the Legislature has a legal and a constitutional existence. The charter of the Providence Bank was the first that was granted by the Legislature of Rhode Island. For several years it was the only bank in the State. Between the date of its charter, however, and June, 1822, several charters were granted, substantially like it. In June, 1822, the time when the act imposing a tax on banks went into operation, the charter of the Mount Hope Bank, in Warren, was granted.

The eighth section provides "that this Act of Incorporation be, and the same is hereby declared to be, subject to all *acts which [***520** may be passed by the General Assembly, in amendment or repeal thereof, or in any way affecting the same."

The power of the Legislature to tax the banks had been previously denied; and the argument against that power was delivered but a few days before the granting the charter of the Mount Hope Bank. All the charters since contain a similar reservation.

From the earliest period down to the Act of 1822, taxes in Rhode Island had been uniform. The proportion which each town was bound to contribute was settled by an Act passed in 1747. By the Act of 1747 the proportion which the town of Providence paid towards the expenses of the State was one-ninth. A new apportion-

ment among the several towns in the State was made in 1796, by which the town of Providence was required to pay one-fifth. In 1824 another apportionment fixed nearly one-third upon that town. Only one tax, however, has ever been ordered under that estimate.

The mode of collecting taxes under these various laws produced great uniformity as to individuals. The treasurer of the State issued his warrant to the treasurers of the several towns, requiring them to collect from the inhabitants each town's proportion of the sum to be raised. The proportion of each town was assessed upon individuals, according to the supposed value of their real and personal estate. This has been the usage from the earliest settlement of the State, with very slight variations, down to the Act of 1822. With the exception of one tax of fifteen thousand dollars, ordered by an Act of May, 1824, the whole expenses of the State have been paid under the Act of 1822. The whole amount collected under the License Act of 1822, from its commencement to the end of the year 1827, is thirty-five thousand nine hundred and twenty-one dollars twelve cents. Of that amount twenty-six thousand three hundred and eighty dollars eighty-six cents was paid by the town of Providence, and twelve thousand eight hundred and eighteen dollars by the banks. The largest proportion of the bank capital is in that town, and the effect of the License Act has been to **521** *burden it with more than two-thirds of the taxes of the State. The amount paid under the act in 1828 and 1829, by the town of Providence, was three-fourths of the whole. The proportion has been increasing against the town from 1822 to the present time, as will be seen by an examination of the accounts of the treasury. The whole real estate, and all other property in the State, is exempted from taxation; and the paying part of the business of government thrown principally upon one town.

The question for the consideration of the court is, whether such a tax, so far as regards the banks whose charters were granted previous to 1822, and without any reservation of authority over them, is a constitutional tax? It will be kept in mind that the charters of all banks established since May, 1822, contain ample reservations of power.

The charter of the Providence Bank was granted in November, 1791; and until 1797 it was the only bank in the State. Its capital at first was fixed at two hundred and fifty thousand dollars, but it was subsequently increased to five hundred thousand dollars. Although no bonus was paid to the State, yet the advantages expected by the public are fully stated in the charter, and constitute the consideration of the contract. The contract was that the stockholders should be entitled to all the advantages of employing their money in banking business, through the agency of a corporation, and the State to all the benefit of a "well regulated bank." These advantages were expected by the parties, for they are expressly stated in the charter, and constitute reciprocal rights and obligations. Whenever the business of the corporation is so managed as to injure instead of benefiting the public; whenever an undue amount of bills is issued; specie payments refused, and the currency depreciated; then is

there a violation of the contract on the part of the stockholders, and the sovereign may interfere, for they contracted to maintain a "well regulated bank." The State has a right to see this object accomplished, and to pass all laws necessary for the purpose. The admission which we most freely make, of a power in the State, so to regulate the conduct of corporations as to attain the objects of their formation may appear *to conflict with a proposition [**522** which we shall endeavor to sustain, which is this—that the State, by becoming a party to the contract, was as much bound to respect the rights of the other party as if the State had been an individual. There is, however, in reality, no hostility between the admission and the proposition. All the legislative power which the State has a right to exert, is remedial in its character, furnishing remedies for or against the corporations, and imposing penalties for violations of their contract. The same power might have been exercised over the Dartmouth College, and the same authority is constantly exercised in all the States over corporations of their own creation. The proceedings of the legislatures of some of the States are of a mixed character, partly legislative and partly judicial. So far as they are legislative, they are clearly remedial; so far as they are judicial, they annex penalties for doing what, under a more regular system of jurisprudence, they would be adjudged to have forfeited their charter for doing.

In the examination of this case, it will be necessary to consider,

1. The contract, the rights which it confers on one party, and the obligations it imposes on the other.

2. The Act of 1822, and the effect which that act has upon the rights conferred by the contract.

3. The provision in the Constitution of the United States, against impairing the obligation of contracts.

First, what was the contract? This general question involves an inquiry into the elements which usually constitute what the law terms a contract. The usual ingredients are: a consideration, parties, and a subject matter. What is called the obligation of a contract is the duty which the law imposes upon a party not to disturb any of the legal rights conferred upon the other party. The extent of the rights of one party, therefore, is the measure of the obligation of the other.

In the first place, there was a full and an ample consideration; not a consideration implied, but expressly stated. The risk of advancing two hundred and fifty thousand dollars, in 1791, to be employed in banking business, was very *great. The Constitu- [**523** tion of the United States was not ratified in Rhode Island, we think, until the year 1790. Although at that period the people of that State had been "taught by the experience of Europe and America that well regulated banks were highly useful to society," yet they had not been taught that they were very profitable to the stockholders. The times were still very feverish. The shock occasioned by paper money had not entirely subsided. The effect of the Constitution of the general government had not been ascertained. Money was very scarce,

Peters 4.

credit very low, and punctuality out of the question. Indeed, it is stated in the charter, that one of the effects beneficial to the public, expected from the bank, was to promote punctuality in payments. The wonderful activity given to trade a short time after, by the war in Europe, was then unlooked for. Under these circumstances, it required all the influence of the leading men in the town of Providence, to obtain money sufficient for so hazardous and doubtful an enterprise. So uncertain was the experiment, that a subscription could not be obtained without providing in the charter a remedy for the collection of debts due to the bank, which was withheld from all individuals. This remedy consisted in the power of attaching the real and personal estate of the debtor on mesne process. In practice, this amounted to a priority of payment. The State willingly granted this, in consideration of the value of the institution to the public, and the hazard to the stockholders. The same remedy has been granted to all banks since, in order that one may have no advantage over the other.

Notwithstanding these inducements, a period of six years elapsed before another bank went into operation. The first meeting of the stockholders of the Bank of Rhode Island was at Newport, in January, 1797. The consideration then was ample. The stockholders purchased the privilege of banking. They paid for it a high price, and the case will result in a question whether they are to pay for it again.

The parties to the contract were the stockholders in their individual capacity, on one side, and the State in its sovereign character on the other. It was not a contract between the **524*** State and the corporation; the corporation had no existence until the contract was completed. The corporation, instead of being a party, was the subject of the contract. It was the thing granted, and not the person to whom the grant was made. The other party was a State, possessing various and extensive sovereign powers. In making this contract, it acted in its sovereign character, for it had no other character in which it could act. It meant to bind itself in its sovereign character, for there was no other character which it could bind. It was well known that the principal strength of sovereignty consisted in its power of making laws, and that the only effectual mode of binding sovereignty was to restrain its law-making power; and that, to restrain its law-making power upon all subjects but one, and leave it free upon that, was tantamount to no restraint at all. If, therefore, the State was a party to a contract, it intended to bind its law-making power. The law presumes that a party understands the legal effect of a contract, and that he intends that legal effect. The legal effect of a contract is to bind the parties to all its stipulations—to bind them in the capacity in which they contracted, and to bind them equally. It was intended, then, that both the parties should be bound, and that, consequently, neither should possess the power to liberate itself without the consent of the other. It therefore results from the fact that the charter is a contract; that the State meant to bind itself in its sovereign capacity, and to restrain the exercise of all its law-making powers, so that it should not be able to resume the grant, or to render Peters 4.

the subject of the grant of no value, or to make its value dependent on its own will, instead of being dependent upon the terms of the contract and the law of the land.

But further: the fact of the State's having become a party to a contract is not only conclusive evidence that it intended to bind itself, and to restrain all its law-making powers, but it is evidence of the extent to which it meant to impose that restraint. The object of binding the State at all was to secure the rights of the other party: consequently, the degree of restraint must be such as will afford that security. There *is an absurdity in saying that the State [***525** meant to bind itself, in order to secure the rights of the other party, and saying, at the same time, it intended a less degree of restraint than was sufficient for the purpose.

If the State intended to be bound at all, it intended to be bound to the same extent as though it had been an individual, and not a sovereign State. A contract, in its very nature imports reciprocity of rights and obligations. One party is not to be bound to a greater extent than the other unless it is so expressed, or unless it is implied from necessity.

Having briefly considered what was the consideration of the contract and who were the parties, a more important object presents itself, which is, to ascertain its obligation. This can be done in no other way than by resorting to its subject matter.

Rights and obligations are correlative terms. The extent of the rights of one party is the exact measure of the obligation of the other; for, in the language of this court, "every grant implies an obligation not to re-assert the right granted."

1. There was granted to the stockholders and to their successors a perpetual right to the powers and capacities of a corporation denominated "the President, Directors and Company of the Providence Bank."

2. There was also granted a perpetual right to employ five hundred thousand dollars in the banking business.

It would be absurd to say that the stockholders obtained an act of incorporation for the sake of an act of incorporation—that they obtained a grant of the right of doing banking business for the sake of banking business; but both were granted for the profit that might arise from them. Is it not fairly to be implied that the amount of that profit should be all that could be made by banking business under the general laws of the land? The corporation, and the right to transact banking business, were granted as mere means: the end was the expected profit.

It must be agreed that the charter was to be perpetual, and that the stockholders cannot be deprived of it. It must *be agreed that [***526** the right to transact banking business was to be perpetual, and that the stockholders cannot be deprived of it. Must it not, then, be agreed that the right to all the profits was to be perpetual, and that the stockholders cannot be deprived of it? If the right to the means was intended to be legal rights, was not the right to the end to be of the same character? Can it be believed that perpetual means would be granted to obtain a doubtful and uncertain end? That the subordinate parts of the contract should be held as rights, subject only to the

law of the land; but that the main object should be possessed only as a legislative indulgence? The presumption of law is that all the rights between the same parties, and conferred by the same grant, are to be of the same character, subject to the same tenure, and to continue during the same time. Nothing but strong language to the contrary will create a difference. The act of incorporation is a legal right, subject to no partial or direct legislation. The right to banking business is a legal right, subject to no partial or direct legislation. Why, then, is not a perpetual right to all the profits a legal right, and subject to no partial legislation? Why should the control of the State over one of these rights be greater than over the other.

We will now examine the Act of 1822 with a view to ascertain whether it involves the power to destroy the rights granted by the contract.

The very title of the act is significant. It is "an act imposing a duty on licensed persons and others, and bodies corporate, within the State." It classes the banks with licensed persons. It considers them, not as exercising their legal rights under their contract, but as enjoying privileges by the license and permission of the State.

It enacts that there shall be, hereafter, annually paid by the persons and bodies corporate within this State, herein named, the following sums, to wit:

"By each and every person licensed by the town councils of the several towns, the sum of two dollars, to be paid to the town councils before granting the license, and by them to be paid over to the general treasurer.

527* "By each and every money broker, or money changer, and each and every vendor of foreign lottery tickets, the sum of one hundred dollars, to be paid to the town councils at the time of granting licenses to those persons.

"By each and every bank within this State (except the Bank of the United States), the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in."

It is too apparent to be denied that the Legislature considered the charter of the banks as mere licenses. Even on that ground, it would have been no more than equal justice to have required the fee when the license was granted, as is provided in relation to all the other licensed persons mentioned in the act. It is a requisition, a duty. It lays no claim to the character of a tax: A tax implies proportion. (5 Rep., 53.) It is a specific duty upon the privilege of the bank, upon the franchise granted and paid for. Its advocates do not deny that this is its character: on the contrary, they assert it and justify it. They are driven to this by necessity, for there is no other character that can attach to it.

No one pretends that it is a tax upon the property of the banks. The act provides "that hereafter, there shall be annually paid by the persons and bodies corporate, within this State, herein named, to and for the use of the State, the following sums, to wit: by each and every bank one dollar twenty-five cents on each and every thousand dollars of the capital stock actually paid in." The capital stock is referred to in order to equalize the duty among the

banks themselves. The duty is not upon the capital stock, but upon the banks. In relation to each other, it is a duty in proportion to the capital stock. In relation to all other persons, it is a direct and arbitrary acquisition, not based upon property, not controlled by any usage, and depending for its amount entirely upon the will and caprice of one of the parties to the contract.

There are but three views that can be taken of this act. It is, first, either a tax upon the persons or polls of the corporations, which subjects it to the objection that it does not at the same time tax the persons of other corporations or individuals; *or, second, [***528** it is a tax upon the franchise of the bank, which was purchased by the stockholders; or, third, it is a tax upon the capital stock of the bank, which is a new species of property, and one of the fruits of the contract. The intention was to tax the franchise—to consider the banks as licensed persons—and, in common with other licensed persons, to compel them to pay an annual stipend for the privileges they enjoy. Suppose the Providence Bank had paid fifty thousand dollars for these privileges at the time of receiving their charter, could it be compelled to pay for them again? How does it alter the case that the payment was in benefits of another kind, which the State acknowledges to have received? Go farther: suppose this franchise to have been a free gift, can payment be subsequently demanded?

But whether the Act of 1822 is a tax upon the privileges of the banks, or upon their property, or a duty or requisition upon them as licensed persons, will not essentially vary the question; inasmuch as it must be conceded, on all hands, that it involves the power to destroy all their beneficial rights. This was one of the points expressly decided in *M'ulloch's* case. If the State has jurisdiction over the subject matter; if it can select its own contract, or the privileges or property conferred by its own contract, and impose a specific duty upon them, and them alone, it can destroy those privileges, because it must necessarily be the sole judge of the amount. Although at present the expenses of the State are small, yet, in cases of war, internal commotions, or the happening of any other causes which would increase our expenditures, it will probably be thought expedient and just that the banks should contribute the same proportion then as now. If it is deemed legal and honest to load them with one-third of all the burdens of government now, why will it not be legal and just then? Nay, why not one-half, or three-quarters, or the whole? If this court decide this tax to be constitutional, must it not decide that a requisition of one-half of the income of the capital stock will be constitutional? In whatever point of view, therefore, this act is considered, it involves the power, and, as we shall directly show, the legal power, *the legal right to destroy the contract [***529** to which the State is a party.

An examination of the Constitution of the United States will show that this is the necessary result. The clause belonging to this subject is, "that no State shall pass any law impairing the obligation of contracts."

"No State shall pass any law!" It intended

to exclude all laws having that effect. It made no exception in favor of laws imposing taxes; but it intended that the taking-power, like all other powers, should be so exercised as not to impair the obligation of contracts. What use would there have been in the prohibition if it had left the State free as to one of its powers? Would not such freedom have destroyed the whole effect of the provision?

But further: No State shall pass any law "impairing the obligation of contracts." It does not confine itself to the direct and express, but extends to all the implied obligations. It also extends to all contracts—those to which a State is a party, as well as the contracts of individuals.

"No State shall pass any law impairing the obligation of contracts!" Does this prohibit the power of impairing contracts, or the exercise of that power? It must be remembered that this, and all the other prohibitions against the States, are addressed not to natural persons, possessing physical powers, but to artificial persons, possessing legal powers. A prohibition not to steal, leaves the natural person with the physical power of violating the injunction, but does it not destroy the legal power? The powers of the States are all legal powers. They have no physical or natural powers. A prohibition, therefore, against the exercise of a legal power, is an annihilation of the power itself; and any law so dependent upon the existence of such a power, or so closely connected with it as to render it practically impossible to sustain the law without submitting to the exercise of the power, must be an unconstitutional law.

Apply this principle to the present case. The State has no power to impair its own contract. It cannot resume the charter, it cannot prohibit banking business, it cannot take all the income of the capital. It will be **530***] agreed that no such *power can be exercised. How, then, can it exist? How can a legal power exist which it is unlawful to use, or a legal right which cannot be exercised? Physical powers may exist, the action of which is prohibited; but legal powers exist only in action. They are contemplated only with a view to their exercise. A legal power is a right to do certain things. A power to destroy the rights of the banks is, therefore, equivalent to the actual destruction of them; because a power to destroy is a legal right to destroy. Considered in relation to its citizens, all the powers of sovereignty are legal rights.

We say that if it is admitted that the charter is a contract, the whole controversy is admitted; because every contract necessarily excludes all power in either of the parties to destroy the rights which vest under it. A tax upon the franchise is a tax upon the contract itself. The law implies a right in the States to tax the banks; that is, the property of the banks; but it does not imply a right to destroy. The State of Rhode Island has contracted not to tax the Blackstone Canal. The State of New Jersey contracted, in the case of *New Jersey v. Wilson*, not to tax certain lands. The exemption of that canal and those lands is a privilege or franchise. Would a tax upon that privilege be valid? Would it not violate the spirit of the contract? Would it not be

mere evasion? The terms of the contract exempted the lands from taxation; but would not that contract have been rendered of no value, if, instead of taxing the lands, they had taxed the privileges or exemption conferred by that contract?

We contend, then, that the power in question is necessarily excluded, because it is inconsistent with the main and leading intention of the parties, which was to make a contract and to bind themselves by it.

How can that be constitutional which necessarily entails consequences that are prohibited by the Constitution? How can a law which, beyond all human control, arms the Legislature with the legal right of doing what the Constitution prohibits their doing, be constitutional? Nay, worse; which puts them in the actual possession of a power, the very existence *of which is a violation of the [**531** contract? How can the Legislature legislate themselves into the possession of a power not only not granted, but expressly withheld by the people?

But a law involving the power to destroy is equivalent to a law which actually does destroy, for another reason. The Constitution intended not only that a law which actually impairs a contract should be void, but it also intended that this court should possess and exercise the power of declaring it void.

The Act of 1822, if admitted to be valid, will deprive this court of this power. If the subject and the mode of taxation are admitted to be constitutional, the amount rests in the discretion of the Legislature. The court must submit to any amount that may be imposed. Their power to protect the rights of the individual is at an end the moment this law is declared to be valid. That power constitutes the remedy of the banks. This law takes from the banks all right to appeal to this court for relief, and all power in the court to extend that relief. Can this court surrender that power? Are not all its legal powers legal duties? Is this court to obey the Constitution and retain the power of declaring void a law which the State may pass, destroying the banks, or to obey the Act of 1822, which deprives them of that power? Is it to rest with the Legislature of Rhode Island to say whether an individual shall retain a constitutional remedy and this court a constitutional power? Is it for the State, against whom this remedy and this power were provided, to legislate the other party out of them? This remedy and this power are the constitutional barriers for the protection of private rights; and an attack upon the outposts is as undisguised war as upon the Constitution itself.

An important question in the case remains yet to be considered. Does not the contract of 1791 afford a necessary implication of an exemption from all modes of taxation which involve the power to destroy? That may be said to be implied, which, from a fair construction of all parts of an instrument, appears to have been the probable intention of *the [**532** parties. That is necessarily implied, without which the obvious and main intention of the parties would be defeated.

Implications bear the same relation to the express provisions of a contract that circum-

stantial docs to positive evidence. Perhaps nothing short of a necessary implication would create a total exemption from the taxing power. A fair and ordinary implication would be sufficient to qualify that power, by confining it to the usual modes.

In the present case we shall attempt to show that there is a necessary implication that the State should neither exercise nor possess the power of destroying any of the rights conferred by the contract. We do not confine the proposition to one mode of destroying these rights; but we mean to contend that all modes in which sovereign power can exert itself were necessarily excluded. The taxing power is undoubtedly of vital importance, though not more so than many others. It is indispensable to the support of government, and so are nearly all the powers which sovereignty usually exercises.

The power to constitute property, or to give to men the dominion over external objects—the power to transmit that dominion from hand to hand, by deeds, wills, descent, and the various other modes—is surely as necessary a power as any other can be. The one creates property; the taxing power operates upon it after it is created.

The attempt to give to the taxing power an importance belonging to no other sovereign power, is reviving the dispute of the relative importance of the stomach and the lungs to animal life.

Before any aid, however, can be derived from the supposed importance of the taxing power, it must be shown that this mode of exerting it is essential to the State. How can it be of vital importance to government to possess the power to tax the money of one man, without at the same time taxing the money of others? How can the existence of government depend on its power to destroy its contracts? There is nothing, then, growing out of the peculiar importance of the power in question, which will rebut any presumption of an exemption from its exercise.

533*] *Is the justice or fairness of this proceeding so very urgent? Is the equity of imposing one-third of all the expenses of the State on the banks of such a nature as to induce us to believe that the parties probably had it in their minds? Suppose the stockholders of the Providence Bank had been informed, in 1791, before they had advanced their money, that, instead of peculiar advantages, they were to be subjected to peculiar burdens; would they have accepted their charter? Suppose they had been informed that, instead of the long established usage of uniform taxes, sovereignty intended to call up one of its dormant powers and spend its whole force upon their money—and their money alone; would they have parted with the money? Did they mean or expect to pay a new consideration differing from the one specified in the charter, and which the State acknowledged to have received? No very strong equity, therefore, and no pressing necessity, require the exercise or the existence of such a power. But such a power is necessarily excluded, because it is inconsistent with the main and leading intention of the parties, and it is inconsistent with the legal effect of a grant.

There is another mode by which it may be shown that the law impairs the contract, and

that is by ascertaining its legal effect. While upon this point, it may be expedient to notice an argument on the opposite side, which we have reason to believe has had some effect, even on professional minds. It is this: Admitting that the charter is a contract; that it binds the parties; that it confers legal rights on one party and imposes legal obligations on the other; yet, that those legal rights are like the legal rights of all other persons, subject to the sovereignty of the State, and, consequently, subject to taxation; that, in fact, the only difference between legal rights conferred by one individual upon another individual, and by a State upon an individual, is a difference of parties; that they are legal rights, when conveyed by an individual, and can be no more when conveyed by the State; that if specific taxation is not inconsistent with legal rights conveyed by an individual, it is not inconsistent with legal rights conveyed by the State; and that, [*534 if the contract is not violated in the one case, it is not violated in the other.

This popular argument must be answered, and satisfactorily answered, or the case is against us. One moment's consideration of the legal effect of a grant will show the fallacy of this view of the subject, which supposes that the legal right to an acre of land, or to any other property or privilege, is not only of the same nature, but of the same extent when conveyed by an individual as when conveyed by a sovereign; whereas, in all cases of unrestricted grants, the extent of the legal rights of the grantee depends mainly, if not entirely, on the extent of the legal rights of the grantor. An unrestricted grant passes to the grantee, or extinguishes all the grantor's interest in and power over the subject which are inconsistent with the right intended to be granted. "A grant," say this court in *Fletcher v. Peck*, "is, in its very nature, an extinguishment of all the rights of the grantor, and implies an obligation not to re-assert that right."

It is no matter who the granting party is or what he is; no matter in what capacity he acts; no matter how limited or how extensive is his interest or his power; all his power and all his interest, so far as they do not consist with the rights granted, are either transferred or extinguished by the grant. If he is an individual, individual interest and individual power are transferred or extinguished. If a corporation, corporate interests and corporate powers. And, if a sovereign, sovereign interests and sovereign powers.

The question then arises whether it can be shown that such a tax is necessary? Can it even be shown to be just? What necessity or what justice can require the money of one class of men to bear all the burdens of the State? Other governments exist without such odious measures. Even Rhode Island did not discover the necessity of resorting to them until 1822. How pressing must that necessity be which it required two hundred years to discover!

The first case before this court was a direct tax upon the operations of The Bank of the United States within the State of Maryland; and the second, a tax by the city council of Charleston upon the six and seven per cent. stocks of the United States.

535*] *The same principle prevailed in both cases. The first was an unanimous, the second a divided opinion; but divided upon the question whether the tax was an income or a specific tax. The leading principle established by *M'Culloch's* case, and confirmed by the case of the city council, is this: that the Constitution of the United States, having conferred upon the general government certain enumerated and specific powers, conferred all the means necessary to the execution of those powers; that the incorporation of a bank was a necessary and proper instrument of fiscal operations; that the law establishing the bank being a law authorized by the Constitution was supreme; and that the unavoidable consequence of that supremacy was that no State could pass any law conflicting with it; and, that as the act of the State of Maryland imposing the tax involved the power of destroying the bank, it was inconsistent with the supremacy of the law establishing the bank.

To suppose that The Bank of the United States was declared by the court to be exempted from the action of State legislation because it was The Bank of the United States, or because it was a means of power in the hands of the general government, would be taking but a narrow view of the principle of *M'Culloch's* case. That a bank was a necessary and proper instrument of power, constituted but a subordinate part of the splendid argument employed on that memorable occasion. It was necessary to take a step much farther in advance; to occupy much higher ground; to show that, being a necessary instrument of power, the Constitution intended to protect it from State legislation. Unless that ground had been occupied, there would have been an end to the bank. The whole case turned upon the intention of the Constitution.

The fact of its being an authorized means in the hands of the general government was used as an argument to show that it was intended to be placed beyond the reach of the States. It was the protection afforded to these means by the Constitution, and not the character or inherent virtue of the means themselves, that called out the power and firmness of the court. Neither the bank nor the custom-house, the **536*]** *Navy or the Army, could plead sufficient merit of their own; but it was because they were sheltered behind the Constitution that State legislation could not reach them.

Having established the proposition that the Constitution had impliedly prohibited the States from interfering with the machinery of the general government, the court proceeded to show that the act of the State of Maryland involved the power of destroying what the States had no power to destroy. Not that the act of itself actually did or would destroy, but that it involved the power of destroying. We therefore repeat the assertion that it was not because The Bank of United States was an instrument of government, but because it was a prohibited subject, that the court declared the act of Maryland to be an unconstitutional act. The great principle is this: because the Constitution will not permit a State to destroy, it will not permit a law involving the power to destroy. In order to show that the case turned entirely on that point, let us suppose that the Peters 4.

court had arrived to the conclusion that the bank was an authorized instrument of government, but that it was not the intention of the Constitution to prohibit the States from interfering with those instruments; would it not have been necessary to have decided that the Maryland act was constitutional? Of what importance was it that the bank was an authorized means of power other than this, that it afforded a key to the meaning of the Constitution? If the bank was a legitimate and proper instrument of power, then the Constitution intended to protect it. If not, then no protection was intended. The question whether it was a necessary and proper means, was auxiliary to the great question, whether the Constitution intended to shelter it; and when the court arrived to the conclusion that such protection was intended, they interfered, not in behalf of the bank, but in behalf of the sanctuary to which it had fled. They decided against the tax, because the subject had been placed beyond the power of the States by the Constitution. They decided, not on account of the subject, but on account of the power that protected it; they decided that a prohibition against destruction was a prohibition against a law involving the power of destruction. The case of the *Providence [**537** Bank starts very far in advance of The Bank of the United States. It is not necessary to resort to implication to prove that the rights of the former are protected by the Constitution. There is an express clause to that effect, and the court will not forget that it is the prohibition, and not the important or unimportant subject that stands behind it, that constitutes the shield against hostile legislation.

"No State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

"No State shall, without the consent of Congress, lay any imposts, or duties on imports and exports, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

To the framers of the Constitution, some of the subjects here prohibited probably appeared to be more important than others. They probably thought it more important to deprive the States of the power of forming alliances with foreign nations than of emitting bills of credit. The exercise of the one power by the States would merely incommode the general government: the exercise of the other endangers its very existence. Yet are not these subjects, judicially, of equal importance? Equally important, because equally prohibited? Are not all the prohibited subjects of equal importance, and have the States any more power to violate one prohibition than another?

It may be said that The Bank of the United States was established by a law of the general government, and that it was the supremacy of the law which rendered all conflicting laws of the States inoperative. The suprem-

acy of the law was a reason, and a conclusive reason, to induce the court to imply a prohibition. It was not the supremacy of the law, but the implied constitutional prohibition, which induced the court to protect the bank. The rights conferred upon The Bank of the United States by its charter, are inviolable **538*** and supreme, as regards all the States. Are not the rights of the Providence Bank, and the law which conferred those rights, inviolable and supreme as regards Rhode Island? Is not that law a contract; those rights the fruit of that contract? What constitutes the supremacy of a law in regard to the States, if it is not their total want of power to interfere with its regular operation, or to destroy the rights which it confers? Can the Legislature of Rhode Island repeal the law incorporating the Providence Bank? Can they alter any of its essential provisions? Is it not supreme, or, in homelier English, above their reach? The only difference between the law incorporating The Bank of the United States and the law incorporating the Providence Bank, as regards their character of supremacy, is, that the former is supreme as regards all the States, the latter as regards Rhode Island only. The supremacy of both originates in contract. The fundamental contract of the Union, or the Constitution, imparts supremacy to the laws of the Union, and binds all the States. The contract with the Providence Bank imparts supremacy to all the rights which it confers, and binds one of the States. The sphere of action is more limited, and the parties less numerous in the one case than in the other, and that is the only substantial difference between them.

To the Legislature, say the court, in *Fletcher v. Peck*, all legislative power belongs. But the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. This language was used in relation to a law of Georgia, attempting to resume the subject of its own grants. Is it not equally applicable to the case before the court? The income of the capitals of the banks is the subject of the grants in this case; land the subject of the grant in that. If a State cannot resume one subject of its grant, can it another? If it cannot resume it directly, can it indirectly? Is there any difference between a direct and a consequential interference with a prohibited subject? The uniform language of this court is in the negative. The warmest advocate for State power will find it difficult to discover any principle from which it **539*** can be implied that one *party to a contract reserves to himself the power of destroying all the rights conferred by the contract.

In relation to individual parties under the law, it will be conceded that no such power can exist. In relation to sovereign parties under the Constitution, is not the rule necessarily the same? Is not the dominion of the Constitution over the States the same, as to its nature and extent, as that of law over individuals? If, in a contract between individuals, no illegal power can be implied, in a contract with a sovereign, can any unconstitutional power be implied? By becoming a party to a contract, a

State imposes upon itself additional obligations and additional duties. To suppose that these duties and these obligations do not qualify its rights, is tantamount to denying that they are obligations and duties. To impose upon an individual or a sovereign an obligation, without an equivalent limitation of its legal and moral power, is as impossible as to produce an effect without a cause. What is an obligation but a limitation of previous power? What is a duty but the abandonment of some corresponding right?

The proposition that a State has the same power over the rights conferred by its own contract as over all other legal rights, is a denial that any obligation is created by its contract; for, if it creates any obligation, that obligation does not exist in relation to the legal rights of those with whom the State has made no contract. The necessary consequence is, that a limitation of State authority to the extent of this superadded obligation must be created; and a limitation which does not exist in relation to the legal rights of others.

Mr. Hazard, for the defendants.

An Act of the Legislature of Rhode Island, passed in 1791, incorporating the Providence Bank, is said to be a contract between the Legislature and that bank; and it is contended that a general law passed by the Legislature in the year 1822, and the acts in amendment thereof, "imposing a duty upon licensed persons and others, and upon bodies corporate, within that State," are laws impairing the obligation of that contract, and violating the Constitution of the United States. Whether this be so or not depends upon the question:

*Whether there is anything in the **[*540]** act incorporating the Providence Bank which exempts that bank from the taxing power of the State; or whether the corporate character of the bank exempts its operations from the action of the State authority.

If the General Assembly, by the Incorporating Act of 1791 or by the acts in addition thereto, did bind the State to exempt this corporation, in perpetuity, from the taxing power of the State, the obligation must either be expressed in those acts, or must be clearly implied from the terms of them; or the exemption must be one of the necessary incidents or immunities of a corporation.

It appears by the preamble to the charter, that about a year after this bank had been established, its president and directors petitioned the General Assembly for an act of incorporation. The prayer of the petition was granted, and an act passed in conformity to it. The act contains a detail of the ordinary properties and capacities of a corporation, such as are alike incident to every corporation of whatever description, and as would appertain to, and be exercised by it, whether expressly granted or not. The act further approves of the private regulations adopted by the company; it exempts the several stockholders from personal liability beyond the amount of their respective shares of stock. It gives to the company an exclusive, summary, legal process for the collection of debts due to them; and lastly, it makes provision for securing the bills of the bank from forgery. The three acts in amendment make some improvement in the bank

process, as it is called; empower the directors to fill vacancies, and provide that the shares of the stockholders shall be held pledged to the bank for their debts due to it.

In these provisions (which are the whole contents of the bank charter) there is no express grant of the exemption claimed, and I am not able to find anything in them from which the most remote inference can be drawn of an intention, on the part of the Legislature, to make such a grant. What was granted, and intended to be granted, has no connection with what is now claimed as part of the grant. All that was **541*** done by the Legislature was to convert a banking copartnership into a body politic; and their having done this does not warrant the inference that they meant to make to that company a further donation either of money or immunities, other than such as necessarily appertains to all corporate bodies. If there is anything in that charter from which such an inference can fairly be drawn, it is to be shown by the plaintiffs.

Is, then, an exemption from the taxing power of the State a necessary incident of this corporation? If it is, it must be an incident of all corporations of every description; for so far as this exemption is the question, there is nothing to distinguish a banking corporation from any other; but if a distinction was to be made, it would not be in favor of banks, which, being moneyed, and money-making institutions, might be considered as the most appropriate objects of taxation.

It is said by the writers on the subject of corporations that such capacities and qualities as are necessary to the creation and legal being of a corporation, and such only, are incidents of the corporation. But it cannot be said that an exemption from taxes is necessary to the existence of a corporation, especially a moneyed corporation. A corporation is as competent to pay duties imposed upon it as brokers, or retailers, or distillers, or auctioneers, or any other individuals or companies of any other trade, craft, or profession; and its being required to pay them is in no way inconsistent with its corporate existence or its corporate character. Such duties have, in fact, been imposed upon them (the banking companies) by the government of the Union, and have been for many years, and still are imposed upon them by many of the States, and no difficulty has been experienced in the collection of them. It is, moreover, admitted that when the power of taxing is expressly reserved in the charters of banks, they may consistently be taxed. If this be so, there is nothing in the power of taxing which is inconsistent with the existence of such corporations, or with the full enjoyment of their franchises. It is plain, therefore, that an exemption from taxes is not one of the necessary **542*** incidents or immunities of such a corporation. This being the case, and it being equally plain (as has already been shown) that the charter itself of the Providence Bank contains no express or implied relinquishment on the part of the State of the power of taxing, it seems to follow that the acts of the Legislature of Rhode Island "imposing a duty upon licensed persons and others, and upon bodies corporate within that State," do not impair the obligation of any contract of the State with **Peters 4.**

the plaintiffs, nor violate the Constitution of the United States.

One of the breaches of contract with which the Legislature of Rhode Island is charged by plaintiffs, is thus stated by them: their charter, they say, grants and secures to them forever "all the profits arising from the employment of their capital in banking business." And this grant, they contend, is impaired by the law of 1822, imposing a tax on the banks. The banks have, no doubt, a perfect right to all the profits to be derived from the corporate franchises granted to them. But no better right, surely, than other companies or individuals have to all the profits of their business, or to their estates, real and personal, and all the rents and income of them. And it has not yet been discovered that the exercise of the taxing power upon those subjects was inconsistent with the full enjoyment of those rights.

The power to tax banks for their corporate property, and to tax the stockholders for their stock, is not denied. But it is said that this is a tax upon the franchise; a tax upon the thing granted. The law speaks for itself. It imposes a duty upon the several banks; equal to one-eighth of one per cent. of the amount of the capital stocks of each actually paid in. If this is a duty on the franchises, why not? That those franchises are property, and valuable property, we know. Corporate franchises are thus described by *Mr. Justice Story* in the *Dartmouth College* case (4 Wheat., 700): "They are, properly speaking, legal estates, vested in the corporation itself as soon as it is *in esse*. They are not mere legal powers granted to the corporation, but powers coupled with an interest. The property of the corporation vests **543*** upon the possession of its franchises. Whatever may be thought of the corporators, it cannot be denied that the corporation has a legal interest in them." He speaks of them elsewhere in the same case as "valuable hereditaments or property." And says, "that a grant of them is not distinguishable, in point of principle, from a grant of any other property." And these remarks were made in reference even to eleemosynary corporations, and corporations for literary purposes; and apply much more forcibly to these trading or moneyed corporations.

The opening counsel will recollect that one of these bank charters was sold in Rhode Island a few years ago for a large sum of money by a company to whom it had been granted several years before, but who had made no use of it. The plaintiffs tell us themselves that their franchises are valuable, and their stock sells for from fifteen to twenty-five per cent. advance. And well may it be so. Their interest money is compounded every sixty days; and that, too, on loans of mere paper bills which carry no interest. For, as the bills of the banks constitute the whole of the circulating medium, they gain, gratuitously, the interest on so much of their paper as is constantly absorbed in circulation—the amount of which we know is immense.

It was the opinion of *Mr. Justice Blackstone* (and the soundness of that opinion has been fully tested by the experience of statesmen) that the revenues of a State may be derived from duties and imposts on objects prudently

selected, with much less expense and burden to the community than from direct taxation. What part is it, of the revenues of the United States, that is derived from the latter source? They have never resorted to direct taxation but on the most pressing occasions, nor until the collection from indirect taxes had proved inadequate to the exigencies of government. From the year 1791 to 1798, and again from 1813 to 1815, laws were passed by Congress laying duties on various commodities and trades. But the first direct tax was not laid until 1798, and the second and last not until 1815. Among the objects then thought most appropriate for taxing, all incorporated banks, as well as private **544*** bankers, *banking companies and money dealers, were selected for duties; and those duties were regularly and readily paid, without any complaint from the banks of their being incompatible with their corporate existence, or their corporate rights.

There is no weight in the objection that the duty does not bear equally upon the whole community. It is not possible that taxes should be made to bear equally upon every member of the community, so as to draw from each one precisely in proportion to his property.

Nor, if this were practicable, would it be a wise or salutary system of taxation. It is certainly wiser and better to draw revenue from surplus income than from the immediate products of labor and industry; from commodities and trades which administer to the pleasures or the vices of men—from the luxuries and superfluities—than from the necessities of life. And thus the United States government began with duties on distilled spirits, on stills, on vendors of wines and spirits, on various articles of luxury, and on banks; and, as long as possible, avoided direct taxes and duties on the more necessary and useful articles, such as household furniture, farming utensils, and the various necessary articles of domestic manufacture.

The true question in this case is, whether the law complained of is a law impairing the obligation of a contract, in the sense those words bear in the Constitution of the United States. The power of taxation is "an incident of sovereignty;" and the government in whom it resides is alone competent, within its own jurisdiction, to judge and determine how, in what manner, and upon what objects that power shall be exercised. "That the power of taxation is one of vital importance," said the *Chief Justice* of this court, in delivering the opinion of the court in *M'Culloch's* case, "that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." (4 Wheat., 425.) And again, in the same case "it is admitted that the power of taxing the people **545*** and their property *is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its

constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." (4 Wheat., 428.)

It is admitted that land or other property granted by the State becomes liable to taxes in the hands of the grantees; and that there is no distinction, in point of principle, between a grant of corporate franchises and a grant of land or any other property, is conclusively shown by *Mr. Justice Story* in the *Dartmouth College* case. (4 Wheat., 684.) But land, it is said, exists, and is taxable before the grant. It exists, to be sure; but that circumstance is of no importance; since, as property of the State, it is not taxed, nor is taxable, until granted, any more than ungranted franchises are taxable. It may be said that, as corporate franchises take their existence only from the grant of them, the Legislature can annex to the grant whatever conditions or exemptions they please. If this were true, it would only show that the Legislature has power to grant an exemption from taxes in such cases as it may think proper; not that such exemption can be claimed when not granted. As these franchises are or may be valuable property, the State has an interest in the grants of them, and in the exercise of the taxing and other legislative powers over them, when they are granted, do exist, and are property, as much as it has in the case of any other grants of any other property.

The doctrine contended for by the plaintiffs amounts fully to this, that the powers of legislation must not be exercised, nay, must be annihilated, because they are liable to be abused. True, they would have this doctrine applied only in their own case; but it will hardly be conceded to them, though they so strenuously urge the claim, that they have a right to better security for their franchises than the rest of the community have for their privileges. But, *even if we adopt the plaintiff's appli- [**546** cation of the doctrine, where will it lead and land us? The power to regulate the public revenue; to fix the rate of interest; to grant charters of incorporation; and to raise revenue by taxation, are branches and incidents of that portion of sovereignty still retained by the States, and are necessary to the very existence of government. But, according to the plaintiffs, all these powers are restrained and controlled, if not surrendered, by the granting of an ordinary act of incorporation to a private trading company; for, if the Legislature has power to regulate the currency, it may say that bank bills shall not make part of it; it may say that no bank bills shall issue of a denomination lower than one dollar, or higher than one thousand dollars. If it can fix the rate of interest, it may deprive the banks of their profits; if it can create other banks at pleasure, it may render those already granted of no value; if it can tax the shares of stock in the hands of stockholders, it may effectually break up the business. They profess not to carry their doctrine so far; they concede the exercise of such powers to the State; but, concessions made to save a doctrine from its own tendencies to absurdity, do not alter the principle. The doctrine itself does go the whole length pointed out. The general legislative powers specified do involve in them the power of reducing the profits of the banks, and

of affecting their operations and their charters as fully as such a power is involved in the power of taxing.

The creation of a body politic is an exercise of legislative power; but it does not imply the relinquishment of any other portion of legislative power. The only obligation which the government imposes upon itself is, not unjustly and arbitrarily to defeat the grant contained in the charter; but, it has no more right to defeat any other legal grant than it has to defeat its own; and no law which would not impair the obligation of a contract between individuals, would impair it if the State was one of the contracting parties. It makes no difference that individuals cannot grant franchises; for it is already clearly shown that, in principle, there is no difference between grants of franchises and §47*] grants of other property. It is not wholesome doctrine for private corporations to imbibe that they are independent of the power that creates them, and that they shall be protected in setting it at defiance. Not only are their franchises and other property subject to the taxing power of States, but, so far as the public interests are affected by the action of a corporation, so far those operations must be under the control of government, whose province and paramount duty it is to provide for the public welfare. Thus, should the public good require the suppression of a paper currency, certainly the government would have a right to suppress it, although, in doing so they would destroy the banks whose paper composes that currency. It will not do to say that a chartered military company may not be put down, or that a chartered company engaged in supplying a city with water, or any such corporations, may not be suppressed, if the government should see good cause for suppressing them; and, in point of character, there is no difference between those corporations and banking corporations whose paper bills constitute the public money currency of the country. In the case of *The Corporation of the Protestant Episcopal Church v. The City of New York*, decided by the Supreme Court of the State of New York, and reported in 7 Cowen, 584; and in a similar case of another church congregation against that city, reported in 5 Cowen, 538, it was decided that a by-law of the city, forbidding the interment of the dead in the cemeteries and grounds appertaining to the churches, was valid and constitutional, although those grounds had been granted by the city itself for that express use, and the grants contained covenants for quiet enjoyment, and although certain private rights and pecuniary interests of individuals were cut off by that law; and it was decided in those cases that the city corporation could not, by its agreement, abridge its legislative powers. In the case of *Brown v. The Penobscot Bank* (8 Mass., 445), it was decided that a law imposing a heavy penalty upon banks which did not punctually redeem their bills, was valid; and in *Foster v. The Essex Bank* (16 Mass., 128), a law was decided to be valid which, for the purpose of giving time for remedies against a bank, prolonged its corporate existence against its wishes §48*] for the space of three years after its charter had expired.

There is another question—a most important one—which must always present itself in a case Peters 4.

like the present. That question is, whether any Legislature can, if it would, grant or surrender any portion of that power of which sovereignty itself consists. No one can entertain a doubt that the existing Legislature must have full power to make all such grants of public lands or other property, and to enter into all such contracts as this court declared to be binding and valid in the cases of *Fletcher v. Peck*, *Terrett v. Taylor*, and other similar cases. But such grants and contracts, it appears, are very different from an alienation, in perpetuity, of a portion of the taxing power of the State; which, in another case, this court declared to be “an incident of sovereignty,” and “essential to the existence of government.”

There are certain powers which are inherent in the people and cannot be alienated, even by the people themselves, much less by their representatives, to whom those powers are entrusted for a time; not to be annihilated, but to be exercised by them until other representatives shall be appointed in their places. The present generation of men may sell or bind themselves to servitude, but they cannot sell or bind their posterity.

It is immaterial whether the Legislature is restrained by a written constitution or not. The absolute rights of the constituents are not to be encroached upon because they may not think it necessary to attempt to guard them by such instruments, which, after all, but very differently answer the purpose for which they are intended; but, on the contrary, are too often made use of by false and forced constructions to justify the assumption of powers which the people never meant to grant.

The power of self-government is a power absolute and inherent in the people. But that power cannot exist distinct from the power of taxation. If the Legislature can exempt, forever, all corporations from taxes, they can exempt all merchants, all farmers, all manufacturers, or all of any other classes of the community. And, in this way, they can cut off §549 the sources of future revenue, and can fasten and entail forever the whole burden of government upon any portion of the people they please.

In the argument, the sentiments frequently expressed by this court and by different members of it on various occasions, seem to have been forgotten. “The question whether a law be void for its repugnance to the Constitution,” said the *Chief Justice* of this court in the case of *Fletcher v. Peck*, “is at all times a question of great delicacy; which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.” “The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.” And in the *Dartmouth College* case (4 Wheat., 125), “on more than one occasion the court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution.” In *Calder v. Bull* (3 Dall., 386), it is said, by the late *Mr. Justice Chase*, “if ever I exercise the jurisdiction, I will never decide any law to be void but in a very clear case.” And by the late *Mr.*

Justice Iredell, in the same case: "The court will never resort to that authority but in a clear and urgent case." And in *Cooper v. Telfair* (4 Dall., 14), by the late *Mr. Justice Patterson*: "To authorize this court to pronounce any law to be void, it must be a clear, unequivocal breach of the Constitution; not a doubtful and argumentative implication."

Mr. Jones, in reply, argued that,

The term "contracts," used in the Constitution, comprehends as well those between two States, or between a State and private individuals, as those between two or more private individuals, citizens or not citizens of the State, the validity of whose law is drawn in question.

It comprehends not only such as remain executory or in action, but all vested rights and interests in any species of property, corporal or incorporeal; and, among these, the franchises and property of private corporations, 550*] whether created *for any expressed consideration of definite value, or for any declared objects of public utility; or purporting to be merely gratuitous, as between grantor and grantee; the implied benefits to the community being the only compensation supposed to be given or received; even donations from the State, or individuals, to eleemosynary and religious institutions, or to others of public beneficence or utility, whether incorporate or unincorporate.

It matters not by what means, or in what form the contract is created or the rights vested; whether by charter or grant from the State, after it became sovereign and independent; or during its colonial state, from the crown; or by a law in the ordinary form of legislative enactment: they are all equally protected by the constitutional prohibition.

This constitutional sanction rests not on the good faith supposed, by the comity of sovereigns, to inform the breasts of each other; nor upon the dread appeal to that *ultima ratio* which is ordinarily the only means of compulsory redress among themselves: but it acts, directly and practically upon State power and jurisdiction, and enables the tribunals to set aside the obnoxious law, and to uphold and enforce by judicial coercion the rights it attempts to violate.

It matters not what the kind or degree of force exerted by the law upon the contract or the vested right, whether it go directly and wholly to annul the one, or to destroy the other; or in any degree to impair or injure it; or to exert any authority over it, necessarily involving and inseparably inherent to an authority to annul, destroy or impair it: any compulsory change in the terms of the contract, or in the essential condition of the vested right, whether positively injurious or even positively beneficial, is within the same reason, and equally prohibited to the States.

The numerous decisions of this court, by which these principles have been judicially established, are too recent and familiar to require any particular reference. Their authority precludes all judicial question, and dispenses with all proof of the axioms deduced from them.

"Taxes (as accurately classed by writers on political economy) are either direct or indirect: 551*] direct when immediately *taken from income or capital; indirect when taken from

them by making the owners pay for liberty to use certain articles, or to exercise certain privileges."

When, therefore, the bank is made to pay for liberty to exercise the privilege of employing a certain capital in the trade of banking, or of exerting any other of its chartered faculties; doubtless an indirect taxation of the capital itself, in what species of property soever consisting, results. But the converse of the proposition does not hold that a direct tax, in the ordinary mode of taxation, upon the capital of individuals invested in bank stock, or upon the product of the skill and labor bestowed in the employment of that capital, or upon the lands, ships, merchandise, or other specific property held by the bank for the benefit of the individual stockholders; necessarily operates, directly or indirectly, any duty or burden whatever on the corporate franchise itself, or the liberty to exercise the privileges conferred by the charter. The very material difference between the two modes of taxation, as they respectively affect the substantial terms of the charter and the essential condition of the rights vested by it, will be presently considered. The simple proposition that it is a duty imposed specifically on the corporate franchise, and the faculties and privileges with which the body corporate is endued by its charter, is what is now to be proved.

This is conceived to be clear from the import of the law itself.

The tax is laid directly on the bank in its corporate capacity, and the stock, belonging to individuals, is made the mere measure of the imposition on the aggregate body. This stock is not the property of the body taxed, but is divided into distinct and separate shares which belong to the several owners as their separate, individual estate, and subject to the independent disposal of each owner; as were the several capitals represented by the stock before they were subscribed to the stock, and while they subsisted in the original form of money. The capital paid in and represented by the stock is entrusted to the custody and husbandry of *the corporation; but, that [*552 artificial and transferable commodity, brought into life by the charter, endued with all its faculties by the charter, and denominated bank stock, is just as much the separate property and at the disposal of the respective owners, clear of all corporate control, as their several lands, chattels, and choses in action. This quality of the stock is just as distinctly guaranteed to the stockholders individually as is the corporate franchise, or any of its faculties, to the aggregate body. There is nothing of the social property or possession incident to partnership. Then, the property of one person is merely adopted as an arbitrary measure of the quantum of taxation on another. There is no more of indirect taxation upon the bank stock held by individuals (and thus made the arbitrary measure of taxation) than upon the lands, ships, choses in action, or other property held by the aggregate body for the benefit of the several corporators, but not comprehended in the rule of admeasurement for determining the mere quantum of taxation. The indirect effect upon all is precisely the same. But this indirect operation of the tax does not go in the

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least degree to relieve any one article of the property, nor any one of the proprietors affected by the operation from the general law of taxation operating upon them, in common with their fellow-citizens. Under that general law, all the property of every species held by the corporation for the benefit of the stockholders, is rated, *qua* property, in the common process of taxation; just the same as if the franchise or chartered faculties of the corporation had not been taxed at all: so are the money capitals invested in and represented by the shares of bank stock, and the products received in the form of dividends: all being still liable to be rated in the general taxation upon capital and income, without the least allowance for what is indirectly abstracted by the duty on the corporate body. This duty, therefore, does not even affect to be a circuitous mode of more conveniently taxing property in any form of fixed or of commercial capital or of income. It is no part of any general system, either of a property tax or an income tax; but is solely and exclusively [*553*] sively directed to the chartered liberty or privilege of a certain mode of artificial existence, and of exercising the peculiar faculties of that mode of existence. The tax is just as effective in terms and in obligation, whether the corporation, *qua* proprietor, own millions or nothing; whether the capital stock be at cent. per cent. advance, or the capital invested in it be utterly lost and sunk in the course of trade; whether the income in the form of dividends be large or small, or nothing. The amount of capital stock paid in is the unvarying standard of the duty on the bank; the actual state and condition of the bank, or of the stockholders as proprietors, enters not at all into the scheme of the duty. Then, how can the bare contingency that it may be one of the incidents and consequences of the scheme, indirectly, to burden the property of the bank, or of the stockholders, make this any the less a duty directed specifically, nay, exclusively, to the continued enjoyment of the corporate franchise to which it attached itself independent of every consideration of property.

The original grant of this franchise to the bank is admitted, it is presumed, to be in the nature of a contract between the State and the corporation, within the meaning of the Constitution; and, it is further presumed to be admitted, notwithstanding a good deal of ambiguity on this point in the opposite argument, that this contract, with all the peculiar rights and privileges vested under it, is of paramount obligation, and altogether irrevocable and indefeasible by any subsequent act of legislation. Admitted or denied, it cannot, at this day, be treated as a subject of controversy, unless this court should please to intimate a wish to review and reconsider the principles of former decisions. The obligation of the contract, if it means anything, means that the corporation shall always enjoy the franchise, with all the faculties, rights and privileges vested by the grant, upon the identical terms and conditions of that grant. The question, then, is a practical one. Does the law of 1822, against the consent of the grantee, materially change the original terms of the grant or the condition of the rights vested by it? In either case, it equally impairs the obligation of the contract.

tract, within the meaning of the Constitution.

*One of the most material terms of a [*554*] contract or grant is the consideration. The grant of a franchise is either in some sort gratuitous, as if founded on the implied consideration of diffusive benefits to the community, or on the expressed consideration of public utility; or of some pecuniary or other equivalent of definite value. In either case it is equally binding and indefeasible, without the consent of both parties. If, being gratuitous, it be burdened with a price; or if, being for valuable consideration the price be arbitrarily increased, who can doubt that the terms of the contract are materially changed? And if this be done by the retrospective operation of a law arbitrarily imposing such new terms, who can doubt that the obligation of the contract is injuriously impaired, if not destroyed?

The case of land purchased from the State being liable to taxation in common with the land of other individuals, is put as an argument, in point, against us. No one ever imagined that a change in the condition of the land from public to private domain necessarily annexed any pre-eminent privileges to it. So we admit, without qualification, that all property held by the bank by virtue of its charter is taxable in common with other property of the like description. So this court admitted was the condition of the property held by The Bank of the United States, though the bank itself or its franchises and privileges were not so. But suppose the Legislature, by a retrospective law, instead of subjecting the land to the general law of taxation, tax the grant itself, the title to hold and enjoy the land, and exact from the grantee over and above the original consideration, a new compensation for parting with the title of the public to an individual; or, what is the same thing, select his particular land from the mass of other taxable lands, and besides the general tax contributed for it by the proprietor in common with other proprietors of lands, exact an additional tax on his because his title or grant was derived from the State; so as, in effect, to tax the grant itself, or the right before granted, to hold and enjoy the land; this would be a clear infringement of the contract, as being a material and [*555*] injurious change in its terms: in effect, the exaction of an additional compensation for the grant.

Next, we are to examine the state and condition of the right vested by the grant, and see if that is subjected by the law in question to any material change from the state and condition in which the grant originally placed it.

This must be determined by the nature and extent of the vested right, then and now.

It is not at this day to be disputed that the grant imports a contract that the grantees shall absolutely and fully enjoy the liberty to exercise all the privileges and faculties, either expressed in the grant or incident to its nature, unrevoked and undiminished; in short, that these privileges and faculties shall continue while the corporation endures, of the same extent and of the specific quality as when originally conferred, without any hindrance, impediment or molestation, on the part of the grantor. The implied covenants of the grant

are just as strong and obligatory as those covenants of title in an ordinary bargain and sale that go to tie up the hands of the bargainor himself, and of all claiming under him or acting by his authority. For instance: the covenants against incumbrances, &c., and for quiet enjoyment, without the let, molestation, hindrance, &c., of the bargainor, &c. The granted liberties and franchises cannot be destroyed or taken away, in the whole or in part; consequently, they cannot be altered or diminished in kind or in degree; for he who has a discretion to alter or diminish, necessarily has a discretion to destroy, unless the limits of his discretion be stipulated in the grant. It is not the mere quantum of the injury to the grantee, nor the degree in which the terms and conditions of the contract are transgressed, that determines the rightfulness of the act. Once admit a discretionary power in any degree as resulting from the relation of the parties and not from the limitations of the contract, and it can be nothing but an unlimited discretion. The granted liberties and faculties cannot be afterwards clogged with any new conditions or incumbrances that may either stop or retard their action; neither a mole-hill nor a mountain can be raised in their path. This is the irresistible ***556**] ible ***and** universal conclusion of reason; and sanctioned, if it wanted sanction, by the reasoning and the decision of this court in *Green v. Biddle* (8 Wheat., 84).

Then, is not the exaction of a tax, or, in other words, of an additional compensation to the State for the chartered liberty, as efficient an instrument, either for the destruction or the diminution of the liberty as any that could be devised? What is there that could more effectually stop or retard its chartered course? It depends entirely upon the weight of the burden whether the party on whom it is imposed sink under it or be measurably impeded and retarded. In mercantile language, it may occasion a partial loss of one per cent., or a total loss of one hundred per cent.; and, in principle, does it matter which? The question is not whether the tax be exorbitant or oppressive. Of that no judicative tribunal can possibly be the judge. If the discretion to tax at all rest with the Legislature, the discretion is, in the nature of things, unlimited. It is impossible for any but the delegated depositaries of the power to tax, and their constituents to judge and determine what tax is reasonable or exorbitant. What might be a light burden to one bank might overwhelm another. Once determine that a discretionary power to impose the burden in any degree exists, and the judicial power is forever gone to control it in any degree.

Then these postulates may be taken for granted.

1. That the imposition of a new tax or burden on the liberty, in any degree, measurably clogs and impedes the practical exercise of that liberty, and so diminishes it.

2. That such tax or burden is an instrument equally efficient to destroy as to diminish the liberty, according to the kind and degree of force with which the instrument is used.

3. That it rests in the absolute discretion of the Legislature to use it, either for the one purpose or the other, if at all.

The conclusion is inevitable that, if it may be used at all, the exercise of the liberty in any degree and its very existence, rest upon sovereign discretion, not on the faith of a contract. This amounts either to a negation of the postulate with which we set out that the grant of the liberty is ***in the nature of a contract, [*557** or to an exclusion of all contracts from the sanction and protection of the Constitution; or to an exception of this particular contract from the condition of contracts in general.

The ground or reason of such exception is not stated, and is altogether beyond comprehension.

Then, if the law of 1822 be borne out in the imposition of this new burden on the liberty to exercise the privileges of the franchise, the change effected in the state or condition of the franchise as it stood under the original law of the contract and as it stands under the subsequent modification of that law, is this: originally, the contract under which it was held was consummate and executed; now, one, at least, of its most material terms—the consideration—is executory and contingent, and, what is worse, discretionary with the other party: originally, the exercise of the franchise within its chartered limits was absolutely free and unrestrained; now, burdened with new impositions, and liable to be further burdened, *ad infinitum*: originally, the liberty and right so to exercise the privileges and faculties of the franchise were absolute, unconditional, and indefeasible; now, at the sovereign will and pleasure of the Legislature.

The franchise is not like the proper subjects of political power intrusted to legislative discretion at all; but, to the positive sanction of public faith, tied down by the inviolable obligation of contract. Indeed, an abuse of legislative power in oppressing the great mass of the community by exorbitant taxation, far less in confiscating all its property, is scarce an admissible supposition. The mass of the community holds in its own hands the remedy against its own oppression and the abuses of its rulers; but the great conservative principle of political responsibility may act very feebly, or not at all, in protecting and enforcing the particular rights and obligations of contracts against violation by the government. It is, therefore, that political rights and the vested rights of contract and property, are placed on different bases and protected by different sanctions. The administration of any political power must, in the nature of things, be more or less discretionary; and can give no guarantee against abuse but the responsibility inseparable from ***delegated power**; the rights ***[*558** and obligations of contracts, on the other hand, are no subjects of political trust or discretion at all, but just as positive and coercive upon the party that happens to be a sovereign State as upon an individual.

An objection somewhat novel is started, which goes to limit and restrict instead of enlarging State power, by denying its competency to make such a contract as we say it has made in this case. The State cannot, it seems, alienate or part with its sovereign power in whole or in part. Taxation is an incident of its highest sovereign power, and cannot be aliened by contract; therefore, a contract to exempt

any particular person or species of property from taxation is void.

To say nothing of the evident inconsequence of the conclusion from the premises, and of the inaccuracy of holding that the constitutional incompetency of a State to lay new exactions upon its own contracts and upon the mere abstract rights of contract created by the State itself, is the same thing as a substantive stipulation to exempt property, in its nature an appropriate and legitimate subject of taxation; we may wonder why the axe was not applied to the root of the bank charter. For, surely, the principle of the objection goes that length: since the franchise itself is carved out of the eminent domain, or transcendental propriety of the State; and is a portion of it, aliened and bestowed upon every corporation; and no small portion of it is parted with when municipal corporations are created.

But it should not have escaped the learned counsel that the State Legislature of New Jersey was held bound by a contract of its predecessor, the colonial Legislature divesting itself of a portion of this very incident of high sovereignty—taxation—as it applied to certain lands belonging to citizens of the State, and constituting as appropriate a subject of taxation in general as can be imagined. This, not as he supposes, because of any peculiar dignity or sanctity attached to a treaty half a century before, between the former colony and the poor remnant of a broken tribe of Indians, but upon the ground of contract simply: which, indeed, is the only intelligible ground for the obligation **559** of treaties, *upon the parties to them. It might also have been recollected that the Legislature of New Jersey, in the instance just stated, and of Georgia, in the case of the Yazoo lands, were held to have conclusively renounced by contract, and by its implied, not its express stipulations, the exercise of one of the highest and most indispensable prerogatives of legislation—that of repealing its own laws.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This is a writ of error to a judgment rendered in the highest court for the State of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the Legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of “The President, Directors, and Company of the Providence Bank,” and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the Legislature of Rhode Island passed “an Act imposing a duty on licensed persons and others, and bodies corporate within the State,” in which, among other things, it is enacted that there shall be paid, for the use of the State, by each and every bank within the State, except The Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in.” This tax was afterwards augmented to one dollar and twenty-five cents.

The Providence Bank, having determined to

resist the payment of this tax, brought an action of trespass against the officers by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration under the Act of Assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the Constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment ^{*}was **[*560]** given by the Court of Common Pleas in favor of the defendants; which judgment was, on appeal, confirmed by the Supreme Judicial Court of the State. That judgment has been brought before this court by a writ of error.

It has been settled that a contract entered into between a State and an individual is as fully protected by the tenth section of the first article of the Constitution as a contract between two individuals, and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the State?

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The State, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties, and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged, amounts, in substance, to this: The charter authorizes the bank to employ its capital in banking transactions for the benefit of the stockholders. It binds the State to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the Constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the State from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits for the use of the State; and, consequently, destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing ^{*}the obligation of the **[*561]** contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing

moneyed corporations has been frequently exercised, and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist: but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied, because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the State should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption in virtue of a charter which does not indicate such an intention? The time may come when **562** a duty may be imposed on *manufacturers. Would an incorporated company be exempted from this duty as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burthens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

If the power of taxation is inconsistent with the charter because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee.

Land, for example, has in many, perhaps in all the States, been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the

proposition appears so extravagant that it is difficult to admit any resemblance in the cases. And yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is, therefore, impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted in these broad terms in any case. We must look for the exemption in the language of the instrument; and if we do *not find it there, it would **[*563]** be going very far to insert it by construction.

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of *M'Culloch v. The State of Maryland*, and in *Osborn et al. v. The Bank of the United States*. Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation than an unincorporated company would be, carrying on the same business.

The case of *Fletcher v. Peck* has been cited; but in that case the Legislature of Georgia passed an act to annul its grant. The case of *The State of New Jersey v. Wilson* has been also mentioned; but in that case the stipulation exempting the land from taxation was made in express words.

The reasoning of the court in the case of *M'Culloch v. The State of Maryland* has been applied to this case, but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn et al. v. The Bank of the United States*, was founded expressly on the supremacy of the laws of Congress, and the necessary consequence of that supremacy to exempt its instruments employed *in the execution of its powers from the **[*564]** operation of any interfering power whatever. In reasoning on the argument that the power of taxation was not confined to the people and property of a State, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition; and added, that "the power was an in-

ident of sovereignty, and was co-extensive with that to which it was an incident. All powers, the court said, over which the sovereign power of a State extends, are subjects of taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not.

So in the case of *Osborn v. The Bank of the United States*, the court said, "the argument" in favor of the right of the State to tax the bank, "supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the State as any individual would be."

The court was certainly not discussing the question whether a tax imposed by a State on a bank chartered by itself impaired the obligation of its contract, and these opinions are not conclusive as they would be had they been delivered in such a case, but they show that the question was not considered as doubtful, and that inferences drawn from general expressions Peters 4.

pointed to a different subject cannot be correctly drawn.

We have reflected seriously on this case, and are of opinion that the Act of the Legislature of Rhode Island passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the State, does not impair the obligation of the contract created by the charter granted to the *plaintiffs in error. It [*565 is therefore the opinion of this court that there is no error in the judgment of the Supreme Judicial Court for the State of Rhode Island affirming the judgment of the Circuit Court in this case, and the same is affirmed; and the cause is remanded to the said Supreme Judicial Court, that its judgment may be finally entered.

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court of the State of Rhode Island and Providence plantations, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Supreme Judicial Court in this cause be, and the same is hereby affirmed with costs.

See 3 How., 140.

Cited—6 Pet., 729; 11 Pet., 546, 549, 566; 2 How., 558; 6 How., 331, 542; 7 How., 482, 504, 534; 8 How., 81; 16 How., 387, 388, 409, 430, 435; 1 Black, 446; 6 Wall., 606; 11 Wall., 429; 16 Wall., 249; 18 Wall., 226; 20 Wall., 61, 669; 3 Otto, 598; 5 Otto, 688, 691; 6 Otto, 436; 7 Otto, 666; 9 Otto, 281; 10 Otto, 497, 561; 1 Abb. U. S., 334; 2 Abb. U. S., 334; 7 Bank. Reg., 426; 12 Blatchf., 461; 3 Cliff., 383.

NOTE.

The **Extra Annotation** here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,
Pac. Pacific Reporter,
N. E. Northeastern Reporter,
N. W. Northwestern Reporter,

So. Southern Reporter,
S. E. Southeastern Reporter,
S. W. Southwestern Reporter,
S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

IV PETERS.

4 Pet. 1-101, 7 L. 761, *CARVER v. JACKSON*.

Appeal and error.—The practice of bringing the whole charge of the court below before Supreme Court reprobated, p. 80.

Cited to this point and statement reaffirmed in *Ex parte Crane*, 5 Pet. 198, 8 L. 95, and *Magniac v. Thompson*, 7 Pet. 390, 8 L. 724. Cited and applied in *Phoenix L. Ins. Co. v. Raddin*, 120 U. S. 193, 30 L. 648, 7 S. Ct. 505, holding bill of exceptions should not contain the whole charge of the court to the jury; dissenting opinion, *Hicks v. United States*, 150 U. S. 457, 37 L. 1143, 14 S. Ct. 150, majority holding exception to the judge's charge does not embrace too large a portion of it; *Phoenix, etc., Co. v. Lucker*, 77 Fed. 248, 42 U. S. App. 111, and *Pittsburgh, etc., Ry. Co. v. Thompson*, 82 Fed. 728, 54 U. S. App. 236, holding exception to charge too general; *Commonwealth v. Costley*, 118 Mass. 23, holding bill of exceptions should not set forth the whole charge to the jury, as also in *Curry v. Porter*, 125 Mass. 94, and *Oliver v. Phelps*, 20 N. J. L. 185, ruling similarly; *Kearney v. Snodgrass*, 12 Or. 317, 7 Pac. 313, holding an exception in general terms to an instruction correct in point of law cannot avail a party on appeal; dissenting opinion, *People v. Berlin*, 10 Utah, 43, 36 Pac. 200, majority holding a general exception to an entire charge is insufficient, if any portion is correct; as also in *People v. Hart*, 10 Utah, 206, 37 Pac. 331, collecting authorities. Cited but without particular application in *Smith v. United States*, 1 Wash. Ter. 272. Denied in dissenting opinion, *Mitchell v. Harmony*, 13 How. 146, 14 L. 89, majority holding in some States it is the practice for the court to express its opinion upon facts in a charge to the jury, and it is proper for Circuit Courts of such States to do likewise.

Appeal and error.—Appellate court is not concerned with trial judge's charge to jury upon matters of fact, p. 80.

Cited and rule applied as follows: *Garrard v. Reynolds*, 4 How. 127, 11 L. 905, holding in submitting an open question of fact, the court did not interfere with province of the jury; *Spring Co. v. Edgar*, 99 U. S. 659, 25 L. 491, refusing to reverse judgment, where defendant did not request the instruction to be qualified or changed; *Vicksburg, etc., R. R. Co. v. Putnam*, 118 U. S. 553, 30 L. 258, 7 S. Ct. 2, holding judge's opinion upon facts cannot be reviewed by writ of error, when no rule of law is incorrectly stated; *Emerson v. Hogg*, 2 Blatchf. 13, F. C. 4,440, holding no exception to charge having been taken, objection could not be taken afterwards; *Lander v.*

United States, 14 Fed. Cas. 1063, holding misstatement of evidence by court furnishes no ground for granting a new trial; *Hayes v. United States*, 32 Fed. 663, refusing to reverse, for comments of court as to facts; *Rhodes v. Sherrod*, 9 Ala. 71, holding omission to charge fully upon the case is not ground for reversal when no charge beyond the one given was asked; *Frankfort Bank v. Johnson*, 24 Me. 500, holding bill of exceptions cannot be taken to a commentary of judge upon the testimony, as also in the following: *Hayden v. Bartlett*, 35 Me. 204; *Nutting v. Herbert*, 37 N. H. 355; *People v. White*, 14 Wend. 116; *People v. Haynes*, 14 Wend. 554, 28 Am. Dec. 531; *McKee v. People*, 36 N. Y. 119; *Utter v. Walker, Wright*, 47; and *Reynolds v. Rogers*, 5 Ohio, 172, all ruling similarly; *Markle v. Akron*, 14 Ohio, 592, holding judgment of court on facts will not be reversed on error; *Sterling v. Ripley*, 3 Pinn. 163, holding court may refuse to give an instruction good in part and bad in part. Cited in note on Recitals in Deeds, 16 Am. Dec. 754, collecting authorities. Cited without particular application to question at issue in dissenting opinion, *State v. Pike*, 49 N. H. 417, 6 Am. Rep. 554, collecting authorities on this point.

Deeds.—Under law of New York, the oath of a subscribing witness, and subsequent recording of the deed, afford prima facie evidence of its execution and delivery, p. 82.

Cited to this point and statement reaffirmed in *Kelly v. Jackson*, 6 Pet. 632, 8 L. 527. Cited and principle applied in *Hanrick v. Neely*, 10 Wall. 366, 19 L. 948, holding grantee being in possession of a recorded deed, upon its face regularly executed, presumption is it was duly delivered; *McIntyre v. Kamm*, 12 Or. 259, 7 Pac. 29, in making proof of an unacknowledged deed, witness should be sworn, and this fact should be in the certificate.

Distinguished in *Holbrook v. Bank*, 2 Curt. 247, F. C. 6,597, holding in Massachusetts certificate of acknowledgment and registration of deed do not estop a person from proving both deed and certificate were fraudulently antedated.

Estoppel.—Recital of a lease in a deed of release binds the parties and privies but does not bind strangers or those claiming by title paramount to the deed, p. 83.

The citations collect a very large number of cases affirming and applying this doctrine. They are in part as follows: *Crane v. Morris*, 6 Pet. 609, 610, 612, 8 L. 518, 519, applying rule to similar facts; *Sprigg v. Bank*, 10 Pet. 265, 9 L. 419, holding one signing as principal cannot set up defense that he was a surety; *Van Rensselaer v. Kearney*, 11 How. 323, 13 L. 714, holding grantee and those claiming under him cannot deny that grantor had an estate in fee simple when deed purports to convey such; *Bush v. Cooper*, 18 How. 85, 15 L. 274, holding one mortgaging land subject to judgment lien (deed containing covenant of warranty), afterwards becoming a

bankrupt, is estopped from setting up title acquired at sale to satisfy judgment, and defeat mortgage; *Johnson v. United States*, 5 Mason, 442, F. C. 7,419, holding receipt of a collector of United States is but prima facie evidence of payment; *Murray v. Lovejoy*, 2 Cliff. 202, F. C. 9,963, holding attaching creditor appearing and defending in suit against sheriff respecting the attachment is bound by judgment therein upon a subsequent suit for trespass; *Reeves v. Vinacke*, 1 McCrary, 216, F. C. 11,663, holding purchaser of land, assuming to pay mortgage, defective because of description, is estopped to claim as an innocent purchaser; *Kirby v. Lewis*, 39 Fed. 70, holding parol evidence inadmissible to vary recitals in a deed; *Pratt v. Nixon*, 91 Ala. 196, 8 So. 753, holding recital in second mortgage referring to the first estops mortgagor and second mortgagee from denying validity of first mortgage; *Doe v. Porter*, 3 Ark. 61, 36 Am. Dec. 455, holding grantor and grantee, and privies, are bound by recital of prior deed; *Stidham v. Matthews*, 29 Ark. 660, holding recitals of vendor's deed are notice to vendee; *Roth v. Williams*, 45 Ark. 449, holding one claiming under title anterior to date of reciting deeds, is not bound by their terms; *Stark v. Barrett*, 15 Cal. 367, holding mere trespassers on land are strangers against whom recitals in the patent are conclusive; *Donahue v. McNulty*, 24 Cal. 418, 85 Am. Dec. 83, holding recital in sheriff's deed is not evidence against strangers or those claiming adversely; *Hurd v. McClellan*, 1 Colo. App. 331, 29 Pac. 183, holding that final judgment in ejectment binds parties and those claiming under them; *Doe v. Dowdall*, 3 Houst. 378, 11 Am. Rep. 762, holding parties and privies are estopped from denying the operation of the deed according to its manifest intent; *Williams v. Keyser*, 11 Fla. 242, 89 Am. Dec. 247, holding recital of one deed in another is evidence of the fact therein recited; *Coogler v. Rogers*, 25 Fla. 873, 7 So. 394, holding estoppel extends to grantee, and those claiming under him; *McCleskey v. Leadbetter*, 1 Ga. 557, holding a deed which recites a former deed and its loss is evidence of the first deed and binds grantor and his privies; *Smith v. Gettinger*, 3 Ga. 143, holding strangers are not concluded by a judgment; *Glanton v. Griggs*, 5 Ga. 434, holding a party acquiring title to bill by indorsement, etc., with express notice of any defect, is so far identified with the previous owner, that his admissions, while owner, may be received against such a party; *Williams v. Martin*, 7 Ga. 380, holding third parties may impeach a judgment for fraud; *Yahoola R. Min. Co. v. Irby*, 40 Ga. 481, holding recital in deed is only evidence against parties and privies; *Simms v. Freiherr*, 100 Ga. 613, 28 S. E. 291, holding recital in deed to original trust deed binds a privy.

Other citing cases which follow the syllabus rule are: *Kershaw v. Kershaw*, 102 Ill. 311, holding acceptance of deed estops grantee from denying that seal attached is his; *Cobb v. Oldfield*, 151 Ill. 541, 42 Am. St. Rep. 264, 38 N. E. 142, where party in possession claiming

titles, buys in an outstanding title, he and his grantees may show their title is paramount, and contest recitals in first deed; dissenting opinion, *Davis v. O'Ferrall*, 4 G. Greene, 364, holding where grantee of plaintiff's husband purchased title from United States his grantee was estopped from showing plaintiff's husband was not seized of the lots; *Campbell v. Ayres*, 18 Iowa, 254, holding judgment against husband binds wife claiming under him; *Edwards v. Ballard*, 14 B. Mon. 290, holding fraudulent vendee cannot rely on recitals in deed as against creditors of vendors; *Davis v. Callahan*, 78 Me. 320, 5 Atl. 77, holding where party signed deed by wrong name, he and his privies are estopped from taking advantage; *Prentiss v. Holbrook*, 2 Mich. 376, holding judgment in favor of sheriff is a bar to action against one purchasing from him; *State v. Coste*, 36 Mo. 438, 88 Am. Dec. 150, holding judgment in favor of administrator is bar to action against his securities; *Durette v. Briggs*, 47 Mo. 360, holding recitals in sheriff's deed are conclusive on parties and privies; *Baldwin v. Thompson*, 15 Iowa, 509, holding recital in deed under which party claims does not estop him from claiming under an older title; *Miller v. Miller*, 63 Iowa 389, 19 N. W. 251, holding recitals in deed as exhibit are not regarded as averments of the answer, unless specially made so by proper allegations; *Ham v. Ham*, 14 Me. 354, holding grantee of deed containing no covenants of warranty is not estopped from showing a paramount title; *Thompson v. Thompson*, 19 Me. 240, 36 Am. Dec. 752, by receiving a second deed of warranty from the same grantor of the same premises, grantee is not estopped from asserting that his title passed by the first conveyance; *Russ v. Alpaugh*, 118 Mass. 376, 19 Am. Rep. 465, holding deed from father with full covenants of warranty does not estop his heirs from asserting an independent title, derived by descent from the mother; *Chauvin v. Wagner*, 18 Mo. 552, holding covenant for further assurances will not estop heirs of grantor from setting up title not derived from him; *Crispen v. Hannavan*, 50 Mo. 419, holding judgment binds parties and privies, but not strangers; *Sutton v. Dameron*, 100 Mo. 151, 13 S. W. 500, declaring an estoppel must be certain to every intent; *Wolff v. Loan Assn.*, 67 Mo. App. 684, declaring recitals in an instrument are prima facie evidence against the party executing it; *Kimball v. Blaisdell*, 5 N. H. 535, 22 Am. Dec. 478, holding purchaser from grantor is estopped by his warranty in a prior deed; *Kimball v. Fenner*, 12 N. H. 254, holding recital of consideration in deed may be attacked by creditors; *Chamberlain v. Carlisle*, 26 N. H. 552, holding record of former judgment does not bind strangers; *Flanders v. Jones*, 30 N. H. 161, holding purchaser of an equity of redemption at sheriff's sale is estopped to impeach mortgage referred to in deed; *Corbett v. Norcross*, 35 N. H. 117, where owners of an undivided tract made an illegal partition and conveyed, but subsequently conveyed their undivided interest, last grantees were estopped from denying the partition; *Decker v. Caskey*, 3 N. J. Eq.

449, if one without title mortgages land, but afterwards acquires it, mortgagee will be entitled to the benefit of it.

Elsewhere the syllabus doctrine is affirmed and applied by the following: *Jackson v. Parkhurst*, 9 Wend. 209, holding recitals in a deed estop parties and privies; dissenting opinion, *Jackson v. Roberts*, 11 Wend. 437, majority holding averment of fact in sheriff's deed cannot be contradicted; *Bradstreet v. Clarke*, 12 Wend. 670, holding where a feme covert goes into a court of chancery to ask its aid on the ground of the existence of particular facts, and obtains the relief sought, she will be precluded from subsequently denying those facts; *Jewell v. Harrington*, 19 Wend. 473, holding recital in deed cannot estop strangers; *Torrey v. Bank*, 9 Paige, 659, holding grantee deriving title to lots through deed reciting mortgage is bound by it; *Palmer v. Smith*, 10 N. Y. 306, holding mortgagor, having recognized titles of trustees, was estopped from denying the validity of the assignment to them; *Hardenburgh v. Lakin*, 47 N. Y. 112, holding recital in conveyance does not bind strangers; *Buckingham v. Hanna*, 2 Ohio St. 560, holding one with paramount equitable title acquiring legal title by decree takes it free from estoppels; *Holmes v. Ferguson*, 1 Or. 221, one holding by deed reciting a mortgage is estopped from denying it; *Baskin v. Seechrist*, 6 Pa. St. 162, holding existence of a petition authorizing sheriff to make deed, will not be presumed against a stranger claiming by an independent possession; *Wilcox v. Daniels*, 15 R. I. 267, 3 Atl. 208, holding strangers to the covenant are not estopped from setting up their elder claim; *Ellen v. Ellen*, 18 S. C. 493, holding that so far as plaintiff claimed under the presumed conveyance, the deed was applicable, but not to part derived through adverse possession; *Hardy v. De Leon*, 5 Tex. 244, and *Kimbrow v. Hamilton*, 28 Tex. 567, holding recital of one deed in another binds parties and privies, as also in *Peters v. Clements*, 46 Tex. 123; *Willis v. Smith*, 72 Tex. 573, 10 S. W. 686, and *Burk v. Turner*, 79 Tex. 278, 15 S. W. 257, ruling similarly; *Baldwin v. Root*, 90 Tex. 554, 40 S. W. 6, holding title to land subsequently acquired by one conveying with warranty of title passes, eo instanti, to his warrantee; *Walton v. Hale*, 9 Gratt. 198, holding recitals in deed of commissioner are not evidence against party claiming adversely to it, as also in *Miller v. Williams*, 15 Gratt. 226, holding similarly; *Reynolds v. Cook*, 83 Va. 823, 5 Am. St. Rep. 321, 3 S. E. 714, holding where conveyance recites or affirms that grantor was seized of the estate, he will be estopped to deny that such estate passed; *Burmeister v. Howard*, 1 Wash. Ter. 213, holding where upon petition of lot-holders an ordinance made a certain disposition of land in a vacated alley, the lot-holders were estopped from setting up any right in contravention to the ordinance; *Coal R. N. Co. v. Webb*, 3 W. Va. 442, holding those claiming the benefit of the trust are estopped by the recital of the deed; *Rogers v. Cross*, 3 Pinn. 42, holding mortgagee assigning mortgage, and his representatives

are estopped from setting up a prior title in assignor to defeat mortgage. Cited in *Parliman v. Young*, 2 Dak. Ter. 185, 4 N. W. 144, and *Reid v. State*, 74 Ind. 262, on general doctrine of estoppel; note, 15 Ind. 424, on estoppel, collecting authorities; *Cotherman v. Cotherman*, 58 Mich. 474, 25 N. W. 471, without any special application of the doctrine to question at issue.

Distinguished in *Sabariego v. Maverick*, 124 U. S. 283, 31 L. 439, 8 S. Ct. 473, holding deed will pass only such title as the government has, and there is no presumption that it is a valid title; *O'Bannon v. Myer*, 36 Ala. 553, 76 Am. Dec. 336, holding recital of a note in a mortgage given to secure its payment is an exception to this rule; *Rich v. Atwater*, 16 Conn. 415, admitting evidence to show recital is not true, and was inserted through mistake; *Douglass v. Scott*, 5 Ohio, 199, holding deed not sufficiently attested does not operate as an estoppel. Distinguished in dissenting opinion, *McCusker v. McEvey*, 10 R. I. 611, without special application.

Evidence.—Recital of lease in a deed of release is admissible even in a suit against a stranger, as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease, especially if the possession be a long one, pp. 83, 84.

The following citing cases have affirmed and relied upon this exception to the general rule, heretofore considered, in making the following holdings: *Deery v. Cray*, 5 Wall. 805, 18 L. 657, holding presumption being established, recitals in deed may be used as proof against strangers; *Davis v. Gaines*, 104 U. S. 398, 26 L. 762, holding where possession was held for sixty years, deed was competent evidence of due advertisement of sale; *Fulkerson v. Holmes*, 117 U. S. 399, 29 L. 919, 6 S. Ct. 785, admitting deed, after lapse of sixty years, to prove pedigree of son; *Smith v. McIntire*, 83 Fed. 467, after fifty years, every reasonable presumption as to existence of power will be indulged in favor of bona fide purchasers; *McMurtry v. Keifner*, 36 Neb. 525, 54 N. W. 845, holding recital in deed of recent date is not sufficient evidence, as against strangers, of death of ancestor; *Schermerhorn v. Negus*, 2 Hill, 337, holding recitals in an ancient deed are not evidence against a stranger; *Chautauque Bank v. Riskey*, 4 Den. 486, holding party is bound by recitals in deed, under which his grantor held; *Jackson v. Deslonde*, 1 Posey, 685, holding instruction, if you believe there were in existence more than thirty years ago, deeds from A. to B. and B. to C., and C. claimed said land, holding possession and paying taxes, you are authorized to presume said deeds were executed by A. and B., if a proper one. Cited, but without particular application of this doctrine, in *Magee v. Doe*, 22 Ala. 717, and *Ferguson v. Dent*, 8 Mo. 673.

Distinguished in *Ives v. Ashley*, 97 Mass. 205, where, there being no evidence to prove the execution and loss of a deed, the recital was inadmissible.

Estoppel.— State claiming title under a deed is subject to all the estoppels running with the title, p. 87.

Cited approvingly, but with no particular application, in *Oxford Twp. v. Columbia*, 38 Ohio St. 95.

Remainders.— Estates in remainder shall be construed to vest as soon as they may be, p. 92.

Cited and rule followed in *Doe v. Considine*, 6 Wall. 475, 478, 18 L. 874, 875, holding estates in remainder vest at the earliest period possible, unless there be a clear manifestation of intent to the contrary; *Cropley v. Cooper*, 19 Wall. 175, 22 L. 113, holding child took a vested estate; *Mercantile Bank v. Ballard*, 83 Ky. 491, 4 Am. St. Rep. 166, holding children took a vested remainder; as also in *Williamson v. Field*, 2 Sandf. Ch. 561.

Marriage settlements.— Acts of parent under, cannot affect the validity of the rights of the children once vested, p. 93.

Cited and applied in *Magniac v. Thompson*, 1 Bald. 363, F. C. 8,956, holding omission of trustee under marriage settlement, did not affect the cestui que trust.

Powers.— In deeds under power to sell recital of the power is unnecessary, p. 98.

Cited and applied in *Terry v. Rodahan*, 79 Ga. 286, 11 Am. St. Rep. 427, 5 S. E. 42, holding deed made by an executor as an individual will execute a power of sale, though deed make no reference to power.

Damages.— Party is not in all cases bound to pay for improvements on his land, made against his will, p. 101.

Cited and applied in *Newton v. Thornton*, 3 N. Mex. 210, 5 Pac. 259, one making improvements upon land of another is not entitled to compensation. Cited, arguendo, in *Tufts v. Tufts*, 3 Wood. & M. 512, F. C. 14,233.

Miscellaneous.— Citation in *Westbrooke v. Romeyn*, 1 Bald. 203, F. C. 17,428, is to argument of counsel; *State v. Patton*, 5 Ired. 185, and *State v. Floyd*, 13 Ired. 385, as to force of prima facie evidence.

4 Pet. 102-107, 7 L. 796, EX PARTE BRADSTREET v. THOMAS.

Mandamus.— The writ will lie to compel a judge to sign and settle a bill of exceptions, although not to control his discretion as to the frame of the bill, p. 106.

The following cases upon this point are collected by the citations: In *re Streep*, 156 U. S. 208, 39 L. 399, 15 S. Ct. 358, refusing to issue writ of mandamus requiring circuit judge to resettle bill of exceptions; *Hudson v. Parker*, 156 U. S. 288, 39 L. 428, 15 S. Ct. 454, holding writ of mandamus will issue to compel district judge to admit to bail, where he has not exercised any discretion in the matter, but

has declined to act at all; *People v. Pearson*, 2 Scam. 204, 33 Am. Dec. 448, granting mandamus to compel judge to sign bill of exceptions as originally presented to him; *People v. Jameson*, 40 Ill. 96, 89 Am. Dec. 338, judge cannot, by mandamus, be compelled to sign bill of exceptions, which he believes incorrect; *People v. Anthony*, 129 Ill. 223, 21 N. E. 781, holding judge cannot, by mandamus, be forced to sign an amended bill of exceptions at a subsequent term, when he is unable to determine that exceptions were in fact taken on the trial; *Halstead v. Brown*, 17 Ind. 203, holding no other judge than the one who tried the cause can correct a bill of exceptions; *Ketcham v. Hill*, 42 Ind. 68, holding successor to judge presiding at trial has power to sign a bill of exceptions; *Jelley v. Roberts*, 50 Ind. 7, holding mandamus lies to compel a judge to sign a bill of exceptions; *Shepard v. Peyton*, 12 Kan. 618, holding judge cannot, by mandamus, be forced to sign a bill of exceptions which he believes untrue; *State v. Todd*, 4 Ohio, 352, discharging mandamus where bill of exceptions was incorrect; as also *Vanvabry v. Staton*, 88 Tenn. 341, 12 S. W. 788, and *Douglass v. Loomis*, 5 W. Va. 545, 546, where judge under oath denied its correctness; *Page v. Clopton*, 30 Gratt. 427, holding mandamus lies to compel judge to settle and sign bill; *State v. Noggle*, 13 Wis. 382, holding judge will not be compelled by mandamus to insert instructions in a bill, when he returns he has already settled it; *State v. Kellogg*, 95 Wis. 679, 70 N. W. 302, holding board, if facts are undisputed, may be compelled by mandamus to revoke a license.

Denied in dissenting opinion, *Ex parte Crane*, 5 Pet. 219, 8 L. 103, majority holding Supreme Court has power by mandamus to command Circuit Court to sign a bill of exceptions.

Practice.— Bill of exceptions should be tendered at trial, and can only be signed after the term with consent of parties, or by special order of judge, p. 107.

The following citing cases affirm and apply the foregoing rule: *Sheppard v. Wilson*, 6 How. 275, 12 L. 436, holding where bill of exceptions was signed two years after the trial, the Supreme Court of Iowa were right in striking it out of the record; *Turner v. Yates*, 16 How. 29, 14 L. 831, holding record must show exception was taken at that stage of the trial, when its cause arose; *Hunnicutt v. Peyton*, 102 U. S. 358, 26 L. 117, holding where bills of exceptions are signed during the term, it is not necessary that they be antedated to time of trial; *Davis v. Patrick*, 122 U. S. 143, 30 L. 1092, 7 S. Ct. 1103, refusing to strike out bill of exceptions, where signature was delayed until term succeeding trial, through fault of judge; *United States v. Jarvis*, 3 Wood. & M. 225, F. C. 15,469, declaring record must show exception was made at time of trial; *Nicoll v. Insurance Co.*, 3 Wood. & M. 537, F. C. 10,259, holding where exceptions are taken at trial, court may allow them to be reduced to form afterwards and filed *nunc pro tunc*; *Marine, etc., Co. v. Manufactur-*

ing Co., 32 Fed. 824, refusing to sign bill of exceptions, not presented at the term nor within a reasonable time; *United States v. Claasen*, 46 Fed. 69, holding defendant in criminal case cannot obtain a further bill of exceptions, after issuance of a writ of error; *Johnson v. Garber*, 73 Fed. 525. 43 U. S. App. 107, exceptions to rulings cannot be considered by appellate court, if same were not taken at the trial, and before verdict was rendered; *Lumber Co. v. Chapman*, 74 Fed. 451, 42 U. S. App. 21, sustaining bills of exceptions signed after regular term, where their considerations had been postponed by formal order of court; *Ex parte Nelson*, 62 Ala. 382, holding, under statute, bill of exceptions must be signed before the adjournment of the term; *Lenox v. Pike*, 2 Ark. 22, declaring it must appear that exceptions were taken at the trial; *Bardin v. L'Engle*, 13 Fla. 572, holding bill of exceptions should be made up and signed during term of court at which trial is had; *Bond v. Baldwin*, 9 Ga. 14, holding admission of illegal testimony, not objected to at the time, is not ground for a new trial; *Evans v. Fisher*, 5 Gilm. 456, in any case bill of exceptions should appear on its face to have been taken and signed at the trial; *Simonton v. Plank Road Co.*, 12 Ind. 380, holding where leave was given to file bill of exceptions within sixty days, but there was nothing to show it was then filed by leave of court, it could not be considered; *Balt., etc., Assn. v. Grant*, 41 Md. 564, holding presumption is that the signing was done by consent of parties or leave of court; *Hooker v. Sawyer*, 56 Md. 469, refusing to review bill of exceptions signed after the expiration of the term; *Edelhoff v. Manufacturing Co.*, 86 Md. 606, 39 Atl. 315, holding bill validly signed within the time fixed by order; *Commonwealth v. Greenlaw*, 119 Mass. 209, holding application for an extension of time not having been made before adjournment of term, bills, though filed three days after verdict, cannot be allowed; *V. & M. R. R. Co. v. Ragsdale*, 51 Miss. 454, by agreement the bill may be settled and signed during vacation; *Williams v. Ramsey*, 52 Miss. 858, holding it error where bill was signed in vacation; *Consaul v. Lidell*, 7 Mo. 256, holding successor to trial judge had no right to sign bill of exceptions without consent of opposite party, under the statute; *Pomeroy v. Selmes*, 8 Mo. 732, holding bill of exceptions cannot be signed at a subsequent term of the court without the consent of the other party; *Law v. Merrills*, 6 Wend. 278, holding bill of exceptions must appear on its face to have been taken and signed at trial of cause; *Ah' Lep v. Gong Choy*, 13 Or. 210, 9 Pac. 485, holding bill should be tendered immediately after trial, but settlement may be made within a reasonable time; as also in *Ferrell v. Alder*, 2 Swan, 79, ruling similarly; *Clark v. Lary*, 3 Sneed, 80, refusing to notice bill filed out of term time; *McGavock v. Puryear*, 6 Cold. 37, also so holding, *Mallon v. Tucker M. Co.*, 7 Lea, 66, holding rule, that bill of exceptions be presented within fifteen days after verdict, is not unlawful or unreasonable; *Nadenbousch v. Sharer*, 2 W. Va. 295, declaring exceptions

ought to be taken before the jury retires. Cited approvingly in *Brown v. Clarke*, 4 How. 15, 11 L. 855, without special application; note, 8 Blackf. 575, on this topic; dissenting opinion, *State v. Withrow*, 135 Mo. 385, 36 S. W. 1038, discussing statute limiting time of preparing bill of exceptions.

Distinguished in *Woods v. Lindvall*, 48 Fed. 73, 4 U. S. App. 49, holding bill of exceptions may be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment.

4 Pet. 108-110, 7 L. 798, EX PARTE TILLINGHAST.

Contempt.—Supreme Court will not punish attorney for contempt, for which he was stricken from the District Court roll of attorneys, by forbidding him the right to be a counsellor at its bar, p. 109.

Cited and followed in *In re Litchfield*, 13 Fed. 869, holding parties in other district than that in which bankruptcy proceedings are pending may bring suits against assignee in State court without being guilty of a contempt of the court which appointed assignee. See also note, 12 Am. Dec. 184, on this topic, collecting authorities; 12 Am. Dec. 185, that judgment for contempt is not revisable in any other court, collecting authorities; note on effect of disbarment as to other courts, 95 Am. Dec. 343, collecting authorities; note, 2 Am. St. Rep. 861, on punishment of contempt, collecting authorities.

4 Pet. 111-123, 7 L. 799, BOYCE v. EDWARDS.

Bills and notes.—Letter describing a bill of exchange so its identity could not be mistaken, and promising to accept it, if shown to one who afterwards takes the bill on the credit of the letter, is a binding acceptance, p. 121.

Cited and rule applied as follows: *Scudder v. Bank*, 91 U. S. 414, 23 L. 249, holding a parol promise to accept a bill is an acceptance thereof; *Cassel v. Dows*, 1 Blatchf. 340, 341, 342, F. C. 2,502, holding where letter is a general authority to draw, writer cannot be held as acceptor; *Russell v. Wiggin*, 2 Story, 237, 240, F. C. 12,165, under facts similar to main case; *Bayard v. Lathy*, 2 McLean, 464, F. C. 1,131, holding an authority to draw several bills of exchange, payable at specified periods, is an acceptance to one taking bills on the credit of such an authority; *State Nat. Bank v. Young*, 5 McCrary, 14, 14 Fed. 890, where draft was not described in unmistakable terms; *Garrettson v. Bank*, 39 Fed. 167, 7 L. R. A. 431, and n., to telegram asking if A. would pay F.'s check for \$22,000, reply "T. is good. Send on your paper" held an acceptance; *Smith v. Ledyard*, 49 Ala. 282, holding one acting on faith of letter of credit, not actually shown him, may sue for a refusal to accept; *Nelson v. Bank*, 48 Ill. 39, 40, 95 Am. Dec. 512, 513, allowing action for breach of

promise to accept; *Carrollton Bank v. Tayleur*, 16 La. 499, 35 Am. Dec. 222, holding a general authority to draw bills will not enable a purchaser to charge drawee upon an implied promise to accept; *Franklin Bank v. Lynch*, 52 Md. 279, 36 Am. Rep. 377, holding telegram did not amount to an acceptance of a certain draft; *Murdock v. Mills*, 11 Met. 10, holding party not liable where agent's authority to show bills was special, and he exceeded it; *Exchange Bank v. Rice*, 98 Mass. 292, 293, holding a promise to accept a bill, contained in a letter after bill has been negotiated, will not authorize writer to be sued as acceptor; *Bissell v. Lewis*, 4 Mich. 459, holding letter to be an unconditional acceptance; *Overman v. Bank*, 30 N. J. L. 69, holding it essential that holder took bill on the faith of the promise; *Ulster Bank v. McFarlan*, 3 Den. 557, holding that the promise to accept must describe bill unmistakably; *Lonsdale v. Bank*, 18 Ohio, 140, holding action could not be maintained against parties as acceptors, but merely for a breach of promise to accept. Cited in note, 28 Am. Rep. 347, on this topic, collecting authorities; note, 2 Gall. 239, F. C. 10,860, collecting authorities; dissenting opinion, *Talmadge v. Williams*, 27 La. Ann. 655, without particular application; likewise in *Birkhead v. Brown*, 5 Hill, 643; *Cunningham v. Shaw*, 7 Pa. St. 408, and *Roman v. Serna*, 40 Tex. 316. Cited in *Carnegie v. Morrison*, 2 Met. 406, but not necessary to decision.

Bills and notes.—In action on an accepted bill, the promise must be applied to that particular bill; in action on breach of promise to accept the evidence may be of a more general character, p. 122.

Cited and applied in *Exchange Bank v. Hubbard*, 62 Fed. 115, 26 U. S. App. 133, holding defendants not liable as acceptors, but as for a loan made to their agents; *Kennedy v. Geddes*, 3 Ala. 585, 37 Am. Dec. 716, holding action will lie on promise to accept bill thereafter to be drawn, though amount and date of payment are unknown; *Whilden v. Bank*, 64 Ala. 28, 30, 38 Am. Rep. 2, 4, holding that in declaring against a party as the acceptor, it was not necessary to aver the acceptance was in writing; *Light v. Powers*, 13 Kan. 98, holding contract to accept draft need not be in writing; *Von Phul v. Sloan*, 2 Rob. (La.) 150, 38 Am. Dec. 208, holding letter not to be an acceptance; *First Nat. Bank v. Clark*, 61 Md. 407, 48 Am. Rep. 116, holding drawee is not liable for breach of promise to accept, unless promise was made at time draft was drawn; *Henrietta Nat. Bank v. Bank*, 80 Tex. 651, 26 Am. St. Rep. 774, 16 S. W. 321, holding description in telegram sufficed to sustain an action for refusal to pay check; *Kelley v. Greenough*, 9 Wash. 664, 38 Pac. 160, holding action maintainable on breach of promise to accept, though not in writing; *Putnam Nat. Bank v. Snow* (Mass.), 52 N. E. 1079, holding action lies for breach of promise to accept an existing bill, in favor of holder of a bill drawn pursuant to such promise, and taken by him on the faith of it.

Bills and notes.— Courts do not favor the doctrine of implied acceptances of bills, p. 122.

Cited approvingly in *Espy v. Bank*, 18 Wall. 620, 21 L. 951, holding verbal reply that a check is good, extends only to matters of which the bank is presumed to have knowledge; *Wildes v. Savage*, 1 Story, 27, F. C. 17,653, holding a promise to accept a non-existing bill payable after sight, does not amount to an acceptance; *Morse v. Bank*, Holmes, 214, F. C. 9,857, holding verbal agreement by bank to pay check if payee will deposit it in another bank, is within the statute of frauds; *Bank of Springfield v. Bank*, 30 Mo. App. 276, holding parol statement that check is good does not bind bank to pay it, whenever presented. Cited, note, 44 Am. Dec. 254, on parol acceptance of a bill, collecting authorities.

Conflict of laws.— Bills are contracts of the State where they are to be paid, p. 123.

Cited and applied in *Musson v. Lake*, 4 How. 278, 11 L. 974, holding laws of the State where contract between indorser and all subsequent indorsees was made governed; *Coghlan v. Railroad Co.*, 142 U. S. 111, 35 L. 955, 12 S. Ct. 153, allowing rate of interest of place of performance; *Hall v. Cordell*, 142 U. S. 121, 35 L. 958, 12 S. Ct. 156, holding rules of place of performance determine validity of acceptance; *Garrettson v. Bank*, 47 Fed. 870, holding an acceptance by telegram makes it a contract of State from where telegram was sent; *Chase v. Dow*, 47 N. H. 406, holding law of place where note which stipulate for interest is made, will govern rate; *Andrews v. Hoxie*, 5 Tex. 186, declaring the general rule to be that rule of interest of place where contract was to be performed should govern; *Peck v. Mayo*, 14 Vt. 37, 39 Am. Dec. 207, holding rate of interest of place where note was payable, governs damages, if note is not paid when due; dissenting opinion, *Nelson v. Fottterall*, 7 Leigh, 202, majority holding bill drawn in Virginia on Liverpool, but negotiated in New York, a Virginia bill. Cited in note, 50 Am. Dec. 292, on *lex loci contractus*, collecting authorities.

4 Pet. 124-138, 7 L. 804, UNITED STATES v. MORRISON.

Judgment lien.— In Virginia, the right to take out an *elegit* is not suspended by suing out a writ of *fiery facias*, consequently the lien of the judgment continues during such proceedings, p. 136.

Cited and applied in *Burton v. Smith*, 13 Pet. 479, 483, 10 L. 255, 257, no matter into whose hands the property goes the lien passes *cum onere*; *Massingill v. Downs*, 7 How. 765, 12 L. 905, holding statute passed in 1841, requiring a judgment to be recorded in a particular way in order to make it a lien, did not abrogate lien acquired under judgment of 1839, not so recorded; *Morsell v. Bank*, 91 U. S. 360, 23 L. 437, holding a judgment at law is not a lien upon

real estate in the District of Columbia, which before judgment had been conveyed to trustees with power of sale; *Burgess v. Seligman*, 107 U. S. 34, 27 L. 365, 2 S. Ct. 22, holding, where State adjudications have not settled the law, Federal courts will exercise their own judgment, authorities collected; *Shrew v. Jones*, 2 McLean, 80, F. C. 12,818, holding at common law there was no lien on land, but there was one under the *elegit*; *Mansony v. Bank*, 4 Ala. 749, 750, holding where judgment is enjoined, it suspends the lien; *Patton v. Hayter*, 15 Ala. 22, holding if senior judgment creditor instructs sheriff to hold up the execution, it will postpone the lien of his judgment in favor of junior judgment upon which executions have been issued and served; *Byers v. Fowler*, 12 Ark. 278, 54 Am. Dec. 280, holding judgment of Circuit Court operates as a lien upon all lands of defendant in the State; *Moseley v. Edwards*, 2 Fla. 435, holding lien of a judgment is not lost by delay in suing out execution; *McAfee v. Reynolds*, 130 Ind. 39, 30 Am. St. Rep. 199, 28 N. E. 425, 18 L. R. A. 214, declaring lien of judgment given by statute cannot be prolonged by court; *Davidson v. Myers*, 24 Md. 556, holding judgment by default, interlocutory in nature, not a lien; *Ashton v. Slater*, 19 Minn. 350, holding judgment creditor, after the expiration of the time within which an execution could be issued on said judgment, is not entitled to the assistance of equity for the enforcement of the lien; *Love v. Harper*, 4 Humph. 115, holding lien of judgment is not lost or suspended by an agreement to suspend execution; *Findlay v. Toncray*, 2 Rob. (Va.) 378, declaring lien continues during the capacity to issue an *elegit*, and fact that *elegit* was not sued out till after sale is immaterial; *Taylor v. Spindle*, 2 Gratt. 57, 66, though a *feri facias* has been issued, judgment is a lien from day of its rendition. Cited in *Hutcheson v. Grubbs*, 80 Va. 255, and *In re Boyd*, 4 Sawy. 264, F. C. 1,746, discussing judgment liens; *Coombs v. Jordan*, 3 Bland, 324, 22 Am. Dec. 271, without particular application. Cited in note, 1 Blackf. (Ind.) 404.

Distinguished in *Lisle v. Cheney*, 36 Kan. 585, 586, 13 Pac. 820, holding, under statute, lien attaches from rendition of judgment.

Construction of statutes.—Federal court follows State court's decision construing statute as to executions and reverses judgment of Circuit Court rendered previous to it, p. 137.

Cited and applied in *Ward v. Chamberlain*, 2 Black, 438, 17 L. 324, holding judgments in Federal courts are liens where those of State courts are made so by law of the State; *Leffingwell v. Warren*, 2 Black, 603, 17 L. 262, holding if highest judicial tribunal of a State adopt new views as to the proper construction of a State statute, and reverse its former decisions, this court will follow the latest settled adjudications; dissenting opinion, *Gelpcke v. Dubuque*, 1 Wall. 212, 213, 17 L. 527, 528, majority refusing to follow decisions, which may prove but oscillations; *Blossburg R. R. Co. v. Rail-*

road, 5 Blatchf. 391, F. C. 1,563, following latest construction of statute of limitation by State court of last resort; *Loring v. Marsh*, 2 Cliff. 319, F. C. 8,514, holding Federal courts must follow State construction of State statute, if it can be ascertained; *King v. Wilson*, 1 Dill. 567, F. C. 7,810, following State court decision upholding a statute, although overruling settled adjudications considered as sound expositions of State Constitution; *In re Wyllie*, 2 Hughes, 459, F. C. 18,112, the reference to "State exemption laws" in bankrupt act confines the inquiry to exemptions under State laws as interpreted by the adjudications of its highest court; *Mitchell v. Lippincott*, 2 Woods, 473, F. C. 9,665, holding Federal courts bound by later State decisions, declaring mortgage invalid, which, according to State decisions, was valid when made; *Udell v. The Ohio*, 24 Fed. Cas. 497, following State court's decision on State statute as to maritime liens; *New Hampshire v. The Railway*, 3 Fed. 889, and *Braun v. Commissioners*, 66 Fed. 479, following State court's construction of local statute; *Myrick v. Heard*, 31 Fed. 243, refusing to follow oscillations of State courts in the process of settlement; *Bloodgood v. Grasey*, 31 Ala. 589, holding State court's construction of State statute is authoritative, though made after the transaction elsewhere arose; *McClure v. Owen*, 26 Iowa, 254, holding Federal courts will follow latest settled State adjudications of statute, reversing former decisions; *Commonwealth v. Railroad Co.*, 58 Pa. St. 44, holding Circuit Court of the United States is not the court of another sovereign to one of the States. Cited in *Alexander v. Worthington*, 5 Md. 486, discussing *stare decisis*.

4 Pet. 139-146, 7 L. 809, *COLUMBIAN INS. CO. v. ASHBY*.

Marine insurance.—Before abandonment is accepted by insurer it may be waived by the insured; and such waiver is generally a question of intention for the jury, p. 143.

An abandonment, if legally made, puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former, p. 144.

Cited and applied in *Copeland v. Security Ins. Co.*, Woolw. 286, F. C. 3,210, declaring the act operating as an abandonment should be decisive; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 544, *Hooper v. Whitney*, 19 La. 271, holding abandonment puts the insurer in place of the assured; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. 378, 379, 41 Am. Dec. 597, 598, declaring that master and mariners are agents of the owner of the cargo, as well as the owners of the vessel, hence a deviation by them discharges insurance on cargo.

Distinguished in *Clark v. Wilson*, 103 Mass. 227, 4 Am. Rep. 538, deciding that holders of a bill of sale of vessel intended as a mortgage may maintain action for conversion, notwithstanding they abandoned.

Abandonment.— Acts of ownership by owner may amount to relinquishment of an unaccepted abandonment, p. 144.

Cited to this point in *Gloucester Ins. Co. v. Younger*, 2 Curt. 337, F. C. 5,487, holding if underwriter takes possession and repairs vessel, this amounts to an acceptance of the abandonment.

Abandonment.— Offer by professed agent of underwriters to pay expenses, does not terminate unaccepted abandonment, p. 146.

Cited, *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 557, insurers taking abandoned boat, presumably acted as insurers only.

Miscellaneous.— Criticised, *Barnard v. Adams*, 10 How. 308, 13 L. 433.

4 Pet. 147-151, 7 L. 811, **HARRIS v. D'WOLF.**

Assignment to secure a bona fide debt, is not rendered fraudulent because vessel assigned, being at sea, is not actually delivered, p. 150.

Assignment of cargo is not invalidated as against innocent creditors, by failure to deliver the bills of lading, p. 151.

Under collection act of 1799, United States acquires no lien by reason of unpaid duty bonds, that would defeat assignment of subsequent imports by same consignees, p. 151.

Cited, *Ex parte Waddell*, 28 Fed. Cas. 1314, distinguishing right to priority of payment from specific lien; *United States v. Fawcett*, 86 Fed. 902, construing act of 1890 on same subject.

Replevin against United States marshal.— In this case, marshal was sued in replevin in Circuit Court for goods attached under Circuit Court writ, pp. 148-151.

Practice approved, *Maddux v. Usher*, 2 Hask. 267, F. C. 8,936.

4 Pet. 152-171, 7 L. 813, **BEATY v. KNOWLER.**

Judicial notice.— Act of incorporation, declared a public act, must be judicially noticed, p. 167.

Cited, *State v. Coosaw Min. Co.*, 45 Fed. 808, holding Federal courts will take judicial notice of public statutes under which complainants claim; *Hard v. Decorah*, 43 Iowa, 316, when a city is incorporated by special act, the courts will judicially notice its incorporation; *Hornberger v. State*, 47 Neb. 50, 66 N. W. 26, under similar facts to main case; *Crawford v. Linn Co.*, 11 Or. 499, 5 Pac. 747, a law is public when all persons must take notice of it at their peril. Cited in notes, 89 Am. Dec. 667, and 49 Am. Rep. 202.

A private act of incorporation cannot affect rights of non-assenting individuals, and is quoad hoc, a contract, p. 167.

Corporate powers are strictly limited to those conferred, p. 168.

The citing cases collect a number of authorities upon this doctrine. They are in part as follows: Dissenting opinion, *United States v. Robertson*, 5 Pet. 666, 672, 8 L. 266, 268, construing a bond executed by president and directors of a bank to the United States; *Charles River Bridge v. Warren Bridge*, 11 Pet. 546, 559, 9 L. 824, 828, declaring that in public grants nothing passes by implication; *Planters' Bank v. Sharp*, 6 How. 319, 12 L. 455, where bank was chartered with power among others "to discount bills and notes," a law passed forbidding it to transfer by indorsement any note or bill is unconstitutional; *Missionary Society v. Dalles*, 107 U. S. 342, 27 L. 547, 2 S. Ct. 677, holding under act of 1848 a religious society acquired title only to such lands then actually occupied as a missionary station; *Alabama R. R. Co. v. Jones*, 5 N. B. Reg. 105, 1 Fed. Cas. 278, holding provision in charter authorizing corporation "to manufacture materials for its equipment" does not constitute it a manufacturer; *Pullan v. Railroad*, 4 Biss. 41, F. C. 11,461, holding authority to mortgage its "road, income and other property," does not authorize a mortgage of its franchise; *Minturn v. Larue*, McAll. 375, F. C. 9,646, declaring that no powers will be construed to have been given by implication in a franchise, unless of a direct character; *Sumner v. Marcy*, 3 Wood. & M. 112, F. C. 13,609, holding corporation chartered for manufacturing cannot engage in banking; *Wheeling v. Baltimore*, 1 Hughes, 98, F. C. 17,502, declaring city could not purchase personal property for other than corporation purposes; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 540, holding plaintiff took by its franchise right to light streets with gas, but not the right to light city by all methods of illumination; *Smith v. Insurance Co.*, 4 Ala. 561, holding company, though charter authorized it to invest in such real or personal securities as it might deem proper, could not issue bonds and exchange them for bonds of an individual; *Saltmarsh v. The Bank*, 14 Ala. 675, holding bank, after its charter had been declared forfeited, had not power to purchase a bill of exchange; *Ex parte Burnett*, 30 Ala. 465, holding law fixing town liquor license at \$1,000 is prohibitory and unauthorized by charter; *Montgomery v. Plank Road Co.*, 31 Ala. 83, 84, limiting "every other matter and thing" to such subjects as are cognate to the powers expressly conferred; *Bliss v. Anderson*, 31 Ala. 623, 70 Am. Dec. 514, holding charter did not authorize the issuance of certificates of deposit to circulate as money; *Grand Lodge v. Waddill*, 36 Ala. 318, deciding that lodge of free-masons had no power to lend money; dissenting opinion, *Philadelphia L. Co. v. Towner*, 13 Conn. 267, majority allowing recovery on usurious note of a Pennsylvania corporation in Connecticut, though corporate charter allowed but 6 per cent. to be charged; dissenting opinion, *So. L. etc., Co. v. Lanier*, 5 Fla. 170, majority holding where bank was authorized to sell surrendered stock and invest in bonds, it could receive bond directly for stock issued; dissenting opinion,

Tuttle v. Walton, 1 Ga. 59, majority holding by-law asserting liens on stock for debts due company, as between the corporators, was valid; McLeod v. Burroughs, 9 Ga. 222, holding authority in franchise must operate in favor of the public; Shorter v. Smith, etc., 9 Ga. 524, holding legislature may grant a like privilege to another, however it may tend to destroy the profits of the first; Amer. Col. Soc. v. Gartrell, 23 Ga. 452, holding society incompetent to take the property; Carlton v. Southern M. Ins. Co., 72 Ga. 402, construing charter of a mutual insurance company.

Elsewhere the cases which cite, affirm and follow the rule are: State v. Smith, 31 Iowa, 495, holding municipality can exercise no power of taxation, unless expressly conferred; People v. Theological Sem., 174 Ill. 180, 51 N. E. 199, holding exemption from taxation did not include property held as an investment, though income was used solely for school purposes; Breaux v. Iberville, 23 La. Ann. 236, holding bonds issued by police jury of a parish are void; Franklin Co. v. Lewiston Inst., etc., 68 Me. 45, 28 Am. Rep. 11, holding act of corporation in borrowing money to buy stock was ultra vires; Spaulding v. Lowell, 23 Pick. 76, holding appropriation of upper story of public building to other purposes than a market was not an excess of authority; Green v. Graves, 1 Doug. (Mich.) 367, holding "act to organize and regulate banking associations," void as being an act providing for incorporation, without the assent of at least two-thirds of each house; Pres., etc., of Bank v. Miles, 1 Doug. (Mich.) 404, 41 Am. Dec. 577, holding bank had no right to purchase lands for the purpose of selling them again; Williams v. Lash, 8 Minn. 508, holding county has no capacity to purchase lands for other than a public use; Collins v. Sherman, 31 Miss. 700, holding exclusive privileges in grants to corporations cannot be founded on implication; St. Louis v. Russell, 9 Mo. 513, holding city had power to sell land for non-payment of taxes; Blair v. Insurance Co., 10 Mo. 565, 47 Am. Dec. 132, holding that a corporation organized for insuring has no power to engage in banking business; Bank of Louisville v. Young, 37 Mo. 406, holding corporation, although forbidden to take more than 6 per cent. interest by its charter, may in other States charge the rate allowed; Carondelet v. Picot, 38 Mo. 129, holding a municipality cannot provide for the collection of taxes by a suit, unless the power be specially delegated by its charter; Ruggles v. Collier, 43 Mo. 375, declaring that a municipality must conform strictly to the statute giving it power; Pacific R. R. Co. v. Seely, 45 Mo. 220, 100 Am. Dec. 375, holding a corporation has no power to acquire land for purposes of speculation; Clarke v. The Railroad, 4 Neb. 466, holding corporation organized for building a railroad has not power to sell its property in its franchises, until its road has been constructed; Trustees v. Peaslee, 15 N. H. 331, holding a corporation cannot be a trustee for purposes foreign to its institution; Pearson v. Railroad, 62 N. H. 549, 13 Am. St. Rep.

603, holding a railroad corporation cannot become a stockholder in another railroad to control its business, unless authorized by statute; *State v. Comrs.*, 23 N. J. L. 513, 57 Am. Dec. 410, deciding that railroad can hold land for repair shops, car-houses etc., but not for houses for employees, or for car factories; *Leggett v. N. J. M. & B. Co.*, 1 N. J. Eq. 550, 23 Am. Dec. 731, holding mortgage signed by president and cashier, without authority of the board of directors, is invalid; *Del. etc., Co. v. Rar. & R. Co.*, 16 N. J. Eq. 372, declaring that ambiguity in franchise is to be construed against the corporation; *Wright v. Briggs*, 2 Hill, 79, where village was authorized to levy assessment to improve sidewalks, an assessment for improving a street was void; *Curtis v. Leavitt*, 15 N. Y. 212, holding banking associations prior to June, 1840, could lawfully issue time paper, provided it was not intended to circulate as money; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, 36, 30 Am. Dec. 187, holding municipality could borrow money, without express authority; *Bank of Chillicothe v. Swayne*, 8 Ohio, 287, 32 Am. Dec. 715, holding corporation cannot take a higher rate of interest than its charter permits; *State v. Granville A. Soc.*, 11 Ohio, 12, holding grant of power to hold, sell, and mortgage real estate does not confer banking privileges; *Bartholomew v. Bentley*, 1 Ohio St. 41, holding an organization to protect officers and shareholders must be substantially in accordance with the charter; *Railroad Co. v. Furnace Co.*, 37 Ohio St. 330, 41 Am. Rep. 514, holding board of directors had power to make the contract; *Johnson v. Philadelphia*, 60 Pa. St. 451, holding that charters are to be construed in favor of the public; *Flagstaff S. M. Co. v. Patrick*, 2 Utah, 315, holding corporation is not bound by an unauthorized contract made by its board of directors; *Pfeister v. Wheeling Build. Assn.*, 19 W. Va. 697, defining powers of building associations; *Janesville Bridge Co. v. Stoughton*, 1 Pinn. 672, holding bridge charter did not confer an exclusive right. Cited, *arguendo*, in *Denniston v. Insurance Co.*, 73 Ala. 467.

Taxation.—Power to impose a tax on real estate and sell it for a failure to pay is a high prerogative, and should never be exercised where the right is doubtful, p. 170.

Cited and principle followed in *Scott v. Babcock*, 3 G. Greene, 141, holding nothing can be presumed in favor of the proceedings of officers in order to sustain a tax title; *Cahoon v. Coe*, 57 N. H. 596, declaring that all pre-requisites to the power of selling lands for non-payment of taxes must precede its exercise; *State v. Guttenberg*, 39 N. J. L. 663, holding that when anybody subordinate to the legislature attempts to levy a tax, it must show an unmistakable authority; *Sharp v. Speir*, 4 Hill, 83, holding power given municipality to sell lands for taxes imposed thereon does not authorize a sale for taxes imposed on occupants and owners merely; dissenting opinion, *Brodhead v. Milwaukee*, 19 Wis. 673, majority holding tax

not invalid by reason of alleged irregularities in proceedings of electors, when tax was voted. Cited in note, 74 Am. Dec. 592, that power of taxation cannot be conferred on a private corporation, collecting authorities.

Miscellaneous.—Cited in *Dodge v. Woolsey*, 18 How. 354, 15 L. 410, to illustrate the cautious wisdom of that provision of the Constitution which secures to the citizens of the different States a right to sue in the Federal courts; *Gilmer v. Lime Point*, 19 Cal. 60, not to point; *Gorbam v. Luckett*, 6 B. Mon. 648, an error.

4 Pet. 172-183, 7 L. 821, *WILCOX v. PLUMMER*.

Statute of limitations begins to run in action against an attorney for negligence, from date of such negligence, though actual damage is suffered afterwards, p. 181.

Cited and principle applied as follows: *Amy v. Dubuque*, 98 U. S. 474, 25 L. 230, holding Iowa statute of limitations runs against coupon interest warrants from maturity, though still attached; *Scovill v. Thayer*, 105 U. S. 153, 26 L. 973, holding limitation prescribed by bankrupt act does not begin to run in stockholder's favor, until court orders an assessment to be made upon unpaid stock; *Mardis v. Shackleford*, 4 Ala. 505, 506, holding statute begins to run in favor of an attorney from the time he becomes liable to an action; *Governor v. Gordon*, 15 Ala. 78, holding statute runs from date of notary's default, not from the time of its discovery; *Snedicor v. Davis*, 17 Ala. 480, 481, holding cause of action against principal for negligence of deputy clerk accrues at time act is done; *Kimbrow v. Waller*, 21 Ala. 379, replication, that no demand had been made, in action against attorney, pleading statute of limitations was held demurrable; *Denton v. Embury*, 10 Ark. 238, holding statute runs, though accrual of action was unknown to plaintiff, unless attorney has been guilty of fraud; *White v. Reagan*, 32 Ark. 290, holding statute as between attorney and client runs immediately: as also in *Lattin v. Gillette*, 95 Cal. 322, 29 Am. St. Rep. 119, 30 Pac. 547, ruling similarly; *Ware v. State*, 74 Ind. 185, holding where auditor drew a warrant in his own favor, statute of limitations began to run against his bond at once; *Steel v. Bryant*, 49 Iowa, 117, holding statute does not begin to run upon cause of action against clerk of court for negligence in accepting an insufficient stay bond, until the stay expires; *Russell v. Polk Co. Abst. Co.*, 87 Iowa, 242, 244, 43 Am. St. Rep. 385, 387, 54 N. W. 214, 215, holding action against maker of abstract is barred five years from date of delivery of abstract, though error be not discovered until long afterwards; *Bartlett v. Bullene*, 23 Kan. 612, holding action against notary accrued at time of the making of the false certificate; *Prov. L. T. Co. v. Walcott*, 5 Kan. App. 476, 47 Pac. 9, holding cause of action against abstracter of titles accrues from date of delivery of wrong certificate; *Kinnison v. Carpenter*, 9 Bush, 606, holding action accrued

against judge accepting a defective bond, at time of misfeasance; *Betts v. Norris*, 21 Me. 323, 38 Am. Dec. 269, holding action against officer for neglect in not attaching accrued at time of his return, see dissenting opinion, p. 329; *Wilson v. Ivy*, 32 Miss. 235, holding statute runs from time the fraudulent representations as to title of property were made; *Schade v. Gehner*, 133 Mo. 259, 34 S. W. 578, and *Rankin v. Schaeffer*, 4 Mo. App. 110, action for negligence in examining title accrues at time examination is made and reported; *Carpet Co. v. Dornan*, 64 Mo. App. 25, holding statute as to enforcement of warrant that carpet is free from spots, begins to run from the time of their appearance; *Baucum v. Streater*, 5 Jones (N. C.) 71, holding statute in action for breach of warranty runs from date of the contract; *Daniel v. Grizzard*, 117 N. C. 111, 23 S. E. 94, holding breach of official bond of register occurs at the time of his neglect; *Kerns v. Schoonmaker*, 4 Ohio, 333, 22 Am. Dec. 758, declaring that statute runs from time act was committed, not from time of the discovery; *Douglas v. Corry*, 46 Ohio St. 353, 15 Am. St. Rep. 606, 21 N. E. 442, holding statute runs from time attorney collected money for client, where there has been no fraudulent concealment of receipt, as also in *Campbell v. Boggs*, 48 Pa. St. 525; *Moore v. Juvenal*, 92 Pa. St. 490, holding statute runs from time attorney's breach of duty occurred; *Owen v. Savings Bank*, 97 Pa. St. 54, 39 Am. Rep. 795, holding cause of action against recorder of deeds for false certificate accrues when claimant parted with his money on the faith of it; *Thomas v. Ervin*, Cheves L. 24, 34 Am. Dec. 588, holding statute in action against an attorney for negligence runs from time of negligent act; *East T. & G. R. R. v. Nelson*, 1 Cold. 278, holding while goods are in store, consignor can sue carrier for delay, or neglect in caring for them; *M'Alexander v. Montgomery*, 4 Leigh (Va.) 67, holding statute ran from time breach of contract occurred. Cited without particular application in *Huston v. Cantil*, 11 Leigh (Va.) 149. See notes, 92 Am. Dec. 628, 629, and 53 Am. Rep. 137, on this topic, collecting authorities.

Distinguished in *Power v. Munger*, 52 Fed. 710, 10 U. S. App. 289, holding statute did not begin to run until plaintiff had paid the judgment, recovered because of defendant's negligence; *Pinkston v. Brewster*, 14 Ala. 320, holding statute did not run from the date of the misapplication of the funds by the trustee; *People v. Cramer*, 15 Colo. 159, 25 Pac. 303, holding cause of action against a public official, as a sheriff, accrues when consequential injury has followed; as also, in *Bank v. Waterman*, 26 Conn. 336, see dissenting opinion, 347; *Smith v. Seattle*, 18 Wash. 488, 63 Am. St. Rep. 913, 51 Pac. 1059, holding cause of action for injuries from removal of lateral support accrues not at date of removal, but at time that injury actually results therefrom.

Damages.—Proof of actual damage may extend to facts that grow out of the injury, even up to the day of the verdict, p. 182.

Cited and principle followed: In *N. Y., etc., R. R. Co. v. Estill*, 147 U. S. 616, 37 L. 304, 13 S. Ct. 454, holding it proper to show some of the cattle died or lost their calves after reaching their destination, from effects of the collision; *Fort v. Railroad*, 2 Dill. 268, F. C. 4,952, holding damages down to and even beyond the day of trial may be given; *Davis v. Ayres*, 9 Ala. 294, holding party may recover damages up to the day of the trial; *Fowler v. Armour*, 24 Ala. 199, holding one suing for breach of contract of service is entitled to recover actual damage sustained up to the time of trial; *Savannah, etc., Co. v. Bourquin*, 51 Ga. 389, holding damages for a continuing trespass can only be recovered to time of commencing suit, subsequent damages give a new right of action; *North Vernon v. Voegler*, 103 Ind. 323, 2 N. E. 826, holding in action to injury to real estate caused by the negligence of corporate officers in grading streets, past and prospective damages can be recovered in one action; *Corner v. Mackintosh*, 48 Md. 389, allowing damages to day of verdict for all facts growing out of the original suit; *Prichard v. Martin*, 27 Miss. 310, allowing for breach of contract of service, damages within the contemplation of the contract; *Mosely v. Hunter*, 15 Mo. 330, holding in action for breach of covenant against incumbrances, plaintiff may introduce facts down to time of trial to show extent of injury; *Everson v. Powers*, 89 N. Y. 530, 42 Am. Rep. 321, allowing party in action for breach of contract of service to recover the same damages as if the action had been commenced after the expiration of the term. Cited, note, 34 Am. Dec. 96, on this subject, collecting authorities.

Distinguished in *Moore v. Love*, 3 Jones (N. C.), 219, holding continued detention of an apprentice was a succession of torts, hence damages could be recovered only up to the commencement of the suit.

Miscellaneous.—Cited in *Baker v. Biddle*, 1 Bald. 416, F. C. 764, evidently miscited; as also, in *Barbour Co. v. Horn*, 48 Ala. 578, and *Flint R. S. Co. v. Foster*, 5 Ga. 202; in *Cox v. Sullivan*, 7 Ga. 148, 50 Am. Dec. 388, as to degree of skill an attorney should exercise, a point not decided by principal case; miscited in *Warner v. Beers*, 23 Wend. 156.

4 Pet. 184-189, 7 L. 825, *BARTLE v. COLEMAN*.

Illegal contract.—The law leaves the parties to a corrupt contract as it found them, 189.

The citations collect a number of similar cases, affirming and applying this rule, as follows: *Dent v. Ferguson*, 132 U. S. 66, 33 L. 248, 10 S. Ct. 19, holding a court of equity will not aid a party or his heirs to recover property conveyed to defraud his creditors; *Piatt v. Oliver*, 2 McLean, 277, F. C. 11,115, holding it is not unlawful for individuals to associate together to purchase public lands for their joint interest; *Hoffman v. McMullen*, 83 Fed. 376,

48 U. S. App. 603, 604, holding contract to prevent bidding and competition for public work is void; *Valentine v. Stewart*, 15 Cal. 404, refusing to enforce an agreement to suppress and get from archives a deposition; *Phalen v. Clark*, 19 Conn. 432, 50 Am. Dec. 255, allowing recovery where the cause of action was unconnected with illegal agreement, and founded upon a distinct consideration; *Howell v. Fountain*, 3 Ga. 181, 184, 46 Am. Dec. 420, 422, holding an action cannot be maintained upon a contract growing out of an immoral or illegal consideration; *Adams v. Barrett*, 5 Ga. 419, holding where a contract which is illegal or opposed to public policy has been executed, and the parties are in *pari delicto*, courts will not give relief; *Rhodes v. Neal*, 64 Ga. 706, 37 Am. Rep. 94, holding declaration demurrable, which seeks to recover for services in securing consent of prosecutor to dismiss prosecutions for felonies; *Root v. Stevenson*, 24 Ind. 119, refusing to enforce a contract based on the corruption of a public officer; *Overshiner v. Wisheart*, 59 Ind. 138, holding party cannot maintain an action to cancel note executed in pursuance of a fraudulent combination; *Marienthal v. Shafer*, 6 Iowa, 225, 226, holding one selling liquors in violation of law cannot replevy them from an attaching creditor or from sheriff; *Boardman v. Thompson*, 25 Iowa, 504, refusing to enforce a champertous contract; *Anderson v. Powell*, 44 Iowa, 23, holding court may appoint receiver for that part of a partnership business, which is legal; *Haas v. Fenlon*, 8 Kan. 606, holding inducements to a party to make a contract, that a person would be appointed to a public office, however false, cannot be used as a ground for recovery; *Hinnen v. Newman*, 35 Kan. 712, 12 Pac. 146, holding action growing out of an illegal transaction, both parties being in equal fault, cannot be maintained; *Davis v. Holbrook*, 1 La. Ann. 178, 179, dismissing action to recover from stakeholder money bet on election; *Bowman v. Gonegal*, 19 La. Ann. 333, 92 Am. Dec. 540, refusing to enforce contract to supply Confederate forces with salt; *Meyer v. Farmer*, 36 La. Ann. 790, holding money paid on illegal contract, both parties being *participes criminis*, cannot be recovered; *Roman v. Mali*, 42 Md. 534, refusing to restore property obtained by attorney from client through their joint fraud; *Bank of Michigan v. Niles*, 1 Doug. (Mich.) 412, 41 Am. Dec. 583, refusing to enforce ultra vires contract to purchase land; *Robinson v. Patterson*, 71 Mich. 149, 39 N. W. 24, holding contract calculated to influence the action of a public officer is void; *Tyler v. Larimore*, 19 Mo. App. 457, refusing to touch a compact between heirs and administrator to circumvent the claims of creditors; *Morrison v. Bennett*, 20 Mont. 570, 52 Pac. 557, 40 L. R. A. 162, refusing to entertain a suit for an accounting, where purpose of partnership was to defraud; *Nellis v. Clark*, 20 Wend. 27, 28, holding plaintiff, chargeable with notice, could not recover on a promissory note given in part consideration of a fraudulent conveyance; *Read v. Smith*, 60 Tex. 382, *Swartz*

v. Gillett, 2 Pinn. 240, and Wiggins v. Bisso (Tex.), 47 S. W. 638, 640, refusing an accounting between parties to an illegal contract; as also in Buck v. Albee, 26 Vt. 192, 62 Am. Dec. 566, ruling similarly; Bank v. Wilson, 25 W. Va. 260, holding where part of consideration of a deed set aside as fraudulent was satisfaction of a bona fide debt due grantee, latter cannot charge the lands with this amount. Cited in note on this topic, 42 Am. Rep. 388, collecting authorities; without special application in Piatt v. Oliver, 1 McLean, 301, F. C. 11,114, Tufts v. Tufts, 3 Wood. & M. 492, F. C. 14,233, and Martin v. Iron Works, 35 Ga. 328.

Distinguished in Philadelphia Loan Co. v. Towner, 13 Conn. 258, 263, where corporation made a loan and afterwards took a note as security in contravention of its charter, money could be recovered, but not on the note; Turley v. Edwards, 18 Mo. App. 682, where parties are not in *pari delicto*, there can be a recovery; as also in Ohio Ins. & T. Co. v. Insurance Co., 11 Humph. 10, 53 Am. Dec. 750; James v. Fulcro, 5 Tex. 522, 55 Am. Dec. 750, holding agreement to unite in bid at auction sale is not void, if not dishonest in its motive or injurious in its consequences.

Miscellaneous.—Miscited in Sturm v. Boker, 150 U. S. 334, 37 L. 1101, 14 S. Ct. 106.

4 Pet. 190-204, 7 L. 828, CALDWELL v. TAGGART.

Equity pleading.—All persons interested in the subject of a suit must be made parties in order that a complete decree may be made, p. 202.

Cited and principle applied as follows: Ribon v. Railroad Companies, 16 Wall. 451, 21 L. 369, dismissing bill for want of proper parties; Baker v. Biddle, 1 Bald. 416, F. C. 764, holding objection for want of parties may be made at the hearing or on appeal; Sutherland v. The Railroad, 9 N. B. R. 305, 23 Fed. Cas. 462, holding that to bill by a junior mortgagee against a mortgagor or his assignee in bankruptcy, prior incumbrancers are necessary parties where there is substantial doubt as to the amounts due them; Piatt v. Oliver, 2 McLean, 306, F. C. 11,115, holding sale under foreclosure of mortgage given to trustee, in which suit *cestui que trusts* are not made parties, does not bind their interest; The Hudson, 15 Fed. 170, holding that in collision cases in admiralty, the liability of all persons or vessels involved should be determined in a single action; Bland v. Fleeman, 29 Fed. 672, declaring suit could not proceed, where all persons whose interests were affected by it were not made parties; Kenan v. Miller, 2 Ga. 329, holding to bill enjoining execution issuing, the attorneys against whom no fraud is charged nor no relief sought ought not to be made parties; Rice v. Tarver, 4 Ga. 588, holding to bill filed by a bank to set aside for fraud an assignment of a schedule of notes against an indorser of one of the notes, that makers of other notes were proper parties;

Sears v. Hardy, 120 Mass. 530, holding in bill against trustee to establish a resulting trust, the court will order cestui que trusts to be made defendants; *Cutler v. Tuttle*, 19 N. J. Eq. 556, refusing to sustain objection to non-joinder of party when it was not raised until the argument of the cause on final hearing; *Townsend v. Bogert*, 126 N. Y. 374, 22 Am. St. Rep. 837, 27 N. E. 556, holding persons claiming an interest in subject-matter, the nature, extent, or merit of which is unknown to plaintiff, are proper parties; *Hannegan v. Roth*, 12 Wash. 697, 44 Pac. 256, holding court will not dismiss action for non-joinder of necessary party, but will retain it until such parties are brought in; *Norris v. Bean*, 17 W. Va. 661, enumerating the necessary parties in bill by judgment creditor to enforce his lien on judgment debtor's lands, for himself and all other judgment creditors. Cited in note, 34 Am. Dec. 722, as to when judgments against trustee bind cestui que trust, collecting authorities, without special application in *Fisher v. Rutherford*, 1 Bald. 194, F. C. 4,823, and *Wilson v. Castro*, 31 Cal. 427.

Distinguished in *Story v. Livingston*, 13 Pet. 375, 10 L. 208, holding an exception to the rule is when a decree in relation to the subject-matter in litigation can be made, without a person having his interest in anyway concluded by the decree; *Carey v. Hoxey*, 11 Ga. 648, holding where parties are numerous, and the representation of a deceased party is suspended by litigation, the court will proceed to a decree, if it can be done without prejudice.

Miscellaneous.—Cited in *Wright v. Miller*, 1 Sandf. Ch. 118, but not in point.

4 Pet. 205-231, 7 L. 833, LLOYD v. SCOTT.

Usury.—There must be an intent to take illegal interest upon the loan, and if the usury can be shown to be the result of accident or mistake, no penalty attaches, p. 224.

Cited and rule applied as follows: *Call v. Palmer*, 116 U. S. 101, 29 L. 561, 6 S. Ct. 303, where agent exacts for his own benefit more than the lawful rate, without authority from the principal, the loan is not usurious; as also in *Palmer v. Call*, 2 McCrary, 524, 7 Fed. 739, ruling similarly; *Mo. K., etc., T. Co. v. Krumseig*, 172 U. S. 356, holding the scheme a colorable device to cover usury; *Brower v. Insurance Co.*, 86 Fed. 751, where one borrows money from life insurance company, takes an endowment policy, which he assigns to the company, contracting to make monthly payments till it is extinguished, and in meantime to pay legal rate of interest on the whole amount, the agreement is usurious; *Dubose v. Parker*, 13 Ala. 781, holding there was no intent to evade the law against usury; *Slaughter v. National Bank*, 109 Ala. 162, 19 So. 432, where only five cents more than legal rate was taken, and there was no intention to charge illegal interest, issue was not submitted to the jury; *Hicks v. Marshall*, 67 Ga. 715, holding payment of usurious debts

by land does not make the contract for the land, a usurious one; also in dissenting opinion, *Delano v. Rood*, 1 Gilm. 697, majority declaring the loan usurious, without submitting it to the jury; *Ferguson v. Sutphen*, 3 Gilm. 567, declaring it is not the form, but the nature of the contract that determines its character; *New England Co. v. Sandford*, 16 Neb. 690, 21 N. W. 395, holding there was no usury; *Freeman v. Brittin*, 17 N. J. L. 213, 223, and *Durant v. Banta*, 27 N. J. L. 633, holding that an indorsement does not necessarily import a contract for a loan, and whether it is, depends upon the intention of the parties; *Ketchum v. Barber*, 4 Hill, 228, and *Cram v. Hendricks*, 7 Wend. 614, 626, 646, holding bona fide sale of one's credit by way of indorsement is not usurious, if the transaction be unconnected with a loan; *Leavitt v. De Launy*, 4 N. Y. 369, holding that upon a sale of credit vendor may reserve more than legal rate of interest; *Fiedler v. Darrin*, 50 N. Y. 443, holding that knowingly taking more than the lawful rate is per se usurious. Cited, note, 55 Am. Dec. 392, 393, and 46 Am. St. Rep. 183, on this topic, collecting authorities. Cited without particular application in *Scot M. & L. I. Co. v. McBroom*, 6 N. Mex. 578, 30 Pac. 860.

Usury has lost the moral stain which formerly attached, and is now considered as an illegal or immoral act, because it is prohibited by law, p. 224.

Cited and applied in *Johnson v. Building Association*, 13 Fed. Cas. 785, holding loans made to their members by building loan associations are not usurious, see *Johnston v. Clarke*, 30 Fed. Cas. 1093; *Bank v. Nolan*, 7 How. (Miss.) 528, holding where there was no forfeiture by statute except of the interest, the party could recover the principal; *Farmers' & T. Bank v. Harrison*, 57 Mo. 509, holding statute forbidding banking corporations to loan money for more than a certain rate, does not render void a note taken for such forbidden rate.

Cited in note, 46 Am. St. Rep. 193, on penalties collecting authorities.

Usury.— If party agrees to pay a specific sum, exceeding the lawful interest, provided he does not pay the principal by a certain day, it is not usury, p. 226.

Cited and rule applied in *Chaffe v. Landers*, 46 Ark. 371, under similar facts; *Broadbent v. Brumback*, 2 Idaho, 343, 16 Pac. 559, holding stipulation in mortgage for attorney's fee is valid; *Mason v. Callender*, 2 Minn. 365, 72 Am. Dec. 107, holding what is recoverable for withholding money after it is due is not interest, but damages; *Stein v. Swensen*, 44 Minn. 221, 46 N. W. 361, upholding agreement at time loan is made, that time may be extended at option of borrower by the payment of more than the legal rate for the period of the extension; *Cridler v. Loan Association*, 89 Tex. 600, 35 S. W. 1048, holding promissory note not usurious though pro-

viding for legal rate upon principal and interest due at maturity, if not then paid; *Ward v. Cornett*, 91 Va. 681, 22 S. E. 495, and *Fisher v. Otis*, 3 Pinn. 91, holding excessive rate of interest to be paid after maturity is not usurious. Cited without special application in *Wood v. Cuthbertson*, 3 Dak. Ter. 335, 21 N. W. 5.

Usury.—A contract for the purchase of an annuity may be usurious, p. 226.

Cited and applied in *Buttrick v. Harris*, 1 Biss. 444, F. C. 2,256, holding where a contract is for a loan of money, with legal rate plus exchange, it is usurious; *Dowdall v. Lenox*, 2 Edw. Ch. 273, as an example of a contrivance to elude the statute against usury.

Distinguished in *Gordon v. Dooley*, 3 Hughes, 188, 190, F. C. 5,607, holding where rent charge is purchased, and there is no provision for the return of the purchase money, the contract is not usurious.

Usury.—Where return of loan depends on a casualty which hazards both loan and interest, it is not usurious, p. 226.

Cited and rule followed in *Reeve v. Ladies' Bldg. Assn.*, 56 Ark. 338, 19 S. W. 918, 18 L. R. A. 135, and n., holding that in building associations the rate of interest is contingent, and there can be no usury, as also in *Homestead Co. v. Linigan*, 46 La. Ann. 1129, 15 So. 373. Cited in note, 55 Am. Dec. 396, on this subject, collecting authorities.

Usury.—Usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of a stranger, p. 228.

Cited and applied in *Morgan v. Tipton*, 3 McLean, 346, F. C. 9,809, holding mortgage given for an usurious debt cannot be enforced; *German Bank v. De Shon*, 41 Ark. 340, holding unconstitutional an act attempting to validate a usurious contract in the hands of a bona fide holder; *Montague v. Sewell*, 57 Md. 415, 416, holding inapplicable a code section providing that bona fide holder of a negotiable instrument should be exempt from the effect of usury. Cited without special application, *Scottish & Co. v. McBroom*, 6 N. Mex. 578, 30 Pac. 860. Cited in *Yardley v. N. Y. G. & I. Co.*, 1 Flip. 556, 557, F. C. 18,125, reaffirming rule.

Distinguished in *Nat. Bank v. Harrison*, 3 McCrary, 322, 10 Fed. 247, holding note given for a balance due on an option may be enforced by a bona fide holder for value without notice.

Usury.—If first indorsement be valid a subsequent usurious indorsement cannot be pleaded by drawer, p. 229.

Distinguished in *Davis v. Clemson*, 6 McLean, 624, 626, F. C. 3,630, where the negotiation of the bill was usurious, and this negotiation was essential to its vitality, the contract was void.

Usury.—Third party in possession may set up usury in deed under which another claims to distrain for rent, p. 231.

Cited and followed in *Saltmarsh v. Tuthill*, 13 Ala. 410, holding bona fide holder, without notice, may recover on bill, though person from whom he received it, acquired it by fraud; *Lilienthal v. Champion*, 58 Ga. 162, holding purchaser of mortgaged property, paying full price with no deduction for mortgage, may set up usury in the mortgage; *Trumbo v. Blizzard*, 6 Gill & J. 23, and *Doub v. Barnes*, 1 Md. Ch. 142, holding usury may be set up by alienee of mortgagor; *Rouskulp v. Kershner*, 49 Md. 523, 524, holding plea denying usury must be accompanied by an answer supporting the denial; *American Rubber Co. v. Wilson*, 55 Mo. App. 659, holding debtor or his privy may take advantage of statute against usury; *Cummins v. Wire*, 6 N. J. Eq. 88, and *Brolasky v. Miller*, 8 N. J. Eq. 790, holding purchaser at sheriff's sale can take advantage of usury in mortgage of prior date; *Brolasky v. Miller*, 9 N. J. Eq. 810, is to same effect; *Dix v. Van Wyck*, 2 Hill, 525, holding usury cannot be set up by a stranger, but may be by a privy; *Post v. Dart*, 8 Paige, 641, holding that one claiming under mortgagor may set up the defense of usury; *Cole v. Savage*, 10 Paige, 592, holding heir of mortgagor, or a devisee or grantee of mortgaged premises, may set up defense of usury; *Pearsall v. Kingsland*, 3 Edw. Ch. 197, holding direct assignee in trust of mortgagor may impeach the mortgage for usury; *Sands v. Church*, 6 N. Y. 352, holding purchaser of an equity of redemption, at a foreclosure sale under a junior mortgage, cannot set up the defense of usury against prior mortgage; *Maloney v. Eaheart*, 81 Tex. 284, 16 S. W. 1031, holding junior mortgagee can set up usury against prior mortgage. Cited without special application in *Hope v. Smith*, 10 Gratt. 224.

Miscellaneous.—Cited in 12 Pet. 146, 9 L. 1034, another hearing in same cause; see reference 4 Cr. C. C. 206, F. C. 8,434. Miscited in *Ewell v. Daggs*, 108 U. S. 153, 27 L. 685, 2 S. Ct. 415.

4 Pet. 232-286, 7 L. 842, *VAN NESS v. CITY OF WASHINGTON and THE UNITED STATES*.

United States.—Act of Congress authorizes a bill in equity in the nature of a petition of right to be brought against the United States, in case of land taken for improvements in the city of Washington, pp. 276, 277.

Cited and applied in *United States v. Lee*, 106 U. S. 239, 27 L. 188, 1 S. Ct. 276, holding, except where Congress has provided, the United States cannot be sued; *Briggs v. Light-Boats*, 11 Allen, 177, holding lien cannot be enforced against vessel built for the United States.

Merger.—Preliminary agreement as to transfer of land to United States held merged in an indenture to certain trustees, p. 284.

Cited and applied in *Hazleton, etc., Co., v. Railway Co.*, 72 Fed. 323, where agreement was afterwards reduced to writing, very

strong evidence of fraud in changing it would be required to avoid the written contract.

Title.—A conveyance “for the use of the United States forever” carries the fee, p. 285.

Cited and applied in *Potomac S. Co. v. Upper P. S. Co.*, 109 U. S. 680, 691, 694, 27 L. 1073, 1076, 1077, 3 S. Ct. 449, 457, 459, under facts similar to those in main case; *Parish v. Gaddis*, 34 La. Ann. 933, holding property donated to a parish for its use does not lose its character of public property by the fact of non-usage. Cited without special application in *Bauman v. Ross*, 167 U. S. 565, 42 L. 280, 17 S. Ct. 973.

Deeds.—A solemn instrument should be construed according to the legal import of its terms, p. 285.

Cited in *Waite v. O’Neil*, 72 Fed. 357, construing a covenant in light of the uses contemplated.

Miscellaneous.—Miscited in *Reed v. Beall*, 42 Miss. 484; *Nisewanger v. Wallace*, 16 Ohio, 560. Cited in dissenting opinion, *New Orleans, etc., R. R. Co. v. New Orleans*, 26 La. Ann. 491, to point that sovereign can alone control public things. Cited to no particular point decided, in *Markham v. Atlanta*, 23 Ga. 406.

4 Pet. 287-290, 7 L. 861, *LAGRANGE v. CHOUTEAU*.

Appeal and error.—Petition for rehearing forms no part of the record, on appeal, p. 288.

Jurisdiction.—Supreme Court has no jurisdiction to re-examine a State court decision involving a right to freedom not claimed under Federal law, p. 290.

No citations.

4 Pet. 291-310, 7 L. 862, *CONARD v. NICOLL*.

Fraud.—Burden of proof is on one alleging it, and the particular act must be shown to be tainted, pp. 296, 297, per Washington, J.

Cited and principle followed in *Clarke v. White*, 12 Pet. 193, 196, 9 L. 1053, 1054, holding the particular act must be shown to be tainted with fraud, notwithstanding party’s guilt in any other number of instances; *United States v. Wiggins*, 14 Pet. 348, 10 L. 488, holding copy of decree of foreign State certified by secretary of government is evidence in our courts; *Magniac v. Thompson*, 1 Bald. 357, F. C. 8,956, to make contract void for fraud against creditors, both parties must concur in it; *United States v. McLellan*, 3 Sumn. 352, 356, F. C. 15,698, holding conveyance by debtor, known to be insolvent, to one or more creditors discharging his debts is not a “voluntary assignment,” in absence of proof of fraudulent intent; as also in *Horsey v. Stockley*, 4 Del. Ch. 550, to same effect; see S. C. 4 Houst. 614; in dissenting opinion, *Robson v. Harwell*, 6 Ga. 614, declaring fraud or circumstances amounting to a charge of

fraud must be alleged; *Moore v. Thomas*, 1 Or. 204, declaring that before prior unrecorded conveyance can take precedence over a recorded one, the fraud in the second must be proved; *Smith v. Montoya*, 3 N. Mex. 45 (11), 1 Pac. 181, holding that chattel mortgage given to secure future advances is valid if made in good faith; *Irons v. Reyburn*, 11 Ark. 389, refusing to consider a plea of fraud not sufficiently proven.

Cited without special application in *United States v. Arredondo*, 6 Pet. 716, 717, 8 L. 556, 557.

Bankruptcy.—In all cases of bankruptcy debts of the United States should be first satisfied, per *Washington J.*, p. 308.

Cited and applied in *Brent v. Bank*, 10 Pet. 612, 9 L. 553, holding priority of the United States is in the appropriation of the debtor's estate, and does not overreach transfers, or existing liens; *Beaston v. Farmers' Bank*, 12 Pet. 134, 9 L. 1029, giving rules affecting this priority; *Pacific Ins. Co. v. Conard*, Bald. 139, F. C. 10,647, holding that person holding goods in virtue of a respondentia bond, with an assignment of the bill of lading, may recover damages against one who takes them unlawfully; *Ex parte Waddell*, 28 Fed. Cas. 1314, distinguishing between priority of payment out of a particular fund and a specific lien thereon. Cited, *arguendo*, in *Cahn v. Person*, 56 Miss. 363.

Damages.—Jury should give such reasonable damages as the plaintiff has actually sustained; per *Washington, J.*, p. 309.

Cited and applied in *State v. Smith*, 31 Mo. 572, allowing value of goods at time of caption with interest; *Cole v. Tucker*, 6 Tex. 268, holding that compensatory damages are given where the injury is not tainted with fraud, malice or willful wrong; *Curry v. Catlin*, 12 Wash. 325, 41 Pac. 56, holding in action for wrongful attachment, which had prevented sale of goods, the sale price is the measure of damages.

Miscellaneous.—Referred to in *Conard v. Insurance Co.*, 6 Pet. 280, 282, 8 L. 398, 399, another decision respecting the same matters. Cited in *Keene v. Wheatley*, 14 Fed. Cas. 197, to no point decided.

4 Pet. 311-330, 7 L. 869, *KING v. HAMILTON*

Specific performance lies in the discretion of the court, and whether it will be decreed depends upon the circumstances of the case and substantial justice, p. 328.

The following citing cases affirm and apply this principle: *Nickerson v. Nickerson*, 127 U. S. 675, 32 L. 318, 8 S. Ct. 1358, dismissing bill; *Tufts v. Tufts*, 3 Wood. & M. 503, 510, 514, F. C. 14,233, refusing to enforce contract with an illegal consideration; *Gould v. Womack*, 2 Ala. 92, holding equity will not specifically enforce an unreasonable contract; *Morrison v. Peay*, 21 Ark. 116, allowing specific performance; *Godwin v. Collins*, 3 Del. Ch. 207,

dismissing bill; *Fitzpatrick v. Beatty*, 1 Gilm. 468, ruling similarly; *Lee v. Kirby*, 104 Mass. 428, holding inadequate consideration, or improvident formation of a contract, is not reason for refusing specific performance; *Chute v. Quincy*, 156 Mass. 192, 30 N. E. 551, refusing to enforce specifically contract entered into through mistake, of which plaintiff had knowledge; *Shuman v. Willets*, 17 Neb. 483, 23 N. W. 360, specifically enforcing the contract; *Eastman v. Plumer*, 46 N. H. 479, holding one, having attempted to repudiate a contract, will not afterwards be allowed specific performance; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 335, holding where interest of party passed into the hands of his assignee in bankruptcy there was no mutuality, and specific performance was refused; *Blake v. Flatley*, 44 N. J. Eq. 231, 6 Am. St. Rep. 888, 14 Atl. 129, dismissing bill, where there was an adequate remedy at law; *Peters v. Delaplaine*, 49 N. Y. 367, refusing specific performance where vendor had delayed a long time; *Cannaday v. Shepard*, 2 Jones Eq. 229, and *Lloyd v. Wheatley*, 2 Jones Eq. 270, refusing to specifically enforce a hard contract; *State v. Baum*, 6 Ohio, 386, refusing specific performance where contract was uncertain; likewise in *City of Tiffin v. Shawhan*, 43 Ohio St. 183, 1 N. E. 585, where title deed was doubtful, *Holley v. Anness*, 41 S. C. 354, 19 S. E. 649, dismissing bill, where non-payment was the only ground for relief; *Hemming v. Zimmerschitte*, 4 Tex. 166, holding specific performance should have been granted, where the only laches was in not promptly demanding a conveyance; *De Cordova v. Smith*, 9 Tex. 149, 58 Am. Dec. 143, holding specific performance will not be decreed, when there is strong unrebutted prima facie evidence of a mutual abandonment; *W. Va. O. & O. L. Co. v. Vinal*, 14 W. Va. 686, equity may refuse its decree, unless the party will take a decree upon condition of doing certain things. Cited in notes, 54 Am. Dec. 133, and 50 Am. Dec. 676, as to when lapse of time bars relief by specific performance, collecting authorities; *Blair v. Snodgrass*, 1 Sneed, 25, without specific application.

Equity.—He who seeks equity must do equity, p. 328.

Cited and followed in *Veazie v. Williams*, 8 How. 161, 12 L. 1029, holding that whole of a contract may be annulled, and terms imposed on the plaintiff to let part of the transaction remain undisturbed; *Green v. Jones*, 76 Me. 569, allowing specific performance where party had so far performed as to take case out of the statute of frauds.

Specific performance.—Under a contract to convey land where there was so great a surplus of land in the patent beyond what it called for, that it could hardly be presumed to have been within the view of either of the parties, the court decreed a conveyance of the surplus, upon condition that vendee pay for same at the average rate per acre, p. 330.

. Cited in *Perkins v. Winter*, 7 Ala. 867, and *Terrell v. Kirksey*, 14 Ala. 215, holding vendor is not responsible for a deficiency of quantity upon land not sold by the acre, unless guilty of fraud.

Miscellaneous.—Cited to no particular point decided by main case in *Finneane v. Kearney*, 1 Freem. Ch. 68.

4 Pet. 331-348, 7 L. 876, *GALT v. GALLOWAY*.

Equity.—Chancery is not the proper tribunal for relief against mere intruders, but the remedy is ejectment to recover possession, p. 339.

Cited and followed in *Fussell v. Gregg*, 113 U. S. 554, 28 L. 995, 5 S. Ct. 633, and *Fussell v. Hughes*, 8 Fed. 395, holding equity has no jurisdiction over a suit based upon an equity title to real estate, unless the nature of the relief asked is equitable.

Land patents.—In Virginia when an entry is surveyed its boundaries are designated, and these limit the claim of the locator, p. 340.

Cited and applied in *Mitchell v. Thompson*, 1 McLean, 100, F. C. 9,669, holding, in North Carolina, errors in the survey should be corrected in a reasonable time.

Evidence.—Entries made by register of land office, or by person authorized to act for him, are received in courts as evidence of the facts stated, pp. 342, 343.

Cited and applied in *Evanston v. Gunn*, 99 U. S. 667, 25 L. 307, admitting record kept by employee of Signal Service of the United States; *Bly v. United States*, 4 Dill. 466, F. C. 1,581, holding official plats in United States Land Office are admissible to show that land on which timber was cut had not been sold by the United States.

Land patents.—Surveys in Virginia may be withdrawn after they have been recorded and the warrant may be relocated, p. 342.

Cited without special application in *Porter v. Robb*, 7 Ohio, 209.

Agency.—Death of principal revokes powers of an agent, p. 344.

Cited and rule applied in *Long v. Thayer*, 150 U. S. 522, 37 L. 1169, 14 S. Ct. 190, holding payments to agent after principal's death did not discharge the obligation to the estate; *Vance v. Anderson*, 39 Iowa, 430, holding death of principal revokes power of attorney not coupled with an interest; *Clayton v. Merrett*, 52 Miss. 359, holding naked power of agency ceases with death of principal; as also in *Ish v. Crane*, 13 Ohio St. 587, to same effect; *Michigan Bank v. Leavenworth*, 28 Vt. 217, death revokes all authority to draw on one, though party had no notice of it, as also in *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 23, 25, ruling similarly. Cited in note, 39 Am. Dec. 88, as to validity of act of agent where parties are ignorant of principal's death, collecting authorities. Cited without special application in *Clark v. Sigourney*, 17 Conn. 523, and *Territory v. Perea*, 6 N. Mex. 546, 30 Pac. 931.

Public lands.—A location made in the name of a deceased person is void, p. 345.

Cited and principle applied as follows: *McDonald v. Smalley*, 6 Pet. 261, 8 L. 392, to facts similar to those in main case; *United States v. Southern C., etc., Co.*, 5 McCrary, 569, 18 Fed. 277, holding that grant to a fictitious person is void; *De La Vergne & Co. v. Featherstone*, 49 Fed. 917, holding patent issued to inventor after his death, is void; *Thomas v. Wyatt*, 25 Mo. 26, 69 Am. Dec. 447, holding patent to a fictitious person is a nullity; *Wallace v. Saunders*, 7 Ohio, 178, holding an entry and survey, in name of a deceased person, are both void; *Price v. Johnston*, 1 Ohio St. 394, holding act of 1807 does not make valid an entry in the name of a deceased person; as also in *Stubblefield v. Boggs*, 2 Ohio St. 219, to same effect. Cited in note, 83 Am. Dec. 467, on this topic, collecting authorities. Cited without special application in *Oliver v. Forbes*, 17 Kan. 129.

Distinguished in *Galloway v. Finley*, 12 Pet. 298, 9 L. 1092, holding since the statute of 1807, vendee could not, validly, make entry on lands purporting to have been granted, notwithstanding vendor's death; *McArthur v. Dun*, 7 How. 268, 270, 12 L. 696, holding statute of 1823, protected an entry made in the name of a dead man in 1822; *Davenport v. Lamb*, 13 Wall. 427, 20 L. 657, holding statute of 1836 obviates this rule, as also in *Schedda v. Sawyer*, 4 McLean, 184, F. C. 12,443, and *Tarver v. Smith*, 38 Ala. 140, upon similar grounds.

4 Pet. 349-365, 7 L. 882, **RONKENDORFF v. TAYLOR.**

Tax sale.—In a sale of land for taxes under a special authority, great strictness is required, and proof of regularity is on claimant, p. 359.

The citations collect a number of authorities affirming and applying this principle, as follows: *Mason v. Fearson*, 9 How. 260, 13 L. 130, and *Dunn v. Games*, 1 McLean, 328, F. C. 4,176, holding purchaser must show a rigid compliance with all the material requisitions of the laws under which the sale was made; *Early v. Doe*, 16 How. 618, 14 L. 1082, holding sale void where not advertised for the full time; *United States v. Pacific R. R.*, 1 McCrary, 7. 1 Fed. 102, holding, under internal revenue act of 1864, to establish a lien for taxes all the prerequisites must be strictly complied with; *Cook v. Lasher*, 73 Fed. 707, 42 U. S. App. 42, holding failure of sheriff to make out and return within ten days, a list of lands purchased on behalf of State, as required by statute, renders tax sale void; *Lyon v. Hunt*, 11 Ala. 313, 46 Am. Dec. 223, holding purchaser at tax sale must show affirmatively a compliance with every substantial requisite of the law; *Scales v. Alvis*, 12 Ala. 619, 46 Am. Dec. 270, holding sale void for irregularity in advertisement; *Merrick v. Hutt*, 15 Ark. 338, holding intention of statute was to cast

the onus probandi on the assailant of the tax title; *Dickerson v. Acosta*, 15 Fla. 620, holding owners, notwithstanding statute, could show commissioners were without power to sell; *D'Antignac v. Augusta*, 31 Ga. 710, holding party lost his ex parte remedy to collect taxes by delay; *Fitch v. Pinckard*, 4 Scam. 79, holding purchaser at tax sale must prove every material fact to show a right of recovery; *O'Brien v. Coulter*, 2 Blackf. 424, holding sale illegal; *Scott v. Babcock*, 3 G. Greene, 141, 143, holding that nothing can be presumed in favor of the proceedings of officers, to sustain a tax title; as also in *Laraby v. Reid*, 3 G. Greene, 420, ruling similarly; *Alexander v. Walter*, 8 Gill, 260, 261, 50 Am. Dec. 701, holding purchaser must affirmatively show compliance with all prerequisites of statute; *Stuart v. Meyer*, 54 Md. 467, where it is shown sufficient notice was not given, the prima facie effect of the order of ratification given by statute is overcome, and the proceeding is null; *Coward v. Dillinger*, 56 Md. 61, holding attachment proceedings must upon their face show a substantial compliance with requirements of the statute; *Richardson v. Simpson*, 82 Md. 160, 33 Atl. 458, holding sale void, because description was misleading; *Alvord v. Collin*, 20 Pick. 421, holding sale valid; *Williams v. Detroit*, 2 Mich. 574, holding assessment for paving streets valid; *Bailey v. Haywood*, 70 Mich. 191, 38 N. W. 210, holding premature return by treasurer renders sale void; *Tucker v. Aiken*, 7 N. H. 131, holding selectmen not liable for committing taxes to collector chosen at meeting where moderator neglected to take statutory oath; *Cahoön v. Coe*, 57 N. H. 576, holding one setting up tax title must show a compliance with all the requirements of the law; *State v. Jersey City*, 36 N. J. L. 192, is to same effect; *State v. Newark*, 36 N. J. L. 290, holding publication of notice must be in strict accordance with the statute; *Sharp v. Spier*, 4 Hill, 86, holding power given municipal corporation to sell lands for taxes imposed thereon, does not authorize a sale for taxes imposed upon owners and occupants and not upon the land; *Striker v. Kelly*, 7 Hill, 25, holding purchaser at tax sale must prove sale regular and authorized; *Lafferty v. Byers*, 5 Ohio, 459, holding tax sale void for insufficient description; dissenting opinion, *Shell v. Duncan*, 31 S. C. 570, 10 S. E. 337, 5 L. R. A. 830, and n., majority holding, under State law, holder of auditor's deed for land purchased at tax sale, has prima facie good title; *Hadley v. Tankersley*, 8 Tex. 20, notwithstanding statute, one claiming under tax deed must prove a compliance with all prerequisites; *Littlefield v. Tinsley*, 26 Tex. 357, holding void a sale under order of Probate Court, no notice having been given to heirs; *Brown v. Wright*, 17 Vt. 99, 42 Am. Dec. 482, holding recital in tax deed, that collector has in all things followed the statute, is not prima facie evidence of such fact; *Flanagan v. Grimmet*, 10 Gratt. 426, holding, under statute, deed need recite only circumstances attending the sale; *Dequasie v. Harris*, 16 W. Va.

353, construing strictly law making tax deed prima facie evidence of facts recited. Cited in note, 17 Am. Dec. 507, recitals in tax deed as evidence, collecting authorities. Cited approvingly in *Sharpleigh v. Surdam*, 1 Flip. 481, F. C. 12,711.

Evidence.—In action respecting tax title official tax books made up by the register who had power to correct the valuations of the assessor are evidence of assessment of tax, and it is not required that assessors' original list be produced, p. 359.

Cited and rule followed in *Haley v. Elliott*, 20 Colo. 389, 38 Pac. 775, holding since treasurer's books were the final repository of the work of assessment and levy of taxes, they are prima facie evidence of taxes so levied; *Fitch v. Pinckard*, 4 Scam. 76, admitting original minutes of board of trustees, where book into which they had been transcribed was lost; *Painter v. Hall* 75 Ind. 213, holding assessment lists are competent evidence to show amount of value owned by the assessed; *Commonwealth v. Hefron*, 102 Mass. 151, holding records of assessors are inadmissible in suits against third parties; dissenting opinion, *Morton v. Reeds*, 6 Mo. 89, 93, majority holding certificate of auditor, stating that provisions of the law have been complied with, is no evidence of that fact; *Moore v. State Bank*, 6 Mo. 380, holding protest of notary, stating note was presented for payment, is evidence of that fact; *Austin v. King*, 97 N. C. 343, 2 S. E. 679, admitting tax list to show one of the parties had paid taxes before there was any controversy.

Evidence—Officers de facto.—Proof of the regular appointment of the assessors is unnecessary, if they have acted under the authority of the corporation, p. 359.

Cited and applied in *Moore v. Turner*, 43 Ark. 250, and *Barton v. Lattourette*, 55 Ark. 83, 17 S. W. 588, holding official character of assessor cannot be questioned in a collateral proceeding; *Sterling v. Warden*, 51 N. H. 241, 12 Am. Rep. 104, holding where postmaster, upon appointment, had taken oath, it is presumed he had complied with all the requirements of the law; *State v. Roberts*, 52 N. H. 495, declaring that an individual has acted notoriously as a public officer is prima facie evidence of his official character.

Tax sale.—Interest of tenants in common may be assessed separately, and the share of one may be sold for unpaid taxes, p. 361.

Cited and applied in *Payne v. Danley*, 18 Ark. 444, 445, 68 Am. Dec. 189, 190, to similar facts; *State v. City Collector*, 24 N. J. L. 115, holding assessment of taxes to "the estate of A.," is not such an error as will authorize the setting aside of the tax.

Distinguished in *Corbin v. Inslee*, 24 Kan. 160, under State statute.

Statutory notice.—A publication on any day of succeeding week is a sufficient compliance with statute, providing that notice shall be published “once a week,” p. 361.

Cited and followed in *S. & L. Soc. v. Thompson*, 32 Cal. 352, to publication of a summons; *In re Tyson*, 13 Colo. 490, 22 Pac. 812, 6 L. R. A. 475, construing statutory provision as to time of execution of criminal; *Raunn v. Leach*, 53 Minn. 87, 54 N. W. 1059, holding it was not necessary that summons should be published at regular intervals of seven days; *State v. Mining Co.*, 5 Nev. 425, 434, holding it was not necessary for call to be published twenty-one days before election, but that three insertions at any time in three successive weeks were sufficient; *Wood v. Knapp*, 100 N. Y. 114, 2 N. E. 634, holding that it is sufficient if weekly publication is made on any day of each week; *State v. Superior Court*, 6 Wash. 357, 33 Pac. 829, holding six publications, one made once in each of the six consecutive weeks, is sufficient; *Marling v. Robrecht*, 13 W. Va. 467, holding service complete on fourth publication, though four weeks have not elapsed between dates of the first and last publication.

Distinguished in *Hernandez v. His Creditors*, 57 Cal. 334, holding, “at least once a week for four successive weeks,” in State statute require four publications not more than seven days apart; *Finlayson v. Peterson*, 5 N. Dak. 589, 57 Am. St. Rep. 586, 67 N. W. 954, 33 L. R. A. 534, holding under statute requiring advertisement “for six successive weeks at least once in each week,” the first publication must be made at least forty-two days before the sale.

Tax sale.—Where statute requires certain facts to be stated in the advertisement, failure to do so is not cured by giving actual notice in some other way, p. 362.

Cited, *Patrick v. Davis*, 15 Ark. 371, holding misdescription in advertisement invalidates sale, although a deed is delivered containing recitals of every prerequisite prescribed by the statute.

Tax sale is void for uncertainty where advertisement purported to sell “half” of lot No. 4, p. 362.

The citations collect the following similar cases, affirming and applying this ruling: *Gault v. Woodbridge*, 4 McLean, 332, F. C. 5,275, holding levy on one-half of a lot, without designating which half, is too indefinite to convey the title; *Fitch v. Pinckard*, 4 Scam. 81, 84, holding sale void for uncertainty in the description of the premises; *Sloan v. Sewell*, 81 Ind. 182, holding imperfect description of land will not preclude purchaser from enforcing lien against the land; *Bosworth v. Farenholz*, 3 Iowa, 88, holding deed purporting to convey forty feet of lot No. 2, fatally defective in its description; *Blair T. L. & L. Co. v. Scott*, 44 Iowa, 148, holding where descriptions in list and deed did not necessarily contemplate the same parcel, purchaser acquired no right; *McDonough v.*

Gravier, 9 La. 544, holding description of land lying between certain streets, insufficient; Larrabee v. Hodgkins, 58 Me. 413, holding tax deed describing premises as one-fourth, No. 5, etc., is void; Wilkins v. Tourtellott, 28 Kan. 844, holding tax deed void for insufficient description; State v. Parker, 39 N. J. L. 692, holding this description in assessment sufficient, B., sixty feet L. street; Stanberry v. Nelson, Wright, 768, holding 158 acres in north half, section 12, is too vague to pass title; Jory v. Palace, etc., Co., 30 Or. 201, 46 Pac. 788, holding description in assessment-roll as a "fraction of a lot," is too indefinite; Norris v. Hunt, 51 Tex. 615, holding patent void for patent ambiguity in description; Head v. James, 13 Wis. 643, holding, where land is assessed and sold for taxes, as the "north part" of a certain tract, the sale is void; Johnson Co. v. Tierney, (Neb.), 76 N. W. 1092, holding tax void for uncertainty, which was levied against an entire city lot under the description "part of lot 5 in block 41." Cited, without special application, in Cooper v. Holmes, 71 Md. 30, 17 Atl. 713.

Distinguished in Boyd v. Wilson, 86 Ga. 383, 12 S. E. 745, holding levy of a tax *fi. fa.*, describing property as one-fourth of lot No. 931, is sufficiently definite.

Miscellaneous.—Apparently miscited in Parsons v. The Trustees, 44 Ga. 538; Noble v. Indianapolis, 16 Ind. 510.

4 Pet. 366-391, 7 L. 888, BANK OF UNITED STATES v. TYLER.

Judgment lien attaches, under Kentucky law, from the delivery of the execution to the sheriff, p. 383.

Cited and followed in Mansony v. United States Bank, 4 Ala. 749, holding that enjoining of judgment suspends the lien; Watson v. Hahn, 1 Colo. 392, holding execution issued seventy days after entry of judgment was as effectual to secure real estate, as if issued at an earlier day. Cited in note, 1 Blackf. (Ind.) 404.

Negotiable paper.—Where maker of note dies before it is due, and indorser administers on his estate, demand of payment and notice to the indorser are indispensable, p. 384.

Cited and followed in Carolina National Bank v. Wallace, 13 S. C. 353, 36 Am. Rep. 698, holding where indorser dies before maturity of note, and the maker becomes his executor, notice of protest to him is requisite to bind the estate.

Negotiable paper.—Neglect of holder of note to proceed against jailer and his securities, unlawfully permitting maker to escape, is not due diligence and discharges indorser, p. 388.

Cited and relied upon in Bradford v. Bishop, 14 Ala. 522, holding that the omission of indorsee, for two years, to sue out an alias execution upon judgment against the maker, discharges indorser; Bishop v. Yeazle, 6 Blackf. (Ind.) 129, holding delay in issuing execution discharges assignor; Johnson v. Lewis, 1 Dana, 184, un-

der facts similar to those in main case; *Jacobs v. McDonald*, 8 Mo. 568, holding where assignee of note sues maker in Justice's Court, and execution is returned unsatisfied for want of personal property, and transcript is filed in Circuit Court, but no execution issued, assignee is discharged.

Distinguished in *Sayre v. McEwen*, 41 Ind. 115, holding assignee of note was not bound, before suing indorser, to proceed by attachment against property of maker, a non-resident.

Discharge under State insolvent law will not authorize the discharge of a person imprisoned under judgment of Federal Circuit Court, p. 388.

Cited and applied in *In re Freeman*, 2 Curt. 494, F. C. 5,083, holding State act to abolish imprisonment for debt will not affect process out of Circuit Court; *Offutt v. Bowen*, Walk. (Miss.) 547, discharge of prisoner delivered by United States marshal, under State insolvent law, is no defense to action on prison bond.

4 Pet. 392, 7 L. 897, **SAUNDERS v. GOULD**.

Appeal and error.—On a certificate of division, where the whole cause, and not a point or points, has been certified, it is irregular and the case will be remanded, p. 392.

Cited and rule followed in *United States v. Chicago*, 7 How. 192, 12 L. 663, holding where there are several questions so material as to decide the whole case, Supreme Court will not dismiss them, provided they appear to have arisen at one time, and to have involved little beyond one point; *Williamsport Bank v. Knapp*, 119 U. S. 360, 30 L. 447, 7 S. Ct. 275, and *Jewell v. Knight*, 123 U. S. 433, 31 L. 193, 8 S. Ct. 194, holding each question certified to Supreme Court must be a distinct point of law and not the whole case; *Bagg v. Detroit*, 5 Mich. 69, holding that questions reserved must be presented directly and definitely; *Kelley, etc., Shoe Co. v. Insurance Co.*, 87 Tex. 114, 26 S. W. 1063, holding the statute never contemplated that the whole of a complicated case should be certified. Cited in *Ward v. Chamberlain*, 2 Black, 435, 17 L. 323, holding power of Supreme Court to revise is strictly confined to questions stated in the certificate.

Federal courts will follow settled construction of State statute by State courts, p. 392.

Cited and applied in *Thompson v. Phillips*, Bald. 284, F. C. 13,974, following State court's construction of State laws as to judgments.

4 Pet. 393-409, 7 L. 897, **SPRATT v. SPRATT**.

Naturalization is a judicial proceeding submitted to courts of record, and their judgments thereon are conclusive, p. 408.

The following citing cases affirm and apply this principle: *In re Loney*, 134 U. S. 376, 33 L. 951, 10 S. Ct. 586, holding State courts

have no jurisdiction of a complaint for perjury in testifying before a notary of the State upon a contested election of a member of the house of representatives; *Ex parte Cregg*, 2 Curt. 100, F. C. 3,380, holding that a court of record, without any clerk, is not competent to take an alien's preliminary declaration; *The Acorn*, 2 Abb. (U. S.) 444, F. C. 29, holding order of court of competent jurisdiction, admitting an alien to citizenship, is conclusive; *In re Coleman*, 15 Blatchf. 426, F. C. 2,980, holding where applicant for citizenship receives a certificate, he cannot afterwards be convicted of using such certificate, knowing it was unlawfully issued; *United States v. Makins*, 26 Fed. Cas. 1144, holding clerks of Federal courts have no power to certify an admission to citizenship, which is a judgment and provable only by the original record; *Green v. Salas*, 31 Fed. 107, holding that naturalization can only be proved by the record of the judgment; *In re Bodck*, 63 Fed. 814, 815, declaring that an applicant for naturalization is a suitor and his petition must allege a fulfillment of all the conditions of the statute; *United States v. Gleason*, 78 Fed. 397, and *Pintsch C. Co. v. Bergin*, 84 Fed. 141, holding certificate of citizenship cannot be set aside upon the ground that the facts were falsely represented to the court; *Harley v. The State*, 40 Ala. 697, holding record of naturalization is not required to show affirmatively the existence of all the legal prerequisites; *Scott v. Strobach*, 49 Ala. 488, holding certificate of naturalization cannot be collaterally impeached, unless for want of jurisdiction; *Ex parte Knowles*, 5 Cal. 301, declaring the power to naturalize is judicial by act of Congress; *Holcomb v. Phelps*, 16 Conn. 131, holding decree of surrogate granting administration, a complete defense to action of trover; *People v. McGowan*, 77 Ill. 647, 20 Am. Rep. 255, holding record of naturalization cannot be impeached collaterally; *Morgan v. Dudley*, 18 B. Mon. 714, 68 Am. Dec. 739, holding Congress cannot authoritatively confer jurisdiction of naturalization on State court; *Dean, Petitioner*, 83 Me. 498, 22 Atl. 387, 13 L. R. A. 232, and n., holding court without clerk has no jurisdiction over naturalization of aliens; *Andres v. Arnold*, Circuit Judge, 77 Mich. 88, 43 N. W. 858, 6 L. R. A. 239, declaring final admission to citizenship cannot be attacked to show want of conformity to the previous requirements of the statute; *State v. Macdonald*, 24 Minn. 59, and *McCarthy v. Marsh*, 5 N. Y. 284, holding record of proceedings in naturalization cannot be questioned in collateral proceedings; *State v. Boyd*, 31 Neb. 710, 48 N. W. 746, holding that admission to citizenship can be proven only by record; *State v. Whittemore*, 50 N. H. 251, 9 Am. Rep. 203, holding court of record, without a clerk, is not competent to naturalize an alien; *Priest v. Cummings*, 16 Wend. 626, holding every intendment is in favor of naturalization proceedings; *People v. Turnpike Co.*, 23 Wend. 227, opinion of Cowen, he maintaining that State is estopped by the certificate of the commissioners from claiming a forfeiture for non-compliance with incorporating act; *People v. Snyder*, 41

N. Y. 409; *Commonwealth v. Towles*, 5 Leigh, 746, and *State v. Hoefinger*, 35 Wis. 400, maintaining that record of naturalization is conclusive; *Knapp v. Thomas*, 39 Ohio St. 387, 48 Am. Rep. 468, holding pardon cannot be impeached by showing it was obtained by false representations.

Alien.— Act of Maryland authorizing descent to aliens of lands held by aliens does not authorize the descent to such heirs of land of a citizen, p. 408.

Cited in *Geofroy v. Riggs*, 133 U. S. 266, 33 L. 644, 10 S. Ct. 296, under article 7 of the convention with France, 1800, a citizen of France can take land in District of Columbia, by descent from a citizen of the United States. Cited without special application in *Kershaw v. Kelsey*, 100 Mass. 574, 97 Am. Dec. 136.

Miscellaneous.— Miscited in *State v. Judge*, 33 La. Ann. 270; *New Orleans v. Orphan Asylum*, 33 La. Ann. 855.

4 Pet. 410-465, 7 L. 903, *CRAIG v. STATE OF MISSOURI*.

Assumpsit.— Everything which disaffirms and invalidates the contract may be shown under the general issue of assumpsit, p. 426.

Cited and applied in *Oscanyan v. Arms Co.*, 103 U. S. 267, 26 L. 542, and *Oscanyan v. Arms Co.*, 15 Blatchf. 87, F. C. 10,600, holding defense that agreement was void because against public policy could be set up under a plea of general issue, as also in *Tufts v. Tufts*, 3 Wood. & M. 501, F. C. 14,233, ruling similarly; *Gauthier v. Cole*, 17 Fed. 717, holding illegality of consideration may, at common law, be pleaded under the general issue; *Minard v. Lawler*, 26 Ill. 305, holding, on appeal from a justice's judgment, notice of any particular defense to be presented need not be given; *Hill v. Callaghan*, 31 Mich. 426, holding, under general issue, invalidity of instrument may be shown, without special notice; *Johnson v. Hulings*, 103 Pa. St. 503, 49 Am. Rep. 134, holding whenever it appears in action of assumpsit that plaintiff's claim is illegal, court will not enforce it.

Practice.— Where cause is tried by court without jury exceptions to court's charge cannot of course be taken, but the court should make findings as to the points in controversy, p. 427.

Cited to this point in *United States v. King*, 7 How. 853, 12 L. 943, and *Weems v. George*, 13 How. 197, 14 L. 111, holding where, in a trial in Louisiana, judge tried case without a jury, no bill of exceptions can be taken to his judgment on the law; *Martinton v. Fairbanks*, 112 U. S. 675, 28 L. 864, 5 S. Ct. 323, holding that the general finding is conclusive of the issues of fact against the plaintiff, and there is no question of law presented by the record; *Obermier v. Core*, 25 Ark. 563, holding findings of facts by court are conclusive; *Lynch v. Grayson*, 7 N. Mex. 34, 32 Pac. 151, holding statute providing

that where jury has been waived the Supreme Court shall review same as if tried by a jury, does not intend that the Supreme Court shall decide on the weight of the evidence. Cited without particular application in *Mercantile Ins. Co. v. Folsom*, 18 Wall. 249, 21 L. 833.

Jurisdiction.— Under twenty-fifth section of the judiciary act, it is sufficient if the record shows that the constitutionality of a State law claimed to be repugnant to the National Constitution was sustained, and the record need not, in terms, aver the fact, p. 429.

Cited and rule applied in *Fisher v. Cockerell*, 5 Pet. 256, 8 L. 117, holding, since record did not show the compact with Virginia was involved, the court had no jurisdiction; *Davis v. Packard*, 6 Pet. 48, 8 L. 315, declaring court had jurisdiction where it appeared from the record that the decision of State court was against the privilege especially set up; *Byrne v. Missouri*, 8 Pet. 42, 8 L. 860, under facts similar to main case; *Crowell v. Randell*, 10 Pet. 397, 9 L. 469, dismissing case where record did not show that such a question did arise, and was applied to the case; *Magwire v. Tyler*, 1 Black, 203, 17 L. 141, where decision of State court, construing act of Congress, is against the title set up thereunder, Federal court has jurisdiction; *The Victory*, 6 Wall. 384, 18 L. 849, holding it is not sufficient that the court can see the question ought to have been raised; *Frost v. Ilsey*, 55 Me. 380, holding it must appear that the sustaining of the validity of the statute was indispensable to the judgment. Cited without special application in *Stockton v. Montgomery*, Dall. (Tex.) 485.

Construction of Constitution.— In construing the Constitution history may be examined, p. 432.

Cited and followed in *Rhode Island v. Massachusetts*, 12 Pet. 723, 9 L. 1260, and *Carey v. McDougald*, 7 Ga. 87.

Constitutional law — Bills of credit.— Certificates issued by State, containing a pledge of its faith, and receivable as payment for State, county and town dues, are bills of credit, p. 433.

The citations of this leading case very naturally collect a number of others involving the same or a similar point to that stated above: dissenting opinions, *Legal Tender Cases*, 12 Wall. 619, 678, 20 L. 334, 353, majority holding legal tender acts constitutional; *Wesley v. Eells*, 90 Fed. 157, holding revenue bond scrip of North Carolina was intended for circulation as money, and constituted bills of credit; *Bragg v. Tuffts*, 49 Ark. 563, 564, 565, 6 S. W. 162, holding treasury warrants to be "bills of credit;" *Linn v. State Bank*, 1 Scam. 90, 93, 25 Am. Dec. 72, 76, holding bills issued by State bank were "bills of credit;" *City Nat. Bk. v. Mahan*, 21 La. Ann. 752, holding certificates of indebtedness authorized by general assembly are "bills of credit;" *Hunt, Appellant*, 141 Mass. 520, 6 N. E. 556, holding a certificate of deposit is not a note issued to circulate as money;

Pagaud v. State, 5 Smedes & M. 495, holding auditor's warrants are not "bills of credit;" Green v. Sizer, 40 Miss. 561, 562, holding State treasury notes issued as a loan of money are not bills of credit, though used as currency; Bank of Kentucky v. Clark, 4 Mo. 61, 28 Am. Dec. 347, holding notes of State bank of Kentucky are "bills of credit;" Delafield v. Illinois, 26 Wend. 218, holding the bonds were transferable certificates of stock, and not bills of credit; Indiana v. Woram, 6 Hill, 37, 40 Am. Dec. 380, holding bonds not intended to circulate as money are not "bills of credit;" Metropolitan Bank v. Van Dyck, 27 N. Y. 492, holding congressional act making treasury notes legal tender is valid; dissenting opinion, Shollenberger v. Brinton, 52 Pa. St. 54, 72, and Breitenbach v. Turner, 18 Wis. 145, majority holding Congress can issue treasury notes and make them legal tender; Thornburg v. Harris, 3 Cold. 160, holding Confederate treasury notes to be "bills of credit;" Gowen v. Shute, 4 Baxt. 63, holding bill drawn by State, resting not on its credit but on a fund, is not a bill of credit; W. & A. R. R. Co. v. Taylor, 6 Heisk. 413, holding bills issued not exclusively on faith of the State are not bills of credit. See note, 25 Am. Dec. 78, 79, as to what are bills of credit, collecting authorities; see note, 37 Am. Dec. 769. Cited without special application in Hatch v. Burroughs, 1 Woods, 447, F. C. 6,203, dissenting opinion, McElvain v. Mudd, 44 Ala. 66; Lucas v. San Francisco, 7 Cal. 477; Griswold v. Hepburn, 2 Duv. 38, and Green v. Lanier, 5 Heisk. 680.

Distinguished in Briscoe v. Bank of Kentucky, 11 Pet. 313, 323, 9 L. 731, 735, holding notes issued by State bank and required to be received on executions by plaintiffs, are not "bills of credit;" see dissenting opinions, pp. 328, 329, 332, 333, 340, 341, 9 L. 737, 738, 739, 742; Poindexter v. Greenhow, 114 U. S. 284, 29 L. 190, 5 S. Ct. 910, holding the coupons are not bills of credit, because they were not intended to circulate as money; Bailey v. Milner, 1 Abb. (U. S.) 263, F. C. 740, 1 Bank. Reg. 107, 35 Ga. 332, holding "Confederate treasury notes" not "bills of credit;" Owen v. Bank, 3 Ala. 262, 263, 264, holding notes issued by State bank are not "bills of credit;" also in McFarland v. State Bank, 4 Ark. 48, 51, 52, 37 Am. Dec. 762, 764, 765, ruling similarly; Ramsey v. Cox, 28 Ark. 369, holding treasurer's certificates not issued to circulate as money, are not "bills of credit;" State Bank v. Gibson, 6 Ala. 815, holding State bank is not invested with attributes of sovereignty, and must present claim to administrator like ordinary creditor; Martin v. Branch Bank of Alabama, 14 La. 417, holding that bank owned by State may be sued in court of another State. Distinguished without special application in Briscoe v. Bank of Commonwealth, 7 J. J. Marsh, 349.

Constitution was intended to prohibit things, not names: giving a new name to an old thing will not take it out of the prohibition, p. 433.

Cited and applied in *In re Klein*, 14 Fed. Cas. 727, holding bankrupt act, so far as it undertakes to discharge debtor from debts con-

tracted before its passage, is unconstitutional; *Schenck v. Peay*, 21 Fed. Cas. 680, calling an excessive apportionment of a direct tax a penalty does not make it any the less an excessive apportionment; *People v. George*, 2 Idaho, 816, 26 Pac. 984, and *People v. Marshall*, 12 Ill. 394, declaring legislature could not divide a county and attach part to another county; *Leavitt v. Palmer*, 3 N. Y. 35, 51 Am. Dec. 336, holding that certificates of deposits are promissory notes, and within the prohibition of the statute.

Bills of credit.—Congress emitted bills of credit to a large amount, p. 435.

Cited in *Legal Tender Cases*, 110 U. S. 442, 448, 28 L. 212, 214, 4 S. Ct. 126, 130, holding Congress has power to make treasury notes of United States a legal tender, in time of peace or war.

Bills of credit.—A note need not be made legal tender in order to come within the denomination of a bill of credit, p. 434.

Cited and applied in *Van Husan v. Kanouse*, 13 Mich. 311, 316, holding Congress had full power to make treasury notes legal tender.

Illegal contract.—A promise made in consideration of an act forbidden by law is void, p. 436.

In the following citing cases this principle is affirmed and variously applied: *Platt v. Oliver*, 2 McLean, 277, F. C. 11,115, holding that on sale of public lands, it is not unlawful for individuals to associate together to purchase for their joint interest; dissenting opinion, *Scheible v. Bacho*, 41 Ala. 455, majority enforcing contract based on loan of Confederate States treasury notes; *Hale v. Huston*, 44 Ala. 139, 4 Am. Rep. 127; *Latham v. Clark*, 25 Ark. 581, 582, see dissenting opinion, p. 601, and *Leach v. Smith*, 25 Ark. 252, holding promissory note for loan of Confederate treasury notes void; *Viser v. Bertrand*, 14 Ark. 284, holding money advanced to husband at request of wife, in consideration of his making no opposition to bill for divorce, cannot be recovered; *Jones v. Little Rock*, 25 Ark. 306, and *Lindsey v. Rottaken*, 32 Ark. 632, holding void bills issued by city without authority; dissenting opinion, *Miller v. Gould*, 38 Ga. 483, majority holding contract, made within Confederate lines, whose consideration was Confederate treasury notes, valid; *Bank of Peru v. Farnsworth*, 18 Ill. 564, holding issuance of time certificates by banks, being prohibited, they are void; *Marienthal v. Shafer*, 6 Iowa, 226, holding that one selling liquor in violation of law cannot replevy them from attaching creditor; *Boardman v. Thompson*, 25 Iowa, 504, refusing to enforce a champertous contract; *Jones v. Knowles*, 30 Me. 404, holding acts intended for performance, which involve a violation of the law, are void; *Bank of Michigan v. Miles*, 1 Doug. (Mich.) 412, 41 Am. Dec. 583, refusing to enforce contract to purchase land by corporation for other than

its own use; *Brien v. Williamson*, 7 How. (Miss.) 31, and *Wooten v. Miller*, 7 Smedes & M. 385, holding contract for purchase of slaves void; *Gilliam v. Brown*, 43 Miss. 660, holding that illegality of executed contract is no defense to action against party in possession of all the profits; *Moreau v. Detchemendy*, 41 Mo. 435, holding void a mortgage for loan office certificates; *Ohio L. Ins. Co. v Merchants' Ins. Co.*, 11 Humph. 16, 53 Am. Dec. 754, if parties in contract against public policy are not in equal fault and relief sought will sustain public policy, it will be given; *Wood v. Stone*, 2 Cold. 373, 88 Am. Dec. 603, holding void contracts made to aid the rebellion; *Stillman v. Looney*, 3 Cold. 21, dismissing bill to foreclose mortgage given to secure payment of notes given for loan of Confederate treasury notes; *Hunt v. Robinson*, 1 Tex. 759, refusing to enforce contract for sale of land granted to colonist, made before the expiration of six years after the grant; *Bancroft v. Dumas*, 21 Vt. 465, holding there can be no recovery for liquor sold without a license; *Commonwealth v. McCullough*, 90 Va. 617, 19 S. E. 121, refusing to enforce contract prohibited by Constitution. Cited without particular application in dissenting opinion, *Moore v. New Orleans*, 32 La. Ann. 760.

Distinguished in *McDougald v. Bellamy*, 18 Ga. 434, and *McDougald v. Lane*, 18 Ga. 454, holding bank liable though director issued more bills than the charter permitted.

Political questions should be addressed to other departments, the judiciary follows the mandates of the law and cannot be influenced by considerations of expediency, p. 438.

Cited in *State v. Porter*, 1 Ala. 702, holding constitutional qualifications of person elected is a judicial question.

Constitutional law.—In case of doubt the constitutionality of a power exercised by the States should be sustained, per *Johnson, J.*, dissenting, p. 444.

Cited in *State v. Fry*, 4 Mo. 177, holding law granting the divorce to be unconstitutional.

Miscellaneous.—Miscited in *Alabama, etc., R. Co. v. Jones*, 1 Fed. Cas. 282, and *Doe v. Anderson*, 5 Ind. 36. Cited in *In re Barry*, 42 Fed. 120 F. C. 1,059, to point that Federal courts have no common-law jurisdiction; *Wray v. Tuskegee*, 34 Ala. 64, that "emit" is synonymous with "issue." Miscited in *School Dist. v. Blaisdell*, 6 N. H. 198.

4 Pet. 466-479, 7 L. 922, **HOLLINGSWORTH v. BARBOUR.**

Judgments, voidable only and not void, are binding everywhere until reversed, p. 471.

Cited and applied in *Amory v. Amory*, 3 Biss. 270, F. C. 334, holding complainant could not show judgment was voidable for fraud; *Buckmaster v. Carlin*, 3 Scam. 108, holding judgment in favor of

bank could not be impeached in action of ejectment because the act creating bank had been declared unconstitutional; *Reed v. Wright*, 2 G. Greene, 33, 37, holding judgments of courts of general jurisdiction cannot be collaterally impeached unless absolutely void on its face; *Massey v. Scott*, 49 Mo. 282, holding general judgment will authorize the issue of a special execution against the property attached and this informality cannot be taken advantage of in action of ejectment.

Practice.—As statute authorized service on unknown heirs by publication, only when complainant claimed as locator, or by a written instrument, and the complaint did not so claim, the decree was made without notice and was void, pp. 473, 475.

In the Federal courts the following have cited and relied upon this principle: *Harris v. Hardeman*, 14 How. 343, 14 L. 448, holding service insufficient where return did not show a compliance with statutory requirements; *Nations v. Johnson*, 24 How. 205, 16 L. 632, holding compliance with statutory requirements as to service by publication gave jurisdiction; *Earle v. McVeigh*, 91 U. S. 508, 23 L. 400, holding notice posted upon house seven months after it had been vacated by party was not upon his "usual place of abode;" *Hart v. Sansom*, 110 U. S. 156, 28 L. 103, 3 S. Ct. 589, holding decree of State court for removal of cloud upon title, against a non-resident cited by publication as directed by local statutes, is no bar to action by him in Circuit Court to recover land; *Scott v. McNeal*, 154 U. S. 46, 38 L. 902, 14 S. Ct. 1112, holding purchaser at sale by administrator of property of living person takes no title as against him; *Lavin v. Emigrant I. S. Bank*, 18 Blatchf. 25, 1 Fed. 663, holding payment to administrator, creditor being alive, is no defense to a subsequent demand; *In re Shepard*, 1 Bank. Reg. 117, 118, 21 Fed. Cas. 1254, holding any creditor whose claim would be barred by a discharge should not be deprived of his just right to be heard; *Daily v. Doe*, 3 Fed. 913, holding in admiralty the seizure is legal notice to all persons; *Preston v. Walsh*, 10 Fed. 325, holding proceedings against Mercer and associates, unknown, void for want of legal notice to the defendants.

State court citing cases, following the syllabus doctrine, are: *Boykin v. Rain*, 28 Ala. 342, 343, 65 Am. Dec. 353, 354, holding decree against feme covert is not binding she not having been properly served; *Bruce v. Strickland*, 47 Ala. 198, holding judgment insufficient where the record did not show there was a failure of the primary method of notice before the secondary method was resorted to; *Comer v. Jackson*, 50 Ala. 385, holding service of process on Sunday does not render judgment by default reversible; *Jones v. Knox*, 51 Ala. 370, holding discharge in bankruptcy cannot be avoided in a collateral proceeding unless creditor proves the omission of his name from notice of publication was fraudulent; *Dugger v. Tayloe*, 60 Ala. 519, holding decree ordering conveyance to purchaser with-

out notice to administrator is void; *Hatchett v. Billingslea*, 65 Ala. 31, holding probate decree against administrator de bonis non without notice is void; *Miller v. Barkeloo*, 8 Ark. 323, holding judgment a nullity where record did not disclose such fact as the statute requires; *Mitchell v. Ferris*, 5 Houst. 40, holding one could not recover on foreign judgment, where it appeared that defendant was a non-resident and had never been served or had not appeared; *Flint Co. v. Roberts*, 2 Fla. 110, 111, 112, 48 Am. Dec. 180, 181, 182, reversing judgment rendered without notice, notwithstanding it did not require any; *Ponder v. Moseley*, 2 Fla. 266, 48 Am. Dec. 200, holding judgments of court of general jurisdiction are never void unless parties were not subject to its jurisdiction; *Flint Co. v. Foster*, 5 Ga. 202, 48 Am. Dec. 254, holding notice may be dispensed with, by statute; *Horner v. Doe*, 1 Ind. 133, 48 Am. Dec. 358, holding foreign judgment rendered without notice to defendant may, in collateral proceeding, be treated as void; *Babbitt v. Doe*, 4 Ind. 357, holding order of sale, without notice to heirs, is void; *Waltz v. Borroway*, 25 Ind. 382, and *Morgan v. Woods*, 33 Ind. 28, holding, where publication has been authorized, irregular or erroneous notice will not cause the judgment to be held void in collateral proceeding; *Seely v. Reid*, 3 G. Greene, 379, and *Penobscot R. R. Co. v. Weeks*, 52 Me. 463, holding, if record shows no service, decree is void; *Verner v. Bosworth*, 28 Kan. 673, holding report of inspector seizing cattle as having contagious disease is not conclusive; *Salem v. Railroad Co.*, 98 Mass. 449, 96 Am. Dec. 660, holding, in action by city against party for insurance, if he had no opportunity to be heard before the board, none of its findings are conclusive upon him; *Campbell v. Brown* 6 How. (Miss.) 114, 234, holding probate decree ordering sale of lands, without notice to heirs, as the statute requires, is void; *Gwin v. McCarroll*, 1 Smedes & M. 368, and *Tarleton v. Cox*, 45 Miss. 437, holding judgment without notice to defendant is void; *Bobb v. Graham*, 4 Mo. 224, holding judgment void for want of certainty as to return day of notice; *Freeman v. Thompson*, 53 Mo. 196, holding in attachment cases, jurisdiction is obtained by a levy of the writ properly issued; *Williams v. Lowe*, 4 Neb. 399, holding the order of publication unauthorized, and decree void; *Jacobus v. Insurance Co.*, 27 N. J. Eq. 624, holding judgment upon a mechanic's lien claim is not conclusive against mortgagee, whose mortgage was created and recorded, after building was commenced and before claim was filed; *Ferguson v. Crawford*, 70 N. Y. 259, 26 Am. Rep. 593, holding under State practice, want of jurisdiction may always be set up against a judgment when a benefit is claimed under it; *Keating v. Spink*, 3 Ohio St. 115, 62 Am. Dec. 222, when proceedings are in rem, the seizure is sufficient notice; *Rhodes v. Gunn*, 35 Ohio St. 393, holding finding of court, that unknown heirs had been notified by publication, is, in effect, equivalent to a notice given in pursuance of the previous direction of the court, at least in collateral

proceedings; *Stegall v. Huff*, 54 Tex. 197, declaring that service by publication should be strictly construed; *Was., etc., R. R. Co. v. Alex., etc., R. R. Co.*, 19 Gratt. 610, 100 Am. Dec. 723, holding order of court substituting another person as trustee without notice, is void; *Richardson v. SeEVERS*, 84 Va. 267, 4 S. E. 716, holding judgment by court without jurisdiction of subject-matter void; *Blanton v. Carroll*, 86 Va. 541, 10 S. E. 329, holding judgment void, where defendant appears not to have been included in the original process; *B. & O. R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va. 840, where actual service cannot be had, constructive service, if authorized by statute, will be regarded as "due process of law;" *Rice v. Schofield*, N. Mex., 51 Pac. 674, the fact that bond was "filed" pending hearing, to answer any judgment recovered, did not authorize rendition of judgment against sureties therein, without notice. Cited without special application in *Judkins v. Insurance Co.*, 37 N. H. 477.

Distinguished in *Galpin v. Page*, 1 Sawy. 330, F. C. 5,205, holding where statute authorizes service by publication, the determination of court issuing the summons, as to its propriety, is conclusive, when collaterally attacked; *Kimball v. Taylor*, 2 Woods, 40, F. C. 7,775, holding personal service of an irregular or erroneous summons is not void; *Hunt v. Ellison*, 32 Ala. 200, 205, holding recital of appearance by record is sufficient to show decree prima facie valid when collaterally assailed; *Borden v. State*, 11 Ark. 549, 54 Am. Dec. 239, holding order of payment by Probate Court, without notice to adverse party, cannot be inquired into in collateral proceeding; *Dorsey v. Garey*, 30 Md. 497, holding under Code order of sale of property by court of equity without waiting for answer of defendant, cannot be collaterally attacked; *Shepherd v. Ware*, 46 Minn. 178, 24 Am. St. Rep. 216, 48 N. W. 775, holding constitutional a statute providing for service of process upon unknown claimants to land.

Miscellaneous.—Miscited in *Thompson v. Phillips*, Bald. 284, F. C. 13,974; *Coulter v. Routt Co.*, 9 Colo. 267, 11 Pac. 204.

4 Pet. 480-510. 7 L. 927. SOCIETY FOR THE PROPAGATION. ETC., v. TOWN OF PAWLET.

Pleading.—General issue pleaded to an action by a corporation, admits the competency of the plaintiff to sue, p. 501.

This principle is affirmed and applied in the following citing cases: *Pullman v. Upton*, 96 U. S. 329, 24 L. 818, holding plea of non-assumpsit admits the existence of the corporation; *Southern Express Co. v. Railroad Co.*, 99 U. S. 199, 25 L. 320, holding complainant need not prove its existence unless the fact is directly put in issue; *Baltimore & P. R. R. v. Fifth Baptist Church*, 137 U. S. 572, 34 L. 787, 11 S. Ct. 186, holding misnomer of a corporation waived by pleading to the merits; *Michigan Ins. Bank v. Eldred*, 143 U. S. 300, 36 L. 164, 12 S. Ct. 452, holding under Code of Wisconsin, an express denial,

upon information and belief, that plaintiff is a corporation, puts in issue the existence of the corporation; *New York Dry Dock v. Hicks*, 5 McLean, 115, F. C. 10,204, holding corporation need not show the land was taken in the regular course of business; *Oregonian Ry. Co. v. O. R. & N. Co.*, 10 Sawy. 476, 482, 23 Fed. 236, 239; *Emerson Co. v. Nimocks*, 88 Fed. 281, holding want of capacity of corporation to sue in a particular case must be pleaded in abatement; *Union Cement Co. v. Noble*, 15 Fed. 503, 504, 505, holding in Federal courts the existence of foreign and domestic corporations can only be denied by special plea; *Imperial Refining Co. v. Wyman*, 38 Fed. 576, 3 L. R. A. 505, and n., holding that a plea to jurisdiction denying averments of the diverse citizenship, must be, in the Federal courts of Ohio, by special plea of abatement; *Hodges v. Kimball*, 91 Fed. 848, holding plea to merits of general issue, in suit by administrator, admits plaintiff's capacity and right to sue; *Jenks v. Edwards*, 6 Ala. 145, holding where suit is brought in name of one person, for use of another, death of nominal plaintiff at commencement of suit may be pleaded in bar or abatement; *Strickland v. Burns*, 14 Ala. 513; *Arnau v. First Nat. Bank*, 36 Fla. 410, 18 So. 789; *McIntire v. Preston*, 5 Gilm. 59, 48 Am. Dec. 323, and *Jones v. C. T. F. Co.*, 14 Ind. 92, all holding that general issue admits character in which plaintiff sues; as also *Alderman, etc., v. Finley*, 10 Ark. 426, 52 Am. Dec. 246; *Savage Manuf. Co. v. Armstrong*, 17 Me. 37, 35 Am. Dec. 228, and *Garton v. Bank*, 34 Mich. 280, to the same effect; *Western Union Tel. Co. v. Eyser*, 2 Colo. 156, holding that defendant suing as a corporation cannot deny its own existence; *Phenix Bank v. Curtis*, 14 Conn. 440, 441, 442, 36 Am. Dec. 494, 496, holding general issue admits capacity of foreign corporation to sue, but it does not admit their power to make the contract; *Spangler v. Railway Co.*, 21 Ill. 277, by demurring defendant admits averment that plaintiff is a corporation; *School District v. Blaisdell*, 6 N. H. 198, holding plea of general issue admits that plaintiffs are a corporation with capacity to sue, as also in *Overland Dis. Co. v. Wedeles*, 1 N. Mex. 532; *Methodist E. Church v. Wood, Wright*, 13, S. C., 5 Ohio, 286; *Rheem v. Wheel Co.*, 33 Pa. St. 364, and *Boston T., etc., v. Spooner*, 5 Vt. 96, all to the same effect; *North Co. Bank v. Eyer*, 60 Pa. St. 440, holding non-existence of plaintiff is pleadable in bar; *Freeland v. Insurance Co.*, 94 Pa. St. 514, holding misnomer should be interposed by plea in abatement. Cited without particular application in *United States v. Insurance Co.*, 22 Wall. 101, 22 L. 817; *Pillsbury W. F. Co. v. Eagle*, 86 Fed. 628, 41 L. R. A. 173, and *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind) 205.

Distinguished in *Commissioners v. Perry*, 5 Ohio, 61, where the individuals were treated as the plaintiffs by the officers of the court and both counsel; *Lewis v. Bank of Kentucky*, 12 Ohio, 149, 40 Am. Dec. 472, and *Anderson v. Coal Co.*, 12 W. Va. 537, holding non-assumpsit puts in issue the capacity of plaintiff to sue; *Girls Ind.*

School v. Fritchey, 10 Mo. App. 349, under Code general denial puts in issue the incorporation of plaintiff, except in a few instances.

Corporation.—Charter of 1761 creating a town granting the “society” one share of the town recognizes their corporate existence and their capacity to take, p. 502.

Cited and applied in **Koch v. Railway Co.**, 75 Md. 226, 23 Atl. 464, 15 L. R. A. 379, and n., holding where legislature by special act recognizes a corporation and authorizes it to exercise certain rights, all charter defects in original certificate are cured, as also in **State v. Butler**, 86 Tenn. 629, 8 S. W. 591. Cited without special application in **San Antonio v. Odin**, 15 Tex. 545.

Distinguished in **State v. Lincoln Trust Co.**, 144 Mo. 595, 46 S. W. 601, holding mere recognition by legislature of powers not expressly granted to corporations, does not have the effect of creating authority in them to exercise such powers.

Adverse possession.—Ouster will not be presumed in favor of the possession of a mere intruder, p. 504.

Cited and applied in **Clarke v. Courtney**, 5 Pet. 355, 8 L. 153, holding one asserting an ouster must prove something more than a mere trespass; **Harvey v. Tyler**, 2 Wall. 349, 17 L. 876, holding occupation by one without claim of title is not adverse; **Herbert v. Hanrick**, 16 Ala. 596, holding a bona fide claim of title, asserted so notoriously as to charge vendor with notice, is sufficient to avoid deed of disseizee; **Byers v. Danley**, 27 Ark. 93, reciting requisites of adverse possession; **Fain v. Garthright**, 5 Ga. 14, holding possession, under a contract of purchase, with bonds for titles when the purchase money is paid, is adverse; **Link v. Doefer**, 42 Wis. 395, 24 Am. Rep. 420, holding a mere intruder may acquire title under tax deed adverse to former owner. Cited as authority for the proposition that legal seizin and possession which follows a title is co-extensive with the right and continues till owner is ousted by an actual adverse possession by the following: **United States v. Arredondo**, 6 Pet. 743, 8 L. 566; **Mitchel v. United States**, 9 Pet. 735, 9 L. 292; **Strother v. Lucas**, 12 Pet. 456, 9 L. 1155; **Unger v. Mooney**, 63 Cal. 593, 49 Am. Rep. 105; **Wiggins v. Holley**, 11 Ind. 7, and **Tush-Ho-Yo-Tubby v. Barr**, 45 Miss. 193. Cited without particular application in **Magill v. Brown**, 16 Fed. Cas. 420.

Adverse possession.—Vendee, though deriving his title from vendor, holds adversely to him, and his entry is an ouster, p. 506.

Cited and principle applied as follows: **Bradstreet v. Huntington**, 5 Pet. 439, 440, 8 L. 184, holding that one in possession holding for himself, to the exclusion of all others, holds adversely to all, whatever may be their relation; **Watkins v. Holman**, 16 Pet. 54, 10 L. 885, holding that the relation of landlord and tenant in no sense exists between vendor and vendee, and latter may controvert former's

title; *Clymer v. Dawkins*, 3 How. 690, 11 L. 786, and *King v. Carmichael*, 136 Ind. 27, 43 Am. St. Rep. 308, 35 N. E. 512, holding where tenant in common in possession claims it in severalty, the possession is adverse; *Croxall v. Shererd*, 5 Wall. 287, 18 L. 579, holding that purchaser holds adversely to all the world; *Moore v. Greene*, 2 Curt. 210, F. C. 9,763, holding guardian of complainant's mother having purchased from the administrator could set up the statute of limitations; *Bybee v. Oregon & California R. R. Co.*, 11 Sawy. 486, 26 Fed. 591, holding vendee is not estopped, except in a few cases, to deny vendor's title; *Ward v. Cochran*, 71 Fed. 131, 36 U. S. App. 307, and *Van Blarcom v. Kip*, 26 N. J. L. 361, holding vendee of land in possession under parol contract holds adversely to his vendor from time purchase money is paid; *San Francisco v. Lawton*, 18 Cal. 476, 79 Am. Dec. 191, holding vendee may deny the title of his vendor, as also in *Wenzel v. Schultz*, 100 Cal. 255, 34 Pac. 698, ruling similarly; *Sands v. Davis*, 40 Mich. 20, holding purchaser of an undivided interest, entering as a stranger, may set up adverse claim that originated before his purchase; *Morgan v. Hazlehurst Lodge*, 53 Miss. 677, holding where parties derive title from a common source, either may show whether the title was legal or equitable; *Macklot v. Dubreuil*, 9 Mo. 485, 490, 43 Am. Dec. 554, 560, holding vendee may set up statute of limitations in bar of action by vendor, as also in *Bradstreet v. Clarke*, 12 Wend. 675; *Coakley v. Perry*, 3 Ohio St. 347; *Ray v. Goodman*, 1 Sneed, 592, and *Core v. Faupel*, 24 W. Va. 244, all to same effect; *Roseboom v. Van Vechten*, 5 Den. 430, holding that adverse possession is not necessarily wrongful; *People v. Van Rensselaer*, 9 N. Y. 343, holding one entering unoccupied part of manorial grant, paying taxes and protecting it, holds adversely; *Turner v. Smith*, 11 Tex. 630, if cestui que trust repudiates the trust statute of limitations begins to run against vendor; *Propagation v. Sharon*, 28 Vt. 611, holding that possession of grantee, claiming by paramount right, is adverse; *Clarke v. McClure*, 10 Gratt. 311, 313, and *Nowlin v. Reynolds*, 25 Gratt. 142, holding vendee entering under executory contract, which leaves legal title in vendor, does not hold adversely. Cited, without particular application, in *Jones v. Porter*, 3 Peñr. & W. 135.

Constitutional law.—State legislature may deprive the plaintiff in ejectment of a right to recover mesne profits in that form of action, p. 509.

Cited and applied in *Drehman v. Stifle*, 8 Wall. 603, 19 L. 511, holding State legislature can pass retroactive laws, where there is no inhibition in the State Constitution, provided they do not impair the obligation of a contract, and are not ex post facto; *Hardeman v. Downer*, 39 Ga. 436, holding State can declare which of the claimants against an insolvent debtor shall have preference. Cited, without particular application, in *Tufts v. Tufts*, 3 Wood. & M. 483, F. C. 14,233, and *Litchfield v. Johnson*, 4 Dill. 556, F. C. 8,387.

Miscellaneous.—Miscited in *People v. Butte*, 4 Mont. 208, 47 Am. Rep. 348, 1 Pac. 415. Cited in *Merrick v. Van Santvoord*, 34 N. Y. 217, as an instance of comity in recognizing foreign suitor; *Blair v. Odin*, 3 Tex. 299, to point that to sustain action for property dedicated, plaintiff must show a legal title.

4 Pet. 511-513, 7 L. 938, SOULARD v. UNITED STATES.

Treaty.—When territory is acquired by treaty the property rights of its inhabitants will be protected, though not so stipulated in the contract treaty, pp. 511. 512.

Reaffirmed in *Strother v. Lucas*, 12 Pet. 436, 9 L. 1147. Cited and principle applied in *Eslava v. Doe*, 7 Ala. 549, holding confirmation by act of Congress was but a disavowal of title in the United States; *Knight v. United States Land Assn.*, 142 U. S. 184. 201, 35 L. 983, 988, 12 S. Ct. 265, 271, holding doctrine that on the acquisition of territory from Mexico, the United States acquired title to lands under tide-water in trust for future States, does not apply to land previously granted to other parties by the former government; *Coburn v. San Mateo Co.*, 75 Fed. 528, holding that title to tide lands in California is in the State except where grants were made by Mexico before the cession; *Reynolds v. West*, 1 Cal. 326, holding grant by Mexican officer, before the acquisition of the country by the Americans, is protected by the law of nations; *Teschemacher v. Thompson*, 18 Cal. 23, 79 Am. Dec. 156, and *Leese v. Clark*, 20 Cal. 421, holding when California was ceded to the United States, the rights of its citizens remained unchanged; *May v. Specht*, 1 Mich. 189, holding stipulations in Jay's treaty for the protection of the rights of property imposed no new obligation on the United State; *Jones v. Menard*, 1 Tex. 783, holding an order of survey and survey, does not come under the description of "evidence of a right to land that has been recognized by the laws," unless such order of survey has been presented to board of land commissioners. Cited, without particular application, in *Pollard v. Kibbe*, 14 Pet. 390, 398, 409, 10 L. 508, 512, 517; *Carpenter v. Rannels*, 19 Wall. 141, 22 L. 78, and *Town v. De Haven*, 5 Sawy. 149, F. C. 14,113.

"**Property**," in treaty by which Louisiana was acquired, as applied to lands, comprehends every species of title inchoate or complete, embracing those rights which lie as well in executory as in executed contracts, p. 512.

Reaffirmed in *Smith v. United States*, 10 Pet. 330, 9 L. 444, and *Bryan v. Kennett*, 113 U. S. 192, 28 L. 912, 5 S. Ct. 412. Cited and applied in *Hornsby v. United States*, 10 Wall. 242, 19 L. 905, holding inchoate interest passed by the grant, constituted property and was protected by the treaty; *Denechaud v. Berrey*, 48 Ala. 605, and *Sloan v. Frothingham*, 72 Ala. 603, holding "property," in statute providing for separate estate of wife, comprehends every

right of property; *Teschemacher v. Thompson*, 18 Cal. 24, 79 Am. Dec. 156, defining "property," as applied to lands, to include all titles, legal or equitable, perfect or imperfect; *Fish v. Fowlie*, 58 Cal. 375, holding that a legal or equitable interest in land is subject to attachment or execution; *King v. Gotz*, 70 Cal. 240, 11 Pac. 658, holding one in possession of property to which he has given a trust deed to secure an indebtedness, has an interest entitling him to homestead; *Tameling v. United States*, 2 Colo. 422, holding confirmation of claim by act of Congress, extends to the whole claim, whether originally valid or void; *Toll Road Co. v. Edwards*, 3 Colo. App. 78, 32 Pac. 551, holding right of way of a toll company is property and taxable; *Figg v. Snook*, 9 Ind. 204, holding interest of a judgment debtor in real estate in his possession under a contract of purchase, legal title being in vendor, may be applied in satisfaction of the judgment, under the statute; *Sherwood v. Lafayette*, 109 Ind. 415, 58 Am. Rep. 417, 10 N. E. 91, holding mortgagee of land taken for public street is an owner within the statute governing condemnation proceedings; *Watkins v. Wyatt*, 9 Baxt. 255, 30 Am. Rep. 65, n., holding that crop yet to be planted is subject to mortgage; *Aggs v. Shackelford Co.*, 85 Tex. 149, 19 S. W. 1086, holding that a mortgage is property; *Puget Sound A. Co. v. Pierce County*, 1 Wash. Ter. 170, holding law levying tax on "real property," embraces every species of title, whether inchoate or complete. Cited, without particular application, in *Morton v. Nebraska*, 21 Wall. 672, 22 L. 645, and *Slidell v. Grandjean*, 111 U. S. 423, 28 L. 325, 4 S. Ct. 479.

Miscellaneous.—Cited to no particular point in *Menard v. Massey*, 8 How. 304, 12 L. 1089; *Bissell v. Penrose*, 8 How. 331, 12 L. 1101; *Crespin v. United States*, 168 U. S. 212, 42 L. 440, 18 S. Ct. 54.

4 Pet. 514-565, 7 L. 939, *PROVIDENCE BANK v. BILLINGS*.

Constitutional law.—Contract between a State and an individual, as well as between two individuals, is fully protected by the Constitution, p. 560.

Cited and principle followed in dissenting opinion, *Louisiana v. Jumel*, 107 U. S. 750, 27 L. 462, 2 S. Ct. 160, majority holding Supreme Court cannot restrain the agents of a State from destroying the obligation of her contract with a citizen, because such relief will require them to disobey the supreme political power of the State; dissenting opinion, *Antoni v. Greenhow*, 107 U. S. 803, 27 L. 481, 2 S. Ct. 119, majority holding subsequent act furnishes a remedy equivalent to that existing at date coupons were issued, and the contract is not impaired; *Poindexter v. Greenhow*, 114 U. S. 286, 29 L. 191, 5 S. Ct. 912, holding unconstitutional any act of the State forbidding the receipt of these coupons as taxes, since by the terms of the act under which they were issued a contract arose; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 673, 29 L.

524, 6 S. Ct. 264, holding grant of exclusive right to supply gas to municipality, upon certain conditions, is a contract; dissenting opinion, *In re Ayers*, 123 U. S. 515, 31 L. 233, 8 S. Ct. 188, majority holding one selling Virginia coupons agreeing that State shall receive them as taxes, if State refuses, cannot sue her; *Sala v. New Orleans*, 2 Woods, 194, F. C. 12,246, holding charter of bank a contract and that it could not be impaired by subsequent legislation; *Selma v. Mullen*, 46 Ala. 414, holding that corporation, unless forbidden, may make a parol contract; *State v. County Court*, 19 Ark. 367, holding exemption of swamp lands from taxation, was a contract; *McCauley v. Brooks*, 16 Cal. 30, holding act requiring that demands against State must receive sanction of a board is void as to existing claims. Cited, without particular application of the rule, in *Camblos v. Railroad Co.*, 4 Fed. Cas. 1106; *Platte, etc., Co. v. Dowell*, 17 Colo. 386, 30 Pac. 72, and *Scobey v. Gibson*, 17 Ind. 577.

Taxing power is of such paramount importance that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon does not plainly appear; accordingly, where corporate charter is silent on subject, no exemption from taxation will be implied, pp. 561, 564.

The citing cases show that this salutary rule has been very uniformly indorsed and followed by the authorities: *Charles River Bridge v. Warren Bridge*, 11 Pet. 546, 549, 566, 9 L. 824, 825, 831, holding in grants by the public nothing passes by implication; *West River B. Co. v. Dix*, 6 How. 542, 12 L. 549, holding that bridge held by corporation can be condemned for a public road; dissenting opinions, *Passenger Cases*, 7 How. 482, 504, 534, 12 L. 785, 795, 807, majority holding unconstitutional State statutes imposing taxes upon alien passengers arriving in the port of those States; *Nathan v. Louisiana*, 8 How. 81, 12 L. 996, and *Jefferson Branch Bank v. Skelly*, 1 Black, 446, 17 L. 178, holding State law imposing a tax upon all money or exchange brokers, is not void for repugnance to power of Congress to regulate commerce; *Ohio L. Ins. Co. v. Debolt*, 16 How. 429, 430, 435, 14 L. 1002, 1003, 1005, holding the legislation of Ohio, respecting the taxation of plaintiffs, not to amount to a contract; *Society for Savings v. Coite*, 6 Wall. 606, 18 L. 902, holding franchise of a corporation may be taxed; *Humphrey v. Pegues*, 16 Wall. 249, 21 L. 327, holding legislature could not repeal law exempting road from taxation; *The Delaware Railroad Tax*, 18 Wall. 226, 21 L. 894, holding the intent to confer the exemption must be clear beyond a reasonable doubt; *North Mo. R. R. v. Maguire*, 20 Wall. 61, 22 L. 294, holding the act did not show an intention of the State to give up its power to tax the property of the railroad; *Tucker v. Ferguson*, 22 Wall. 375, 22 L. 816; *West Wis. R. R. Co. v. Supervisors*, 93 U. S. 598, 23 L. 815; *Newton v. Commissioners*, 100 U. S. 561, 25 L. 712; *Memphis Gas Co. v. Shelby Co.*, 109 U. S. 401,

27 L. 977, 3 S. Ct. 206, and *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 84, 33 L. 272, 10 S. Ct. 37, all holding a contract to exempt property from taxation is never extended beyond what the terms clearly require; *Morgan v. Louisiana*, 93 U. S. 222, 23 L. 861, holding immunity from taxation is a personal privilege and not transferable; *Farrington v. Tennessee*, 95 U. S. 688, 24 L. 560, holding where charter granted bank provides bank "shall pay State a certain per cent. in lieu of all other taxes," no additional tax can be imposed; see dissenting opinion, 691, 24 L. 561; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. 1038 (affirming 70 Ill. 642), holding charter was not a contract guaranteeing exemption from the exercise of police power by State for fifty years; *Missionary Soc. v. Dalles*, 107 U. S. 342, 27 L. 547, 2 S. Ct. 677, holding the society acquired, under act of 1848, title only to such land actually occupied as a missionary station at that date; *Sturges v. Carter*, 114 U. S. 521, 29 L. 244, 5 S. Ct. 1019, holding law exempting stockholder from taxes, where the capital stock is taxed in the name of the company, does not apply to shares in a foreign corporation which pays taxes only on the portion of its property situated here; *Railroad Commission Cases*, 116 U. S. 326, 29 L. 642, 6 S. Ct. 342, and *Atlantic, etc., R. R. Co. v. United States*, 76 Fed. 192, holding a statute which grants to railroad the right from time to time to regulate tolls, does not deprive the State of its power to reasonably limit the amount of tolls; *Vicksburg, etc., R. R. Co. v. Dennis*, 116 U. S. 667, 29 L. 771, 6 S. Ct. 626, and *Dennis v. Railroad Co.*, 34 La. Ann. 956, holding provision in charter exempting capital stock for ten years after completion of road, from taxation, does not exempt before such completion; *Van Brocklin v. Tennessee*, 117 U. S. 156, 29 L. 847, 6 S. Ct. 673, holding property of United States taxed while in its possession, cannot afterwards be sold for such taxes; *Given v. Wright*, 117 U. S. 655, 29 L. 1024, 6 S. Ct. 910, holding exemption from taxation can be lost by long acquiescence in imposition of taxes; *Chicago, etc., R. R. v. Guffey*, 120 U. S. 575, 30 L. 734, 7 S. Ct. 696, and *Louisville, etc., R. R. v. Commonwealth*, 10 Bush (Ky.), 48, holding exemption of stock of railroad, does not apply to stock issued for branches constructed under act of 1868; *Hewitt v. Railroad Co.*, 12 Blatchf. 461, F. C. 6,443, holding that by reason of the reservations in the Constitution, the State could amend the charter by repealing the exemption clause; in the following: *Stein v. Mobile*, 17 Ala. 239; *Mobile, etc., R. R. Co. v. Kennerly*, 74 Ala. 571; *Shorter v. Smith*, 9 Ga. 524; *Mayor, etc. v. Railroad Co.*, 50 Ga. 621; *Gordon v. Mayor, etc.*, 5 Gill, 237; *County Commissioners v. Railroad Co.*, 47 Md. 612; *Washington University v. Rowse*, 42 Mo. 321; *North Mo. R. R. v. Maguire*, 49 Mo. 499, 8 Am. Rep. 145; *Pacific R. R. v. Cass Co.*, 53 Mo. 27; *State, etc. v. Parker*, 32 N. J. L. 435; *Del. & R. & Co. v. Par. & Del. Co.*, 16 N. J. Eq. 372; *People v. Davenport*, 91 N. Y. 586; *Debolt v. Ohio L. Ins. Co.*, 1 Ohio St. 573; *Bank of Pennsyl-*

vania v. Commonwealth, 19 Pa. St. 154; Packer v. Railroad Co., 19 Pa. St. 218; Erie Ry. Co. v. Commonwealth, 66 Pa. St. 87, 5 Am. Rep. 353, and Pennsylvania R. Co. v. Duncan, 129 Pa. St. 200, all holding legislative intention to exempt from taxation must be expressed in the charter of the corporation in unambiguous terms.

Elsewhere the citing cases have affirmed and relied upon the doctrine as follows: *Montgomery v. Shoemaker*, 51 Ala. 120, holding power of city to collect specific tax, not lost by provision that no percentage tax shall be levied; *City Water-Works v. Athens*, 74 Ga. 416, holding water company liable to be taxed by city; *Ohio, etc., R. R. Co. v. McClelland*, 25 Ill. 127, holding railroad corporations subject to proper police regulations; *People v. Theological Sem.*, 174 Ill. 180, 51 N. E. 198, holding exemption from taxation did not include property held as an investment, though income is used solely for school purposes; *Hanna v. Commissioners*, 8 Blackf. 355, holding act exempting lands from taxation, the repealing of which was reserved, did not prevent the legislature from afterwards including such lands in list of taxable property; *Winchester, etc., Co. v. Croxton*, 98 Ky. 747, 34 S. W. 520, 33 L. R. A. 191, and *n.*, holding legislature had power to alter rates of toll fixed in charter; *Union Boat Co. v. Bordelon*, 7 La. Ann. 196, holding valid a tax on tow-boats plying on the Mississippi; dissenting opinion, *State v. Board of Assessors*, 35 La. Ann. 667, majority holding State and municipal bonds were not taxable; *Portland, etc., R. R. Co. v. Saco*, 60 Me. 200, holding exemption from taxation of roadbed, does not exempt depots; *Mayor, etc. v. Board of Police*, 15 Md. 390, 391, 466, 74 Am. Dec. 587, holding constitutional a law providing a permanent police for the city; *Redemptorist Fathers v. Boston*, 129 Mass. 180, holding land owned by religious corporation, separated by passage-way from portion of estate where church is, not exempt from taxation; *People v. Detroit, etc., R. R.*, 1 Mich. 459, 460, holding railroad incorporated before certain statutes is liable to pay specific tax it imposes; *Walcott v. People*, 17 Mich. 83, holding tax on gross amount of business of express company is constitutional; *East Saginaw M. Co. v. East Saginaw*, 19 Mich. 279, 2 Am. Rep. 89, holding the exemption from taxation was a bounty law and not a contract; *Winona, etc., R. R. Co. v. Waldron*, 11 Minn. 535, 88 Am. Dec. 105, holding constitutional a statute requiring railroad to fence its line; *Payne, etc. v. Baldwin*, 3 Smedes & M. 680, holding constitutional an act prohibiting banks from transferring certain notes, etc.; *Collins v. Sherman*, 31 Miss. 700, holding, unless there be an express grant of exclusive right, the legislature may authorize a second ferry on the same river; *Reed v. Beall*, 42 Miss. 487, holding liquor licenses are not contracts but franchises and taxable; *St. Joseph v. Hann. & St. Joseph R. R.*, 39 Mo. 479, holding exemption in charter could be repealed by legislature; *St. Louis v. Boatmen's Ins. Co.*, 47 Mo. 155, holding clause of charter withdrawing corporation from operation of general laws, does not ex-

empt from taxation; *State v. Dulle*, 48 Mo. 287, holding, unless there has been some express contract in limitation of the power, the legislature may increase taxes; *State v. Lange*, 16 Mo. App. 469, holding charter exemption from taxation of property used as cemetery does not include a lot used as a residence; *North. Pac. R. R. v. Carland*, 5 Mont. 187, 3 Pac. 155, holding Congress could exempt from taxation right of way of railroad through public lands; *Esser v. Spaulding*, 17 Nev. 301, 30 Pac. 898, holding certificates of indebtedness issued by county for allowances on general fund, does not create a contract to pay same out of the first money apportioned to general fund; *Brewster v. Hough*, 10 N. H. 145, holding a permanent exemption from taxation was not intended; *Academy v. Exeter*, 58 N. H. 307, 42 Am. Rep. 590, holding dormitory not exempt from taxation under provision that "all lands, etc., given for use of academy shall be exempt;" *Society v. Manchester*, 60 N. H. 350, holding State Constitution does not exempt church property from taxation; *State v. Berry*, 17 N. J. L. 81, holding an exemption applied to all the property of the company; *Cook v. State R. R.*, 33 N. J. L. 478, holding land not used by the company, but rented, was not exempt; dissenting opinion, *Chenango B. Co. v. Binghamton B. Co.*, 27 N. Y. 113, majority holding the prohibition in charter against the construction of another bridge was not a contract; *People v. Commissioners of Taxes*, 35 N. Y. 446, 447, holding shares of national bank taxable; *People v. Roper*, 35 N. Y. 633, 634, holding statute exempting from taxation, not founded upon adequate consideration, may be repealed at any time.

In other jurisdictions are the following, indorsing and applying the rule: *Gardner v. Hall*, Phill. (N. C.) 24, holding valid a tax upon "dead heads;" *State v. Petway*, 2 Jones Eq. 405, holding constitutional a tax on holders of bank stock; *Attorney-General v. Bank*, 4 Jones Eq. 290, holding unconstitutional a tax upon franchise of bank; *Simonton v. Lanier*, 71 N. C. 505, holding provision in charter that bank "may lend money at such rates as may be agreed upon," does not authorize the taking of more than legal rate; *Railroad Co. v. Alsbrook*, 110 N. C. 149, 150, 14 S. E. 654, holding that consolidation of railroad not exempt from taxation with one which is, does not exempt property of former; *Toledo Bank v. Bond*, 1 Ohio St. 667, 701, holding power of legislature to amend and repeal existing laws cannot be surrendered or abridged; *Matheny v. Golden*, 5 Ohio St. 368, 438, holding there was a contract to exempt lands, and they could not be taxed; *Sandusky City Bank v. Wilbor*, 7 Ohio St. 506, holding "act to tax bank, etc.," is constitutional; *Bank v. Commonwealth*, 10 Pa. St. 450, holding bank, chartered under act prescribing payment of a certain tax on dividends declared, is subject to an increase of taxation; *Mott v. Pennsylvania R. R.*, 30 Pa. St. 31, 72 Am. Dec. 676, holding contract for exemption from taxes unconstitutional; *Iron City Bank v. Pittsburgh*, 37 Pa. St. 346, holding, under reservation in Constitution of power to revoke char-

ter, legislature may tax corporation for other than State purposes, though charter prohibits it; *Brown University v. Granger*, 19 R. I. 709, 36 Atl. 722, 36 L. R. A. 849, holding part of endowment rented for business use, was included in "college estate," and not taxable; *Rose v. Charleston*, 3 S. C. 379, holding that exemption in act was not a contract, but a mere legislative restriction on taxing power of the State, and subject to repeal; *Jenkins v. Charleston*, 5 S. C. 395, 398, 22 Am. Rep. 17, 20, holding city council may lawfully tax its own stock and that of non-residents; *Union Bank v. State*, 9 Yerg. 495, holding the exemption did not include any property, not necessarily included in the privileges; *Lawyers' Tax Cases*, 8 Heisk. 634, 642, holding invalid tax on privilege of practicing law; *Louisville & N. R. R. Co. v. State*, 8 Heisk. 794, holding railroads not included in act excepting any bank or other joint-stock company from taxation, and laying the tax on the stockholders; *Memphis v. Farrington*, 8 Baxt. 554, holding charter exemption from taxation of capital stock did not exempt shares of stock; *Knoxville & O. R. R. Co. v. Hicks*, 9 Baxt. 445, holding immunity from taxation passed to purchasers of railroad; *Ex parte Williams*, 31 Tex. Cr. 274, 20 S. W. 582, 21 L. R. A. 787, holding act forcing attorney to obtain another license is valid; *Thorpe v. Rutland & Bennington R. R. Co.*, 27 Vt. 145, 146, 62 Am. Dec. 628, 630, holding valid an act requiring cattle-guards at farm-crossings; *Morgan v. Cree*, 46 Vt. 790, 14 Am. Rep. 652, construing "public taxes" in exemption act not to include municipal taxes; *Richmond, etc., R. R. Co. v. Richmond*, 26 Gratt. 95, holding, if no contract is violated, municipality can prohibit railroad from propelling cars through streets with steam; *Roanoke Gas Co. v. Roanoke*, 88 Va. 824, 14 S. E. 670, where city gave privilege to lay pipes, for value received, it may afterwards lower grade and have pipes exposed removed; *Puget Sound Agr. Co. v. Pierce County*, 1 Wash. Ter. 169, 170, holding taxing power will never be presumed to have been relinquished; *Janesville Bridge Co. v. Stoughton*, 1 Pinn. 672, holding act did not grant an exclusive right to maintain bridge across river at that place; *Pingree v. Michigan Central R. R. Co. (Mich.)*, 76 N. W. 640, holding act conferred on corporation the right to fix tolls within the limit of three cents per mile; *Dow v. Northern R. R.*, 67 N. H. 48, 36 Atl. 534, where a corporation was chartered to operate a railroad, a lease of the road was a change of its corporate purpose, invalid without consent of all stockholders. Cited without particular application in *Pearsall v. Great Northern Ry.*, 161 U. S. 664, 40 L. 844, 16 S. Ct. 709, reviewing the Dartmouth college doctrine at length; *Commissioners v. Water P. Co.*, 104 Mass. 458, 6 Am. Rep. 258; dissenting opinion, *Commercial Bank of Rodney v. State*, 4 Smedes & M. 508; opinion of court, 58 N. H. 623; *Burton v. State*, 3 Gill, 7, 8, 10; *Shollenberger v. Brinton*, 52 Pa. St. 93; *State v. S. P. R. R. Co.*, 24 Tex. 127; and *Kerr v. Woolley*, 3 Utah, 465, 24 Pac. 834. See note, 5 Am. St. Rep. 805, on non-performance of condition in grant of franchise, collecting authorities.

Distinguished in *Planters' Bank v. Sharp*, 6 How. 331, 12 L. 460, where bank was chartered to discount bills and notes, a law forbidding banks to transfer notes by indorsement, is invalid as applied to notes then in such bank's hands.

Corporations.—The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men, p. 562.

The following citing cases affirm and apply this proposition: *Louisville R. R. Co. v. Letson*, 2 How. 558, 11 L. 378, and *Kansas Pac. R. v. Atchison, etc.*, R. R., 112 U. S. 415, 28 L. 795, 5 S. Ct. 209, holding that a corporation created by and doing business in a State, is a citizen of that State for the purposes of suing and being sued; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 189, 31 L. 653, 8 S. Ct. 741, and *Santa Clara R. R. Tax Case*, 9 Sawy. 192, 18 Fed. 402, holding "person" in fourteenth amendment includes a private corporation; *Georgia Banking Co. v. Smith*, 128 U. S. 179, 32 L. 380, 9 S. Ct. 48, holding the granting of special privileges to a corporation, gives legislature power to prevent unreasonable charges and unjust discrimination; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 590, and *Cutshaw v. Fargo*, 8 Ind. App. 694, 34 N. E. 377, holding that the essential attribute of a corporation is the capacity to act as a legal entity distinct from its members; *Mayor, etc. v. Steamboat Co.*, Charl. (Ga.) 347, holding that a political corporation is liable to the control of the legislature; *Rodemacher v. Railway Co.*, 41 Iowa, 301, 20 Am. Rep. 595, holding act rendering railroads liable for all damages by fire caused by the operation of their road is not unconstitutional; *Coffin v. Rich*, 45 Me. 509, 71 Am. Dec. 561, and *State v. Noyes*, 47 Me. 214, holding that corporations like natural persons are amenable to general laws; dissenting opinion, *Attorney-General v. Old Colony R. R.*, 160 Mass. 97, 35 N. E. 260, 22 L. R. A. 122, majority holding unconstitutional a statute compelling one railroad to carry passengers on the credit of another; *Bullard v. North. Pac. R. R.*, 10 Mont. 181, 25 Pac. 123, 11 L. R. A. 251, and n., holding act constitutional prohibiting unjust discrimination by common carriers; *Clarke v. Omaha, etc.*, R. R., 5 Neb. 321, holding corporations enter into contracts by vote of the company, not by unauthorized promises of its members; *Assurance Assn. ads. Cole*, 26 N. J. L. 365, holding in suit where corporation is a party, the officers and members are not parties and may testify; *Charleston I. & T. Co. v. Sebring*, 5 Rich. Eq. 346, holding in bill by stockholder against corporate officers to compel a retransfer to bank of shares which they had sold and purchased themselves, the corporation should be made a party; *Crafford v. Supervisors*, 87 Va. 116, 12 S. E. 149, 10 L. R. A. 132, and n., holding "persons" in act includes corporation. Cited without particular application in *Gifford v. Livingston*, 2 Den. 395, and *Gray v. Navigation Co.*, 2 Watts & S. 160, 37 Am. Dec. 502.

Taxation.— Power of taxation operates on all persons and property belonging to the body politic, it is a part of all governmental sovereignty, p. 563.

Cited and principle followed in *St. Louis v. The Ferry Co.*, 11 Wall. 429, 20 L. 194, holding ferry-boats of corporation of another State carrying passengers to and from a city, are not taxable under law taxing boats "within the city;" *Transportation Co. v. Wheeling*, 99 U. S. 281, 25 L. 414; *Battle v. Mobile*, 9 Ala. 236, 44 Am. Dec. 439, and *Howell v. State*, 3 Gill, 24, 28, holding steamboats may be taxed by city where owner has its principal office, although they are enrolled as coasting vessels under the laws of the United States; *Day v. Buffinton*, 3 Cliff. 387, F. C. 3,675, holding salary of judge, payable out of State treasury, not taxable by the United States; *Stein v. Mobile*, 24 Ala. 613, 618, and *Osborne v. Mobile*, 44 Ala. 499, holding power to levy tax for local purposes may be delegated by the legislature to a municipal corporation; *People v. Naglee*, 1 Cal. 236, 52 Am. Dec. 316, holding State may tax foreigners for privilege of working mines; *Spring Valley W. W. v. Schottler*, 62 Cal. 111, 112, holding State may tax a franchise; *State v. Fullerton*, 7 Rob. (La.) 218, upholding statute imposing tax on passengers on steamboat as constitutional; *Stetson v. Bangor*, 56 Me. 283, upholding State tax assessed upon shares of national bank situated there; *O'Neal v. Bridge Co.*, 18 Md. 23, 79 Am. Dec. 670, holding equity would not interfere to relieve corporation from payment of taxes assessed in wrong name; *Cincinnati, etc., R. R. Co. v. Commissioners Clinton Co.*, 1 Ohio St. 101, holding valid a law authorizing county to subscribe to stock of railroad; *Scovill v. Cleveland*, 1 Ohio St. 137, holding valid an assessment upon adjoining lands for improvement of street, although it exceeded the actual expense; *Champaign Co. Bank v. Smith*, 7 Ohio St. 56, holding State bonds, not expressly exempt, are subject to taxation; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 533, holding valid a tax on foreign telegraph company; *King v. Portland*, 2 Or. 153, holding legislative provision for assessment is not reviewable in the courts; *Salt Lake C. N. Bank v. Golding*, 2 Utah, 8, holding that a territory can tax the individual shares of stockholders in national banks; *Commonwealth v. Moore*, 25 Gratt. 954, holding constitutional an act imposing license tax on merchants; *Whiting v. West Point*, 88 Va. 907, 29 Am. St. Rep. 751, 14 S. E. 699, 15 L. R. A. 862, and n., holding a municipality authorized to tax all property can exempt none; *Baltimore & Ohio R. R. Co. v. Supervisors*, 3 W. Va. 332, holding phrase "general taxation" means the company was liable to taxes for State and local purposes. Cited, without any particular application of the doctrine, in *Bank of United States v. State*, 12 Smedes & M. 458, and *Piscataqua v. N. H. B.*, 7 N. H. 68.

Constitutional law.— Except where the Constitution restricts, the only security against unwise legislation by a State, is the wisdom and justice of the representative body, p. 563.

The citing cases show how extensively and how variously this proposition has been relied upon by the courts; dissenting opinion, *Loan Association v. Topeka*, 20 Wall. 669, 22 L. 463, majority holding power of taxation can only be used in aid of a public object; *Kirtland v. Hotchkiss*, 100 U. S. 497, 25 L. 562, and *In re Meador*, 1 Abb. (U. S.) 334, F. C. 9,375, holding United States Supreme Court can afford no relief against enforcement of State taxation laws which do not violate the Constitution; *Spencer v. Merchant*, 125 U. S. 355, 31 L. 767, 8 S. Ct. 926, holding act of legislature directing expenses of grading street to be assessed upon adjoining owners, and providing for hearings to fix proportionment of taxes, is not a taking of property without due process of law; *United States v. California, etc., Land Co.*, 148 U. S. 44, 37 L. 360, 13 S. Ct. 463, holding determination of officer of United States within his authority is conclusive in the absence of fraud; *Atkinson v. Philadelphia, etc., Co.*, 2 Fed. Cas. 110, refusing injunction where legislature granted charter to build bridge across navigable waters, which masts of ships would strike; *Ryder v. Innerarity*, 4 Stew. & P. 30, holding that certificate of confirmation by register is competent evidence in trespass to try title; *Borden v. State*, 11 Ark. 548, 54 Am. Dec. 238, holding record of allowance and order of payment by Probate Court properly admissible, in action against sheriff refusing to execute *fi. fa.* upon such order; *Emery v. San Francisco Gas Co.*, 28 Cal. 354, holding legislature can impose tax on adjoining property to improve street; *Houghton v. Austin*, 47 Cal. 654, holding power to fix rate of taxation is legislative and cannot be delegated to a board; *Cheney v. Jones*, 14 Fla. 610, holding act authorizing the issuing of bonds to meet an indebtedness not then existing is unconstitutional; *Doe v. Deavors*, 8 Ga. 482, holding taxes due State are a general lien upon all the property of the debtor; *Linton v. Mayor, etc.*, 53 Ga. 591, holding courts cannot interfere with tax, however unfair, unless it is unconstitutional; *Rhinehart v. Schuyler*, 2 Gilm. 506, holding State revenue laws valid; *Porter v. Railroad Co.*, 76 Ill. 573, holding State can tax franchise of a corporation; dissenting opinion, *Treadway v. Schnauber*, 1 Dak. Ter. 266, 46 N. W. 475, majority holding territorial legislature derives all its powers from Congress; dissenting opinion, *Beebe v. State*, 6 Ind. 528, majority holding act prohibiting right to manufacture intoxicating liquors is unconstitutional; *Goodrich v. Turnpike Co.*, 26 Ind. 121, holding act providing that cost of turnpike be assessed upon adjoining real estate is constitutional; *Hanson v. Vernon*, 27 Iowa, 50, 85, 1 Am. Rep. 230, holding undertakings of railroad corporations cannot be aided by taxation; *Cincinnati, etc., R. R. Co. v. Commonwealth*, 81 Ky. 499, holding legislature could provide that property of railroad be assessed by commissioners; *Police Jury v. Succession of McDonogh*, 8 La. Ann. 360, holding of the public good which warrants a tax, the legislature is the sole judge; *Bordelon v. Lewis*, 8 La. Ann. 472, holding legislature

can delegate power of taxation to school directors; dissenting opinion, *State v. Railroad Co.*, 40 Md. 61, majority holding unconstitutional a tax upon coal transported beyond State; dissenting opinion, *State v. Railroad Co.*, 48 Md. 85, 86, majority holding a charter exemption from taxation was a contract and could not be impaired; *Salisbury Assn. v. Wicomico Co.*, 86 Md. 622, 39 Atl. 427, holding decision of board of appeal on valuation of stocks is final; *Williams v. Cammack*, 27 Miss. 219, 61 Am. Dec. 514, holding that act exempting from taxation lands between the river and levee, confers no exclusive privilege upon the owners of such lands and is valid; *Coulson v. Harris*, 43 Miss. 740, holding licenses to retail liquors are liable to taxation; *Daily v. Swope*, 47 Miss. 389, and *Turner v. Althaus*, 6 Neb. 71, holding that judiciary cannot relieve against hard legislation. Other applications of the syllabus rule appear in the following: *State v. Garesche*, 36 Mo. 260, holding valid a constitutional provision prohibiting attorneys from practicing, until they have taken the oath of loyalty; *State v. County Commissioners*, 4 Neb. 540, 19 Am. Rep. 643, holding constitutional a law imposing tax upon parties commencing suits; *Dover v. Portsmouth Bridge*, 17 N. H. 227, holding State legislature may authorize the erection of a bridge over navigable waters, within their limits; *State v. Branin*, 23 N. J. L. 495, 500, 504, holding valid a law placing a second tax upon the same property; *People v. Brooklyn*, 4 N. Y. 425, 55 Am. Dec. 271; *People v. Lawrence*, 41 N. Y. 141, and *People v. Fitch*, 148 N. Y. 78, 42 N. E. 522, holding that the remedy against unjust taxation is to be sought from the legislative department; *Howell v. Buffalo*, 37 N. Y. 271, holding constitutional a statute authorizing a municipality to reassess upon benefited owners the expense of a public improvement already made and paid for; *Gordon v. Cornes*, 47 N. Y. 612, holding that the exercise of power of apportionment of taxes by the legislature cannot be reviewed by the courts; *People v. Equitable Trust Co.*, 96 N. Y. 395, holding tax upon foreign corporations is constitutional; *State v. Bell*, Phill. (N. C.) 85, holding constitutional a retrospective law taxing business done during the whole of the current year; *Northern Pacific R. R. Co. v. Barnes*, 2 N. Dak. 323, 329, 51 N. W. 387, 389, holding legislature had power to impose the tax; *State v. Bank*, 7 Ohio, 126, holding charter was so framed that no tax of more than 4 per cent. upon dividends can be levied; *State v. Toledo*, 48 Ohio St. 132, 26 N. E. 1066, 11 L. R. A. 736, and n., holding that the supplying of municipalities with gas is a public use for which the taxing power may be constitutionally exercised; *Sharpless v. Philadelphia*, 21 Pa. St. 164, 59 Am. Dec. 768, holding constitutional, an act authorizing subscription by city to stock of railroad; *Jenkins v. Charleston*, 5 S. C. 397, 22 Am. Rep. 19, holding city may lawfully tax its own stock, and also that of non-residents; *Winona & St. Paul R. R. Co. v. Watertown*, 1 S. Dak. 55, 44 N. W. 1075, holding constitutional an act apportioning improvement of street upon

adjoining property at a fixed sum per foot; *Harrison v. Willis*, 7 Heisk. 41, 19 Am. Rep. 607, holding constitutional the taxation of litigation; *Taylor v. Chandler*, 9 Heisk. 358, 24 Am. Rep. 312, holding void assessments for improvements, made upon the basis of the frontage of lots on the streets to be improved; *Eyre v. Sheriff*, 14 Gratt. 426, 73 Am. Dec. 370, and *Schoolfield v. Lynchburg*, 78 Va. 370, holding constitutional a tax on collateral inheritances; *Langhorne v. Robinson*, 20 Gratt. 668, holding valid an act authorizing municipality to tax persons and property within corporate limits, and for a half a mile outside, 6 per cent. per annum upon stock of railroad company; *Richmond v. Richmond & D. R. R. Co.*, 21 Gratt. 615, holding exemption from taxation of real estate of company in Richmond is not unconstitutional as being in conflict with charter previously given empowering city to tax real estate; *Norfolk v. Ellis*, 26 Gratt. 228, holding municipality may assess expense of paving streets upon owners of the property on the street in ratio to their frontage; *R. & A. R. R. Co. v. Lynchburg*, 81 Va. 479, holding constitutional a provision in municipal charter empowering council to assess expense of water mains upon owners on both sides of street, and exempt property to which water is supplied; *Davis v. Lynchburg*, 84 Va. 871, 6 S. E. 231, holding system of assessing estate adjacent to street to be improved by the front foot is constitutional; *Norfolk v. Chamberlain*, 89 Va. 221, 227, 16 S. E. 738, 740, where part of A.'s property was condemned to widen street, and he was allowed a sum for land taken and damages to residue, a subsequent assessment by city of tax against residue for betterments was held invalid. Cited, but without particular application of the principle, in *United States v. Arredondo*, 6 Pet. 729, 8 L. 561; *Sabariego v. Maverick*, 124 U. S. 282, 31 L. 439, 8 S. Ct. 472; *Macon v. Patty*, 57 Miss. 387, 34 Am. Rep. 455; *Piscataqua Bridge v. Bridge*, 7 N. H. 70, and *Stockton v. Montgomery*, Dall. (Tex.) 485. See note on power of State legislature to grant perpetual immunity from taxation; 72 Am. Dec. 684, collecting authorities; note on power of legislature to delegate power of taxation, 74 Am. Dec. 591, collecting authorities; note, 32 Am. Rep. 538, on this general topic.

Distinguished in *Bank of Ohio v. Knoop*, 16 How. 387, 388, 409, 14 L. 984, 985, 994, where general banking law required officers to set off 6 per cent. of semi-annual dividends for the State, same to be in lieu of all taxes, it was held this was a contract, and a law taxing banks was void.

Miscellaneous.—Cited to no particular point in *re Brinkman*, 7 Bank. Reg. 426, 4 Fed. Cas. 147; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. 532; *Norris v. Doniphan*, 4 Met. (Ky.) 431; *Grand Lodge of Masons v. New Orleans*, 44 La. Ann. 668, 11 So. 152; *Edwards v. Carson Water Co.*, 21 Nev. 479, 34 Pac. 384.

GENERAL INDEX

TO THE

FOUR VOLUMES OF PETERS CONTAINED IN THIS BOOK. FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

Figures in parenthesis refer to marginal paging of the volumes contained in this book respectively, while the black-faced figures indicate the page of this book on which the marginal paging referred to is found.

ABANDONMENT UNDER A POLICY OF INSURANCE—1.

The right to compensation from Spain, under the Florida treaty, held under an abandonment made to the underwriters upon vessels and cargoes illegally captured; passed by the assignment under the bankrupt laws, and vested in the assignees.

Comegys et al. v. Vasse, (219) **119**

ABANDONMENT—4.

See Insurance.

ACCEPTANCE OF BILLS OF EXCHANGE—4.

1. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon a bill. For all practical purposes in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of bills; and this has led judges frequently to express their dissatisfaction that the rule has been carried so far as it has; and their regret that any other act, than a written acceptance on the bill, had ever been deemed an acceptance.

Boyce and Henry v. Edwards, (122) **803**

2. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable, by an action for the breach of the promise to accept, as they would be by an action on the bill itself.

(123) **803**

ACKNOWLEDGMENT OF DEEDS—1.

1. Deeds.
2. Feine Covert.
3. Recording of deeds.

ACTIONS—1.

When an action is in its origin instituted in the name of A, for the use of B, the *cestui que use* is, by the law of Maryland, regarded as the real party to the suit.

Gaither v. Bank, (42) **45**

ACTIONS—2.

By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that State.

Harper v. Butler, (239) **410**

ACTIONS—3.

In England any instrument or claim, though not negotiable, may be assigned to the king, who can sue upon it in his own name. No valid objection is perceived against giving the same effect to an assignment to the government of this country.

The United States v. Buford, (30) **591**

Peters 1, 2, 3, 4.

ADJUTANT AND INSPECTOR-GENERAL OF THE ARMY OF THE UNITED STATES—1.

See Army of the United States, 1, 5.

ADMINISTRATOR—1.

After the recovery of a judgment by an administrator, it is not necessary in a suit upon the judgment that he shall sue as administrator, the debt on the judgment being due to him personally; and if in such suit he shall name himself as administrator, it will be surplusage.

Biddle, adm., v. Wilkins, (686) **315**

ADMINISTRATORS—2.

1. Where administrators, acting under the provisions of an Act of Assembly of the State of Ohio, were ordered by the court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made the law was repealed, the powers of the administrators to sell terminated with the repeal of the law.

The Bank of Hamilton v. Dudley's Heirs, (523) **507**

2. The lands of an intestate descend not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts. The administrator has no estate in the land, but a power to sell under the authority of the Court of Common Pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but it is conferred by the court, in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order, be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every Legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the Legislature.

Id. (1b.) **507**

ADMIRALTY—3.

In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming of the decree below.

The United States v. Preston, (65) **604**

AFFIDAVIT—1.

See Evidence, 20, 21.

AGENT—1.

It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the principal has, by his declarations or conduct, authorized

the opinion that he had given more extensive powers to his agent than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned.

Schimmelpennich et al. v. Bayard et al., (290) 149

AGENT AND PRINCIPAL—4.

1. No principle is better settled than that the powers of an agent cease on the death of his principal.

Galt et al. v. Galloway et al., (344) 880

AGENT AND PRINCIPAL—3.

1. C. & Co., merchants of Boston, owners of a ship proceeding on freight from Havana to the consignment of B. & Co. at Leghorn, and to return to Havana, instructed B. & Co. to invest the freight, estimated at four thousand six hundred pesos; two thousand two hundred in marble tiles, and the residue, after paying disbursements, in wrapping paper. B. & Co. undertook to execute these orders. Instead, however, of investing two thousand two hundred pesos in marble, they invested all the funds which came into their hands in wrapping paper, which was received by the captain of the ship and was carried to Havana, and there sold on account of C. & Co. and produced a loss, instead of the profit which would have resulted had the investment been made in marble tiles. As soon as information of the breach of orders was received, C. & Co. addressed a letter to B. & Co., expressing in strong terms their disapprobation of the departure from their orders, but did not signify their determination to disavow the transaction entirely, and consider the paper as sold on account of B. & Co. Held, that C. & Co. were entitled to recover damages for the breach of their orders; that their not having given notice to B. & Co. that the paper would be considered as sold on their account did not injure their claim, and that the amount of the damages may be determined by the positive and direct loss arising plainly and immediately from the breach of the orders.

Bell et al. v. Cunningham, (69) 606

2. If the principal, after a knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury. But if the merchandise was received by the principal, under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable.

Id., (81) 611

3. The faithful execution of orders which an agent or correspondent has contracted to execute, is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. Speculative damages dependent on possible, successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate.

Id., (85) 612

4. The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss, and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed as damages.

Id., (86) 612

5. The general rule is, that the principal is bound by the act of his agent no further than he authorizes that agent to bind him; but the extent of the power given to an agent is decided as well from facts as from express delegation. In the estimate or application of such facts, the law has regard to public security, and often applies the rule "that he who trusts must pay." So, also, collusion with an agent to get a debt paid through the intervention of one in failing circumstances, has been held to make the principal liable on the ground of immoral dealing.

Parsons v. Armor and Oakley, (428) 730

AGREEMENT—1.

1. Equity, 3, 4, 5.

2. When property conveyed in trust, to be sold at

public auction, had been sold by private contract, and the property was afterwards offered for sale in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time more was bid for the same than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the *cestui que trust* to those interested in the proceeds of the sale, for the amount offered at the auction, it is not an objection, on the part of the purchaser, to release him from his contract.

Greenleaf v. Queen et al., (146) 89

3. Equity, 10.

ALEXANDRIA, DISTRICT OF COLUMBIA—3.

See the case of *Fowle v. The Common Council of Alexandria*, 398 as to the powers of the corporation of Alexandria.

ALIEN, AND ALIENAGE—3.

See the cases of *Inglis v. The Trustees of the Sailor's Snug Harbor*, 99, and *Shauks et al. v. Dupont et al.*, 242.

ALLEGIANCE—3.

1. What are the rights of the individuals composing a society, and living under the protection of the government when a revolution occurs, a dismemberment takes place, and when new governments are formed, and new relations between the government and the people are established. A person born in New York before the 4th of July, 1776, and who remained an infant with his father in the city of New York during the period it was occupied by the British troops; his father, being a royalist and having adhered to the British government, and left New York with the British troops, taking his son with him, who never returned to the United States, but afterwards became a bishop of the Episcopal Church in Nova Scotia; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the State of New York.

Inglis v. The Trustees of the Sailor's Snug Harbor, (126) 627

2. If such a person had been born after the 4th of July, 1776, and before the 15th of September, 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done, he remained a British subject, and disabled from inheriting land in the State of New York.

Id., (1b.) 627

3. The rule as to the point of time at which the American *antenati* ceased to be British subjects differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace in 1783. Our rule is to take the date of the Declaration of Independence.

Id., (121) 625

4. The settled doctrine in this country is, that a person born here, but who left the country before the Declaration of Independence and never returned here, became an alien and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast.

Id., (1b.) 625

5. The doctrine of perpetual allegiance is not applied by the British courts to the American *antenati*; and this court, in the case of *Blight's Lessee v. Rochester* (7 Wheat., 544), adopted the same rule with respect to the rights of British subjects here. That, although born before the Revolution, they are equally incapable with those born subsequent to that event of inheriting or transmitting the inheritance of lands in this country.

Id., (1b.) 625

6. The British doctrine, therefore, is that the American *antenati*, by remaining in America after the peace, lost their character of British subjects; and our doctrine is, that by withdrawing from this country and adhering to the British government they lost, or perhaps, more properly speaking, never acquired, the character of American citizens.

Id., (122) 625

Peters 1, 2, 3, 4.

7. The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases.

Inglis v. The Trustees of the Sailor's Snug Harbor. (1b.) 625

8. This court in the case of M'Ilvaine's Lessee v. Coxe (4 Cranch, 211), fully recognized the right of election; but they considered that Mr. Coxe had lost that right by remaining in the State of New Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she declared him to be a member of, and in allegiance to, the new government.

Id. (124) 626

9. Allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance. This is even the British doctrine.

Id. (125) 626

10. Thomas Scott, a native of South Carolina, died in 1782, intestate, seized of land on James Island, having two daughters, Ann and Sarah, both born in South Carolina before the Declaration of Independence. Sarah married D. P., a citizen of South Carolina, and died in 1802, entitled to one-half of the estate. The British took possession of James Island and Charleston in February and May, 1789; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the Treaty of Peace between this country and Great Britain of the 19th of November, 1794. Held, that they were entitled to recover and hold the same.

Shanks et al. v. Dupont et al. (242) 666

11. If Ann Scott was of age before December, 1782, she remained in South Carolina until that time, her birth and residence must be deemed to constitute her by election a citizen of South Carolina while she remained in that State. If she was not of age, then, under the circumstances of this case, she might well be deemed to hold the citizenship of her father; for children born in a country, continuing while under age in the family of the father, partake of his natural character as a citizen of that country.

Id. (245) 667

12. All British-born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words of the Treaty of 1794.

Id. (250) 669

13. The capture and possession of James Island in February, 1780, and of Charleston on the 11th of May in the same year, by the British troops, was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance.

Id. (246) 668

14. The marriage of Ann Scott with Shanks, a British officer, did not change or destroy her allegiance to the State of South Carolina, because marriage with an alien, whether friend or enemy, produces no dissolution of the native allegiance of the wife.

Id. (1b.) 668

15. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens.

Id. (1b.) 668

16. The subsequent removal of Ann Shanks to England with her husband, operates as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the Treaty of Peace in 1793.

Id. (1b.) 668

17. The Treaty of 1793 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects of that crown. The Treaty of Peace was a treaty operating between States and the inhabitants thereof.

Id. (247) 668

Peters 1, 2, 3, 4. U. S. Book 7.

AMENDMENT—2.

1. The declaration purported to count upon sixty-eight bills of the Bank of the Commonwealth of Kentucky, and it appeared that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ claimed or the judgment gave. The defendants in error, plaintiffs below, moved for leave to cure the defect by entering a *remittitur* of the amount of the bill so omitted and damages *pro tanto*.

This court thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remittitur*; but on payment of the costs of the writ, it error is prosecuted no further after such amendment made.

Bank of Kentucky v. Ashley et al., (329) 441

AMENDMENT—3.

This court has repeatedly decided that the exercise of the discretion of the court below, in refusing or granting amendments of pleadings or motions for new trials, affords no grounds for a writ of error. In overruling a motion for leave to withdraw a replication and file a new one, the court exercised its discretion; and the reason assigned, as influencing that discretion, cannot affect the decision.

United States v. Buford. (31) 591

AMERICAN REVOLUTION—3.

For the effect of the American Revolution on the rights of persons born in the British colonies in America before the Revolution, and born in the United States during the Revolution and before the Treaty of Peace, see the cases of *Inglis v. The Trustees of the Sailor's Snug Harbor*, 99, and *Shanks v. Dupont*, 242.

APPEAL—3.

1. In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below.

The United States v. Preston. (65) 604

2. The Josefa Segunda, having persons of color on board of her, was, on the 11th of February, 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libeled in the District Court of the United States of Louisiana, under the Act of Congress of the 2d of March, 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of color as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law. By the tenth section of the Act of the 30th of April, 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of color found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the Act of 1807, no power having been given to dispose of them otherwise than to appoint some one to receive them. The seventh section of the Act of 1818 confirms no other sales previously or subsequently made under the State laws, but those for illegal importation, and does not comprise the case of a condemnation under the seventh section. The final condemnation of the persons on board the Josefa Segunda took place in this court on the 13th of March, 1820, after Congress had passed the Act of the 3d of March, 1819, entitled, "An Act in addition to an act prohibiting the slave trade," by the provisions of which persons of color brought in under any of the acts prohibiting traffic in slaves, were to be delivered to the President of the United States to be sent to Africa. The condemnation could not affect them.

Id. (1b.) 604

3. Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term, and move to have the appeal re-

instated. To allow such a certificate would be to prejudge such a motion.

Bank of the United States et al. v. Swann,
(68) 605

4. It is of great importance to the due administration of justice, and in furtherance of the manifestation of the Legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments or successive appeals. It would occasion very great delays and oppressive expenses.

Canter v. The American and Ocean Insurance Company,
(307) 638

ARBITRAMENT—1.

See Award.

ARMY OF THE UNITED STATES—1.

1. The adjutant and inspector-general of the Army of the United States was not entitled to double rations, from the 30th September, 1818, to the 31st May, 1821.

Parker v. The United States, (296) 151

2. The President of the United States has a discretionary power to allow such additional number of rations, to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post. The law granting this authority is not imperative; and in the exercise of his discretion, the President may allow, or refuse to allow, additional rations, as in his opinion he may deem proper.

Id. (296) 151

3. The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power; and make the allowance to officers having a separate command.

Id. (297) 152

4. No officer is entitled to the additional allowance, unless he be a commandant at a separate post, and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.

Id. (Ib.) 152

5. In the discharge of his ordinary duties, the adjutant and inspector-general has no distinct command; his duties consist in details of service, and not in active military command.

Id. (Ib.) 152

6. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood. He must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer.

Id. (Ib.) 152

7. The general order of the War Department, of 16th March, 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding each department; it does not relate to the law of the 3d of March, 1813, "for the better organization of the general staff of the Army."

Id. (Ib.) 152

ASSIGNMENT—1.

1. In general, it may be affirmed that mere personal torts which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*, possibilities coupled with an interest and claim, growing out of and adhering to property, may pass by assignment.

Comegys et al. v. Vasse, (213) 117

2. The law gives to the act of abandonment, to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction.

Id. (214) 117

3. It is clear that the right to compensation for damages and injuries to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation; passed by abandonment to the underwriters upon property, which had been seized or captured.

Id. (215) 118

4. The right to indemnity for an unjust capture, on the sovereign, whether remediable in his own courts, or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the account of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded.

Id. (Ib.) 118

5. It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice. Claims and debts due by a sovereign are not commonly capable of being so enforced. It does not follow that because an unjust sentence cannot be reversed, that the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration.

Id. (216) 118

6. The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them for damages and injuries, and which were to be satisfied under the treaty by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800.

Id. (219) 119

ASSUMPSIT—2.

1. The Act incorporating the Bank of the Commonwealth of Kentucky contains a provision by which it is enacted, that the bank shall receive money on deposit without being required to give an obligation under seal to repay it. This enactment must be construed with regard to the practice of banking, and the general understanding of mankind; and must create a liability to the depositor by the simple act of depositing, that is, an *assumpsit* in law, implied from an act in pais.

The Bank of the Commonwealth of Kentucky v. Wister et al., (324) 439

2. Upon the deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave under his hand a certificate that there had been deposited to the credit of the plaintiffs below, \$7,730.81, which is subject to their order on presentation of this certificate. The deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one-half their nominal value. When the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general, not a specific deposit, and the Act of Incorporation is express, that the bank shall pay and redeem their bills in gold or silver. The transaction then was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, they might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills.

Id. (325) 439

3. The bank having offered to pay the amount of the certificate in their bills, they put their own construction on the same, and they cannot afterwards say that the plaintiffs below should have accompanied the certificate with a check.

Id. (326) 439

ASSUMPSIT—3.

When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action of *assumpsit* against the receiver for the same.

The United States v. Buford, (28) 590

ASSUMPSIT—4.

1. Everything which disaffirms the contract; everything which shows it to be void; may be given in evidence on the general issue, in an action of *assumpsit*.

Craig et al. v. The State of Missouri, (426) 909

ATTACHMENT—1.

1. The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D.

Peters 1, 2, 3, 4.

Barry, said to have been assumed by Robert Barry, the plaintiff in error. Robert Barry appeared, gave special bail, and discharged the attachment. The plaintiff below then filed a declaration of "*indebitatus assumpsit*" "for money had and received" and "for goods sold and delivered," to which Robert Barry pleaded the general issue. The parties went to trial, and a verdict and judgment were rendered for the defendant in error.

2. The court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail, and the appearance of the defendant. The defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment.

Barry v. Foyles,

(315) 159

AWARD—1.

1. There is a class of cases upon awards to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted upon the ground of this submission being conditional, *ita quod*. But the rule is to be understood with this qualification: that, in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must *distinctly* show that there were other points in difference, of which express notice was given to the arbitrators, and that they neglected to determine them.

Karthauss v. Ferrer et al.,

(227) 123

2. It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it.

Id.

(228) 123

3. If a submission be of all actions real and personal, and the award be only of actions personal, the award is good, for it shall be presumed no actions real were depending between the parties.

Id.

(*Ib.*) 123

BANK OF THE UNITED STATES—2.

The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.

Bank of the United States v. Owens, (538) 512

BANKRUPT AND BANKRUPTCY—1.

The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them for damages and injuries, which were to be satisfied under the treaty by the United States, passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800.

Comegys et al. v. Vasse,

(219) 119

BARRATRY—3.

1. What is barratry. Its definition.

The Patapseo Insurance Company v. Coulter,

(230) 662

2. The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, they will not sustain the defense that negligence was the remote cause, and will hold the assurers liable for the loss.

Id.

(236) 664

3. The rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts.

Id.

(237) 665

Peters 1, 2, 3, 4.

BILLS OF CREDIT—4.

1. In its enlarged, and perhaps literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day. This is the sense in which the terms have always been understood.

Craig et al. v. The State of Missouri,

(431) 910

2. The Constitution considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other; which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. *Id.*

(434) 911

3. On the 27th day of June, 1821, the Legislature of the State of Missouri passed an Act, entitled "An Act for the establishment of loan offices;" by the third section of which, the officers of the treasury of the State, under the direction of the governor, were required to issue certificates to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan-offices in the State of Missouri, in discharge of taxes or debts due to the State, for the sum of ——— dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers, in payment of taxes, or moneys due or to become due to the State, or to any town or county therein, and by all officers, civil and military, in the State, in discharge of salaries and fees of office; and in payment for salt made at the salt springs owned by the State, and to be afterwards leased by the authority of the Legislature. The twenty-third section of the act pledges certain property of the State for the redemption of these certificates; and the law authorizes the governor to negotiate a loan of silver or gold for the same purpose. A provision is made in the law for the gradual withdrawal of the certificates from circulation, and all the certificates have since been redeemed. The commissioners of the loan-offices were authorized to make loans of the certificates to citizens of the State, assigning to each district a proportion of the amount of the certificates, to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent. per annum, and the loans on personal property to be for less than two hundred dollars. Held, that the certificates issued under the authority of the law of Missouri, were "bills of credit;" and that their emission was prohibited by the Constitution of the United States, which declares that no State shall "emit bills of credit." *Id.*

(410) 903

BILL OF EXCEPTIONS—2.

The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial of the cause by each party in support of the issue. It is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this court for consideration, and forms an expensive and unnecessary burthen upon the record. This court has had occasion, in many cases, to express its regret on account of irregular proceedings of this nature. There was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the court delivered to the jury presented a general principle of law; and the application of the evidence to it was left to the jury.

Pennock et al. v. Dialogue,

(15) 332

BILL OF EXCEPTIONS—4.

1. Practice.

2. On the trial of a cause in the District Court of the United States for the Northern District of New York, exceptions were taken to opinions of the court delivered in the course of the trial; and some time after the trial was over, a bill of exceptions was tendered to the district judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time altering the bill then tendered so as to conform to his recollection of the facts of the case, and inserting in the bill all that he deemed proper to be contained in the same; which bill of exceptions, thus altered, was signed by the judge. On the motion of the party who had tendered the bill of exceptions, a rule was granted on the district judge to show cause why he did not sign the bill of exceptions as first tendered him. To this rule the judge returned his reasons for refusing to sign the bill so tendered, and stating that he had signed such a bill of exceptions as he considered correct.

BY THE COURT: This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. The object of the rule is to oblige the judge to sign a particular bill of exceptions which has been offered to him. The court granted the rule to show cause, and the judge has shown cause by saying he has done all that can be required from him, and that the bill offered is not such a bill as he can sign. The court cannot order him to sign such a bill.

Ex-parte Martha Bradstreet. (102) 796

3. The law requires that a bill of exceptions should be tendered at the trial.

If a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be matter of consent between the parties; unless the judge has made an express order in the term, allowing such a period to prepare it.

Id. (Ib.)

BILLS OF EXCHANGE—1.

1. The deposit of a bill in one bank to be transmitted to another for collection, is a common usage of great public convenience, the effect of which is well understood; and the duty of a bank receiving such a bill for collection, is precisely the same whoever may be the owner thereof, and, if it was unwilling to undertake the collection without precise information on the subject, the duty ought to have been declined.

The Bank of Washington v. Triplett & Neale. (30) 40

2. By failing to demand payment of a bill held for collection, the bank would make the bill its own, and would become liable to its real owner for the amount.

Id. (31) 40

3. The allowance of days of grace for the payment of a bill of exchange, or note, is now universally understood to enter into every bill or note of a mercantile character, and so, to form a part of the contract, that the bill does not become due until the last day of grace.

Id. (31) 40

4. It is the usage of the Bank of Washington, and of other banks in the District of Columbia, to demand payment of a bill on the day after the last day of grace, and this usage has been sanctioned by the decisions of this court. This usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable.

Id. (32) 41

5. The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed.

Id. (34) 42

6. The failure of a bank holding a bill payable after date for collection, to give notice to the drawer that the drawee was not found at home when called upon to accept the bill, is not such negligence as discharges the drawer from his liability.

Id. (35) 42

7. A bill of exchange, payable after date, need not be presented for acceptance before the day of

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payment; but if presented, and acceptance be refused, it is dishonored, and notice must be given. The absence from his home of the drawee of a bill payable after date, when the holder of a bill, or his agent, call with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest.

Id. (Ib.) 42

8. In a suit instituted by the holder of a bill against the bank for negligence in relation to demand or notice of nonpayment of the bill, the court, although required, are not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might consequently so act as to discharge the drawer without becoming liable to its principal.

Id. (36) 42

9. A stranger to the drawer and indorser of a nonaccepted bill of exchange, may intervene *supra protest*, to pay the same for the honor of an indorser or drawer.

König v. Bayard et al. (262) 137

10. It is no objection to this intervention that it has been done at the request and under the guarantee of the drawees of the bill, who had refused to accept or pay the same. The arrangements made by the payer of the dishonored bill with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honor it has been paid.

Id. (Ib.) 137

11. If A, at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill *supra protest* for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defense which he could have had if the bill had been paid *supra protest* for the honor of the indorser by the drawee, and suit brought for the same.

Id. (Ib.) 137

12. The court confirm the principle established in the case of *Coolidge v. Payson*, (2 Wheat., 75), that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.

Schimmelpennich et al. v. Bayard et al. (283) 146

13. If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right as the holders of the bill paid *supra protest*, if they were bound to honor it in the character of drawees.

Id. (285) 147

14. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill generally to the account of the shipper; held, that the drawees were not bound to accept or pay the bill in consequence of the proceeds of the shipment being received by them.

Id. (286) 147

15. A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee by shipment, and the consignee must pay the bills if the shipment places funds in his hands.

Id. (288) 148

16. Promissory notes, *passim*.

BILLS OF EXCHANGE—2.

1. Promissory notes.

2. Bills of exchange, payable at a given time after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity.

Townsend v. Sumrall. (178) 388

3. It is admitted, that in respect to foreign bills of exchange, the notarial certificate of protest is, of itself, sufficient proof of the dishonor of a bill, without any auxiliary evidence.

Id. (179) 389

4. It is not disputed, that by the general custom of merchants in the United States, bills of exchange drawn in one State on another State, are, if

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dishonored, protested by a notary; and the production of such protest is the customary document of dishonor.

Id. (180) 389

5. If a person undertake to accept a bill in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it; and the bill is purchased upon the credit of such promise for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice as well as in law, it ought to bind him.

Id. (181) 389

6. It can make no difference in law, whether the debt for which a bill of exceptions is taken is a pre-existing debt, or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promisee, whose promise is substantially a new and independent one, and not a mere guarantee of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence or be drawn afterwards. In each case, the object of the promise is to induce the party to take the bill upon the credit of the promise.

Id. (182) 339

If the holder of a bill of exchange, at the time of taking the bill, knew that the drawee had not funds in his hands belonging to the drawee, and took the bill on the promise of the drawee to accept it, expecting to receive funds from the drawer, the promise of the drawee to accept the bill, constitutes a valid contract between the parties, notwithstanding the failure of the drawer to place funds in his hands. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance.

Id. (183) 390

8. It is well settled that if a bill of exchange be drawn by one partner in the name of the firm, or if a bill drawn on the firm by their usual name and style, be accepted by one of the partners, all the partnership are bound. It results necessarily from the nature of the association, and the objects for which it is constituted, that each partner should possess the power to bind the whole, when acting in the name by which the partnership is known; although the consent of the other partners to the particular contract should not be obtained, or should be withheld.

Le Roy v. Johnson. (197) 396

9. Where a bill of exchange was drawn by A, after the dissolution of his partnership with B, and the proceeds of the bill went to pay, and did pay, the partnership debts of A & B, which A on the dissolution of the firm had assumed to pay; the holder of the bill after its dishonor can have no claim on B in consequence of the particular appropriation of the proceeds of the bill.

Id. (199) 396

BILLS OF EXCHANGE—3.

1. F. at New Orleans was the correspondent of P. at Boston, received goods from him on consignment, and was from time to time directed to purchase produce, and ship the same to P., and was instructed to draw on P. for the funds to pay for the same. When he made purchases, "the bills of parcels were made out in the name of F., and the accounts assured in the books of the different merchants in his name." The general course of the business was, that P. sent out, in his own vessels, merchandise to F. which was sold by F., and F., at the request of P., purchased from merchants in New Orleans produce, and shipped the same as ordered by P.; and to put himself in funds for the same when necessary, drew bills of exchange on P. who had always, until the presentation of the bills on which this suit was brought, accepted and paid the same; but he did not in his purchases act under the idea that he was restricted in his purchases to the drawing of bills for the payment of the articles purchased for P. F. purchased a quantity of tobacco to be shipped to P.; and payment for the same in bills on P. made a particular part of the contract for the purchase. At the time of the purchase, F. showed to the vendor of the tobacco the letters from P. ordering the purchase and shipment of the same. Some of Peters 1, 2, 3, 4.

the bills drawn by F. on P., and which were delivered to the vendor of the tobacco in payment for the same, were refused acceptance and payment, and this suit was instituted for the recovery of the amount of the bills from P. Held, that P. was not liable to pay the bills.

Parsons v. Armor and Oakley. (426) 729

2. A bill of exchange is the substitute for the actual transmission of money by sea or land. Power therefore to draw on a house in good credit, and to throw the bills upon the market, is equivalent to a deposit of cash in the vaults of the agent. There is not the least tittle of evidence in this cause to show that P. meant to use the credit of the drawer of the bills on which this suit is brought, or to authorize him to pledge his credit in anything but the negotiation of the bills. This depended on the confidence which merchants of New Orleans who wished to remit would place in the solvency and integrity of the drawer and drawee, and had no connection whatever with the application of the money thus raised to the purchases ordered by the principal. As to those purchases, the agent was authorized to go no farther than to apply the funds deposited with him.

Id. (428) 730

3. Of the general power to protest the bills of one who has overdrewn, there can be no question; for it is the only security which the one who gives a power to draw bills, and throw them on the market, has against the bad faith of his correspondent. He takes the risk of paying the damages, if in fault, or of throwing them on the other, if he has actually abused his trust. It is a question between him and his correspondent.

Id. (429) 730

4. The currency which a merchant may give to bills drawn on him by a correspondent, by payment of such bills, does not deprive him of the security he has a right to, by refusing his acceptance of other bills so drawn.

Id. (430) 731

BILLS OF EXCHANGE—4.

1. Action on two bills of exchange drawn by Hutchinson, on B. and H. in favor of E. which the drawers, B. and H. refused to accept, and with the amount of which bills E. sought to charge the defendants as acceptors, by virtue of an alleged promise before the bills were drawn.

The rule on this subject is laid down with great precision by this court in the case of Coolidge v. Payson (2 Wheat., 75), after much consideration, and a careful review of the authorities, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise.

Boyce and Henry v. Edwards. (121) 803

2. Whenever the holder of a bill seeks to charge the drawee as acceptor, upon some occasional or implied undertaking, he must bring himself within the spirit of the rule laid down in Coolidge v. Payson.

Id. (1b.)

3. The rule laid down in Coolidge v. Payson requires the authority to be pointed at the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill upon the credit of such authority may not be mistaken in its application.

Id. (1b.)

4. The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been attended to. But the evidence necessary to support the one or the other is materially different. To maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character; and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of promise.

Id. (1b.)

5. Courts have latterly leaned very much against extending the doctrine of implied acceptances so as to sustain an action upon a bill. For all practical purposes in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient and injurious to the credit of bills; and this has led judges frequently to express their dissatisfaction that the rule has been carried so far

as it has; and their regret that any other act, than a written acceptance on the bill, had ever been deemed an acceptance.

Id.

(*Ib.*)

6. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable by an action for the breach of the promise to accept, as they would be by an action on the bill itself.

Id.

(*Ib.*)

7. The contract to accept the bills, if made at all, was made in Charleston, South Carolina. The bills were drawn in Georgia, on B. and H. in Charleston, and with a view to the State of South Carolina for the execution of the contract. The interest is to be charged at the rate of interest in South Carolina.

Id.

(*Ib.*)

BILLS OF LADING—1.

1. By the well settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsement of the bill of lading to a *bona fide* purchaser for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property.

Coward v. The Atlantic Insurance Company, (445) 214

2. Strictly speaking, no person but the consignee can by any indorsement on the bill of lading pass the legal title to the goods. But if the shipper be the owner and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same, and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner passes the legal title against his agents or factors, and creditors, in favor of the assignee.

Id.

(*Ib.*) 214

BONDS—1.

See Pleas and Pleading, 8.

BOTTOMRY AND RESPONDENTIA—1.

See Respondentia.

BRITISH TREATY—3.

1. For the effect of the British treaties of 1783 and 1794, on the claims of British subjects born in America before the Treaty of Peace, see the case of *Juglis v. The Trustees of The Sailor's Snug Harbor*, 99, and *Shanks et al. v. Dupont et al.*, 242.

2. Thomas Scott, a native of South Carolina, died in 1782, intestate, seized of land on James Island, having two daughters, Ann and Sarah, both born in South Carolina before the Declaration of Independence. Sarah married D. P., a citizen of South Carolina, and died in 1802, entitled to one-half of the estate. The British took possession of James Island and Charleston in February and May, 1780; and in 1781 Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston in 1782, she went to England with her husband, where she remained until her death in 1801. She left five children born in England. They claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the Treaty of Peace between this country and Great Britain of the 19th of November, 1794. Held, that they were entitled to recover and hold the same.

Shanks et al. v. Dupont et al., (242) 666

3. All British-born subjects whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words of the Treaty of 1794.

Id.

(250) 669

4. The Treaty of 1783 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British crown; all those who then

adhered to the British crown were deemed and held subjects of that crown. The Treaty of Peace was a treaty operating between States and the inhabitants thereof.

Id.

(247) 668

BRITISH TREATY—4.

1. *Carver v. Astor*, Vol. IV., 101.
2. Construction of statutes, 1.

CARRIERS—2.

1. The law regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not, and cannot have over them the same absolute control that he has over inanimate matter. In the nature of things, and in their character, they resemble passengers, and not packages of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.

Boyce v. Anderson,

(155) 380

2. The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, its necessity and its policy are admitted; yet it ought not to be carried further or applied to new cases. It has not been applied to living men, and it ought not to be.

Id.

(*Ib.*) 380

3. The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves.

Id.

(156) 381

CHANCERY—3.

1. The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract.

Boyce's Executors v. Grundy,

(210) 655

2. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.

Id.

(215) 657

3. It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud, but it is very far from a conclusive argument. The doctrine will not be contended for that a written agreement cannot be relieved against on the ground of false suggestions.

Id.

(219) 658

4. It is not an answer to an application to a court of chancery for relief in rescinding a contract to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution.

Id.

(220) 659

CHANCERY AND CHANCERY PRACTICE—1.

1. Where a bill had been filed against a trustee of real estate, and, after his death, administration had been granted to A, who, on the petition of creditors interested in the trust, was also appointed by the court the substituted trustee, and the court went on to decree that A, as trustee, should execute certain conveyances, the decree was held to be invalid, the course of proceeding being rather to make the decree against A in the character of administrator, because he claimed as administrator under a title derived from the original trustee, and was the person designated by law to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee, in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill.

Greenleaf v. Queen et al.,

(148) 89

2. A decree of a court of chancery is erroneous which, after ordering certain acts to be done to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out

Peters 1, 2, 3, 4.

of court and renders the decree ineffectual, and it is no answer to this objection, that it appears by the record in the case, that the acts ordered to be done have been performed, since the error is in the decree itself, and not in its execution.

Greenleaf v. Queen et al. (148) 89

3. A bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so; but this must be done on demurrer, plea, or answer, pointing out the person or persons whom the defendant insists ought to be made parties.

Id. (149) 90

4. When a debtor had conveyed to a trustee real estate to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding relative to the execution of the trust and the conveyance of the estate, it is necessary that the heirs-at-law, of the first trustee, shall be parties to the same, as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs.

Id. (149) 90

5. A court of chancery is not the proper tribunal to enforce a forfeiture, the remedy for the same being at law.

Horsburg v. Baker, (236) 127

6. After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it.

Id. (149) 90

7. A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for was a forfeiture, which might be enforced at law. Under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as an absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish.

Id. (149) 90

8. If in a case where the loss of a deed or other instrument is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill failed to demur for the cause, but answered over to the bill, or permitted it to be taken for confessed, by default against him, it seems that the absence of the affidavit is not a sufficient cause for the reversal of the decree.

Findlay et al. v. Hinde and Wife, (244) 130

9. Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate, and upon a receipt of the purchase money, binding the party to convey the estate, the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding, although he had subsequently by a legal and formal conveyance duly executed, conveyed the estate to others and thus, so far as he could, divested himself of all title in the same.

Id. (246) 130

10. The decree of the Circuit Court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same, and awarded costs generally against all the defendants. All the defendants appealed together to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantees, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs, yet, the reversal of the decree of the Circuit Court was made general, as to all of the appellants, and the whole case opened.

Id. (247) 131

11. Although it seems to be a general rule that a court of chancery will not decree a specific performance of contracts, except for the purchase of lands, or things which relate to the realty and are of a permanent nature, and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law; yet, notwithstanding this distinction between Peters 1, 2, 3, 4.

personal contracts for goods, and contracts for lands, there are many cases to be found where specific performance of contracts relating to personality have been enforced in chancery, and courts will only weigh with greater nicety contracts of this description than such as relate to lands.

The Mechanics' Bank of Alexandria v.

Louisa and Maria Seton, (305) 155

12. Although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing of an appeal, except in very strong cases, and where the court perceives a necessary and indispensable party is wanting.

Id. (306) 155

13. All persons materially interested in the subject of a suit in chancery ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court, and it should be restricted to parties whose interests are in the issue and to be affected by the decree. The relief granted will always be so modified as not to affect the interests of others.

Id. (149) 90

14. It is a well settled rule that a court is not bound to take notice of any interest acquired in the subject matter of the suit, pending the dispute.

Id. (310) 157

15. If a bill charges a defendant with notice of a particular fact, an answer must be given without a special interrogatory to the matter. But a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill.

The Mechanics' Bank of Alexandria v. Lynn,

(383) 188

16. The rules which govern the practice of the Circuit Courts in chancery have been prescribed by this court, and ought to be observed.

McDonald v. Smalley et al., (625) 289

CHANCERY AND CHANCERY PRACTICE—2.

1. As the plaintiffs in the Circuit Court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties. The Circuit Court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice.

Hunt v. Wickliffe, (215) 402

2. The court has decided that a suit could be maintained in equity, by the holder of an indorsed note, against a remote indorser; and upon grounds perfectly familiar to courts exercising equity jurisdiction.

The Bank of the United States v.

Weisiger, (331) 441

3. It has been decided in Kentucky, that a suit at law could not be maintained in that State by the indorsee, against a remote indorser. The conclusion then results from our decisions, that he must be let into equity; for an indorsement is certainly no release to the previous indorsers; and the ultimate assignee alone is entitled to the benefit of their liability. And this we understand to be consistent with the received opinions and practice in Kentucky.

Id. (348) 447

4. The testatrix directed that the interest of certain funds should be applied "to the proper education" of certain persons, her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education or reach the age of twenty-one years of age, one hundred pounds to set him up in his trade." She also gave the whole of her estates of every description, to be equally divided among certain persons, who should be living when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed that so long as any one of the three nephews should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given, should be deferred, and no longer.

A bill was filed by one of the three nephews of the testatrix, charging that the executors had not paid the several sums of money bequeathed to him, and praying that they may be decreed to pay the same. No other persons were made parties to the proceeding but the executors; and after a report

of the matter, the cause came on to a hearing, and the Circuit Court dismissed the bill for want of proper parties. The defendants at the argument insisted that not only the two nephews, whose education was provided for by the testatrix, should have been made parties, but also all the residuary legatees. So far as the bill sought to obtain such a portion of the fund as was by a fair construction of the will applicable to the education of the nephews of the testatrix, they alone were required to be parties; and the court reversed the decree of the Circuit Court which dismissed the bill, for the purpose of enabling the complainant to make the other two nephews of the testatrix parties.

The court did not consider it necessary to make the residuary legatees parties; in a proceeding the sole object of which was to ascertain and distribute among the nephews of the testatrix, the amount to which they were entitled, for the expenses of education. The residuary legatees have undoubtedly an interest in reducing every demand on the estate. Whatever remains, sinks into the residuum; and that residuum is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits, the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors.

Dandridge v. Washington's Executors,

(377) 457

5. Where a bill was filed against the stockholders of a voluntary association, for the purposes of banking, and the process was returned "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found;" the court stated, that it was not meant to say that in cases of this nature it is necessary to bring all the stockholders before the court, before any decree can be made. It is well known that there are cases in which a court of equity dispenses with such a proceeding, when the parties are very numerous and unknown; and the adoption of the rule would evidently impede, if not defeat the purposes of justice.

Mandeville et al. v. Riggs,

(487) 494

6. Upon the death of some of the parties to the bill who had been served with process, the bill ought to have been revived against their personal representatives, if they could be brought before the court; unless some good reason, such as absolute insolvency, could be assigned to justify the decision.

Id.

(*Ib.*) 494

7. One of the great principles upon which courts of equity generally require all parties, who are known and within the reach of its jurisdiction, to be made parties, is to prevent future litigation and to take away multiplicity of suits. There are exceptions, it is true, to the rule, but they are founded upon special considerations.

Id.

(*Ib.*) 494

8. No instances are known where a joint liability has been asserted before a court of chancery, on which the decree has not been made against all the parties before it who did not establish some personal discharge.

Id.

(488) 495

9. In a bill filed in the Circuit Court of Alexandria County, in the District of Columbia, against the stockholders of an association for banking purposes, the bill was dismissed as to those stockholders who were named in the bill, but were not served with process; and it was held to be error. As non-residents, the Act of Congress of the 3d of May, 1803, allows proceedings to be had against them by publication in the newspapers in the district.

Id.

(489) 495

10. The complainants in the Circuit Court were proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession; under the circumstances of the case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession.

Beatty et al. v. Kurtz et al.,

(584) 527

11. The only difficulty which presents itself upon the question, whether the complainants in the Circuit Court have shown in themselves sufficient authority to maintain their suit, is, that it is not evidenced by any formal vote or writing. If it were

necessary to decide the case on this point under all the circumstances, it might be fairly presumed. But this is not necessary; because this is one of those cases in which certain persons belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others, having the like interests as part of the same society, for purposes common to all, and beneficial to all.

Id.

(585) 528

12. There is no doubt but that under the general prayer in a bill in chancery for general relief, other relief may be granted than that which is particularly prayed for; but such relief must be agreeable to the case made by the bill.

English et al. v. Forall,

(595) 531

13. A marriage settlement provided that the trustees, after the death of the husband, should stand possessed of a bond executed to them by the husband, and of the sum of \$37,038 to be received by them upon trust to place out the same, when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of the wife; and to call in and replace the same, and re-invest the same and the produce thereof, from time to time, upon or in such securities, or stock, with the approbation of the wife. It is not an unreasonable interpretation to say that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract. She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment. The trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct.

Id.

(*Ib.*) 531

14. The husband by his will confirmed the marriage settlement, and he further declared "that if the sum of \$37,038 secured to be paid to the trustees should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of \$2,222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that in no event less than \$2,222.22 shall be raised annually for his wife, or for her benefit in the United States." The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested at six per cent. stock of the United States the \$37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate. The wife has a right to claim this deficiency to be so made up.

Id.

(*Ib.*) 531

CHANCERY AND CHANCERY PRACTICE—4.

1. Where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said: It has been urged in reply to those grounds of reversal for want of parties or for want of due maturation for a final hearing, that nothing is ordered to be mortgaged or sold besides the interest of the party who is ordered to execute the mortgage, or whose interest is to be sold, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has means of reducing every right to certainty and precision, and is, therefore, bound to employ these means in the exercise of its jurisdiction.

Caldwell v. Taggart et al.,

(190) 828

Peters 1, 2, 3, 4.

2. The general rule is, that however numerous the persons interested in the subject of a suit, they must all be made parties—plaintiff or defendant—in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice, by embracing the whole subjects; deciding upon and settling the rights of all persons interested in the subject of the suits; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.

Caldwell v. Taggart et al., (190) 288

3. Where in the course of proceedings in a suit in chancery in the Circuit Court it is apparent that the father has not presented the interests of his children for protection, the court said: Although there is no appeal taken in behalf of the children, the court, while interfering to prevent the breach of a trust in behalf of the father, can hardly be expected to pass over without noticing an omission in the father, amounting to a breach of trust, to the prejudice of his infant children.

Id.

Id. 828

4. The complainants, in the Circuit Court of Ohio, filed a bill to enforce the specific performance of a contract. The bill states that there is a surplus of several hundred acres, and by actual measurement it is found to be eight hundred and seventy-six acres; the patent having been granted for one thousand five hundred and thirty-three and one-third acres beyond the quantity mentioned in the contract.

The powers of a court of chancery to enforce a specific execution of contracts are very valuable and important. For in many cases where the remedy at law for damages is not lost, complete justice cannot be done without a specific execution. And it has been almost as much a matter of course for a court of equity to decree a specific execution of a contract for the purchase of lands (where in its nature and circumstances it is unobjectionable) as it is to give damages at law where an action will lie for a breach of the contract. But this power is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case.

King v. Hamilton, (328) 875

5. When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. When a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it.

Id.

(Id.) 875

6. It is a settled rule in a bill for specific performance of a contract to allow a defendant to show that it is unreasonable, or unconscientious, or founded in mistake or other circumstances leading satisfactorily to the conclusion that the granting of the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for a specific execution of a contract, should show himself ready and desirous to perform his part.

Id.

(Id.) 875

CHARITABLE USES—2.

A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran Church;" and by the German Lutherans of the place, had been used as a place of burial from the dedication, and who had erected a school-house on it, but no church; exercising acts of protection and ownership over it at some periods, by committees appointed by the German Lutherans, the original owners acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses; and although the German Lutherans were not incorporated, nor were there any persons who as trustees could hold the property, the appropriation was also valid under the bill of rights of Maryland. The bill of rights, to this extent at least, recognizes the doctrines of the statute of Elizabeth for charitable uses; under which, it is well known, that such uses would be upheld, although there was no specific grantee or trustee. This might at all times have been enforced as a charitable and pious use, through the intervention of the government, as *parens patrie*, by its attorney-general or other law officer. It was originally consecrated for a religious purpose. It has become Peters 1, 2, 3, 4.

a depository of the dead; and it cannot now be resumed by the heirs of the donor.

Beatty & Ritchie v. Kurtz et al. (584) 527

CHARITABLE USES—3.

See the case of *Inglis v. The Trustees of the Sailor's Snug Harbor*, 101, and Appendix, 481.

CHOSES IN ACTION, ASSIGNMENT OF,—3.

See Action.

CIRCUIT COURTS—3.

See the case of *Ex-parte Tobias Watkins*, 193, for the jurisdiction of the Circuit Court of the District of Columbia in criminal cases.

CITIZENSHIP—4.

See Naturalization.

CITY OF WASHINGTON—4.

1. In 1822 Congress passed an Act authorizing the corporation of Washington to drain the ground in and near certain public reservations, and to improve and ornament certain parts of the public reservations. The corporation are empowered to make an agreement by which parts of the location of the canal shall be changed for the purpose of draining and drying the low grounds near the Pennsylvania Avenue, &c. To effect these objects, the corporation is authorized to lay off in building lots certain parts of the public reservations No. 10, 11 and 12, and of other squares, and also a part of B street, as laid out and designated in the original plan of the city, which lots they may sell at auction and apply the proceeds to those objects, and afterwards to inclosing, planting and improving other reservations, and building bridges, &c., the surplus, if any, to be paid into the Treasury of the United States. The act authorizes the heirs, &c., of the former proprietors of the land on which the city was laid out, who may consider themselves injured by the purposes of the act, to institute in the Circuit Court a bill in equity, in the nature of a petition of right, against the United States, setting forth the grounds of any claim they may consider themselves entitled to make, to be conducted according to the rules of a court of equity; the court to hear and determine upon the claim of the plaintiffs, and what portion, if any, of the money arising from the sale of the lots they may be entitled to, with a right of appeal to this court. The plaintiffs, Van Ness and wife, filed their bill against the United States and the corporation of Washington, claiming title to the lots which had been thus sold, under David Burns, the original proprietor of that part of the city, and father of one of the plaintiffs, on the ground that by the agreement between the United States and the original proprietors, upon laying out the city, those reservations and streets were forever to remain for public use, and without the consent of the proprietors could not be otherwise appropriated or sold for private use; that the Act of Congress was a violation of that contract; that by such sale and appropriation for private use the right of the United States thereto was determined, or that the original proprietors reacquired a right to have the reservations, &c., laid out in building lots for their joint and equal benefit with the United States, or that they were in equity entitled to the whole or a moiety of the proceeds of the sales of the lots. Held, that no rights or claims exist in the former proprietors or their heirs, and that the proceedings of the corporation of Washington, under and in conformity with the provisions of the act, are valid and effectual for the purposes of the act.

Van Ness and Wife v. The City of Washington and the United States, (232) 842

2. *Ronkendorf v. Taylor's Lessee*, (349) 882

CLERICAL ERROR—3.

A commission was issued in the name of Richard M. Meade, the name of the party being Richard W. Meade. This is a clerical error and does not affect the execution of the commission.

Keene v. Meade, (6) 583

COLUMBIA, DISTRICT OF,—3.

For the jurisdiction of the Circuit Court of the District of Columbia in criminal cases, see *Ex-parte Tobias Watkins*, (193) 650

COMMISSION—3.

1. A commission was issued in the name of Richard M. Meade, the name of the party being Richard W. Meade. This is a clerical error in making out the commission and does not affect the execution of the commission.

Keene v. Meade, (6) 583

2. It is not known that there is any practice in the execution or return of a commission, requiring a certificate, in whose handwriting the depositions returned with the commission were set down. All that the commission requires is, that the commissioners, having reduced the depositions taken by them to writing, should send them with the commission under their hands and seals to the judges of the court out of which the commission issued. But it is immaterial in whose handwriting the depositions are, and it cannot be required that they should certify any immaterial fact.

Id. (8) 584

3. A certificate by the commissioners, that A. B. whom they were going to employ as a clerk had been sworn, admits of no other reasonable interpretation than that A. B. was the person appointed by them as clerk.

Id. (9) 584

4. It is not necessary to return with the commission the form of the oath administered by the commissioners to the witnesses. When the commissioners certify the witnesses were sworn, and the interrogatories annexed to the commission were all put to them, it is presumed that they were sworn and examined as to all their knowledge of the facts.

Id. (10) 584

COMMON LAW—2.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright. But they brought with them and adopted only that portion which was applicable to their situation.

Van Ness v. Pacard, (144) 377

COMMON LAW—3.

By "common law," the framers of the Constitution of the United States meant, what the Constitution denominated in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.

Parsons v. Bedford et al., (447) 737

CONCEALMENT—1.

See Insurance, 15, 16.

CONDITION—2.

If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with it, or, by any act of his own, prevent the performance; the opposite party is excused from proving a strict compliance with the conditions. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the nonperformance of the condition as a bar to the responsibility which his part of the contract had imposed upon him.

Williams v. The Bank of the United States, (102) 362

CONDITION—3.

1. The testator was seized of a very large real and personal estate in the States of Virginia, Kentucky, Ohio, and Tennessee. After making by his will in addition to her dower, a very liberal provision for his wife for her life out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife, and certain other bequests, his will declares: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on

condition of his marrying a daughter of William Trigg's and my niece Rachel, his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, Leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife to John Mitchell, and to their issue." The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons, James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander M'Call. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg.

BY THE COURT. We have found no case in which a general devise in words, importing a present interest in a will making no other disposition of the property on a condition which may be performed at any time has been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent.

Finlay et al. v. King's Lessee, (377) 712

2. It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

Id. (374) 711

3. It is a general rule that a devise in words of the present time, as, "I give to A my lands in B," imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be, that a devise to A, on condition that he shall marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B at any time during his life. The condition is subsequent.

Id. (376) 712

4. As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking the possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction.

Id. (378) 712

5. The introductory clause in the will states: "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of testator's wife as the time when the devisee shall be entitled to possession. They are "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life, is postponed until her death.

Id. (379) 713

CONSIDERATION—2.

Damage to the promisee constitutes as good a consideration as benefit to the promisor.

Townsend v. Sumrall, (182) 390

Peters 1, 2, 3, 4.

CONSIDERATION—4.

1. It has been long settled that a promise made in consideration of an act which is forbidden by the law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the Supreme law, is against law.

Craig et al. v. State of Missouri, (431) 910

2. A promissory note given for certificates issued at the loan-office of Chariton in Missouri, payable to the State of Missouri, under the Act of the Legislature "establishing loan-offices," is void.

Id. (Ib.) 910

3. A contract was made for rebuilding Fort Washington, by M., a public agent, and a deputy-quartermaster-general, with B.; in the profits of which M. was to participate. False measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the Treasury. A bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction, one-half of the loss sustained in the execution of the contract.

Held, that to state such a case is to decide it. Public morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which begun with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court.

Bartle v. Coleman, (184) 825

4. The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers to shift the loss from one to the other, or to equalize the benefits or burthens which may have resulted from the violation of every principle of morals and of law.

Id. (Ib.) 825

CONSIGNMENT AND CONSIGNEES—1.

See Bills of Lading, 1, 2.

CONSTITUTION OF THE UNITED STATES—2.

1. There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions.

Satterlee v. Matthewson, (413) 469

2. There is no part of the Constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract.

Id. (Ib.) 469

3. A tax imposed by a law of any State of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional.

Weston et al. v. The City Council of Charleston, (449) 481

4. It is not the want of original power in an independent sovereign State to prohibit loans to a foreign government, which restrains the State Legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments. The grant of the power, and the declaration of supremacy, are a declaration that no such restraining or controlling power shall be exercised.

Id. (468) 488

CONSTITUTIONALITY OF STATE STATUTES—2.

1. The Act of the Assembly of the State of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks, must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the

powers of the general government, are, undoubtedly, within those which are reserved to the States. The measure authorized by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens; of which this court can take no cognizance.

Willson v. The Black Bird Creek Marsh Company, (251) 414

2. If Congress had passed any act, in execution of the power to regulate commerce, the object of which was, to control State Legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the middle and southern States, the court would feel not much difficulty in saying that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations, and among the several States; a power which has not been so exercised as to affect this question.

Id. (252) 414

3. S. and M. held land in Luzerne County, Pennsylvania, in common, under a Connecticut title. A division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year. S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land, brought by M. against S., the Court of Common Pleas of Bradford County, Pennsylvania, held that S., having held the land as tenant of M., could not set up a title against his landlord. Upon a writ of error to the Supreme Court of Pennsylvania in 1825, it was held that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The Legislature of Pennsylvania, on the 8th of April, 1826, passed an Act declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between citizens of the Commonwealth." The case came again before the Supreme Court of Pennsylvania, and the judgment of the Court of Common Pleas of Bradford County in favor of M., the landlord, was affirmed; that court having decided that the Act of Assembly of the 8th of April, 1826, was a constitutional act, and did not impair the validity of any contract. S. brought a writ of error to this court, claiming that the Act of the Assembly of Pennsylvania, of the 8th of April, 1826, was unconstitutional. Held, that the act was constitutional.

Satterlee v. Matthewson, (380) 458

4. In the case of *Fletcher v. Peck* (6 Cranch, 87), it was stated by the Chief Justice, that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power, and he asks: "If any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion, that a State statute which divests a vested right, is repugnant to the Constitution of the United States.

Id. (413) 469

5. A tax imposed by a law of any State of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional.

Weston et al. v. The City Council of Charleston, (449) 481

6. It is not the want of original power in an independent sovereign State to prohibit loans to a foreign government, which restrains the State Legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments. The grant of the power, and the declaration of supremacy, are a declaration that no such restraining or controlling power shall be exercised.

Id. (468) 488

7. The lands of an intestate descend not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts. The administrator has no es-

tate in the land, but a power to sell under the authority of the Court of Common Pleas. This is not an independent power, to be exercised at discretion, when the exigency in his opinion may require it; but it is conferred by the court, in a state of things prescribed by the law. The order of the court is a prerequisite, indispensable to the very existence of the power; and if the law which authorizes the court to make the order, be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every Legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the Legislature.

The Bank of Hamilton v. Dudley's heirs, (523) 507

8. J. J. died in New Hampshire, seized of real estate in Rhode Island, having devised the same to his daughter, an infant. His executrix proved the will in New Hampshire, and obtained a license from a probate court in that State, to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the Legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. Held, that the Act of the Legislature of Rhode Island, which confirmed the title of the purchasers, was valid.

Wilkinson v. Leland et al. (657) 553

9. That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be justified in assuming, that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority; or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.

Id. (Ib.) 553

CONSTITUTIONAL LAW—3.

1. The plaintiff in error claimed to recover the land in controversy, having derived his title under a patent granted by the State of New York to John Cornelius. He insisted that the patent created a contract between the State and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the State, and that an act passed by the Legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent. This is not a case within the clause of the Constitution of the United States, which prohibits a State from passing laws which shall impair the obligation of contracts. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land. The patent contains no covenant to do or not to do any further act in relation to the land; and the court are not inclined to create a contract by implication. The Act of the Legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent.

Hart v. Lamphire, (289) 682

2. It is within the undoubted powers of State Legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the reording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of

contracts. So, too, is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court.

Id. (290) 683

CONSTITUTIONAL LAW—4.

1. In its enlarged and perhaps literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money; which paper is redeemable at a future day. This is the sense in which the terms have always been understood.

Craig v. The State of Missouri, (431) 910

2. The Constitution considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts; is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted.

Id. (Ib.) 910

3. On the 27th day of June, 1821, the Legislature of the State of Missouri passed an Act, entitled "An Act for the establishment of loan-offices;" by the third section of which the officers of the Treasury of the State, under the direction of the Governor, were required to issue certificates to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan-offices in the State of Missouri, in discharge of taxes or debts due to the State, for the sum of — dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers, in payment of taxes, or moneys due or to become due to the State or to any town or county therein, and by all officers, civil and military, in the State, in discharge of salaries and fees of office; and in payment for salt made at the salt springs owned by the State, and to be afterwards leased by the authority of the Legislature. The twenty-third section of the act pledges certain property of the State for the redemption of these certificates; and the law authorizes the Governor to negotiate a loan of silver or gold for the same purpose. A provision is made in the law for the gradual withdrawal of the certificates from circulation; and all the certificates have since been redeemed. The commissioners of the loan-offices were authorized to make loans of the certificates to citizens of the State, assigning to each district a proportion of the amount of the certificates, to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent. per annum, and the loans on personal property to be for less than two hundred dollars. Held, that the certificates issued under the authority of the law of Missouri were "bills of credit"; and that their emission was prohibited by the Constitution of the United States, which declares that no State shall emit "bills of credit."

Id. (Ib.) 910

4. A promissory note given for certificates issued at the loan office of Chariton in Missouri, payable

Peters 1, 2, 3, 4.

to the State of Missouri, under the Act of the Legislature "establishing loan-offices," is void.

Craig v. The State of Missouri, (481) 910

5. The action was *assumpsit* on a promissory note, and the record stated "that neither party having required a jury, the cause was submitted to the court; and the court having seen and heard the evidence, the court found that the defendants did assume as the plaintiff had declared; that the consideration for the note and the *assumpsit* was for loan-office certificates loaned by the State of Missouri at her loan-office in Chariton, which certificates were issued under "an Act for establishing loan-offices, &c." Held, that it could not be doubted that the declaration is on a note given in pursuance of the act of Missouri; and that under the plea of *non assumpsit* the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record thus exhibiting the case, gives jurisdiction to this court over the case, on a writ of error prosecuted by the defendants to this court from the Supreme Court of Missouri, under the provision of the twenty-fifth section of the Judiciary Act of 1789.

Id. (Ib.) 910

6. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue, in an action of *assumpsit*.

Id. (Ib.) 910

7. In 1791 the Legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated for the purpose of banking. They were incorporated by the name of "The President, Directors and Company of the Providence Bank," with the ordinary powers of such associations. In 1822 the Legislature passed an act imposing a tax on every bank in the State, except the Bank of the United States. The Providence Bank refused the payment of the tax, alleging that the act which imposed it was repugnant to the Constitution of the United States, as it impaired the obligation of the contract created by the charter of incorporation. Held, that the Act of the Legislature of Rhode Island, imposing a tax, which, under the law, was assessed on the Providence Bank, does not impair the obligation of the contract created by the charter granted to the bank.

The Providence Bank v. Billings and Pitman (514) 939

8. It has been settled that a contract entered into between a State and an individual is as fully protected by the prohibitions contained in the tenth section, first article of the Constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract.

Id. (Ib.) 939

9. The power of taxing moneyed corporations has been frequently exercised: and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

Id. (Ib.) 939

10. That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that the community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.

Id. (Ib.) 939

11. The power of legislation, and consequently of taxation, operate on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.

Id. (Ib.) 939

12. However absolute the right of an individual may be, it is still in the nature of that right that it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital Peters 1, 2, 3, 4.

power may be abused; but the Constitution of the United States was not intended to furnish the correction of every power which may be committed to the State government. The intrinsic wisdom and justice of the representative body, and its relations with its constituents, furnished the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.

Id. (Ib.) 939

CONSTRUCTION OF STATUTES—1.

1. It is a general rule in the construction of public statutes that the word "may" is to be construed "must" in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. And in all cases, the construction should be such as carries into effect the true intent and meaning of the Legislature in the enactment.

Minor et al. v. The Mechanics' Bank of Alexandria, (64) 55

2. The Mechanics' Bank of Alexandria, 1, 2.

3. Jurisdiction, 1.

4. Lands and Land Titles.

5. In the construction of the Registry Act of Ohio, the term "purchasers" is usually taken in its limited legal sense. It means a complete purchaser, or in other words, a purchaser clothed with a legal title.

Steele's Lessee v. Spencer et al., (559) 262

6. District of Columbia.

7. Construction of the Act of Congress, passed March 2d, 1807, entitled, "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated.

Jackson v. Clark et al., (634) 293

8. The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States as a common fund for those States who were, or might become, members of the Union, to be disposed of for that purpose.

Id. (635) 293

9. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust.

Id. (Ib.) 293

10. If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence.

Id. (Ib.) 293

11. If it be conceded that the proviso in the Act of 2d March, 1807, was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity.

Id. (Ib.) 293

12. Lands surveyed are under the law as completely withdrawn from the common mass as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times.

Id. (638) 295

CONSTRUCTION OF STATUTES—2.

1. Where English statutes, such, for instance, as

the statute of franchises, and the statute of limitations, have been adopted into our own legislation; the known and settled construction of those statutes by English courts of law, has been considered as silently incorporated into the acts; or has been received with all the weight of authority.

Pennoek et al. v. Dialogue, (18) 333

2. Patents and patent rights.

3. Where the question upon the construction of the statute of a State relative to real property, has been settled by any judicial decision in the State where the land lies, this court, upon the uniform principles adopted by it, would recognize that decision as a part of the local law.

Gardner v. Collins, (85) 356

4. Descents.

5. State laws.

6. The 2d, 3d and 4th sections of the Act of January 6, 1800, entitled "An Act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the 5th section extends "the privileges and relief" of that act to persons in confinement, against whom judgment is obtained, but no execution issued. Under the provisions in favor of persons charged in execution, on the day of arrest a notice may be served upon the person at whose suit they are confined, and at the end of thirty days they may be discharged. By the 5th section it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration of thirty days from the time such judgment has been or shall be recovered; though the creditor should not within that time sue out his execution, and charge the debtor therewith." It has been argued that, under this section, the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement, in the cases which come under this section; whereas he remains but thirty days, when confined under execution. There can be no reason for this distinction; and in favor of liberty, and with a view to consistency, the construction should be otherwise. If such were the true construction, the relief would not be the same as is extended to debtors of the other class. The day of entering judgment under the 5th section, is the day that corresponds to the day of arrest, under the previous provisions of the law; and therefore in thirty days after the judgment, the defendant may be discharged; complying with the other requisitions of the law.

The Bank of the United States v. Weistger, (349) 447

7. The Act of the 30th of March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time, when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased after March, 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offense within the meaning of the before-mentioned acts of Congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture.

American Fur Company v. The United States, (368) 454

8. A legislative act is to be interpreted according to the intention of the Legislature apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature.

Wilkinson v. Leland et al., (662) 554

9. The legislative and judicial authority of New Hampshire were bounded by the territory of that State, and could not be rightfully exercised to pass estates lying in another State. The sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein.

Id., (655) 552

10. By the laws of Rhode Island, the probate of a will, in the proper Probate Court, is understood to be an indispensable preliminary to establish the right of the devisee; and then his title relates back to the death of the testator.

Id., (Ib.) 552

11. The Act of the Legislature of Maryland, pass-

ed in 1796, ch. 47, sec. 13, declares "that all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of any slave or slaves belonging to such person or persons, by his, her, or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence." The time of freedom of the appellee in this case commenced when he was about eleven years old. Held, that his manumission by will was valid.

Le Grand v. Darnall, (664) 555

12. The Court of Appeals of Maryland has decided that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication. This court entertains the same opinion.

Id., (670) 557

CONSTRUCTION OF STATE STATUTES—3.

1. It is the uniform rule of this court with respect to the title to real property, to apply the same rule which is applied in State tribunals in like cases.

Inglis v. The Trustees of The Sailor's Snug Harbor, (127) 627

2. The right of an absent and absconding debtor to real estate held adversely, passed to and became vested in the trustees by the Act of the Legislature of New York passed April 4, 1786, entitled, "An Act for relief against absconding and absconding debtors."

Id., (131) 628

3. Construction of the statute of limitations of Ohio.

McCluny v. Silliman, (270) 676

CONSTRUCTION OF STATE STATUTES—4.

1. The Act of the Legislature of New York of May 1, 1786, gave to the purchasers of forfeited estates the like remedy in case of eviction, for obtaining compensation for the value of their improvements, as is directed in the Act of the 12th of May, 1774. The latter act declares that the person or persons having obtained judgment against such purchasers, shall not have any writ of possession, nor obtained possession of such lands, &c., until he shall have paid to the purchaser of such lands, or persons holding title under him, the value of all improvements made thereon after the passing of the act. Held, that claims of compensation for improvements made under authority of these acts of the Legislature of New York are inconsistent with the provisions of the Treaty of Peace with Great Britain of 1783, and should be rejected.

Carver v. Astor, (1) 761

2. That in all cases a party is bound by natural justice to pay for improvements on land, made against his will or without his consent, is a proposition which the court are not prepared to admit.

Id., (Ib.) 761

3. There is no statute in Virginia which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this, the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect of any suspension of this right.

The United States v. Morrison, (124) 804

4. Soon after this case was decided in the Circuit Court for the District of East Virginia, a case was decided in the Court of Appeals of the State, in which this question on the execution law of the State of Virginia was elaborately argued, and deliberately decided. The decision is that the right to take out an *elegit* is not suspended by suing out a writ of *fi fieri facias*, and, consequently, that the lien of the judgment continues pending the proceedings on that writ. This court, according to its uniform course, adopts the construction of the act which is made by the highest court of the State.

Id., (Ib.) 804

5. Lands and land titles.

CONSTRUCTION OF STATUTES OF THE U.S.—3.

1. The offense against the law of the United States, under the seventh section of the Act of Congress, passed the 2d day of March, 1807, entitled "An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st of January, 1808," is not that of importing or bringing into the United States persons of color with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor of the State or persons appointed by the respective States to receive the same.

United States v. Preston, (65) 604

2. The Josefa Segunda, having persons of color on board of her, was, on the 11th of February, 1818, found hovering on the coast of the United States, and was seized and brought into New Orleans, and the vessel and the persons on board were libeled in the District Court of the United States of Louisiana, under the Act of Congress of the 2d of March, 1807. After the decree of condemnation below, but pending the appeal to this court, the sheriff of New Orleans went on, with the consent of all the parties to the proceedings, to sell the persons of color as slaves, and sixty-five thousand dollars, the proceeds, were deposited in the registry of the court to await the final disposal of the law. By the tenth section of the Act of the 30th of April, 1818, the six first sections of the act are repealed, and no provision is made by which the condition of the persons of color found on board a vessel hovering on the coast of the United States is altered from that in which they were placed under the Act of 1807, no power having been given to dispose of them otherwise than to appoint some one to receive them. The seventh section of the Act of 1818 confirms no other sales previously or subsequently made under the State laws, but those for illegal importation, and does not comprise the case of a condemnation under the seventh section. The final condemnation of the persons on board the Josefa Segunda took place in this court on the 13th of March, 1820, after Congress had passed the Act of the 3d of March, 1819, entitled "An Act in addition to an act prohibiting the slave trade," by the provisions of which persons of color brought in under any of the acts prohibiting the traffic in slaves, were to be delivered to the President of the United States to be sent to Africa. It could not affect the persons of color.

Id., (66) 605

3. In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. If, therefore, the persons of color who were on board the Josefa Segunda when captured, had been specifically before the court on the 13th of March, 1820, they must have been delivered up to the President of the United States to be sent to Africa, under the provisions of the Act of the 3d of March, 1819, and, therefore, there is no claim to the proceeds of their sale, under the law of Louisiana, which appropriated the same. The court do not mean to intimate that the United States are entitled to the money, for there was no power to sell the persons of color.

Id., (65) 604

4. Under the thirty-fourth section of the Judiciary Act of 1789, the acts of limitations of the several States where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the State courts.

McCluny v. Silliman, (277) 678

CONSTRUCTION OF STATUTES OF THE U. S.—4.

1. Priority of the United States.
2. Statutes of the United States.
3. *Ronkendort v. Taylor's Lessee*, (349) 882
4. Taxes.

CONTEMPT OF COURT—4.

1. That a counselor practising in the highest court of the State of New York in which he resides had been struck off from the roll of counselors of the District Court of the United States for the Peters 1, 2, 3, 4.

Northern District of New York, by the order of the Judge of the court, for a contempt, does not authorize this court to refuse his admission as a counselor of this court.

Ex-parte Tillinghast, (108) 798

2. This court does not consider the circumstances upon which the order of the district judge was given within its cognizance; or that it is authorized to punish for a contempt which may have been committed in the District Court of the Northern District of New York.

Id., (Ib.) 798

CONTINGENT REMAINDER—4.

See Remainder.

CONTRACTS—1.

1. Chancery and Chancery Practice, 11.

2. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.

The Bank of Columbia v. Hagner, (464) 222

3. Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident the intimation of courts have strongly favored the latter construction as being obviously the most just.

Id., (465) 223

4. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal.

Id., (Ib.) 223

5. An averment of performance is always made in the declaration upon contracts, containing dependent undertakings, and that averment must be supported by proof.

Id., (Ib.) 223

6. The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. But equity, which from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed.

Id., (Ib.) 223

7. It may be laid down as a rule that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. And this averment must be sustained by proof, unless the tender has been waived by the purchaser.

Id., (467) 224

8. If before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of the suit unnecessary. But this rule can never apply except in cases where the act which is construed into a waiver, occurs previous to the time for performance.

Id., (Ib.) 224

9. The taking possession of property by the vendee before conveyance, is a circumstance from which is to be inferred that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title, or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase money, had it been paid.

Id., (468) 224

10. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase money. It would be compelling him to take a law suit, instead of the land.

Id., (Ib.) 224

11. When no specific time for the payment of money is fixed in a contract by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand.

Id., (Ib.) 224

12. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement, forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper, stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Taylor v. Riggs, (598) 278

13. When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that can not be done, the party is in the condition of every other suitor in court, who makes a claim which he can not support.

Id. (600) 279

14. When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon unknown and vague impressions, made by a conversation antecedent to the reduction of the agreement.

Id. (Ib.) 279

CONTRACTS—2.

Upon a deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave under his hand a certificate that there had been "deposited to the credit of W. P. & W., \$7,730.81, which is subject to their order on presentation of this certificate." The deposit was made in the notes of the bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one-half their nominal value. When the certificate was presented to the bank, the cashier offered to pay the amount in the notes of the bank, but they refused to receive payment in anything but gold or silver. The language of the certificate is expressive of a general, not a specific deposit; and the Act of Incorporation is express, that the bank shall pay and redeem their bills in gold or silver. The transaction, then, was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it they might have refused to receive it; and the plaintiffs would certainly have recovered the gold and silver, to the amount upon the face of the bills.

The Bank of the Commonwealth of Kentucky v. Wister et al., (325) 439

CONTRACT—3.

See Fraud. 1.

CONTRACT—4.

1. A contract was made for rebuilding Fort Washington, by M., a public agent, and a deputy-quartermaster-general, with B.; in the profits of which M. was to participate. False measures of the work were attempted to be imposed on the government, the success of which was prevented by the vigilance of the accounting officers of the treasury. A bill was filed to compel an alleged partner in the contract to account for and pay to one of the partners in the transaction one half of the loss sustained in the execution of the contract.

2. Held, that to state such a case is to decide it. Public morals, public justice, and the well established principles of all judicial tribunals, alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which began with the corruption of a public officer, and progressed in the practice of known willful deception in its execution, can never be approved or sanctioned by any court.

Bartle v. Coleman, (184) 825

3. The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud. He must not expect that a judicial tribunal will degrade itself, by an exertion of its powers to shift the loss from one to the other, or to equalize the benefits or burdens which may have re-

sulted from the violation of every principle of morals and law.

Id. (Ib.) 825

4. It has been long settled that a promise made in consideration of an act which is forbidden by the law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law.

Craig et al. v. The State of Missouri, (410) 903

COPIES—3.

Certified copies of the opinions of the court, delivered in cases decided by the court, are to be given by the reporter, and not by the clerk of the court.

Anonymous, (397) 685

CORPORATION—1.

A subsequent board of directors of a bank is to be considered as knowing all the circumstances communicated, or known to a previous board.

The Mechanics' Bank of Alexandria v. Louisa and Maria Seton, (309) 157

CORPORATION—3.

1. The plaintiff placed goods in the hands of an auctioneer in the city of Alexandria, who sold the same, and became insolvent, having neglected to pay over the proceeds of the sales to the plaintiff. The auctioneer was licensed by the corporation of Alexandria, and the corporation had omitted to take from him a bond with surety for the faithful performance of his duties as auctioneer. This suit was instituted to recover from the corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency of the auctioneer, on an alleged liability, in consequence of the corporation having omitted to take a bond from the auctioneer. The power to license auctioneers, and to take bonds for their good behaviour, not being one of the incidents to a corporation, must be conferred by an act of the Legislature; and in executing it, the corporate body must conform to the act. The Legislature of Virginia conferred this power on the mayor, aldermen and commonalty of the several corporate towns within that commonwealth, of which Alexandria was then one, "provided that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties, payable to the mayor, aldermen and commonalty of such corporation." This was a limitation of the power.

Fonle v. The Corporation of Alexandria, (407) 722

2. Though the corporate name of Alexandria was "the mayor and commonalty," it is not doubted that a bond taken in pursuance of the act would have been valid.

Id. (Ib.) 722

3. The Act of Congress of 1804, "An Act to amend the charter of Alexandria," does not transfer generally to the common council, the powers of the mayor and commonalty, but the powers given to them are specially enumerated. There is no enumeration of the power to grant licenses to auctioneers. The act amending the charter, changed the corporate body so entirely as to require a new provision to enable it to execute the powers conferred by the law of Virginia. An enabling clause, empowering the common council to act in the particular case, or some general clause which might embrace the particular case, is necessary under the new organization of the corporate body.

Id. (408) 722

4. The common council granted a license to carry on the trade of an auctioneer, which the law did not empower that body to grant. Is the town responsible for losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the corporation, but is understood to act for himself as entirely as a tavern-keeper, or any other person who may carry on any business under a license from the corporate body.

Id. (409) 723

5. Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a license which it had no authority to grant, without taking that security for the conduct of the person obtaining the license, which its own ordinances had been supposed to require, and which might protect those who transact business

Peters 1, 2, 3, 4.

with the persons acting under the clause? The court find no case in which this principle has been affirmed.

Fowle v. The Common Council of Alexandria,

(409) 723

6. That corporations are bound by their contracts is admitted. That money corporations, or those carrying on business for themselves, are liable for torts is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided; is a principle for which we can find no precedent.

Id.

(*Ib.*) 723

CORPORATION—4.

1. The defendant claimed land in controversy under a tax sale which was made by a company incorporated by the Legislature of Connecticut in 1796, called "the proprietors of the half million of acres of land lying south of Lake Erie," and incorporated by an Act of the Legislature of Ohio, passed on the 15th of April, 1803, by the name of "the proprietors of the half million of acres of land lying south of Lake Erie, called the sufferers' land." In 1806 the Legislature of Ohio imposed a land tax, and authorized the sale of the lands in the State for unpaid taxes, giving to the owners the right to redeem within one year after the determination of their minority. This act was in force in 1808. In 1808 the directors of the company, incorporated by the Legislatures of Connecticut and Ohio, assessed two cents per acre on the lands of the company for the payment of the tax laid by the state of Ohio, and authorized the sale of those lands on which the assessments were not paid. The lands purchased by the defendant were the property of minors at the time of the sale; they having been sold to pay the said assessments under the authority of the directors of the company. Held, that the sale of the land under which the defendant claimed was void.

Beatty v. The Lessee of Knowler, (152) 813

2. That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.

Id.

(*Ib.*) 813

3. From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain those objects.

Id.

(*Ib.*) 813

4. The words, "all necessary expenses of the company," cannot be construed to enlarge the power to tax, which is given for specific purposes. A tax by the State is not necessary expense of the company, within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers.

Id.

(*Ib.*) 813

5. The provision in the tenth section, "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the State," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred.

Id.

(*Ib.*) 813

6. The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

Providence Bank v. Billing and Pittman,

(514) 939

COSTS—3.

Costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court, and no appeal lies from a mere decree respecting costs and expenses.

Canter v. The American and Ocean Insurance Company,

(319) 692

COURTS—1.

1. It is, doubtless, within the province of a court, Peters 1, 2, 3, 4. U. S., Book,

in the exercise of its discretion, to sum up the facts in the case to the jury; and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But, care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province.

M'Lanahan v. The Universal Insurance Company,

(182) 104

2. Little stress ought to be laid upon general expressions falling from judges, in the course of trials. Where the facts are not disputed, the judge often suggests in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury, but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court. This is so familiarly known, that it needs only to be stated, to be at once admitted.

Id.

(190) 107

3. Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection.

Elliott et al. v. Peirsol et al.,

(338) 169

4. The construction of words belongs to the court, and the materiality of an alteration in a deed, is a question of construction.

Steele's Lessee v. Spencer et al.,

(561) 262

5. Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the court.

Id.

(560) 262

6. A special verdict was found by the jury, upon which judgment was to be entered according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof. A deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions with the said deed, was contained in the record. The court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it.

M'Arthur v. Porter's Lessee,

(626) 290

COURTS—2.

1. It is no ground of reversal, that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient that the court has given no erroneous directions.

Pennock et al. v. Dialogue,

(16) 332

2. If either party considers any point presented by the evidence omitted in the charge of the court, it is competent for such party to require an opinion from the court upon that point. The court cannot be presumed to do more, in ordinary cases, than to express its opinion upon questions, which the parties themselves have raised on the trial.

Id.

(*Ib.*) 332

3. A court cannot be required to give an instruction to the jury as to the relation, right and credibility of the testimony adduced by the parties in a cause.

Van Ness v. Pacard,

(149) 378

4. In a controversy between two nations concern-

ing national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

Foster & Elam v. Neilson. (307) 433

5. However individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the Legislature, if that will has been clearly expressed.

Id. (Ib.) 433

6. After the acts of sovereign power over the territory in dispute with Spain, which have been exercised by the Legislature and government of the United States, asserting the American construction of the treaty by which the government claims it; to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction thus asserted; it is not in its own courts that this construction is to be denied.

Id. (309) 434

7. The court refused to reverse the decree of the Circuit Court of the County of Washington, although an error had been committed in proceeding under mandate from this court; as no benefit would result to the appellant from a reversal.

Campbell's Executors v. Pratt. (354) 449

8. A District Court of the United States, performing the appropriate duty of a District Court, is not sitting as a Circuit Court, because it possesses the powers of a Circuit Court also.

Southwick et al. v. The Postmaster-General. (442) 479

9. The power of the inferior court of a State to make an order at one term as of another, is of a character so peculiarly local, a proceeding so necessarily dependent on the judgment of the revising tribunal, that the judgment of the same is considered authority, and this court is disposed to conform to it.

The Bank of Hamilton v. Dudley's

Heirs. (522) 506

10. That a court of record, whose proceedings are to be proved by the record alone, should, at a subsequent term, determine that an order was made at a previous term, of which no trace could be found on its records, and that, too, after the repeal of the law which gave authority to make such an order; is a proceeding of so much delicacy and danger, which is liable to so much abuse, that some of the court question the existence of the power.

Id. (Ib.) 506

11. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. If in a case depending before any court a legislative act shall conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the act. The court must determine whether a repugnancy does, or does not exist, and in making this determination must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason.

Id. (524) 507

12. When the court was asked to instruct the jury upon a particular point, if they believed from the evidence certain facts, and there was not the slightest evidence from which the jury had a right to believe the existence of any such facts, the court ought not to have given such instructions, since they were calculated to mislead them, and raise a mere speculative question.

Chirac v. Reinecker. (625) 542

COURTS OF THE DISTRICT OF COLUMBIA—2.

It was assumed on the argument by the counsel

on both sides, that the Circuit Court of the County of Washington in the District of Columbia, is vested with the same power in relation to intestates' estates in that county, that is possessed by a county court in Maryland over lands lying within the county.

Thompson v. Tolmie.

(162) 383.

COURTS OF THE SEVERAL STATES—1.

1. If the court of a State had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a State court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States.

Elliott et al. v. Peirsol et al. (340) 170

2. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and, whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments, and orders, are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers.

Id. (Ib.) 170

3. The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings.

Id. (Ib.) 170

4. The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the State.

Id. (341) 170

5. The clerk of Woodford County Court has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made.

Id. (Ib.) 170

6. A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land should, within six months, make a deed, &c., with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner as if the same had been conveyed to him." The decree of the Supreme Court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the Registry Act of Ohio applies as well to a title under such a decree, as it would do if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed.

Steele's Lessee v. Spencer et al. (558) 261

7. It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the State tribunals in like cases.

Waring v. Jackson et al. (571) 267

8. Where by the established practice of courts in particular States, the courts in actions of ejectment look beyond the grant, and examine the progressive stages of the title, from its incipient State until its consummation; such a practice will form the law of cases decided under the same in these States, and the Supreme Court of the United States regard those rules of decision in cases brought up from such States, provided that in so doing they do not suffer the provisions of any statute of the United States to be violated.

Ross v. Barland et al.

(664) 306

COURTS OF THE UNITED STATES—1.

1. Jurisdiction.

2. Practice.

3. The course of prudence and duty in judicial proceedings in the United States courts, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our

Peters 1, 2, 3, 4.

very peculiar relations, cases may occur in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the Constitution, to conform as nearly as possible to the administration of justice in the courts of the several States.

Fullerton et al. v. The Bank of the United States. (614) 284

4. Courts of the several States.

COURTS OF THE UNITED STATES—2.

1. District courts of the United States.

2. Admitting that the Legislature of Ohio can give an occupant claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved, until he shall have received that value; and assuming that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the Legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury.

The Bank of Hamilton v. Dudley's Heirs. (526) 508

COURTS OF THE UNITED STATES—3.

1. This action was instituted in the District Court of the United States for the Eastern District of Louisiana, according to the forms of proceedings adopted and practiced in the courts of that State. The cause was tried by a special jury, and a verdict was rendered for the plaintiff. On the trial, the counsel for the defendant moved the court to direct the clerk of the court to take down in writing the testimony of the witnesses examined in the cause, that the same might appear on record, such being the practice of the State courts of Louisiana, and which practice the counsel for the defendant insisted was to prevail in the courts of the United States, according to the Act of Congress of the 26th of May, 1824; which provides that the mode of proceeding in civil causes in the courts of the United States established in Louisiana, shall be conformable to the laws directing the practice in the District Court of the State, subject to such alterations as the judges of the courts of the United States should establish by rules. The court refused to make the order, or to permit the testimony to be put down in writing; the judge expressing the opinion that the courts of the United States are not governed by the practice of the courts of the State of Louisiana. The defendant moved for a new trial, and the motion being overruled, and judgment entered for the plaintiff on the verdict, the defendant brought a writ of error to this court. Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing by the clerk, to be sent to the Supreme Court, to serve as a statement of facts in case of appeal, and the written evidence produced on the trial is to be filed with the proceedings. This is done to enable the appellate court to exercise the power of granting a new trial, and of revising the judgment of the inferior court. Held, that the refusal of the judge of the District Court of the United States to permit the evidence to be put in writing could not be assigned for error in this court, the cause having been tried in the court below and a verdict given on the facts by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the Constitution of the United States and of the amendment thereto, which declares, "no fact once tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law," is not competent to redress any error by granting a new trial. The proviso in the Act of Congress of the 26th of May, 1824, ch. 181, demonstrates that it was not the intention of Congress to give an absolute and imperative force to the State modes of proceeding in civil causes in Louisiana in the courts of the United States; for it authorizes the judge to modify them so as to adapt them to the organization of his own courts, and it further demonstrates that no absolute repeal was intended of the antecedent modes of proceeding authorized Peters 1, 2, 3, 4.

in the United States courts under former acts of Congress; for it leaves the judge at liberty to make rules, by which discrepancy between the State laws and the laws of the United States may be avoided.

Parsons v. Bedford et al. (444) 736

2. The act of Congress having made the practice of the State courts the rule for the courts of the United States in Louisiana, the District Court of the United States in that district is bound to follow the practice of the State, unless that court had adopted a rule superseding the practice.

Id. (445) 736

3. It was not the intention of Congress, by the general language of the Act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by a jury; and to enable it, after trial by jury, to do that, in respect to the courts of the United States sitting in Louisiana, which is denied to such courts sitting in all the other States of the Union.

Id. (447) 737

4. No court ought, unless the terms of an act of Congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the Constitution. The terms of the Act of 1824 may well be satisfied by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial. The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by a bill of exceptions. If there be any mistake of the facts, the court below is competent to redress it, by granting a new trial.

Id. (4b.) 737

COVERTURE—3.

See *Femes Covert*.

DAMAGES—3.

1. The faithful execution of orders which an agent or correspondent has contracted to execute is of vital importance in commercial transactions, and may often affect the injured party far beyond the actual sum misapplied. A failure in this respect may entirely break up a voyage and defeat the whole enterprise. Speculative damages dependent on possible, successive schemes, ought not to be given in such cases; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate.

Bell et al. v. Cunningham et al. (85) 612

2. The jury, in an action for damages for breach of orders, may compensate the plaintiff for actual loss, and not give vindictive damages. The profits which would have been obtained on the sale of the article directed to be purchased, may be properly allowed as damages.

Id. (86) 612

3. The libelants, in their original libel in the District Court of the United States for the District of South Carolina, prayed that certain bales of cotton might be decreed to them with damages and costs. Canter, who also claimed the cotton, prayed the court for restitution, with damages and costs. The District Court decreed restitution of part of the cotton to the libelants, and dismissed the libel, without any award of damages on either side. Both parties appealed from this decree to the Circuit Court, where the decree of the District Court was reversed, and restitution of all the cotton was decreed to Canter, with costs; without any award of damages, or any express reservation of that question in the decree. From this decree the libelants in the District Court appealed to this court; no appeal was entered by Canter. Held, that the question of a claim of damages by Canter is not open before this court. The decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages. It was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution and costs only. This is not a proper case for the award of damages. The proceedings of the libelants were in the ordinary course to vindicate a supposed legal title. There is no pretense to say that the suit was instituted without probable cause, or was conducted in a malicious or oppressive manner. The libelants had a right to submit their title to the decision of a judicial tribunal, in any legal mode which promised

them an effectual and speedy redress. Where parties litigate in the admiralty, and there was a probable ground for the suit or defense, the court considers the only compensation which the successful party is entitled to, is a compensation in costs and expenses. If the party has suffered any loss beyond these, it is *damnum absque injuria*.

Canter v. The American and Ocean

Insurance Company, (318) 692

4. The settled practice of this court is, that whenever damages are claimed by the libellant or the claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages; and the party will be deemed to have waived the claim for damages unless he then interposes an appeal or cross appeal to sustain that claim.

Id. (Ib.) 692

5. Counsel fees in defending and prosecuting successfully a case of admiralty jurisdiction allowed as damages.

Id. (307) 689

DEBTS-2.

1. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is upon the death of the party under whom he claims immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens, which have been created by the party in his lifetime, or by law at his decease. It is not an unqualified, though it may be a vested interest, and it confers no title, except to what remains after every such lien is discharged.

Wilkinson v. Leland et al., (658) 553

2. By the laws of Rhode Island, as well as of all the New England States, the real estate of intestates stands chargeable with the payment of their debts upon a deficiency of assets.

Id. (Ib.) 553

DEEDS-1.

1. See Feme covert, 1.

2. If a deed has not been proved, acknowledged and recorded, and would therefore be insufficient against subsequent purchasers, without notice, parties who claim under such deed have a right to come into a court of equity, for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title.

Findlay et al. v. Hinde and Wife, (245) 130

3. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony.

Elliott et al. v. Peirsol et al., (338) 169

4. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these States, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

Id. (Ib.) 169

5. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed.

Id. (339) 169

6. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid.

Id. (Ib.) 169

7. It is the construction of the Act of 1810, that the clerks of the County Court of Kentucky, have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands.

Id. (Ib.) 169

8. What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

Id. (340) 170

9. A deed from *Baron and feme*, of lands in the State of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a reconveyance to the husband and thus to vest in him the estate of the wife; was indorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows:—"Attest, J. M'Kenney, Jun., clerk."

"Woodford County, ss. September 11th, 1813.

"This deed from James Elliott, and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

"JOHN M'KENNEY, Jun., C. C. C."

Held, that subsequent proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect or give validity to the deed.

Id. (Ib.) 170

10. Whether erasures and alterations in a deed are material or not, is a question for the court.

Steele's Lessee v. Spencer et al., (560) 262

11. The provisions of the laws of Kentucky relative to the acknowledgment of deeds.

Elliott et al. v. Peirsol et al., (338) 169

DEMURRER-3.

1. The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is, therefore, bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favor of the other party. And if upon any view of the facts the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

Thornton v. The Bank of Washington, (36) 594

2. The defendant in the court below having withdrawn his cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiff, subject to the demurrer, cannot hope for a judgment in his favor, if by any fair construction of the evidence the verdict can be sustained.

Chinoweth et al. v. The Lessee of Haskell et al., (36) 616

DEPOSITIONS-1.

1. The authority given by the Act of Congress of 24th September, 1789, chap. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible.

Bell v. Morrison et al., (355) 176

2. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed.

Id. (356) 176

3. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to supply any defects in the taking the deposition.

Id. (Ib.) 176

DEPOSITIONS-2.

See Evidence.

DESCENTS-2.

1. The statute of descents of Rhode Island, of 1822, enacts, "that when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend, and pass in equal portions to his or her kindred in the following course." It then provides, "if there be no father, then to the mother, brother and sister of such intestate, and their descendants, or such of them as there be;" and then declares, in the nature of a proviso, that "when the title to any estate of inheritance, as to which the person having such title shall die intestate, came by descent,

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gift, or devise from the parent or other kindred of the intestate, and such intestate die without children; such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended, if any there be."

Gardner v. Collins, (58) 347

2. An estate situated in Rhode Island was devised by John Collins to his daughter, Mary Collins, in fee; Mary Collins intermarried with Caleb Gardner, and upon her death, in 1806, the estate descended to her three children, John, George, and Mary C. Gardner. John and George Gardner died intestate and without issue, and Mary C. Gardner, as heir to her brothers, became seized of the whole estate, and died in 1822. Held, that under the provisions of the law of descents of Rhode Island, two-thirds of the estate of Mary C. Gardner descended to Samuel F. Gardner, Eliza Phillips formerly Eliza Gardner, and Mary Clarke, formerly Mary Gardner, children of Caleb Gardner by a former marriage; they being brothers and sisters of the half blood of Mary C. Gardner; it being admitted that the remaining one-third, which Mary C. Gardner took by immediate descent from her mother, belongs to the heirs of the whole blood of John Collins.

Id. (86) 357

3. The phrase "of the blood," in the statute, includes the half blood. This is the natural meaning of the word "blood," standing alone, and unexplained by any context. A half brother or sister is of the blood of the intestate; for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another, who has any, however small, a portion of the same blood derived from a common ancestor. In the common law, the word "blood" is used in the same sense. Whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied from the context, or known principles of law.

Id. (87) 357

4. A descent from a parent to a child cannot be construed to mean a descent through, and not from a parent. So a gift or devise from a parent, must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote passing through the parent.

Id. (90) 358

5. It is true, that in a sense an estate may be said to come by descent from a remote ancestor to a person upon whom it has devolved, through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the terms. When an estate is said to have descended from A to B, the natural and obvious meaning of the words is, that it is an immediate descent from A to B.

Id. (91) 358

6. At the common law, a man might sometimes inherit who was of the whole blood of the intestate, who could not have inherited from the first purchaser. As in the case of a purchase of an estate by a son who dies without issue, and his uncle inherits the same, and dies without issue; the father may inherit the same from the uncle, although he could not inherit from his own son.

Id. (93) 359

7. By the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last seized of the estate; and if an intestate leaves a brother of the whole blood who survived him and died without issue, and without having ever been actually seized of the estate, the estate will descend to the half blood of the person so seized.

Chirac v. Reinacker, (625) 542

8. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is upon the death of the party under whom he claims immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens, which have been created by the party in his lifetime, or by law at his decease. It is not an unqualified, though it may be a vested interest, and it confers no title, except to what remains after every such lien is discharged.

Wilkinson v. Leland et al., (658) 553

9. By the laws of Rhode Island, as well as of all the New England States, the real estate of intestates stands chargeable with the payment of their debts upon a deficiency of assets.

Id. (Ib.) 553

DEVISE—1.

1. The testator devised to his son Joseph Eden certain portions of his estate in New York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators forever. In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and adds the following clause: "It is my will and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, I give all the property aforesaid to my brother John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister Hannah Johnson, of Whitby, in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden on the death of his brother Joseph Eden became seized of an estate in fee-simple absolute.

Waring v. Jackson et al., (571) 267

2. Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the courts of New York, prevent the operation of a devise by another in whom the title to the estate was vested by the death of the defendant in the executions.

Id. (Ib.) 267

3. The testator residing and owning real and personal estate in the county of Alexandria, District of Columbia, by his will gave "all his estate, real and personal, to his wife during her life, for the use and purpose of raising and educating his children," each child at the age of twenty-one to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife. He recommends his wife to sell the negroes for a term of years, and directs "an appraisement" only of "his estate" shall be made, that no sale of the furniture shall be made; and then states "that he is indebted to no one, and proposes to continue so," that he is surety for his brother, for which he holds a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it." This will does not charge the real estate of the testator with his debts.

Archer et al. v. Deneale et al., (588) 274

4. The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation.

Id. (589) 274

DEVISE—3.

1. The testator gave all the rest and residue and remainder of his estate, real and personal, comprehending a large real estate in the city of New York, to the Chancellor of the State of New York, and recorder of the city of New York, &c. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office to the uses and trusts, subject to the conditions and appointments declared in the will; which were, out of the rents, issues and profits thereof, to erect and build upon the land upon which he resided, which was given by the will, an asylum, or marine hospital, to be called "The Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepit and worn-out sailors, &c. And after giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors should forever continue the governors thereof, &c., he adds, "it is my will and desire that if it cannot legally be done according to my above intention, by them, without an act of the Legislature, it is my will and desire that they will as soon as possible apply for an act of the Legislature to incorporate them for the purpose above specified; and I do further declare it to

be my will and intention that the said rest, residue, &c., of my estate should be at all events applied for the uses and purposes above set forth; and that it is my desire all courts of law and equity will so construe this my said last will as to have the said estate appropriated to the above uses, and that the same should in no case, for want of legal form or otherwise, be so construed as that my relations, or any other persons, should heir, possess or enjoy my property, except in the manner and for the uses herein above specified." Within five years after the death of the testator, the Legislature of the State of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons holding the offices designated in the will and their successors a body corporate, by the name of "The Trustees of the Sailor's Snug Harbor," and enabling them to execute the trusts declared in the will. This is a valid devise to divest the heir of his legal estate, or at all events to affect the lands in his hands with the trust declared in the will. If, after such a plain and unequivocal declaration of the testator with respect to the disposition of his property, so cautiously guarding against and providing for every supposed difficulty that might arise, any technical objection shall now be interposed to defeat his purpose, it will form an exception to what we find so universally laid down in all our books as a cardinal rule in the construction of wills, that the intention of the testator is to be sought after and carried into effect. If this intention cannot be carried into effect precisely in the mode at first contemplated by him, consistently with the rules of law, he has provided an alternative, which with the aid of the act of the Legislature, must remove every difficulty.

Ingalls v. The Trustees of the Sailor's Snug Harbor. (113) 622

2. In the case of "The Baptist Association v. Hart's Executors" (4 Wheat., 27), the court considered the bequest void for uncertainty as to the devisees, and the property vested in the next of kin, or was disposed of by some other provisions of the will. If the testator in that case had bequeathed the property to the Baptist Association on its becoming thereafter and within a reasonable time incorporated, could there be a doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund?

Id. (114) 623
3. C. B., by her last will and testament, devised "all her estate, real and personal, wheresoever and whatsoever in law or equity, in possession, reversion, remainder or expectancy, unto her executors and to the survivor of them, his heirs and assigns forever," upon certain designated trusts; under the statute of wills of the State of New York (1 N. Y. Revised Laws, 364), all the rights of the testator to real estate, held adversely at the time of the decease of the testator, passed to the devisees by this will.

Id. (127) 627
4. The testator was seized of a very large real and personal estate in the States of Virginia, Kentucky, Ohio and Tennessee. After making, by his will, in addition to her dower, a very liberal provision for his wife for her life, out of part of his real estate, and devising, in case of his having a child or children, the whole of his estate to such child or children with the exception of the provision for his wife and certain other bequests, his will declares: "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel his wife, lately Rachael Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's or of my sister Elizabeth's, wife to John Mitchell, and to their issue." The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood, who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander McCall. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the

other to Abraham B. Trigg. BY THE COURT: We have found no case in which a general devise in words, importing a present interest in a will making no other disposition of the property on a condition which may be performed at any time, has been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended, is a condition subsequent.

Finlay v. King's Lessee. (377) 712

5. It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, it is to be collected from the whole will, the condition is subsequent.

Id. (374) 711

6. It is a general rule that a devise in words of the present time, as, "I give to A my lands in B," imports, if no contrary intent appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance. The result of these two principles seems to be that a devise to A, on condition that he shall marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B at anytime during his life. The condition is subsequent.

Id. (376) 712

7. As the devise in the will to William King was on a condition subsequent, it may be construed so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction.

Id. (378) 712

8. The introductory clause in the will states, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are, "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life, is postponed until her death.

Id. (379) 713

9. *Quære*, Did William King take an estate which, in the events that have happened, enures to his own benefit; or is he, in the existing state of things, to be considered a trustee for the heirs of the testator? This question cannot be decided in this cause; it belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust.

Id. (383) 714

DEVISE AND BEQUEST—2.

1. The testatrix directed that the interest of certain funds should be applied "to the proper education" of certain persons her nephews, "so that they may be severally fitted and accomplished in some useful trade;" and gave to each of them "who should live to finish his education or reach the age of twenty-one years of age, one hundred pounds to set him up in his trade." She also gave the whole of her estates of every description, to be equally divided among certain persons, who should be living when the interest applicable to the education of her nephews should cease to be re-

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quired, they being some of the persons among whom the same was to be divided; and she directed that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised and given, should be deferred, and no longer.

The court do not think that in ascertaining the amount applicable to the education of the appellant, one of the learned professions may be taken as the standard, with as much propriety as the trade or art of a mechanic. The distinction between a profession and a trade is well understood; and they are seldom, if ever, confounded with each other in ordinary language. If the testatrix had contemplated what in the common intercourse of society is denominated a profession, she would scarcely have used a term, which is generally received as denoting a mechanical art. But the bequest is not confined to the expense of acquiring the trade, so as to be enabled to exercise it in the common way. The testatrix intended such an education as would fit her relations to hold a distinguished place in that line of life in which she designed them to move. The sum allowed for the object ought to be liberal, such as would accomplish it, if the fund from which it was to be drawn would permit it.

Dandridge v. Washington's Executors, (377) 457

DISCOUNT—3.

See Interest, 1, 2, 3.

DISTRICT COURTS OF THE UNITED STATES—2.

A District Court of the United States, performing the appropriate duty of a District Court, is not sitting as a Circuit Court, because it possesses the powers of a Circuit Court also.

Southwick et al. v. The Postmaster-General, (442) 479

DISTRICT OF COLUMBIA—1.

1. The Act of the Legislature of Maryland, passed 19th December, 1791, entitled "An Act concerning the Territory of Columbia, and the City of Washington," which, by the sixth section provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen.

Spratt v. Spratt, (349) 173

2. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act. Thus after-purchased lands, vest in him as a citizen, not by virtue of the act of the Legislature of Maryland, but because of his acquiring the rights of citizenship.

Id. (Ib.) 173

3. Land in the County of Washington, and District of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchasers, who were foreigners; and the capacity so to transmit those lands, is given absolutely by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner.

Id. (Ib.) 173

4. The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court through the Circuit Court for the County of Washington, by virtue of the Act of Congress of February 13, 1801; and by the act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of \$1,000 in order to entitle the party to an appeal.

Nicholls et al. v. Hodges' Ex. (565) 264

DUTIES ON MERCHANDISE IMPORTED INTO THE UNITED STATES.

1. See Priority of the United States.
2. See Lien of the United States for duties.

EJECTMENT—2.

Where A was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery Peters 1, 2, 3, 4.

in the ejectment, when offered in evidence in an action of trespass for mesne profits against B, is not conclusive evidence of title in the plaintiffs; but it is *prima facie* evidence thereof, and is evidence of the plaintiffs' possession; but B may controvert the title of the plaintiffs. As to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs.

Chirac v. Reinecker, (622) 541

EJECTMENT—3.

1. When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

Willison v. Watkins, (49) 599

2. If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his devise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit, and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession.

Id. (Ib.) 599

3. A mortgagee, or direct purchaser from the tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy.

Id. (50) 599

4. It is an undoubted principle of law, fully recognized in this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who responds under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by the lapse of time or demand of possession.

Id. (47) 598

5. The same principle applies to a mortgagee and mortgagee, trustee and *cestui que trust* and generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title.

Id. (48) 598

EQUITY—1.

1. It is a principle of equity that when an instrument is drawn and executed which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman either in fact or in law, does not fulfill, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement.

Hunt v. Rousmaniere's Adm., (13) 33

2. The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement according to the terms of it, and to the manifest intention of the parties.

Id. (Ib.) 33

3. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant

relief, according to the nature of the particular case in which it is sought.

Hunt v. Rousmaniere's Adm., (13) 33

4. If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented for a court of equity to decree another security to be given different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed.

Id., (14) 33

5. Courts of Equity may compel parties to execute their agreements, but they have no power to make agreements for them. The death of one of the parties, and the consequent inefficiency of a security selected and intended to be valid and complete, but which was not so, will not give the right of interference.

Id., (1b.) 33

6. A mistake arising from ignorance of law is not a ground for reforming a deed founded on such mistake, except in some few cases, and those of peculiar characters.

Id., (15) 33

7. If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors.

Id., (16) 33

8. It seems that there may be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law. But where parties upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security of a different character to be given, or decree that to be done which the parties suppose would have been effected by the instrument which was finally agreed upon. The court would be much less disposed to interfere in such a case in favor of a particular creditor against the general creditors of an insolvent estate.

Id., (17) 35

9. Parol evidence, 1.

10. Where the vendee of real estate had purchased it subject to the dower of the widow—of which dower he might have been informed if he had used proper diligence—a court of equity will not interfere to release the vendee, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed.

Greenleaf v. Queen et al., (147) 87

11. Chancery Practice, 1, 2, 3.

12. A court of equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice, as far as the circumstances will permit, and refuse specific execution unless the party seeking it will comply with such modifications as justice requires.

The Mechanics' Bank of Alexandria v. Lynn, (382) 187

13. If a bill charges a defendant with notice of a particular fact, an answer must be given without special interrogatory to the matter. But, a defendant is not bound to answer an interrogatory not warranted by some matter contained in a former part of the bill.

Id., (383) 188

14. When a judgment debtor comes into a court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant the prayer, upon such conditions as justice demands.

Id., (384) 188

15. In an appeal, under the testamentary law of Maryland, the court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the County of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim.

Nicholls et al. v. Hodges' Ex., (566) 264

EQUITY—2.

It is well settled, both in the court of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity.

Hunt v. Wickliffe, (212) 401

ERROR—2.

The court refused to reverse the decree of the Circuit Court of the County of Washington, although an error had been committed in proceeding under the mandate from this court; as no benefit would result to the appellant from a reversal.

Campbell's Executors v. Pratt, (354) 449

ERROR—3.

Generally speaking, matters on practice in the inferior courts do not constitute subjects upon which errors can be assigned in the appellate court.

Parsons v. Bedford et al., (445) 736

ESCAPE—4.

After judgment obtained in the Circuit Court of the United States against the drawer of a note, a *capias ad satisfaciendum* was issued against him by the holder, and he was put in prison. Two justices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors; and the jailer permitted him to leave the prison. The jailer made himself and his securities liable for an escape, by permitting the prisoner to leave the prison.

Bank of the United States v. Tyler, (366) 888

ESTATES IN REMAINDER—4.

See Remainder.

ESTATES ON CONDITIONS—3.

See Condition.

ESTOPPEL—4.

See Evidence, 2, 3.

EVIDENCE—1.

1. When one party to an agreement, signed by the other contracting party, had delivered to such party a copy of an agreement in his own handwriting, but not signed by him, and from the nature of the instrument it was to be fairly presumed the original was in his custody, notice to produce the original paper in order to give the copy in evidence is not necessary. Such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered not as a copy but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence.

Carroll v. Peake, (22) 36

2. Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents.

Id., (1b.) 36

3. If in any case in which testimony was offered by a plaintiff, the court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action.

The Bank of Washington v. Triplett & Neale, (31) 40

4. The cross examination of a witness by the opposite party is considered as a waiver of exceptions to the regularity of his deposition.

The Mechanics' Bank of Alexandria v. Maria and Louisa Seton, (307) 156

5. By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record, as evidence; unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent."

Id., (1b.) 156

6. Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day,

Peters 1, 2, 3, 4.

gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement up to the periods when the certificates bore date, such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence to charge the parties, whose agent the person giving the certificates was.

Barry v. Foyles, (316) 159

7. Where the suit is brought upon a partnership transaction against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given to support such a declaration; and the want of notice has never been considered as justifying an exception to such evidence at the trial.

Id. (317) 160

8. Depositions, how taken under the provisions of the Act of Congress of 24th September.

Bell v. Morrison, (355) 176

9. The authority given by the Act of Congress of 24 September, 1789, ch. 20, to take depositions of witnesses in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and, therefore, it is necessary to establish that all the requisites of the law have been complied with before such testimony is admissible.

Id. (1*b.*) 176

10. The certificate of the magistrate taking the deposition is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed.

Id. (356) 176

11. It should plainly appear from the certificate of the magistrate that all the requisites of the statute have been fully complied with, and no presumption will be admitted to supply any defects in the taking the deposition.

Id. (1*b.*) 176

12. A letter from a deceased member of a family stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore in her deposition that the facts stated in the letter had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, in a question of pedigree.

Elliott v. Peirsol, (337) 169

13. The rule of evidence that in questions of pedigree, the declarations of aged and deceased members of the family may be proved and given in evidence, has not been controverted.

Id. (1*b.*) 169

14. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written about the time, stating the pedigree of the claimants, was not considered as excluded by the rule of law which declares that declarations relating to pedigree made *post litem motam*, cannot be given in evidence.

Id. (1*b.*) 169

15. Where the defendant has reserved a right to move the court to exclude any part of the plaintiff's evidence which he might choose to designate as incompetent, and it did not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency unless the whole was incompetent. The court is not bound to do more than respond to the motion in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection.

Id. (338) 169

16. A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *prima facie* evidence of his execution of the instrument.

Conard v. The Atlantic Insurance Company.

(451) 217

Peters 1, 2, 3, 4.

17. Under the law of the State of Kentucky and the decisions of their courts, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will.

Davis v. Mason, (508) 241

18. It is a settled rule in Kentucky that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.

Id. (509) 241

19. The rule of law is that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in favor of the party who is called upon for it. For this reason a party who is in possession of an original paper, is not permitted to give a copy in evidence or to prove its contents.

Taylor v. Riggs, (596) 277

20. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least in a court of law.

Id. (1*b.*) 277

21. It is a sound general rule that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received.

Id. (1*b.*) 277

22. The testimony which establishes the loss of a paper is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause.

Id. (597) 277

23. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper stated to be lost or mislaid been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Id. (598) 278

24. When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support.

Id. (600) 279

25. When parties reduce their contract to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement.

Id. (1*b.*) 279

EVIDENCE—2.

1. It is undoubtedly true, that questions respecting the admissibility of evidence, are entirely dis-

ting from those which refer to its sufficiency or effect. They arise in different stages of the trial; and cannot, with strict propriety, be propounded at the same time.

The Columbian Insurance Company v. Lawrence. (44) 343

2. Presumptions from evidence of the existence of particular facts, are in many cases, if not in all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted upon, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that they would err in giving such an instruction.

The Bank of the United States v. Coreoran, (133) 372

3. A court cannot be required to give an instruction to the jury as to the relation, right and credibility of the testimony adduced by the parties in a cause.

Van Ness v. Pacard, (149) 378

4. In an action originally commenced against A and B as partners, upon an alleged engagement by the firm, and where A, who was not found or served with process, was offered as a witness in favor of B, having been released by B, the court said: "It is to be premised that the only ground upon which the objection can be rested is the supposed interest of the witness in the event of the cause: since the suit having regularly abated as to him by the return that he was "no inhabitant," he was no more a party to it than he would have been had his name been altogether omitted in the declaration. As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favor he testified, and who offered it in evidence; since the plaintiffs' recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of A protected him against any action which A might bring against him for contribution or otherwise."

Le Roy et al. v. Johnson, (194) 395

5. Undoubtedly, the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it to support his objections. The whole burthen of proof lies on him. But if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony, also, must be laid before the jury; and the court may declare the law upon the fact, but cannot declare it on the testimony.

Patterson's Lessee v. Jenks, (227) 406

6. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal.

American Fur Company v. The United States, (364) 452

7. Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the other.

Id. (365) 453

8. After the plaintiffs had proved, by a surveyor, that most of the lines and streets in "Howard's late addition to Baltimore town" had been run by him as the same were marked in a particular plot, upon which was the lot of ground for which the ejectment was brought, they gave the plot so authenticated in evidence. This was contained in a volume in which were also other plots. The defendant then offered in evidence another plot, in the same volume, but gave no evidence to authenticate it, claiming to use the same in evidence, as it was authenticated in the same volume in which was that exhibited by the plaintiffs. It was held, that the whole volume was not in evidence; and if the defendant meant to use any plot in the same, it was his duty to establish it by competent proof of its particular authenticity.

Chirac et al. v. Reinecker, (619) 540

9. Evidence to establish heirship and pedigree, had been obtained under a commission issued for that purpose to France, in an action of ejectment, in which the plaintiffs had recovered the lots of ground for which this suit was instituted. In the course of that trial, a bill of exception was tendered by the plaintiffs and sealed by the court, in which the evidence contained in the commission was inserted. The commission and the testimony obtained under it were afterwards lost. In an ac-

tion for mesne profits, brought by the plaintiffs in the ejectment, against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit on record; it was held, that the testimony, as copied into the bill of exceptions, was legal and competent evidence of pedigree.

Id. (620) 540

10. It is well known that in cases of pedigree, the rules of law have relaxed in respect to evidence to an extent far beyond what has been applied to other cases. This relaxation is founded on principles of public convenience and necessity.

Id. (621) 540

11. Where A was the real landlord of the premises in controversy in an ejectment, and employed counsel to defend the suit, but was not a party defendant on the record, the record of the recovery in the ejectment, when offered in evidence in an action of trespass for mesne profits against B, is not conclusive evidence of title in the plaintiffs; but is *prima facie* evidence thereof, and is evidence of the plaintiffs' possession; but B may controvert the title of the plaintiffs. As to third persons, strangers to the suit, the record is evidence to show possession of the property in the plaintiffs.

Id. (622) 541

EVIDENCE—3.

1. See Commission, 1, 2, 3, 4.

2. A witness, the clerk of the plaintiff, examined under a commission, stated the payment of a sum of money to have been made by him to the defendant, and that the defendant, at his request, made an entry in the plaintiff's rough cash book, writing his name at full length, and stating the sum paid to him, not so much for the sake of the receipt, as in order for him, the witness, to become acquainted with his signature and the way of spelling his name. It is not necessary to produce the book in which the entry was made, and parol evidence of the payment of the money is legal. It cannot be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact is excluded.

Keene v. Meade, (7) 383

3. An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated.

The United States v. Buford, (29) 591

4. But when moneys come into the hands of an individual, not through the officers of the treasury, or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by the evidence on which that statement was made.

Id. (1b.) 591

5. On a trial in ejectment, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants, within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove by a witness that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce as evidence, official copies of entries made by other and third persons since the date of the plaintiffs' grant, for the purpose of proving a general opinion, that the lands contained in the plaintiff's survey, made under the order of the court, after the commencement of the suit, were vacant at the date of such entries; and to disprove notice to him of the identity of plaintiff's claim when he made the entries under which he claimed. The evidence was unquestionably irrelevant.

Stringer et al. v. The Lessee of Young et al., (337) 698

6. Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry.

Id. (1b.) 698

7. The admission of evidence which was irrelevant, but which was not objected to, will not authorize the admission of other irrelevant evidence

Peters 1, 2, 3, 4.

offered to rebut the same, when the same is objected to.

Stinger et al. v. The Lessee of Young et al., (337) 698

8. Certified copies of the opinions of the court are to be given by the reporter, and not by the clerk of the court.

Anonymous, (397) 719

EVIDENCE—4.

1. The plaintiff claimed under a marriage settlement purporting to be executed the 13th of January, 1758, by an indenture of release between Mary Philipse, of the first part, Roger Morris, of the second part, and Johanna Philipse and Beverly Robinson, of the third part. Whereby, in consideration of a marriage intended to be solemnized between Roger Morris and Mary Philipse, &c., R. M. and M. P. granted, &c., to J. P. and B. R. "in their actual possession now being, by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the date of these presents, and by force of the statute for transferring uses into possession, and to their heirs, all those," &c., upon certain trusts therein mentioned. This indenture, signed and sealed by the parties, and attested by the subscribing witnesses to the sealing and delivery thereof, with a certificate of William Livingston, one of the witnesses, and the execution thereof before a judge of the Supreme Court of the State of New York, dated the 5th of April, 1757, and of the recording thereof in the Secretary's office of New York, was offered in evidence by the plaintiff, and objected to, on the ground that the certificate of the execution was not legal and competent evidence, and did not entitle the plaintiff to read the deed without proof of its execution. A witness was sworn, who proved the handwriting of William Livingston, and of the other subscribing witness, both of whom were dead. The certificate of the judge of the Supreme Court of New York stated that William Livingston had sworn before him that he saw the parties to the deed "sign and seal the indenture, and deliver it as their and each of their voluntary acts and deeds," &c. BY THE COURT: According to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture; not merely of the signing and sealing, but of the delivery, to justify the court in admitting the deed to be read to the jury; and that in the absence of all controlling evidence, the jury would have been bound to find that the deed was duly executed.

Carver v. Astor, (1) 761

2. The plaintiff, in the ejectment, derived title under the deed of marriage settlement of the 15th of January, 1758, executed by Mary Philipse, who afterwards intermarried with Roger Morris, and by Roger Morris and certain trustees named in the same. The premises, before the execution of the deed of marriage settlement, were the property of Mary Philipse, in fee-simple. The defendant claimed title to the same premises under a sale made thereof, as the property of Roger Morris and wife, by certain commissioners acting under the authority of an Act of the Legislature of New York passed the 22d of October, 1779, by which the premises were directed to be sold as the property of Roger Morris and wife, as forfeited; Roger Morris and wife having been declared to be convicted and attainted of adhering to the enemies of the United States. Not only is the recital of the lease in the deed of marriage settlement evidence between the original parties to the same of the existence of the lease, but between the parties to this case the recital is conclusive evidence of the same, and supercedes the necessity of introducing any other evidence to establish it.

Id., (Ib.) 761

3. The recital of a lease in a deed of release is conclusive evidence upon all persons claiming under the parties in privity of estate. Independently of authority, the court would have arrived at the same conclusion upon principle.

Id., (Ib.) 761

4. Law of estoppels.

5. Leases, like other deeds and grants, may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital in an old deed of the fact of such a lease having been executed, is certainly presumptive proof, or stronger, in favor of such possession under title, than the naked presumption arising from a mere unexplained possession.

Id., (Ib.) 761

Peters 1, 2, 3, 4.

6. The Legislature incorporated a company, and declared that the Act of Incorporation should be considered a public act. *Held*: the provision in the act that it should be considered a public act, must be regarded in courts; and its enactments noticed, without being specially pleaded, as would be necessary if the act were private.

Beatty v. The Lessee of Knowler, (152) 813

7. As the records of the land-office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated.

Galt et al. v. Galloway et al., (332) 876

8. After an assessor of taxes has made the returns of his assessments according to the law under which he acted, and the books for the collection of the taxes have been made up according to the returns, and delivered to a collector, it is not necessary to prove the appointment of the assessor. The highest evidence of his appointment is the sanction given to the returns of the assessor.

Runkendorf v. Taylor's Lessee, (349) 882

EXECUTION—1.

Under the law of Virginia which directs the sheriff holding an execution against the goods and effects of defendants to take fortheoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution after ten days' notice to the obligors in the bond of the motion for execution, the property levied on not having been redelivered according to the condition of the bond; if the notice given to the obligees (of the plaintiff's intention to proceed) is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored.

Alexander et al. v. Brown, (684) 315

EXECUTORS AND ADMINISTRATORS—1.

1. The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons according to law. The commission to be allowed to an executor or administrator is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent., on the amount of the inventory.

Nicholls et al. v. Hodges' Ex., (565) 264

2. If the executor has a claim on the estate of the deceased, it shall stand on an equal footing with other claims of the same nature.

Id., (Ib.) 264

3. On a plenary proceeding, if either party shall require it, the court will direct an issue or issues to be made up and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery or to a court of law; and in Maryland, the decision of the court to which the appeal is made is final.

Id., (Ib.) 264

4. The court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the County of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim.

Id., (566) 264

5. The commission to be allowed to the executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances, and it was obviously the intention of the Legislature that the decision of the Orphans' Court should be final and conclusive.

Id., (565) 264

EX POST FACTO—2.

See Appendix, 681, 361

FACTOR—3.

See Agent and principal.

FEES—3.

The counsel fees allowed as expenses attending the prosecution of an appeal to the Circuit Court, and to the Supreme Court, in an admiralty case.

Canter v. The American and Ocean Insurance Company, (307) 689

FEME COVERT—1.

1. *Feme sole* trader.

2. By the law of Maryland, a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property, acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void.

Rhea et al. v. Rhenner, (109) 73

3. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony.

Elliott et al. v. Peirsol et al., (335) 169

4. In Virginia and Kentucky, the modes of conveyance by fine and common recovery have never been in common use; and in these States, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

Id. (1b.) 169

5. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

Id. (339) 169

6. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid.

Id. (1b.) 169

7. It is the construction of the Act of 1810 that the clerks of the County Court of Kentucky have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands.

Id. (1b.) 169

8. What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

Id. (340) 170

9. A deed from Baron and *feme* of lands in the State of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a reconveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September, 11th, 1816," and was certified as follows:—"Attest, J. M'Kenney, Jun., Clerk."

"Woodford County, ss.

SEPTEMBER 11th, 1813.

"This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. JOHN M'KENNEY, JUN., C. C. C."

Held, that subsequent proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed.

Id. (1b.) 170

FEMES COVERT—3.

The incapacities of *femes covert* provided by the common law, apply to their civil right, and for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. These

political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations.

Shanks et al. v. Dupont, (248) 669

FEME SOLE TRADERS—1.

The law seems to be settled that when the wife is left by the husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes or has voluntarily abandoned the wife.

Rhea et al. v. Rhenner, (108) 73

FIXTURES—2.

See Waste.

FLORIDA—1.

1. The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They do not, however, participate in political power; they do not share in the government until Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers "Congress to make all useful rules and regulations, respecting the territory, or other property belonging to the United States."

The American Insurance Company v. 356 Bales of Cotton, (542) 255

2. The powers of the Territorial Legislature of Florida extend to all rightful objects of legislation; subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States."

Id. (543) 255

3. All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle by using the words "laws of the territory now in force therein." No laws could then, have been in force but those enacted by the Spanish government. If among them there existed a law on the subject of salvage—and it is scarcely possible there should not have been such a law—jurisdiction over it was conferred by the act of Congress relative to the Territory of Florida on the Superior Court; but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases as an inferior court, would not have been inconsistent with the seventh section of the act vesting the whole judicial power of the territory in two superior courts, and in such inferior courts, and justices of the peace as the legislative council of the territory may from time to time establish."

Id. (544) 256

4. The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial powers conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government, or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of its powers over the territories of the United States.

Id. (546) 256

5. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and State governments.

Id. (1b.) 256

6. The act of the Territorial Legislature of Florida erecting a court which proceeded under the provisions of the law to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial

Peters 1. 2. 3. 4.

limits, is not inconsistent with the laws and Constitution of the United States, and is valid; and consequently a sale of the property made in pursuance of it changed the property.

The American Insurance Company
v. 356 Bales of Cotton, (543) 256

FLORIDA TREATY—1.

1. The object of the treaty with Spain which ceded Florida to the United States, dated 22d May, 1819, was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal. But it does not naturally follow that this authority extends to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial who is the legal or equitable owner of the claim, provided he is an American citizen.

Comegys et al. v. Vasse, (212) 117
2. After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands and those of others, are left to the ordinary course of judicial proceedings in the established courts of justice.

Id. (17.) 117
3. The treaty with Spain recognized an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity. It was demanded by our government as matter of right, and as such was granted by Spain.

Id. (217) 119
4. Bankrupt and Bankruptcy, 1.

FORFEITURE—1.

A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law.

Horsburg v. Baker et al., (236) 127

FORFEITURE—2.

The Act of the 30th of March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time when purchases of territory should be made of the Indians; the carrying of spirituous liquors into a territory so purchased after March, 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offense within the meaning of the before-mentioned acts of Congress, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture.

American Fur Company v. The
United States, (368) 454

FRAUD—1.

1. Without undertaking to suggest whether in any case the want of possession of the thing sold constitutes, *per se*, badge of fraud, or is only, *prima facie*, a presumption of fraud; it is sufficient to say that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties.

Conard v. The Atlantic Insurance
Company, (449) 216
2. In cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud.

Id. (17.) 216

FRAUD—3.

1. It cannot be doubted that reducing an agreement to writing is in most cases an argument against fraud; but it is very far from a conclusive argument. The doctrine will not be contended for that a written agreement cannot be relieved against on the ground of false suggestions.

Boyc's Executors v. Grundy, (219) 659

2. It is not an answer to an application to a court Peters 1, 2, 3, 4.

of chancery for relief in rescinding a contract, to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution.

Id. (220) 659

FRAUDS—1.

See Statute of.

FRAUD AND FRAUDULENT CONVEYANCE—2.

1. The court set aside a conveyance which had been made to defeat the claims of creditors.

Venable et al. v. The Bank of the
United States, (107) 364

2. In proceedings to set aside a conveyance of real estate, made in fraud of the rights of creditors, it is not necessary to make a mortgagee of the estate a party; his rights under the mortgage not being brought into question.

Id. (112) 365

GEORGIA—2.

1. Construction of the provisions of the treaties made by the State of Georgia with the Indians, relative to boundaries; and of the Acts of the Legislature of that State, relative to grants of lands within its territorial limits, and which were not within the Indian boundary line, as defined by the treaties and as recognized by those acts.

Patterson's Lessee v. Jenks, (216) 402

2. If the State of Georgia have construed their treaty with the Cherokee Indians, by any subsequent acts manifesting an understanding of it, this court would not hesitate to adopt that construction.

Id. (230) 407

3. If the State of Georgia had practically settled the limits of Franklin County, such settlement ought to have been conclusive on the Circuit Court.

Id. (232) 408

GRANTS OF LAND—2.

1. In the nature of things, we perceive no reason why the grant of the land in controversy, should not be good for land which it might lawfully pass; and void as to that part of the tract for the granting of which the office had not been open. It is every day's practice to make grants for lands which have in part been granted to others. It has never been suggested, that the whole grant is void, because a part of the land was not grantable.

Patterson's Lessee v. Jenks, (235) 409

2. The principle, that a patent conveying lands lying partly within and partly without the territory retained by the Indians, was void as to so much as lay within it, and valid for the residue, was settled by this court in the case of *Danforth v. Wear* (9 Wheaton, 673). This decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

Id. (236) 409

HABEAS CORPUS—3.

1. A petition was presented by Tobias Watkins for a *habeas corpus* for the purpose of inquiring into the legality of his confinement in the gaol of the County of Washington, by virtue of a judgment of the Circuit Court of the United States of the District of Columbia, rendered in a criminal prosecution instituted against him in that court. The petitioner alleged that the indictments under which he was convicted and sentenced to imprisonment, charge no offense for which the prisoner was punishable in that court, or of which that court could take cognizance; and, consequently, that the proceedings were *coram non judice*. The Supreme Court has no jurisdiction in criminal cases which could reverse or affirm a judgment rendered in the Circuit Court in such a case, where the record is brought up directly by writ of error.

Ex-parte Tobias Watkins, (201) 653

2. The power of this court to award writs of *habeas corpus* is conferred expressly on the court by the fourteenth section of the Judicial Act, and has been repeatedly exercised. No doubt exists respecting the power. No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party

brought up by it. The term used in the Constitution is one which is well understood, and the Judicial Act authorizes the court, and all the courts of the United States and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment.

Ex-parte Tobias Watkins, (201) 653
3. The nature and powers of the writ of *habeas corpus*.

Id. ((202) 653
4. The cases of the United States v. Hamilton, 3 Dall. Rep., 17; *Ex-parte* Buford, 3 Cranch's Rep., 447; *Ex-parte* Bollman and Swartwout, 4 Cranch, 75; and *Ex-parte* Kearney, 7 Wheat., 39, examined.
Id. (207) 654

INDIAN COUNTRY—2.

Sec Forfeiture.

INJUNCTION—2.

If the complainants in the Circuit Court were proved to be the regularly appointed committee of a voluntary society of Lutherans in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession; under the circumstances of this case, there does not appear to be a serious objection to their right to maintain a suit for a perpetual injunction against the heirs of the donor, who sought to regain the property, and to disturb their possession.

Beatty et al. v. Kurtz et al., (584) 527

INSOLVENCY—1.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, sec. 65.

Conard v. The Atlantic Insurance Company, (438) 211

2. It is obvious that the latter clause of the 65th section of the Act of 1799 is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment.

Id. (439) 212

3. Insolvency, in the sense of the statute, relates to such a general devestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of the United States v. Hooe (3 Cranch, 73), and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute.

Id. (Ib.) 212

4. Mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section.

Id. (Ib.) 212

INSOLVENT LAWS OF THE STATES OF THE UNITED STATES—3.

The plaintiff below, a citizen of the State of Kentucky, instituted a suit against the defendant, a citizen of Louisiana, for the recovery of a debt incurred in 1808, and the defendant pleaded his discharge by the bankrupt law of Louisiana in 1811; under which, according to the provisions of the law, "as well his person as his future effects" were forever discharged "from all the claims of his creditors." Under this law the plaintiff, whose debt was specified in the list of defendant's creditors, received a dividend of ten per cent. on his debt, declared by the assignees of the defendant. Held, that the plaintiff, by voluntarily making himself a party to those proceedings, abandoned his extra-territorial immunity from the operation of the bankrupt law of Louisiana; and was bound by that law to the same extent to which the citizens of Louisiana were bound.

Clay v. Smith, (411) 723

INSOLVENT LAW OF THE UNITED STATES—2.

1. The 2d, 3d and 4th sections of the Act of January 6, 1800, entitled "An Act for the relief of persons imprisoned for debts," make provision for the discharge of persons confined under execution; and the 5th section extends "the privileges and relief" of that act, to persons in confinement, against whom judgment is obtained, but no execu-

tion issued. Under the provisions in favor of persons charged in execution, on the day of arrest, a notice may be served upon the person at whose suit they may be confined, and at the end of thirty days they may be discharged. By the 5th section it is enacted, "that any person imprisoned upon process issuing from any court of the United States, except at the suit of the United States in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act after the expiration of thirty days from the time such judgment has been or shall be recovered; though the creditor should not within that time sue out his execution, and charge the debtor therewith." It has been argued that under this section the defendant must remain in prison thirty days after judgment, before he can sue out his notice to the plaintiff; thus requiring him to remain sixty days in confinement in the cases which come under this section, whereas he remains but thirty days when confined under execution. There can be no reason for this distinction; and in favor of liberty, and with a view to consistency, the construction should be otherwise. If such were the true construction, the relief would not be the same as is extended to debtors of the other class. The day of entering judgment under the 5th section, is the day that corresponds to the day of arrest, under the previous provisions of the law, and therefore in thirty days after the judgment, the defendant may be discharged; complying with the other requisitions of the law.

Bank of the United States v. Weisiger, (350) 448

2. Where the agent of the plaintiff agreed in writing to dispense with the imprisonment required by law, to entitle the defendant to be discharged, under the insolvent law of the United States; and the defendant who was in confinement was discharged without having been imprisoned thirty days, this was not such a proceeding as would bar the assignee of the note to recover against a subsequent assignor. The object of the imprisonment is to give the plaintiff an opportunity to ascertain the situation of the defendant, and if he does not require this, it may be waived without prejudice to his claims on others.

Id. (351) 448

3. A discharge under the insolvent laws of the United States is confined in its effects altogether to the particular cause; and even as to that, does not exempt the debtor's present effects, or future acquisition from the process of the law. Nor is his person exempt from confinement for the same debt, should he be detected in a fraud upon the creditor.

Id. (353) 449

INSURABLE INTEREST—1.

The master of a vessel, to whom property shipped on board of a vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy.

Buck & Hedrick v. The Chesapeake Insurance Company, (163) 96

INSURABLE INTEREST—2.

1. L. & P. at the time an insurance was made for them against loss by fire, were entitled to one-third of the property by deed, and to two-thirds as mortgagees; but one moiety of the whole was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. L. & P. had an insurable interest in the property.

The Columbian Insurance Company v. Lawrence, (46) 343

2. That an equitable interest may be insured is admitted; and we can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has, undoubtedly, a substantial interest in the property. If it be destroyed the loss in contemplation of law is his. If the purchase money be paid, it is his in fact. If he owes the purchase money the property is equivalent and is still valuable to him. The embarrassments of his affairs may be such that his debt may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The

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destruction of the property is a real loss to the person in possession, who claims title under an executory contract; and the contingency, that his title may be defeated by subsequent events, does not prevent this loss.

The Columbian Insurance Company v. Lawrence, (46) 343

INSURANCE—1.

1. To affirm that "in policies for whom it may concern," there can be no undue concealment as to the parties interested in the property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases.

Buck & Hedrick v. The Chesapeake Insurance Company, (159) 94

2. A policy "for whom it may concern" will, in ordinary cases, cover belligerent property.

Id. (160) 94

3. A knowledge of the state of the world—of the allegiance of particular countries—of the risks and embarrassments affecting their commerce—of the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters.

Id. (1b.) 94

4. The term interest, as used in application to the right to insure does not necessarily imply property, in the subject of insurance.

Id. (163) 96

5. The master of a vessel, to whom property shipped on board the vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy.

Id. (1b.) 96

6. As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation to vitiate a policy, made under the authority and directions of the letter.

Id. (1b.) 96

7. Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew.

M'Lanahan v. The Universal Insurance Company, (183) 104

8. Seaworthiness in port, or while lying in the offing, may be one thing; and seaworthiness for the whole voyage, quite another.

Id. (184) 104

9. A policy on a ship, "at and from a port," will attach; although the ship be, at the time, undergoing extensive repairs in port—so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy.

Id. (1b.) 104

10. What is a competent crew for the voyage—at what time such crew should be on board—what is proper pilot ground—what is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground for the voyage—are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury.

Id. (1b.) 104

11. The contract of insurance is one of mutual good faith; and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any fact material to the risk which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him.

Id. (185) 105

12. If a party, knowing that his agent is about to procure insurance for him, withholds information for the purpose of misleading the underwriter, it is a fraud, and vitiates the insurance.

Id. (1b.) 105

13. Where a party orders insurance and afterwards receives intelligence material to the risk, or

has knowledge of a loss, he ought to communicate it to the agent by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermmanding the order, or laying the circumstances before the underwriter.

Id. (1b.) 105

14. What constitutes due and reasonable diligence is a question of fact for the jury.

Id. (186) 105

15. The accidental concealment of the time of the sailing of a vessel would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury.

Id. (188) 106

16. The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information, and experience; and are, in no sense, judicially cognizable, as matters of law. It seems that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad.

Id. (1b.) 106

17. The question of the materiality of the time of the sailing of the ship to the risk, is a question for the jury under the direction of the court, as in other cases. The court may aid the judgment of the jury by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matters of fact resolving itself into a mere point of law.

Id. (191) 107

INSURANCE—2.

In all treatises on insurances and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is material to the risk, avoids the policy.

The Columbian Insurance Company v. Lawrence, (49) 344

INSURANCE—3.

1. Insurance on profits on board the ship *Mary* "at and from Philadelphia to Gibraltar and a port in the Mediterranean not higher up than Marseilles, and from thence to Sonsonate in Guatemala, Pacific Ocean, with liberty of Guayaquil, the insurance to begin from the loading of the goods at Philadelphia, and to continue until the goods were safely landed at the said ports. The insurance, five thousand dollars, declared to be on profits warranted to be American property, to be proved at Philadelphia only, valued at twenty thousand dollars." The vessel proceeded with a cargo of flour to Gibraltar, where the same was to be sold and the proceeds invested at Marseilles in dry goods to be sent from thence to Sonsonate or Guayaquil. While the vessel lay at Gibraltar, before the discharge of her cargo, she and her cargo were totally lost by fire. The evidence on the trial went to show that with proper diligence on the part of the captain and crew, the fire might have been extinguished and the vessel and cargo saved. Soon after the fire commenced, the captain called upon the crew to leave the ship, under an apprehension from a small quantity of gunpowder on board; and after they left her she was boarded by other persons, who endeavored without success to extinguish the flames, having, as was alleged, arrived too late. Evidence was given, intended to show that the fire originated from the carelessness of the captain. The Circuit Court refused to instruct the jury that if the fire proceeded from the carelessness or negligence of the captain, the insured could not recover. The court also refused to instruct the jury that if the fire originated from accident, or without any want of due care on the part of the master and crew, and if the jury should find that by reasonable and proper exertions the vessel and cargo might have been preserved by them, which they omitted, the assured could not recover. That court also refused to instruct the jury that the assured, having offered no evidence that the sales of the flour at Gibraltar would have yielded a profit, they were not entitled to recover. Held, that there was no error in these instructions.

The Patapsco Insurance Company v. Coulter, (230) 662

2. What is barratry? Its definition.

Id. (1b.) 662

3. The British courts have adopted the safe and legal rule, in deciding that where the policy covers the risk of barratry and fire is the proximate cause of the loss, they will not sustain the defense that

negligence was the remote cause, and will hold the assurers liable for the loss.

The Patapasco Insurance Company v. Coulter, (236) 664

4. The rule that a loss, the proximate cause of which is a peril insured against is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts.

Id. (237) 665

5. It seems difficult to perceive, if profit be a mere excrescence of the principal, as some judges have said; or identified with it, as has been said by others; why the loss of the cargo should not carry with it the loss of the profits. Proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required if the cargo has been lost.

Id. (241) 666

INSURANCE—4.

1. Action on a policy of insurance on the brig Hope, from Alexandria to Barbadoes, and back to the United States. On the outward voyage, the Hope put into Hampton Roads for a harbor during an approaching storm, and was driven on shore above high water-mark. A survey was held, and she was recommended to be sold for the benefit of all concerned. The assured abandoned, and there was no pretense but that the injury which the vessel had sustained justified the abandonment. The question in the case was whether, by the acts of the assured, the abandonment had not been revoked. There can be no doubt but that the revocation of an abandonment before accepted by the underwriters may be inferred from the conduct of the assured; if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of fact, and is not to be decided by the court as matter of law.

The Columbian Insurance Company v. Ashby and Stribling, (139) 809

2. In the case of the Chesapeake Insurance Company v. Stark (2 Cond. Rep., 367) this court lays down the general rule, that if an abandonment be legally made, it puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former; and that the acts of the agent interfering with the subject insured will not affect the abandonment. But the court takes a distinction between the acts of an agent and the acts of the assured. That in the latter case, any acts of ownership by the owner himself might be construed into a relinquishment of the abandonment, which had not been accepted. But the court in that case did not say, and we think did not mean to be considered as intimating, that every such act of ownership must necessarily, and under all possible circumstances, be construed into a relinquishment of an abandonment. The practical operation of so broad a rule would be extremely injurious.

Id. (1b.) 809

INSURANCE AGAINST FIRE—2.

1. The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence & Poindexter, and states it afterwards to be their stone mill. It contains no qualifying terms, which should lead the mind to suspect that their title was not complete and absolute. The title of the assured was subject to contingencies, and was held under contracts which had become void by the nonperformance of the same. This court is of opinion, that a precarious title depeuding for its continuance on events which might or might not happen, is not such a title as is described in this offer for insurance; construing the words of that offer as they are fairly to be understood.

Columbian Ins. Co. v. Lawrence, (48) 344

2. The contract for insurance against fire, is one in which the underwriter generally acts on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material to the underwriter to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state if it was offered for sale; but fair dealing requires that he should state everything which

might influence the mind of the underwriter in forming or declining the contract.

Id. (49) 344

3. What will not constitute a waiver of the preliminary proof of loss, which the assured is bound by the policy to produce.

Id. (53) 345

4. Construction of a policy of insurance against loss by fire.

Id. (56) 346

INTEREST—3.

1. The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has long been settled, and is not now open for controversy.

Thornton v. The Bank of Washington, (40) 595

2. The taking of interest for sixty-four days on a note is not usury, if the note given for sixty days, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. In the case of Renner v. The Bank of Columbia (9 Wheat., 581), it was expressly held, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default.

Id. (1b.) 595

3. Where it was the practice of the party who had a sixty day note discounted at the Bank of Washington to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the District of Columbia; such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the meantime.

Id. (1b.) 595

INTEREST—4.

1. The contract to accept the bills of exchange on which the action was brought, was made in Charleston, South Carolina. The bills were drawn in Georgia on B. & H. in Charleston, with a view to their payment in Charleston, where the contract was to be executed. The interest on the bill which was so drawn, and was unpaid, is to be charged at the rate of interest in South Carolina.

Boyce & Henry v. Edwards, (111) 799

JUDGMENTS—1.

Under the Laws of Virginia, a confession of judgment by the defendant is a release of errors.

Mandeville v. Suckley et al., (136) 85

JUDGMENT—4.

A judgment does not bind lands in the State of Kentucky. The lien attaches only from the delivery of the execution to the sheriff. It then binds real and personal property held by legal title.

The Bank of the United States v. Tyler, (366) 888

JUDGMENTS AND DECREES—4.

By the general law of the land, no court is authorized to render a judgment or decree against anyone or his estate, until after due notice by service of process to appear and defend.

Hollingsworth v. Barbour et al., (466) 922

JURISDICTION—1.

1. In the construction of the 25th section of the Judicial Act, passed 24th of September, 1789, this court has never required that the treaty or act of Congress under which the party claims, who brings the final judgment of a State court into review before this court, should have been spread upon the record. It

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has always deemed it essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty or act.

Hickie v. Starke et al., (98) 69

2. In the District Court of the United States for the District of Georgia, a libel was filed claiming certain Africans as the property of the libellant, which had been brought into the State of Georgia, and were seized by the authority of the Governor of the State, for an alleged illegal importation; process was issued against the slaves, but was not served. The case was taken by appeal to the Circuit Court, and the Governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the Circuit Court, etc. Held, that such a stipulation could not give jurisdiction in the case to the Circuit Court; as process could not issue legally from the Circuit Court against the Africans, because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess.

The Governor of Georgia v. Juan Madrazo, (121) 78

3. "It may be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.

Id., (122) 79

4. The libel and claim exhibited a demand for money actually in the treasury of the State of Georgia, mixed up with the general funds of the State, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the State to exercise. Held, that the courts of the United States had no jurisdiction, the same being taken away by the 11th article of the amendments to the Constitution of the United States.

Id., (123) 79

5. In a case where the chief magistrate of a State issued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party in the record.

Id., (124) 79

6. The complainants are stated in the bill to be citizens of the State of South Carolina. The defendant, the Bank of Georgia, is a body corporate, existing under an act of the Legislature; but the citizenship of the individual corporators is not stated. The averment in the original bill is, that William B. Bullock and Samuel Hale are citizens of Georgia, and residents therein; William B. Bullock is afterwards designated in the bill as "President of the Mother Bank, and Samuel Hale as the President of the Branch Bank at Augusta, in the State of Georgia." The courts of the United States have no jurisdiction of the case. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank were citizens of that State.

Breithaupt et al. v. The Bank of Georgia et al., (238) 127

7. The court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars, the title to a lot of ground, part of the whole tract, which was of less value than five hundred dollars, was only involved in the case before the court.

Old Grant, ex dem. Meredith, v. McKee et al., (248) 131

8. If the court of a State had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition that the jurisdiction of a State court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States.

Elliott v. Peirsol, (340) 170

9. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in execut-

Peters 1, 2, 3, 4. U. S. Book 7.

ing such judgments or sentences, are considered in law as trespassers.

Id., (1b.) 170

10. The jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings.

Id., (1b.) 170

11. The jurisdiction and authority of the courts of Kentucky are derived wholly from the statute law of the State.

Id., (341) 170

12. The clerk of Woodford County Court has no authority to alter the record of the acknowledgment of a deed at any time after the record is made.

Id., (1b.) 170

13. The Constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself.

The American Insurance Company v. 356 Bales of Cotton, (545) 256

14. The Constitution declares that "the judicial power shall extend to all cases of law and equity arising under it—the laws of the United States, and treaties made, or which shall be made under their authority—to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them is conclusive against their identity.

Id., (1b.) 256

15. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. Such cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the eighth section of the Territorial Act, that we are to look for the grant of Admiralty and maritime jurisdiction in the Territorial courts of Florida. Consequently, if that jurisdiction is exclusive, it is not made so by the reference in the act of Congress to the District Court of Kentucky.

Id., (1b.) 256

16. The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court, through the Circuit Court for the County of Washington, by virtue of the Act of Congress of February 13th, 1801; and by the act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of \$1,000 in order to entitle the party to an appeal.

Nichols et al. v. Hodges' Executors, (565) 264

17. It cannot be alleged that a citizen of one State, having title to lands in another State, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie.

McDonald v. Smalley et al., (623) 288

18. M., a citizen of Ohio, apprehensive his title to lands in that State could not be maintained in the State court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of \$1,100, offered to sell and convey to him the land in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the State. The property was estimated at more than the debt, but in consequence of the difficulties attending the title he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land on condition of receiving \$1,000. Held, that the title acquired by the purchaser gave jurisdiction to the courts of the United States.

Id., (1b.) 288

19. The motives which induced M. to make the contract for the purchase of the land can have no influence on its validity. A court cannot enter into the consideration of those motives, when deciding on its jurisdiction.

Id., (624) 289

20. In a contract between a mortgagee and mortgagee, being citizens of different States, it cannot be doubted that an ejectment, or bill to foreclose may be brought in by a court of the United States, by the mortgagee residing in a different State.

Id., (1b.) 289

63 993

21. Both the plaintiff and defendants claimed title under the provisions of the Act of Congress passed March 3d, 1803, entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States south of the State of Tennessee;" and the decision of the Supreme Court of the State of Mississippi was upon the construction given to that act by the commissioners acting under its authority. This is a case which draws into question the construction of an act of Congress, and the Supreme Court of the United States has jurisdiction on a writ of error, by which the decision of the court of the State of Mississippi is brought up for revision under the 25th section of the Judiciary Act of 1789.

Ross v. Barland et al.,

(655) 302

JURISDICTION—2.

1. The 11th section of the Act of 1789, must be construed in connection with and in conformity to the Constitution of the United States. By this latter, the judicial power does not extend to private suits in which an alien is party, unless a citizen be the adverse party; and it is indispensable to aver the citizenship of the defendants, to show, on the record, the jurisdiction of the court.

Jackson v. Twentyman,

(136) 374

2. When the proceedings of a court of competent jurisdiction are brought before another court collaterally, they are by no means subject to all the exceptions which might be taken to them on a direct appeal. The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities of any suit are to be corrected by some direct proceeding, either before the same court to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question.

Thompson v. Tolmie,

(163) 383

3. The decision of this court in *Elliott v. Piersol* (1 Peters, 340), was not intended to decide anything at variance with the principles established in this case.

Id.

(168) 385

4. When the jurisdiction of the court on the subject, under whose authority lands have been sold, appears on the face of the proceedings, its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally.

Id.

(169) 385

5. The value of the interest a guardian has in the minor's estate, is not the value of the estate, but that of the office of guardian. This is of no pecuniary value except so far as it affords a compensation for labors and services; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot be considered as amounting to a sufficient sum to authorize an appeal to the court, from a circuit court of the District of Columbia.

Ritchie v. Mauro et al.,

(243) 411

6. This court has frequently decided that to sustain its jurisdiction in appeals and writs of error, it is not necessary to state in terms upon the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the record shows that the Constitution or a law of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a State law was questioned and the decision was in favor of the party claiming under such law.

Wilson et al. v. The Black Bird Creek

Marsh Company,

(250) 414

7. In an action for money had and received for the recovery of the amount of a deposit made in the Bank of the Commonwealth of Kentucky, acting under an act of incorporation passed by the Legislature of that State, the defendant pleaded to the jurisdiction on the ground that the State of Kentucky alone was the proprietor of the stock of the bank; for which reason it was insisted that the suit was virtually against a sovereign State. The court are of opinion that the question is no longer open here. The case of *The United States Bank v. The Planters' Bank of Georgia* (9 Wheaton, 904), was a much stronger case for the plaintiffs in

error than the present; for there the State of Georgia was not only a proprietor, but a proprietor. Here the State is not a proprietor, since by the terms of the Act incorporating this bank, "the president and directors" alone constitute the body corporate, the metaphysical person liable to suit. Hence by the law of the State itself it is excluded from the character of a party in the sense of this law when speaking of a corporation. It may be added to the reasons which influenced the court in their opinion in the case of *The Bank of the United States v. The Planters' Bank of Georgia* that if a State did exercise the powers in and over a bank or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such a bank, from a direct issue of bills of credit; which violation of the constitution, no doubt, the State here intended to avoid.

Bank of the Commonwealth of Ken-

tucky v. Wister et al.,

(324) 439

8. The bills of a bank were payable to an individual or bearer, and in the action upon the bills there was no averment of the citizenship of the person to whom the bills are payable, and they might therefore have been payable, in the first instance, to a party not competent to sue in the courts of the United States. This court has uniformly held that a note payable to bearer is payable to anybody, and is not effected by the disabilities of the nominal payee.

Id.

(326) 439

9. Objections to the jurisdiction of this court have been frequently made on the ground that there was nothing apparent on the record to raise the question whether the court from which the case has been brought, had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the Judiciary Act of 1789. This has given occasion for a critical examination of the section which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is that if the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause: although the record should not in terms state a misconstruction of the Constitution of the United States; or that the repugnancy of the statute of the State, to any part of that Constitution, was drawn into question.

Satterlee v. Matthewson,

(409) 467

10. The power of this court to revise the judgment of State tribunals, depends on the 25th section of the Judiciary Act. That section enacts, "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined, and reversed or affirmed in the Supreme Court of the United States."

Weston et al. v. The City Council of

Charleston,

(463) 486

11. The city council of Charleston, exercising an authority under the State of South Carolina, enacted an ordinance by which a tax was imposed on the six and seven per cent. stock of the United States; and in the Court of Common Pleas of the Charleston District, an application was made for a prohibition to restrain them from levying the tax on the ground that the ordinance violated the Constitution of the United States. The prohibition was granted and the proceedings in the case were removed to the Constitutional Court, the highest court of law of the State; and in that court it was held that the ordinance did not violate the Constitution of the United States, and a writ of error was prosecuted on this decision to this court. Held, that the question decided by the Constitutional Court was the very question on which the revising power of this court is to be exercised.

Id.

(464) 486

12. A writ of error to this court may be prosecuted, where, by the judgment of the highest court of the State of South Carolina, a prohibition issued in a State court, to prevent the levying of a tax which was imposed by a law repugnant to the Constitution of the United States, was refused by the State courts on the ground that the law was not so repugnant to the Constitution.

Id.

(1b.) 486

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13. The term *suit* is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him.

Weston et al. v. The City of Charleston.

(464) 486

14. The words "final judgment," in the 25th section of the Judiciary Act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause; and it is not required that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section. *Id.*

(*Ib.*) 486

15. A motion to dismiss a suit for want of jurisdiction, applies solely to cases where this court has not jurisdiction of the cause; and not where the Circuit Court has exceeded its proper jurisdiction in the particular case.

Canter v. The American and Ocean Insurance Company,

(554) 517

16. By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi; the suit was well brought by the assignee, without any probate of the will in that State.

Harper v. Butler,

(239) 410

17. When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties, is governed by that condition as it was at the commencement of the suit.

Conolly et al. v. Taylor et al.,

(565) 521

18. If an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise jurisdiction while the defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.

Id.

(*Ib.*) 521

19. The suit was originally instituted by aliens and a citizen of the United States as complainants, against the defendants, citizens of the United States. In the progress of the cause, and before the final hearing, the name of the citizen of the United States who was one of the plaintiffs, was struck out and he was made a defendant by the court. It was held: The substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction; strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties, and all the citizen defendants. There is no objection, founded on convenience or law, to this course.

Id.

(*Ib.*) 521

JURISDICTION—3.

1. The plaintiff below claimed more than two thousand dollars in his declaration, but obtained a judgment for a less sum. The jurisdiction of this court depends on the sum or value in dispute between the parties, as the case stands upon the writ of error in this court, not on that which was in dispute in the Circuit Court.

Gordon v. Ogden,

(34) 593

2. If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered should the judgment for a smaller sum be reversed, and, consequently, the whole sum claimed is still in dispute.

Id.

(*Ib.*) 593

3. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court, and, consequently, the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties.

Id.

(*Ib.*) 593

4. A judgment in its nature concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of the court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as on

Peters 1, 2, 3, 4.

other courts. It puts an end to inquiry concerning the fact, by deciding it.

Ex-parte Tobias Watkins,

(202) 653

5. With what propriety can this court look into an indictment found in the Circuit Court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange, if under color of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Id.

(203) 653

6. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court.

Id.

(*Ib.*) 653

7. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offenses charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of its jurisdiction, whether its judgment be for or against the prisoner. The judgment is equally binding in one case and in the other, and must remain in full force, unless reversed regularly by a superior court capable of reversing it. If this judgment is obligatory, no court can ever look behind it.

Id.

(*Ib.*) 653

8. Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question whether any offense was committed, or was not committed; that is, whether the indictment did or did not show that an offense had been committed, was a question which this court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment; and until reversed, cannot be disregarded.

Id.

(*Ib.*) 653

9. It is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown on the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. The judgment of the Circuit Court in a criminal case is of itself evidence of its own legality, and requires for its support no inspection of the indictment on which it is founded. The law trusts that court with the whole subject, and has not confided to this court the power of revising its decisions. This court cannot usurp that power by the instrumentality of a writ of *habeas corpus*. The judgment informs us that the commitment is legal, and with that information it is our duty to be satisfied.

Id.

(207) 654

10. This court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

Boyce's Executors v. Grundy,

(210) 655

11. The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract.

Id.

(*Ib.*) 655

12. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.

Id.

(215) 657

13. Where the point in which the judges of the Circuit Court differed in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case.

D'Wolf v. Usher,

(269) 675

14. This court has no authority, on a writ of error from a State court, to declare a State law void on

account of its collision with a State constitution; it not being a case embraced in the Judiciary Act, which gives the power of a writ of error to the highest judicial tribunal of the State.

Jackson v. Lamphire,

(238) 682

15. The plaintiff in error claimed to recover the land in controversy, having derived his title under a patent granted by the State of New York to John Cornelius. He insisted that the patent created a contract between the State and the patentee, his heirs and assigns, that they should enjoy the land free from any legislative regulations to be made in violation of the constitution of the State, and that an act passed by the Legislature of New York, subsequent to the patent, did violate that contract. Under that act commissioners were appointed to investigate the contending titles to all the lands held under such patents as that granted to John Cornelius, and by their proceedings, without the aid of a jury, the title of the defendants in error was established against, and defeating the title under a deed made by John Cornelius, the patentee, and which deed was executed under the patent. This is not a case within the clause of the Constitution of the United States, which prohibits a State from passing laws which shall impair the obligation of contracts. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land. The patent contains no covenant to do or not to do any further act in relation to the land, and the court are not inclined to create a contract by implication. The act of the Legislature of New York does not attempt to take the land from the patentee, the grant remains in full effect; and the proceedings of the commissioners under the law, operated upon titles derived under, and not adversely to the patent.

Id.

(239) 682

16. It is within the undoubted powers of State Legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law violating the obligation of contracts. So, too, is the power to pass limitation laws. Reasons of sound policy have led to the general adoption of laws of this description, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of this court.

Id.

(290) 683

17. It has often been decided in this court that it is not necessary that it shall appear, in terms, upon the record, that the question was presented in the State court, whether the case was within the purview of the twenty-fifth section of the Judicial Act of 1789 to give jurisdiction to this court in a case removed from a State court. It is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the State court would not have been what it is if there had not been a misconstruction of some act of Congress, &c., &c., or a decision against the validity of the right, title, privilege, or exemption set up under it.

Harris v. Dennie,

(292) 683

18. Where the verdict for the plaintiff in the Circuit Court is for a less amount than two thousand dollars, and the defendant prosecutes the writ of error, this court has not jurisdiction, although the demand of the plaintiff in the suit exceeded two thousand dollars.

Smith v. Honey,

(469) 744

JURISDICTION—4.

1. The action was *assumpsit* on a promissory note, and the record stated "that neither party having required a jury, the cause was submitted to the court; and the court having seen and heard the evidence, the court found that the defendants did assume as the plaintiff had declared; that the consideration for the note and the *assumpsit* was for loan-office certificates, loaned by the State of Missouri at her loan-office in Chariton, which certificates

were issued under an act for establishing loan offices, &c." Held, that it could not be doubted that the declaration is on a note given in pursuance of the act of Missouri; and that under the plea of *non assumpsit*, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record, thus exhibiting the case, gives jurisdiction to this court over the case on a writ of error prosecuted by the defendants to this court from the Supreme Court of Missouri, under the provisions of the twenty-fifth section of the Judiciary Act of 1789.

Craig et al. v. The State of Missouri,

(410) 903

KENTUCKY—2.

The law of Kentucky relative to the liabilities of indorsers on promissory notes, and the mode of enforcing the same.

The Bank of the United States v.

Weisiger,

(331) 441

KENTUCKY—4.

The law of Kentucky as to promissory notes and the liability of parties to such instruments.

The Bank of the United States v. Tyler,

(356) 888

1. The acts of the Assembly of Kentucky, authorizing proceedings against absent defendants, referred to and examined.

Hollingsworth v. Barbour, et al.,

(466) 922

2. The claim of "a locator" is peculiar to Kentucky, and has been universally understood by the people of the country to signify that compensation of a portion of the land located, agreed to be given by the owner of the warrant to the locator of it for his services.

Id.

(Ib.) 922

3. The record of proceedings against "unknown heirs" is no evidence that any such heirs existed; and the decree and deed made in pursuance of it, cannot avail to pass any title without some evidence that there were some heirs.

Id.

(Ib.) 922

LACHES—1.

1. Official bonds,

(4) 29

2. Dox v. the Postmaster-General,

(318) 160

LANDLORD AND TENANT—2.

Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the lands lie. Every person, under such circumstances, is supposed to be conversant of this custom, and to contract with a tacit reference to it.

Van Ness v. Pacard,

(148) 378

LANDLORD AND TENANT—3.

1. It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating the contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time or demand of possession.

Willson v. Watkins,

(47) 598

2. The same principle applies to a mortgagee and mortgagor, trustee and *cestui que trust*, and generally, to all cases where one man obtains possession of real estate belonging to another by a recognition of his title.

Id.

(48) 598

3. In no instance has the principle of law which protects the relations between landlord and tenant been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession after-

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wards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land.

Willison v. Watkins (48) 598

4. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we would give our sanction to such a doctrine, and this is not the case upon authorities.

Id. (51) 599

5. Where a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

Id. (49) 599

6. If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit, and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession.

Id. (1b.) 599

7. A mortgagee, or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord with all its legal consequences, and is as much estopped from denying the tenancy.

Id. (50) 599

LANDS AND LAND TITLES—1.

1. In order to bring himself within the protection of the Act of Cession by the State of Georgia to the United States, the party must show that he was "actually settled" on the land on the 27th of October, 1795, the period mentioned in the said Act of Cession.

Hickie v. Starke, et al., (98) 69

2. It seems that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement" within the meaning of the law, though the proprietor should not reside in person on the estate, or within the territory.

Id. (1b.) 69

3. Construction of the Act of Congress passed March 2d, 1807, entitled "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated.

Jackson v. Clark, et al., (634) 293

4. The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the Ohio River is not a reservation of the whole tract of country between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those States who were or might become members of the Union, to be disposed of for that purpose.

Id. (635) 293

5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust.

Id. (1b.) 293

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6. If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence.

Id. (1b.) 293

7. If it be conceded that the proviso in the Act of March 2d, 1807, was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity.

Id. (1b.) 293

8. Lands surveyed, are under the law, as completely withdrawn from the common mass as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times.

Id. (633) 295

9. Under the Act of Congress of March 3d, 1803, entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee," such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof. A right, therefore, to a particular tract of land derived from a donation certificate given under that law, is superior to the title of any one who purchased the same land at the public sales, unless there is some fatal infirmity in the certificate which renders it void.

Ross v. Bayland et al., (666) 307

10. The Act of Congress requires no precise form for the donation certificate. It is sufficient if the proofs be exhibited to the Court of Commissioners, to satisfy them of the facts entitling the party to the certificate. It is sufficient if the consideration, to wit, the occupancy, and the quantity granted, appears. Nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent.

Id. (1b.) 307

11. The second section of the Act of Congress of March 3, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section it is the duty of the court to adopt that construction which will best effect the liberal intentions of the Legislature.

Id. (667) 308

12. The time when the territory over which this law operated was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually at that time inhabitants of, and cultivated the soil within it; but whether it was in 1797 or 1798 was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place is sufficient; and the court are disposed to adopt the construction of the Act, given by the commissioners west of Pearl River, that the evacuation took place on the 30th of March, 1798, by which persons coming within the objects of the section were entitled to donation certificates.

Id. (1b.) 308

13. Congress have treated as erroneous the construction given to the law by the commissioners to settle claims to lands east of Pearl River, who have decided that only those who were settled on the lands within the territory in the year 1797, were entitled to donation certificates, and who had granted to others pre-emption certificates.

Id. (668) 308

14. The commissioners appointed under the Act of Congress relative to claims to lands of the United States south of the State of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops, and to decide upon the fact. The law gave them power to hear and decide all matters respecting such claims, and to determine thereon according to justice and equity; and declared their deliberations shall be final. The court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that consequently, it was shown to them that the final evacuation of the territory by the Spanish troops took place on the 30th of March, 1798.

Id. (1b.) 308

LANDS AND LAND TITLES—2.

1. The act of the Legislature of Maryland, relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision: that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission, and all the proceedings, should be set out *in hæc verba*. If the substance of the proceedings is recited, it is sufficient.

Thompson v. Tolmie, (167) 385

2. The law appears to be settled in the States, that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings.

Id. (Ib.) 385

3. An entry was made in the land-office of Kentucky, of one thousand acres, in the name of "John Floyd's heirs," without naming the persons who were the heirs. Upon an objection to the validity of the entry, the court said: That substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are the heirs, was not of such substantial importance as to vitiate the transaction.

Hunt v. Wickliffe, (208) 400

4. An entry was made "so as to join the settlements on the north-east and south sides thereof, so as to run into the old military surveys which are legal." The old military surveys formed together a parallelogram, and adjoined the lands intended to be described by the entry. It was objected that the limitation on the entry, "so as not to run into the old surveys which are legal," rendered the whole entry so uncertain as to make it void.

Id. (Ib.) 400

5. The rules, which are settled in Kentucky, would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north-east and south side of the settlement, the whole land to be included by rectangular lines. The old military survey must, therefore, be so contiguous to the settlement as to stop one or two of those lines. A subsequent locator knows where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them. "We consider the last words 'which are legal,' merely as an affirmation that they are so, not as leaving it doubtful; and consequently that they make no change in the entry."

Id. (209) 400

6. It is well settled, both in the court of Kentucky and in this court, that a possession which will bar an ejectment, is also a bar in equity.

Id. (212) 401

7. Each of the parties held in possession, distinct parts of the land in controversy. In this state of things it is well settled, that the party having the better right, is in constructive possession of all the land not occupied, in fact, by his adversary.

Id. (Ib.) 401

8. Undoubtedly, the presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts it to support his objections. The whole burthen of proof lies on him. But if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony, also, must be laid before the jury; and the court may declare the law upon the fact, but cannot declare it on the testimony.

Patterson's Lessee v. Jenks, (227) 406

9. In the nature of things, we perceive no reason why the grant of the land in controversy should be good for land which it might lawfully pass; and void as to that part of the tract for the granting of which the office had not been open. It is every day's practice to make grants, for lands which have in part been granted to others. It has never been suggested that the whole grant is void because a part of the land was not grantable.

Id. (235) 409

10. The principle, that a patent conveying lands lying partly within, and partly without the territory retained by the Indians, was void as to so much as lay within it, and valid for the residue, was settled by this court in the case of *Danforth v. Wear*, (9 Wheaton, 673). This decision was made on a patent

depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

Id. (236) 409

11. Under the statute of limitations of Tennessee, of seventeen hundred and ninety-seven, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; and a void deed is not such a conveyance as that a possession under it will be protected by the statute of limitations.

Lessee of Powell v. Harman, (241) 411

12. See Louisiana.

13. The lands north-west of the River Ohio, between the rivers Scioto and Little Miami, lying west of Ludlow's line, east of Roberts's line and south of the Indian boundary, reserved by Virginia, in her deed of cession to the United States of March, 1784, for the satisfaction of the military bounties Virginia had promised, were not, prior to 1810, by any legislative Acts of the government of the United States, withdrawn from appropriation under and by virtue of Virginia military land warrants. A patent issued on the 12th of October, 1812, founded upon a military land warrant, for land within the reserved lands, is valid against a claimant of the same land, holding under a sale made by the United States.

Reynolds v. M'Arthur, (417) 470

14. Proceedings for the sale of the real estate of an intestate, for the payment of debts, were commenced before the repeal of the Act of the Legislature of Ohio, entitled "A law for the settlement of intestates' estates." The administrators, notwithstanding the repeal, went on to sell the land, and appropriate the proceeds to the discharge of the debt to the intestate. Held, that the sale was void.

The Bank of Hamilton v. Dudley's heirs, (492) 496

LANDS AND LAND TITLES—3.

1. It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself. The description of the land consists of the courses and distances run by the surveyor, and of the marked trees at the lines and corners, or other natural objects which ascertain the very land which was actually surveyed.

Chinoweth et al. v. The Lessee of Haskell, (96) 616

2. If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given and must be used.

Id. (Ib.) 616

3. The line which forms the western boundary of the land intended to be granted was never run or marked. In his office the surveyor assumed a course and distance, and terminated the line at two small chestnut oaks. But where are we to look for those two small chestnut oaks in a wilderness in which one man takes up fifty thousand acres and another one hundred thousand? or how are we to distinguish them from other chestnut oaks? The guide, and the only guide given us by the surveyor or by the grant, is the course and distance.

Id. (Ib.) 616

4. It is admitted that the course and distance called for in a grant may be controlled and corrected by other objects of description which show that the survey actually covered other ground than the lines of the grant would comprehend.

Id. (98) 616

5. On a trial in ejectment for lands in Virginia, the plaintiffs offered in evidence a number of entries of recent date, made by the defendants, within the bounds of the tract of land in dispute, designated as "Young's four thousand acres;" and attempted to prove, by a witness, that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce, as evidence, official copies of entries made by other and third persons since the date of the plaintiffs' grant, for the purpose of proving a general opinion that the lands contained in the plaintiffs' survey made under the order of the court after the commencement of the suit, were vacant at the date of such entries; and to disprove notice to him of the identity of plaintiff's claim

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when he made the entries under which he claimed. This evidence was unquestionably irrelevant.

Stringer et al. v. The Lessee of Young. (337) 699

6. Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry.

Id. (Ib.) 699

7. The land law of Virginia directs that, within three months after a survey is made the surveyor shall enter the plat and certificate thereof in a book, well bound, to be provided by the court of his county at the county charge. After prescribing this, among other duties, the law proceeds to enact that any surveyor failing in the duties aforesaid, shall be liable to be indicted. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded.

Id. (338) 699

8. The chief surveyor appoints deputies at his will, and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself, to the register of the land-office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual or irregular, cannot affect the grant.

Id. (340) 699

9. Objections, which are properly overruled when urged against a legal title in support of an equity, dependent entirely on a survey of land for which a patent had been issued, can have no weight when urged against a patent regularly issued in all the forms of law.

Id. (340) 699

10. In Virginia the patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of these preliminary measures, which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud—not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned.

Id. (Ib.) 699

11. It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy, and that the defendants were at liberty to resist the testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose, or be wholly irrelevant. The question of its relevancy must be decided by the court; and any error in its judgment would be corrected by an appellate tribunal. The court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted.

Id. (342) 700

12. The warrant for the land in controversy was entered with the surveyor of Monongalia County on the 7th of April, 1784. At the May session of that year, the General Assembly of Virginia divided the County of Monongalia, and erected a new county, to take effect in July, by the name of Harrison. The land on which the plaintiffs' warrant was entered, lay in the new county. The certificate of survey is dated in December, 1784, and in accordance with the entry, states the land to be in Monongalia. The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location specially and precisely. It also directs despatch in the survey of all lands entered in the office. No provision is made for the division of a county between the entry and the survey. The act establishing the county of Harrison, does not direct that the surveyor of Monongalia County shall furnish the surveyor of Harrison with copies of the entries of lands which lay in the new county, and with the warrants on which they were made. In this state of things the survey of the land in controversy was made by the surveyor of Monongalia; the plat and certificate on which the patent was afterwards issued were transmitted to the land-office, and the patent described the land as in Monongalia County. No change was made in the law until 1788. This will not annul the patent, or deprive the unoffending patentee of his property.

Id. (343) 701

13. The misnomer of a county, in a patent for Peters 1, 2, 3, 4.

land, will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent on which the misnomer is found is not absolutely void.

Id. (344) 701

LANDS AND LAND TITLES—4.

1. The defendant claimed land in controversy under a tax sale, which was made by a company incorporated by the Legislature of Connecticut in 1796, called "the proprietors of the half million of acres of land lying south of Lake Erie," and incorporated by an Act of the Legislature of Ohio passed on the 15th of April, 1803, by the name of "the proprietors of the half million of acres of land lying south of Lake Erie, called the sufferers' land." In 1806 the Legislature of Ohio imposed a land tax, and authorized the sale of the lands in the State for unpaid taxes, giving to the owners the right to redeem within one year after the determination of their minority. The act was in force in 1808. In 1808 the directors of the company, incorporated by the Legislatures of Connecticut and Ohio, assessed two cents per acre on the lands of the company for the payment of the tax laid by the State of Ohio, and authorized the sale of those lands on which the assessments were not paid. The lands purchased by the defendant were the property of minors at the time of the sale; they having been sold to pay the said assessments under the authority of the directors of the company. *Held*, that the sale of the land under which the defendant claimed was void. That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the Act of Incorporation. From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain these objects. The words, "all necessary expenses of the company," cannot be so construed to enlarge the power to tax, which is given for specific purposes. A tax by the State is not a necessary expense of the company within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers. The provision in the tenth section, "that the directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the State," was not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred.

Beatty v. The Lessee of Knowler. (152) 813

2. It is a fact of general notoriety that the surveys and patents for lands within the Virginia military district, contain a greater quantity of land than is specified in the grants. Parties, when entering into a contract for the purchase of a tract of land in that district, and referring to the patent for a description, of course expect that the quantity would exceed the specific number of acres. But so large an excess as in the present case can hardly be presumed to have been within the expectation of either party. And admitting that a strict legal interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows that a court of chancery will in all cases lend its aid to enforce a specific performance of such a contract.

King et al. v. Hamilton. (311) 869

3. If this large surplus of eight hundred and seventy-six acres in a patent for one thousand five hundred and thirty-three and one-third acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price.

Id. (Ib.) 869

4. When there was so great a surplus of land in the patent beyond that which is called for nominally, as that it could hardly be presumed to have been within the view of either of the parties to the contract of sale; the court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same.

Id. (Ib.) 869

5. The possession of a warrant has always been considered at the land-office in Ohio sufficient authority to make locations under it. Letters of attorney were seldom if ever given to locators, because they were deemed unnecessary.

Galt et al. v. Gallway, (232) 876

6. An entry could only be made in the name of the person to whom the warrant was issued or assigned; so that the locator could acquire no title in his own name, except by a regular assignment.

Id. (Ib.) 876

7. When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just than that these shall limit the claim of the locator. To permit him to vary his lines, so as to affect injuriously the rights of others subsequently acquired, would be manifestly in opposition to every principle of justice.

Id. (Ib.) 876

8. Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants, both before and after surveys were executed. This practice is shown by the records of the land-office, and is known to all who are conversant with these titles. The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn. This change cannot be made to the injury of the rights of others; and the public interest is not affected by it. The land from which the warrant is withdrawn is left vacant for subsequent locators; and the warrant is laid elsewhere, on the same number of unimproved lands.

Id. (Ib.) 876

9. As the records of the land-office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated.

Id. (Ib.) 876

10. Under the peculiar system of the Virginia land law, as it has been settled in Kentucky and in the Virginia military district in Ohio by usages adapted to the circumstances of the country, many principles have been established which are unknown to the common law. A long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed.

Id. (Ib.) 876

11. An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others, at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by the records, must be received as *prima facie* evidence of the right of the person at whose instance they were recorded; and as conclusive in regard to such things as the law requires to be recorded.

Id. (Ib.) 876

12. A location made in the name of a deceased person is void; as every other act done in the name of a deceased person must be considered.

Id. (Ib.) 876

13. The withdrawal of an entry is liable to objection, subject to the rights which others may have acquired subsequent to its withdrawal having been entered in the land-office. This is required by principles of justice as well as of law.

Id. (Ib.) 876

14. Where by a royal charter of a town in Vermont lauds were given to the Society for the Propagation of the Gospel in Foreign Parts, the society being named as grantees of one share in the town, the court held that this was a plain recognition by the crown of the existence of the corporation and of its capacity to take lands. Such a recognition would confer the power to take land, if it had not previously existed.

The Society for the Propagation of the Gospel v. The Town of Pawlet, &c., (480) 927

15. H. entered with the proper surveyor for the District of Kentucky, forty-five thousand acres of land, in the County of Washington in that State, by virtue of treasury warrants. A survey was made thereon in 1786, and a patent for the land issued to H. in 1797. The warrants were purchased

by the ancestor of the complainant, by a parol agreement with H. previous to their entry. Before this agreement H., in connection with a person who owned other warrants, had made an agreement with S. to locate their respective warrants, which agreement was ratified by the complainant, who paid a sum of money to S. for fees of patenting, and agreed to make S. a liberal compensation for his services; and S. located and surveyed under the warrants forty-five thousand acres, returned the surveys to the office, and paid the fees of office. The locating and surveying of the warrants, and all the necessary steps for completing the title were done by S., who was employed first by H., and afterwards by the complainant, who paid in money for the same. H. being deceased, and having made no conveyance of the legal title to the lands, the complainant filed a bill in the County of Washington, "against the unknown heirs of H.," and in 1815 a decree was made by that court for a conveyance of the lands by the unknown heirs, or in their default by a commissioner appointed in the decree to make the same. Held, that the conveyance was not authorized by the laws of Kentucky in force at the time of the decree.

Hollingsworth v. Barbour et al., (465) 922

16. The claim of "a locator" is peculiar to Kentucky, and has been universally understood by the people of the country to signify that compensation of a portion of the land located, agreed to be given by the owner of the warrant, to the locator of it for his services.

Id. (Ib.) 922

17. The term "property," when applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contact; those which are executory, as well as those which are executed.

Soulard et al. v. The United States, (511) 938

LENGTH OF TIME—1.

See Statute of Limitations.

LEX LOCI—3.

It is a well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction.

McCluny v. Silliman, (270) 676

LEX LOCI—4.

4. A contract to accept certain bills was made in Charleston, South Carolina. The bills were drawn in Georgia, on B. & H. in Charleston, and with a view to the State of South Carolina for the execution of the contract. The interest is to be charged at the rate of interest in South Carolina.

Boyce & Henry v. Edwards, (111) 799

LIEN—1.

1. See Priority of the United States.

2. Mortgages may as well be given to secure future advances and contingent debts, as those which are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction.

Conard v. The Atlantic Insurance Company, (448) 216

3. The case of *Thelusson v. Smith* (2 Wheat., 396) turned upon its own particular circumstances. And it establishes no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States.

Id. (444) 214

4. It is not understood that a general lien, by judgment on lands, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out immediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land.

Id. (443) 214

LIEN—4.

1. See Construction of State laws, 3, 4.

2. See Lien of judgments and execution in Kentucky.

Bank of the United States v. Tyler, (366) 888

Peters 1, 2, 3, 4.

LIEN OF THE UNITED STATES FOR DUTIES—3.

1. The United States have no general lien on merchandise, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the Act of 1799, ch. 128, is that the delinquent debtor is denied at the custom-house any further credit for duties until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods imported. The manifest intention of the remaining clause in the section, is to compel the original consignee to enter the goods imported by him.

Harris v. Dennie, (302) 687

2. No person but the owner or original consignee, or in his absence or sickness, his agent or factor, is entitled to enter the goods at the custom-house, or give bond for the duties, or to pay the duties. Upon the entry the original invoices are to be produced and sworn to, and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry.

Id. (304) 687

3. The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured; any attachment by a State officer is an interference with such lien and right to custody, and, being repugnant to the laws of the United States, is void.

Id. (305) 688

4. The acknowledgment by the custom-house store-keeper that he holds goods upon which the duties have not been secured or paid, subject to an attachment issued out of a State court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorized by the law of the United States, and cannot be admitted to vary the rights of the parties.

Id. (Ib.) 688

LIMITATION—1.

See Statute of Limitations.

LIMITATION OF ACTION—3.

1. B., a Deputy Commissary-General of the United States received from M., a Deputy Quartermaster-General of the United States, the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M. as their agent in the transaction, by making B. their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar.

The United States v. Buford, (29) 591

2. Where, before the transfer to the United States of an instrument which was the evidence of debt the term of five years had elapsed, the period after which the statute of limitations was a bar, it can require no argument to show that the transfer of such claim to the United States cannot give it greater validity than it possessed before the transfer.

Id. (30) 591

3. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we would give our sanction to such a doctrine, and this is not the case upon authorities.

Willson v. Watkins, (51) 599

4. In no instance has the principle of law which protects the relations between landlord and tenant been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out four times before he has done any act to assert his right to the land.

Id. (48) 598

5. The plaintiff sued the defendant, as register of the United States land-office in Ohio, for damages, for having refused to note on his books applications made by him for the purchase of land within his district. The declaration charged the register with this refusal, the lands had never been applied for nor sold, and were at the time of the application liable to be so applied for and sold. The statute of limitations is a good plea to the suit.

McCluny v. Silliman, (276) 678

6. It is a well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction.

Id. (Ib.) 678

7. Under the thirty-fourth section of the Judiciary Act of 1789, the acts of limitations of the several States where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the State courts.

Id. (277) 678

8. Construction of the statute of limitations of the State of Ohio.

Id. (278) 678

9. Where the statute of limitations is not restricted to particular causes of action, but provides that the action, by its technical denomination, shall be barred if not brought within a limited time, every cause for which such action may be prosecuted is within the statute.

Id. (Ib.) 678

10. In giving a construction to the statute of limitations of Ohio, the action being barred by its denomination, the court cannot look into the cause of action. They may do this in those cases where actions are barred for causes specified in the statute; for the statute only operates against such actions when prosecuted on the grounds stated.

Id. (Ib.) 678

11. Of late years the courts in England and in this country have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law within a reasonable time, a salutary vigilance is imposed and an end is put to litigation.

Id. (Ib.) 678

LIMITATION OF ACTIONS—4.

1. A promissory note was, by the plaintiff, placed in the hands of P. for collection. He instituted a suit in the State court thereon against the drawer on the 7th of May, 1820, but neglected to do so against the indorser. The drawer proved insolvent. On the 8th of February, 1821, he sued the indorser, but committed a fatal mistake by a misnomer of the plaintiffs; upon which, after passing through the successive courts of the State, a judgment of nonsuit was finally rendered against the plaintiffs. Before that time, the action against the indorser was barred by the statute of limitation, to wit, on the 9th of November, 1822. This suit was instituted on the 27th of January, 1825. The statute of limitations of North Carolina interposes a bar to actions of *assumpsit* after three years.

Wilcox et al. v. The Executors of Plummer, (172) 821

2. The questions in the case were, whether the statute of limitations commenced running, when the error was committed in the commencement of the action against the indorser; or whether it commenced from the time the actual damage was sustained by the plaintiffs by the judgment of nonsuit; whether the statute runs from the time the action accrued, or from the time that the damage was developed, or became definite. Held, that the statute began to run from the time of committing the error, by the misnomer in the action against the indorser.

Id. (Ib.) 821

3. The ground of action in the case is a contract to act diligently and skillfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been brought, is the question; for from that time the statute must run.

Id. (Ib.) 821

4. When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action.

Id. (Ib.) 821

5. The statutes of limitation of Vermont interpose no bar to the institution by the Society for the Propagation of the Gospel, &c., of an action for

the recovery of land granted by the charter of the town of Pawlet.

The Society for the Propagation of the Gospel, &c., v. The Town of Pawlet, &c., (480) 927

6. The act of the Legislature of Vermont which prohibits the recovery of mesne profits in certain cases, applies to the claims to such profits by the plaintiffs in this suit; and the provisions of the Treaty of Peace of 1783, and those of the Treaty with Great Britain in 1794, do not interfere with the provisions of that act. The law has prescribed the restrictions under which mesne profits shall be recovered; and these restrictions are obligatory on the citizens of the State. The plaintiffs take the benefit of the statute remedy to recover their right to the land; and they must take the remedy with all the statute restrictions.

Id.

(*Ib.*) 927

LOUISIANA—2.

1. By the treaty of St. Ildefonso, made on the 1st of October, 1800, Spain ceded Louisiana to France; and France, by the treaty of Paris, signed the 30th of April, 1803, ceded it to the United States. Under this treaty the United States claimed the countries between the Iberville and the Perdido. Spain contended that her cession to France comprehended only that territory which at the time of the cession was denominated Louisiana, consisting of the island of New Orleans, and the country which had been originally ceded to her by France, west of the Mississippi. The land claimed by the plaintiffs in error, under a grant from the crown of Spain, made after the treaty of St. Ildefonso, lies within the disputed territory; and this case presents the question, to whom did the country between the Iberville and Perdido belong after the treaty of St. Ildefonso? Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the Province, cannot be admitted as conclusive. In questions of this charter, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself.

Foster et al. v. Neilson, (306) 433

2. If a Spanish grantee had obtained possession of the land in dispute so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the Legislature and judicial departments, and mark the limits of each.

Id. (309) 434

3. The sound construction of the 8th article of the treaty between the United States and Spain, of the 22d of February, 1829, will not enable the court to apply its provisions to the case of the plaintiff.

Id. (314) 435

4. The article does not declare that all the grants made by His Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and it would have repealed those acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the Legislature. Until such act shall be passed, the court is not at liberty to disregard the existing laws on the subject.

Id. (*Ib.*) 435

LOUISIANA—4.

1. By the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territories should be protected in the free enjoyment of their property. The United States as a just nation regard this stipulation as the avowal of a principle which would have been held equally sacred, although it had not been inserted in the treaty.

Soulard et al. v. The United States, (511) 938

2. The term "property," as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory, as well as those which are executed. In this respect the relations of the inhabitants of Louisiana to their government is not changed. The new government takes the place of that which has passed away.

Id.

(*Ib.*) 938

MANDAMUS—1.

The court refused to issue a *mandamus* to the Circuit Court for the County of Washington, commanding that court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an act of the Legislature of Maryland, upon which the proceedings were founded incorporating the Bank of Columbia.

Bank of Columbia v. Sweeney, (567) 265

MARRIAGE—1.

By the laws of Maryland, a *feme covert* who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years, and shall not have been heard of during that time.

Rhea et al. v. Rhenner, (108) 73

MARRIAGE SETTLEMENT—2

1. A marriage settlement provided that the trustees, after the death of the husband, should stand possessed of a bond executed to them by the husband, and of the sum of \$37,038 to be received by them; upon trust to place out the same when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, with the approbation of the wife; and to call in and replace the same, and reinvest the same and the produce thereof, from time to time, upon or in such securities, or stock, with the approbation of the wife.

English et al. v. Forall, (595) 531

2. It is not an unreasonable interpretation to say, that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract. She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment. The trustees are bound to make the investment in any one of the funds mentioned, which the wife might request or direct.

Id. (609) 536

3. The husband by his will confirmed the marriage settlement, and he further declared, "that if the sum of \$37,038 secured to be paid to the trustees should at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of \$2,222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that, in no event, less than \$2,222.22 shall be raised annually for his wife, or for her benefit in the United States.

Id. (610) 537

4. The personal estate of the husband, exclusive of the sum placed in the hands of the trustees of the annuity, was so invested as to produce six per centum per annum, and the direction of the wife to keep invested in six per cent. stock of the United States the \$37,038, produced a deficiency in the annuity, which she claimed to have made up from the residuary estate. The wife has a right to claim this deficiency to be so made up.

Id. (*Ib.*) 537

MASTER OF A VESSEL—1.

See Insurance, 5.

Peters 1, 2, 3, 4.

MECHANICS' BANK OF ALEXANDRIA—1.

1. The provision in the act of Congress incorporating "The Mechanics' Bank of Alexandria," which requires that the capital stock of the bank shall consist of 50,000 shares of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares.

Minor v. The Mechanics' Bank of Alexandria, (65) 55

2. Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain that such a fraud, which was private between the original subscribers to the stock and the commissioners, could be set up to the injury of subsequent purchasers of the stock, who became *bona fide* holders of the same, without participation in or notice thereof.

Id. (1b.) 55

3. It is not a correct construction of the 3d and 21st sections of the Act of Congress, incorporating the Mechanics' Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognize the interests of any *cestui que trust*, and may refuse to permit the stock to be transferred whilst the nominal holder is indebted to the bank.

The Mechanics' Bank of Alexandria v. Louisa and Maria Seton, (308) 156

MESNE PROFITS—4.

1. The Act of the Legislature of New York of May 1, 1786, gave to the purchasers of forfeited estates the like remedy in case of eviction for obtaining compensation for the value of their improvements as is directed in the Act of the 12th of May, 1784. The latter act declares that the person or persons having obtained judgment against such purchasers, shall not have any writ of possession, nor obtain possession of such lands, &c., until he shall have paid to the purchaser of such lands or person holding title under him, the value of all improvements made thereon after the passing of the act. Held, that claims of compensation for improvements made under the authority of these acts of the Legislature of New York are inconsistent with the provisions of the Treaty of Peace with Great Britain of 1783, and should be rejected.

Carver v. Astor, (1) 761

2. That in all cases a party is bound by natural justice to pay for improvements on land, made against his will or without his consent, is a proposition which the court are not prepared to admit.

Id. (101) 796

3. The act of the Legislature of Vermont which prohibits the recovery of mesne profits in certain cases, applies to the claims to such profits by the plaintiffs in this suit; and the provisions of the Treaty of Peace of 1783, and those of the treaty with Great Britain in 1794, do not interfere with the provisions of that act. The law has prescribed the restrictions under which mesne profits shall be recovered; and these restrictions are obligatory on the citizens of the State. The plaintiffs take the benefit of the statute remedy to recover their right to the land; and they must take the remedy with all the statute restrictions.

The Society for the Propagation of the Gospel, &c., v. The Town of Pawlet, &c., (480) 927

MISNOMER—3.

1. A commission issued in the name of Richard M. Meade, the name of the plaintiff being Richard W. Meade. This is a clerical error in making out the commission, and does not affect its execution.

Keene v. Meade, (6) 583

2. It may well be questioned whether the middle letter of a name forms any part of the Christian name of a party. It is said the law knows only of one Christian name, and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or variance.

Id. (7) 583

3. The misnomer of a county, in a patent for land will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent in which the misnomer is found is not absolutely void.

Lessee of Stringer v. Lessee of Young (344) 701

MISTAKE—1.

See Equity, 6, 8.

MORTGAGE—1.

It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. The estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security; where the debt is discharged there is a resulting trust for the mortgagee. It is, therefore, only in a loose and general sense that it is sometimes called a lien; and then only by way of contrast to an estate absolute and indefeasible.

Conard v. The Atlantic Insurance Company, (441) 213

NATURALIZATION—4.

1. The second section of the Act of Congress "to establish a uniform system of naturalization," passed in 1802, requires that every person desirous of being naturalized shall make report of himself to the clerk of the District Court of the district where he shall arrive, or some other court of record in the United States; which report is to be recorded, and a certificate of the same given to such alien; and "which certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of the act, on his application to be naturalized, as evidence of the time of his arrival within the United States." James Spratt arrived in the United States after the passing of this act, and was under the obligation to report himself according to its provisions. The law does not require that the report shall have been made five years before the application for naturalization. The third condition of the first section of the law, which declares that the court admitting an alien to become a citizen "shall be satisfied that he has resided five years in the United States," &c., does not prescribe the evidence which shall be satisfactory. The report is required by the law to be exhibited on the application for naturalization as evidence of the time of arrival in the United States. The law does not say the report shall be the sole evidence, nor does it require that the alien shall report himself within any limited time after arrival. Five years may intervene between the time of arrival and the report, and yet the report be valid. The report is undoubtedly conclusive evidence of the arrival; but it is not made by the law the only evidence of that fact.

Spratt v. Spratt, (393) 897

2. James Spratt was admitted a citizen of the United States by the Circuit Court for the County of Washington in the District of Columbia, and obtained a certificate of the same in the usual form. The act of the court admitting James Spratt as a citizen was a judgment of the Circuit Court, and this court cannot look behind it and inquire on what testimony it was pronounced.

Id. (406) 902

3. The various acts on the subject of naturalization, submit the decision upon the right of aliens to courts of record. They are to receive testimony to compare it with the law, and to judge on both law and fact. If their judgment is entered on record in legal form, it closes all inquiry; and, like any other judgment, is complete evidence of its own validity.

Id. (408) 902

NEW TRIAL—1.

An application for a new trial, on motion after verdict, addresses itself to the sound discretion of the court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. The application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exceptions, to the cognizance of the Appellate Court, the directions of the court below must then stand or fall, upon their own intrinsic propriety, as matters of law.

McLanahan v. The Universal Insurance Company, (183) 104

NOLLE PROSEQUI—1.

1. According to modern decisions, a *nolle prosequi* does not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied.

Minor et al. v. The Mechanics' Bank of Alexandria, (74) 59

2. In an action on a joint and several bond, some of the parties, sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards the principal was called upon to plead, and he did so; judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal. To this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties. The court held, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the courts of the United States upon this proceeding, have been on the ground that the question is matter of practice and convenience.

Id. (75) 59

3. When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant. It is a practice which violates no rules of pleading, and will subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

Id. (80) 62

NONSUIT—1.

1. The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff might agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it.

Elmore v. Grymes, (471) 225

2. A nonsuit may not be ordered by the court in any case, without the consent and acquiescence of the plaintiff.

D'Wolf v. Rabaud et al., (497) 236

OFFICIAL BONDS—1.

1. The condition of an official bond, that the officer who gives it shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully, if they are violated from want of capacity or want of care, they can never be said to have been "well and truly executed."

Minor et al. v. The Mechanics' Bank of Alexandria, (69) 57

2. No act or vote of the Board of Directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders or the bank, will justify the cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors in violation of the trusts assumed by them, are on the responsibility of the cashier and of his sureties.

Id. (71) 58

3. The official bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office, from time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws.

Id. (73) 58

4. The claim of the United States upon an official bond and upon all parties thereto, is not released by the laches of the officer to whom the assertion of this claim is intrusted by law. Such laches have no effect whatsoever on the rights of the United States, as well against the sureties as the principal in the bond.

Doe v. The Postmaster-General, (325) 163

PAROL EVIDENCE—1.

The court held, that parol evidence was admissible, to show the agreement relative to the place where payment of a note was to be demanded, although the agreement did not appear on the face

of the note. Such an agreement is a circumstance extrinsic to the contract made by the note, and its proof by parol is regular.

Brent's Executors v. The Bank of the Metropolis, (92) 67

PARTIES—1.

1. See Chancery practice, 3, 9, 12, 13.

2. The affidavit of a party to the cause of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least in a court of law.

Taylor v. Riggs, (596) 277

3. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received.

Id. (1b.) 277

PARTIES—2.

When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties is governed by that condition as it was at the commencement of the suit.

Conolly v. Taylor, (565) 521

PARTNER AND PARTNERSHIP—1.

1. One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he might bind himself, so as to submit his own interests to such decision.

Karthauss v. Ferrer et al., (223) 123

2. See Pleas and Pleadings, 14.

PARTNER AND PARTNERSHIP—2.

1. Third persons are not bound to inquire whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage. The interest of the partner in the joint stock of the concern, and his consequent authority to use the partnership name, raises a presumption that the contract was made for joint account; which is sufficient to bind the firm, unless to the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe that the former was acting on his separate account.

Le Roy v. Johnson, (198) 396

2. Where in the articles of partnership no name of the firm was mentioned as agreed upon, and the concern went into operation under the articles, the books being kept, and the bills and accounts relating to their transactions being made out at their warehouse, in the name of "Hoffman & Johnson;" it cannot be questioned but that a name thus assumed, recognized, and publicly used, became the legitimate name and style of the firm; not less so than if it had been adopted by the articles of partnership.

Id. (199) 396

Where a bill of exchange was drawn by A, after the dissolution of his partnership with B, and the proceeds of the bill went to pay, and did pay, the partnership debts of A & B, which A on the dissolution of the firm had assumed to pay; the holder of the bill after its dishonor can have no claim on B in consequence of the particular appropriation of the proceeds of the bill.

Id. (1b.) 396

4. It is admitted, that if one of the partners contracted with a third person, in the name of the firm after the dissolution, but that fact not made public, or known by such third person, the law considers the contract as being made with the firm, and on their credit. But if the partner deal with another in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other to know that the partnership was dissolved, since he

Peters 1, 2, 3, 4.

was dealing, not with the firm, and upon their credit, but with the individual with whom he was acting, upon his own credit.

Id.

(200) 397

PATENT FOR LANDS—3.

1. Objections which are properly overruled, when urged against a legal title in support of an equity dependent entirely on a survey of land for which a patent has been issued, can have no weight when urged against a patent regularly issued in all the forms of law.

Lessee of Stringer v. Lessee of

Young.

(340) 700

2 In Virginia, the patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures which ought to precede it is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud—not legal and technical, but actual and positive fraud, in fact, committed by the person who obtained it; and even this is questioned.

Id.

(*Id.*) 700

PATENTS AND PATENT-RIGHTS—2.

1. It has not, and indeed it cannot be denied, that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterward be resumed at his pleasure; for when gifts are once made to the public in this way, they become absolute. The question which generally arises on trials in a question of fact, rather than of law; whether the acts or acquiescence of the party, furnish, in the given case, satisfactory proof of an abandonment, or dedication of the invention to the public.

Pennoek et al. v. Dialogue.

(16) 332

2. It is obvious, that many of the provisions of our Patent Act, are derived from the principles and practice which have prevailed in the construction of the law of England in relation to patents.

Id.

(18) 333

3. Where English statutes, such for instance as the statute of frauds, and the statute of limitations, have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts; or has been received with all the weight of authority. This is not the case with the English statute of monopolies, which contains an exception, on which the grants of patents for inventions have issued in that country. The language of that clause in the statute is not identical with the patent law of the United States; but the construction of it adopted by the English courts, and the principles and practice which have long regulated the grants of their patents, as they must have been known, and are tacitly referred to in some of the provisions of our own statute, afford materials to illustrate it.

Id.

(*Id.*) 333

4. The true meaning of the words of the patent law, "not known or used before the application," is, not known or used by the public, before the application.

Id.

(19) 333

5. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should, for a long period of years, retain the monopoly, and make and sell his invention publicly; and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to procure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries.

Id.

(*Id.*) 333

6. If an invention is used by the public, with the consent of the inventor, at the time of his application for a patent, how can the court say that his case is nevertheless such as the act was intended to protect? If such a public use is not a use within the meaning of the statute, how can the court extract the case from its operation, and support a patent, when the suggestions of the patentee were not true, and the conditions, on which alone the grant was authorized, do not exist?

Id.

(21) 334

7. The true construction of the patent law is, Peters 1, 2, 3, 4.

that the first inventor cannot acquire a good title to a patent if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. This voluntary act or acquiescence in the public sale or use is an abandonment of his right; or, rather, creates a disability to comply with the terms and conditions of the law on which alone the Secretary of State is authorized to grant him a patent.

Id.

(23) 335

PAYMENT—1.

When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand.

The Bank of Columbia v. Hagner.

(463) 222

PEDIGREE—1.

1. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness in a question of pedigree.

Elliott et al. v. Peirsol et al.

(337) 169

2. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted.

Id.

(*Id.*) 169

3. In a case, where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter then written, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence.

Id.

(*Id.*) 169

PLEAS AND PLEADINGS—1.

1. Surplusage in pleading does not, in any case, vitiate after verdict.

Carroll v. Peake.

(23) 37

2. In a declaration upon an agreement, by way of lease, by which the lessor stipulated to let a farm from the first of January, 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that although specially requested on the said 1st of January, the defendant refused, and neglected to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff; this assignment is sufficient.

Id.

(*Id.*) 37

3. It is sufficient that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January generally, and not at the last convenient hour of that day; and if an averment of a personal demand is made, it need not have been on the land.

Id.

(24) 37

4. The strict doctrines relative to averments in pleading have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons.

Id.

(*Id.*) 37

5. Declarations containing general averments of readiness and request have been held sufficient, especially after verdict, unless in very peculiar cases.

Id.

(*Id.*) 37

6. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters.

Minor et al. v. The Mechanics' Bank of Alexandria.

(67) 56

7. What defects in pleading are, and are not, cured by verdict.

Id.

(*Id.*) 56

8. On a joint and several bond the plaintiff may sue one or all of the obligors; but, in strictness of law he cannot sue an intermediate number. He must sue all or one. But if such error is not taken advantage of by plea in abatement, it is waived by pleading to the merits.

Id.

(73) 58

9. See *Nolle prosequi*, 1, 2, 3.

10. Where it was omitted to allege in the declaration on a promissory note, a demand of payment on the person of the maker, but it averred a demand at the bank "where the note was negotiable" such averment in the declaration could not be true, unless there was an agreement between the parties that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and after a verdict the judgment will be sustained.

Brent's Executors v. The Bank of the Metropolis.

(93) 67

11. After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue or any further or other pleas, which his case may require; but he may, if he pleases, abide by his plea already pleaded, and waive his right of pleading, *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration, and puts the plaintiff to the proof of his case on the new, as well as on the old counts.

Wright et al. v. The Lessee of Holingsworth,

(169) 98

12. When, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made directing the payment of money in an action on the bond, to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, etc.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay.

Karthauss v. Ferrer et al.,

(231) 125

13. See Attachment, 1.

14. The principle is, that a contract made by co-partners is several as well as joint, and the assumption is made by all and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it at the time of trial.

Barry v. Foyles,

(317) 160

15. The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction. The proceeding is always as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained.

Id.

(1*b.*) 160

16. A question of the citizenship of a party to a cause cannot constitute a part of the issue on the merits; and must be brought forward by a proper plea in abatement, in an earlier stage of the cause than the trial on the merits.

D'Wolf v. Rabaud et al.,

(498) 237

17. The plaintiff, as administrator of W., had brought a suit in the District Court of the United States for the Western District of Pennsylvania, and recovered a judgment; and upon this judgment he instituted a suit in the District Court of the United States of the State of Mississippi against the defendant in the original suit. The defendant pleaded that by the Orphans' Court of Adams County, in the State of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity. Held, that the debt due upon the judgment obtained in Pennsylvania by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial whether the defendant was or was not administrator of W., in the State of Mississippi. That would not, in any manner, affect the rights of the plaintiff, and the plea tenders an immaterial issue, and is bad on demurrer.

Biddle v. Wilkins,

(691) 317

18. Where the court in which judgment is rendered has not jurisdiction over the subject matter of the suit, or where the judgment upon which suit is brought is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment.

Id.

(1*b.*) 317

19. The general rule is, that there can be no aver-

ment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground that no matter of defense can be pleaded in such case to a suit on a judgment which existed anterior to the judgment.

Id.

(692) 318

20. It has become a settled practice in declaring in an action upon a judgment, not, as formerly, to set out in the declaration the whole of the proceedings in the original suit, but only to allege generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed in *rem judicatam*.

Id.

(1*b.*) 318

21. In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a profert of the letters of administration. That it is not necessary in actions upon such judgments that the plaintiff name himself as administrator, follows from his not being bound to make profert of the letters of administration; and when he does so name himself, it may be rejected as surplusage.

Id.

(1*b.*) 318

PLEAS AND PLEADING—3.

1. In the correct order of pleading it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.

United States v. Buford.

(31) 591

2. The Act of Virginia, passed in 1792, authorizes a defendant to plead and demur in the same case.

Fowle v. The Common Council of Alexandria.

(409) 723

3. The party who demurs to evidence, seeks thereby to withdraw the consideration of the facts from the jury; and is, therefore, bound to admit not only the truth of the evidence, but every fact which that evidence may legally conduce to prove in favor of the other party. And if upon any view of the facts the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

Thornton v. The Bank of Washington.

(40) 595

PLEAS AND PLEADINGS—4.

1. A case came before the court on a judgment in the Circuit Court for the defendant, the avowant in replevin; he having demurred to the pleas of the plaintiff in an action of replevin. The court having reversed the judgment of the Circuit Court remanded the cause, with instructions to the Circuit Court to overrule the demurrer and permit the defendant, the avowant, to plead.

Lloyd v. Scott,

(205) 833

2. In an ejectment to recover a lot of land, being the first division lot laid out to the right of the society in the town of Pawlet, the plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England within the dominions of the King of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king." The defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue, in the corporate capacity in which they have sued. The plaintiffs are a foreign corporation, the members of which are averred to be aliens, and British subjects; and the natural presumption is that they are residents abroad.

The Society for Propagating the Gospel v. The Town of Pawlet and Clarke,

(480) 927

3. If the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. The general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring.

Id.

(1*b.*) 927

POSSESSION OF LANDS—2.

Each of the parties held in possession distinct parts of the land in controversy. In this state of things it is well settled that the party having the

Peters 1, 2, 3, 4.

better right, is in constructive possession of all the land not occupied, in fact, by his adversary.

Hunt v. Wickliffe, (212) 401

POST-OFFICE DEPARTMENT—1.

The Act of Congress for regulating the Post-Office Department does not, in terms, discharge the obligors in the official bond of a deputy-postmaster from the direct claim of the United States upon them, on the failure of the Postmaster-General to commence a suit against the defaulting postmaster within the time prescribed by law. Their liability, therefore, continues. They remain the debtors of the United States. The responsibility of the Postmaster-General is superadded to, not substituted for, that of the obligors.

Dox et al. v. The Postmaster-General, (323) 162

PRACTICE—1.

1. See Chancery Practice, *passim*.

2. In a trial in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G., citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading; and the jury found for the plaintiff upon the third, or new count, and a judgment was rendered in his favor. Held to be valid.

Wright et al. v. The Lessee of Holingsworth, (165) 96

3. The allowance and refusal of amendments in the pleadings, the granting and refusing new trials, and most of the other incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction as to be fit for their decision only, under their own rules and modes of practice. This court has always declined interfering in such cases.

Id. (Ib.) 96

4. On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue; this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection.

Conard v. The Atlantic Insurance Company, (450) 217

5. When the state of the record did not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*.

Elmore v. Grymes, (472) 226

6. The State of Ohio, not having been admitted into the Union until 1802, the Act of Congress passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the State courts into the courts of the United States, could have no operation in that State; but the District Court of the United States, established in that State in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The District Court of Ohio did not create a system for itself, but finding one established in the State, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the State courts, and by a single rule adopted the State system of practice. When in 1807, the seventh circuit was established, the judge assigned to that circuit found the practice of the State adopted, in fact, into the Circuit Court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued without any positive rule upon the subject.

Fullerton v. The Bank of the United States, (612) 283

7. The Act of 18th February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and Peters 1, 2, 3, 4.

the suits have in many instances been prosecuted under it.

Id. (613) 284

8. It will not be contended that the practice of a court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding sanctioned by the most solemn acts of the court through a course of years, is to be surprised and turned out of court upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty where long acquiescence has established it to be the law of the court that the State practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making.

Id. (Ib.) 284

9. Although the act of the Legislature of Ohio regulating the mode of proceeding in actions on promissory notes was passed after the making of the note upon which this action was brought, yet the Circuit Court of the United States for the District of Ohio, having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted.

Id. (615) 285

10. Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees, were willing to submit, upon argument, the whole case to the final decision of the court, but it appeared that the Circuit Court of Ohio had not decided any question but that which had been raised upon the jurisdiction of the court, the counsel were directed by this court to argue the point of jurisdiction only.

McDonald v. Smalley et al., (621) 287

PRACTICE—2.

1. See Bills of exceptions.

2. See Re-argument.

3. Where the appellee had died after the commencement of the term, and the court not knowing his decease had decided upon the case, after argument, the court ordered the decree to be entered as of the first day of the term.

The Bank of the United States v. Weisiger, (481) 492

4. Where an appeal from the Circuit Court to this court was prayed by a number of the defendants, and one only executed the proper appeal bond, the objection to the proceeding ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond.

Mandeville v. Riggs, (490) 495

2. The declaration purported to count upon sixty-eight bills of the Bank of the Commonwealth of Kentucky, and it appeared that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ claimed or the judgment gave. The defendants in error, plaintiffs below, moved for leave to cure the defect by entering a *remittitur* of the amount of the bill so omitted and damages *pro tanto*. This court thinks itself authorized to make a precedent in furtherance of justice, whereby a more convenient practice may be introduced, and to allow the party to enter his *remittitur*; but on payment of the costs of the writ, if error is prosecuted no further after such amendment made.

Bank of the Commonwealth of Kentucky v. Wister et al., (329) 440

PRACTICE—3.

1. Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term, and move to have the appeal re-instated. To allow such certificate would be to prejudice such a motion.

The United States et al. v. Swann, (68) 605

2. In a writ of right the tenant may, on the nise joined, set up a title out of himself and in a third person. If anything which fell from this court in the case of *Greene v. Lister*, 8 Cranch, 229, can be

supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene v. Watkins*, 7 Wheaton, 31. It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the demandant's seisin; that a writ of right does bring into controversy the mere right of the parties to the suit, and if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises, or that this mere right is inferior to that set up against him.

Inglis v. The Trustees of the Sailor's

Snug Harbor, (133) 629

3. In a writ of right on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety.

Id. (135) 630

4. Where the point on which the judges of the Circuit Court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case.

D'Wolf v. Usher, (269) 675

5. The plaintiff in error having died while the cause was held under advisement, the judgment was entered *nunc pro tunc*, as on the first day of this term.

Clay v. Smith, (411) 723

9. The practice has uniformly been, since the seat of government was removed to Washington, for the clerk of the court to enter at the first term to which any writ of error or appeal is returnable, in cases in which the United States are parties, the appearance of the Attorney-General of the United States. This practice has never been objected to. The practice would not be conclusive against the Attorney-General if he should at the first term withdraw his appearance, or move to strike it off. But if he lets it pass for one term, it is conclusive upon him as to an appearance. The decisions of this court have uniformly been that an appearance cures any defects in the forms of process.

Farrar and Brown v. The United

States, (459) 741

7. The subpoena issued on the filing of a bill in which the State of New Jersey were complainants and the State of New York were defendants, was served upon the Governor and Attorney-General of New York sixty days before the return day, the day of the service and return inclusive. This being irregular, a second subpoena issued, which was served on the Governor of New York only, the Attorney-General being absent. There was no appearance by the State of New York. BY THE COURT: This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the governor, and on the Attorney-General. A service on one is not sufficient to entitle the court to proceed.

The State of New Jersey v. The State of New York, (461) 741

8. Upon an application by the counsel for the State of New Jersey that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the State of New York, as they might employ counsel in the interim. It, indeed, the argument should be merely *ex-parte*, the court could not feel bound by its decision if the State of New York desired to have the question again argued.

Id. (464) 742

9. A notice was given by the solicitors for the State of New Jersey to the Governor of the State of New York, dated the 12th of January, 1830, stating that a bill had been filed on the equity side of the Supreme Court by the State of New Jersey, against the people of the State of New York, and that on the 13th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the State of New York, on the motion of the counsel for the State of New Jersey for a subpoena to be served on the Governor and Attorney-General of the State of New York the court said, as no counsel appears to argue the motion on the part of the State of New York, and the precedent for granting it has been established upon very grave and solemn argument, the court do not require an *ex-parte* argument in favor of their authority to grant

the subpoena, but will follow the precedent heretofore established. The State of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do.

Id.

(466) 742

PRACTICE—4.

1. The practice of bringing the whole of the charge of the court delivered to the jury in the court below for review before this court is unauthorized, and extremely inconvenient both to the inferior and to the Appellate Court. With the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact, and are entitled to no more weight or importance than the jury in the exercise of their own judgment choose to give them. They neither are, nor are understood to be, binding on them, as the true and conclusive exposition of the evidence. If, in summing up the evidence to the jury, the court should mistake the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement; and by being made known at the moment, would often enable the court to correct an erroneous expression, so as to explain or qualify it in such manner as to make it wholly unexceptionable, or perfectly distinct.

Carver v. Astor, (1) 761

2. A rule had been granted on the district judge of the northern district of New York, to show cause why he did not sign a bill of exceptions in a case tried before him. The court said, that on the day of the return of the rule, the district judge has a right to show cause; whether the person who obtained the rule moves or not. He has a right to have the rule disposed of.

Ex-Parte Martha Bradstreet, (102) 796

3. A return by the district judge to a rule to show cause, need not be sworn to by him.

Id.

(1b.) 796

4. A case came before the court on a judgment in the Circuit Court, for the defendant, the avowant in replevin; he having demurred to the pleas of the plaintiff in an action of replevin. The court having reversed the judgment of the Circuit Court, remanded the cause, with instructions to the Circuit Court to overrule the demurrer, and permit the defendant, the avowant, to plead.

Lloyd v. Scott, (205) 833

5. Where the whole cause, and not a point or points in the cause, has been adjourned from the Circuit Court to this court, the case will be remanded to the Circuit Court.

Saunders v. Gould, (392) 897

6. In an ejectment to recover a lot of land, being the first division lot laid out to the right of the society in the town of Pawlet, the plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England within the dominions of the King of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king." The defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue, in the corporate capacity in which they have sued.

The Society for the Propagation of

the Gospel in Foreign Parts v. The

Town of Pawlet, and Clarke, (480) 927

7. If the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. The general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring.

Id.

(1b.) 927

PRESIDENT OF THE UNITED STATES—1.

See Army of the United States, 2, 3.

PRINCIPAL AND AGENT—1.

The officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the

Peters 1, 2, 3, 4.

bank in favor of third persons, possessing no other knowledge.

Minor et al. v. The Mechanics' Bank of Alexandria, (70) 157

PRINCIPAL AND AGENT—3.

[See Agent and principal.

PRIORITY OF THE UNITED STATES—1.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, sec. 65.

Conard v. The Atlantic Insurance Company, (438) 211

2. It is obvious that the latter clause of the 65th section of the Act of 1799 is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative, in the former part of the enactment.

Id. (439) 212

3. Insolvency, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of *The United States v. Hooe* (3 Cranch, 73); and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute.

Id. (Ib.) 212

4. Mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section.

Id. (Ib.) 212

5. The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent its passing by virtue of such assignment to the assignees; but it is a mere right of prior payment, out of the general funds of the debtor in the hands of the assignees; and the assignees are rendered personally liable if they omit to discharge the debt due to the United States.

Id. (Ib.) 212

6. It is true that in discussions in courts of equity a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. The estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagee. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast, to an estate absolute and indefeasible.

Id. (441) 213

7. It has never yet been decided by this court that the priority of the United States will divest a specific lien attached to anything, whether it be accompanied by possession or not.

Id. (Ib.) 213

8. The case of *Thelusson v. Smith* (2 Wheat., 396) turned upon its own particular circumstances, and did not establish any principles different from those which are recognized in this case. And it establishes no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States.

Id. (444) 214

9. It is not understood that a general lien by judgment on lands constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land.

Id. (443) 214

PRIORITY OF THE UNITED STATES—3.

1. Twenty-three cases of silk were imported from Canton in the ship *Rob Roy* into the port of Boston, consigned to George D'Wolf and John Smith.

Peters 1, 2, 3, 4. U. S., Book 7.

After the arrival of the vessel with the merchandise on board, the collector caused an inspector of the customs to be placed on board. Soon afterwards, and prior to the entry of the merchandise, and prior to the payment or any security for the payment of the duties thereon, the merchandise was attached by the deputy-sheriff of the county, in due form of law, as the property of G. D'Wolf and J. Smith, by virtue of several writs of attachment issued from the Court of Common Pleas for the County of Suffolk, at the suit of creditors of G. D'Wolf and J. Smith. These attachments were so made prior to the inspector's being sent on board the vessel. At the time of the attachment, the sheriff offered to give security for the payment of the duties on the merchandise, which the collector declined accepting. The merchandise was sent to the custom-house stores by the inspector, and several days after, the custom-house store-keeper gave to the deputy-sheriff an agreement signed by him, reciting the receipt of the merchandise from the inspector, and stating, "I hold the said merchandise to the order of James Dennie, deputy-sheriff." The marshal of the United States afterwards attached, took, and sold the merchandise under writs and process in favor of the United States, against George D'Wolf; which writs were founded on duty bonds, due and unpaid, for a larger amount than the value of the merchandise, given before by D'Wolf and Smith; who, before the importation of the merchandise, were indebted to the United States on various bonds for duties, besides those on which the suits were instituted. Held, that the attachments issued out of the Court of Common Pleas of the County of Suffolk, did not affect the rights of the United States to hold the merchandise until the payment of the duties upon them; and that the merchandise was not liable to any attachment by an officer of the State of Massachusetts for debts due to other creditors of George D'Wolf and John Smith.

Harris v. Dennie. (292) 683

2. The United States have no general lien on merchandise, the property of the importer, for duties due by him upon other importations. The only effect of the first provision in the sixty-second section of the Act of 1799, ch. 128, is that the delinquent debtor is denied at the custom-house any further credit for duties until his unsatisfied bonds are paid. He is compellable to pay the duties in cash, and upon such payment he is entitled to the delivery of the goods imported. The manifest intention of the remaining clause in the section is to compel the original consignee to enter the goods imported by him.

Id. (302) 687

3. No person but the owner or original consignee, or in his absence or sickness his agent or factor, is entitled to enter the goods at the custom-house, or give bond for the duties, or to pay the duties (sec. 36 and 62). Upon the entry the original invoices are to be produced and sworn to; and the whole objects of the act would be defeated by allowing a mere stranger to make the entry, or take the oath prescribed on the entry.

Id. (304) 687

4. The United States having a lien on goods imported for the payment of the duties accruing on them, and which have not been secured by bond, and being entitled to the custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a State officer is an interference with such lien and right to custody, and, being repugnant to the laws of the United States, is void.

Id. (305) 688

5. The acknowledgment of the custom-house store-keeper that he holds goods upon which the duties have not been secured or paid, subject to an attachment issued out of a State court at the suit of a creditor of the importer, was a plain departure from his duty, and is not authorized by the law of the United States, and cannot be admitted to vary the rights of the parties.

Id. (Ib.) 688

PRIORITY OF THE UNITED STATES—4.

1. The plaintiff in replevin, James D'Wolf, claimed the merchandise under an assignment executed by George D'Wolf and John Smith to him, in consideration of a large sum of money due by them to James D'Wolf, and in consideration of advances to be made to them by him. The assignment transferred four vessels and their cargoes, three of which vessels were then at sea, and one in New York ready to sail, the property of the assignors.

The assignment was to be void on the payment to James D'Wolf of the money due to him; and if it should not be paid, the assignee to enforce the pledge by process and arrest in all countries or places whatsoever, and to sell the same for the payment of the amount due by them, the assignors, to George D'Wolf. The merchandise for which this action of replevin was instituted was part of the return cargo of one of the vessels. The defendant, Harris, pleaded that the merchandise was not the property of the plaintiff, but of George D'Wolf and John Smith; and justified the taking of the goods of the plaintiff, as marshal of the district of Massachusetts, by virtue of a writ of attachment sued out in the District Court of the United States for the District of Massachusetts, in which suit judgment was obtained against George D'Wolf. On the trial, the plaintiff in the replevin proved the assignment; that large sums of money were due to him by George D'Wolf and John Smith; that the goods were part of the property assigned; that he had used all proper means to take possession of the goods, but was prevented by the attachment issued by the United States. The defendant proved that the goods were imported into the United States by D'Wolf and Smith; and that at the time of the importation they were indebted to the United States for duties which were due and unpaid to an amount exceeding the value of the merchandise attached; and that the Octavia, one of the vessels assigned, with a cargo on board ready for sea, was at New York at the time of the assignment; which ship was not delivered to James D'Wolf, the assignee, nor were the bills of lading assigned; the cargoes on board the vessels being consigned to the masters for sales and return.

By THE COURT: In the case of *Conard v. The Atlantic Insurance Company* (1 Peters, 306), it was decided that the nondelivery of a vessel assigned to secure or pay a *bona fide* debt did not make the assignment absolutely void. This court is well satisfied with that opinion.

Harris v. D'Wolf, (147) 812

2. The deed of assignment conveyed to the assignee a right to the proceeds of the outward bound cargoes on board the vessels assigned to James D'Wolf. The failure of George D'Wolf to deliver to the assignee the copies of the bills of lading which were in his possession did not leave the property subject to the attachment of creditors, who had no notice of the deed. It was held in the case of *Conard v. The Atlantic Insurance Company* that such a transfer gives the assignee a right to take and hold those proceeds against any person but the consignee of the cargo, or purchaser from the consignee without notice.

Id. (148) 812

3. That the consignees of the merchandise were indebted to the United States on duty bonds remaining due and unpaid at the time of the importation, did not, under the sixty-second section of the Act of March 2d, 1799, make the merchandise, as to the United States, the property of the consignees, notwithstanding the assignment; and make the attachment of the United States for the debt due to them sufficient to bar the action of replevin brought by the assignee.

Id. (Ib.) 812

PROMISSORY NOTE—1.

1. In an action against the indorser of a promissory note made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same at that bank. No other notice of the non-payment of the note was sent to the indorser but that left for him at the Bank of the Metropolis; and it was proved that there was an agreement, by parol, with the indorser, as to other notes discounted previously by the bank for his accommodation, that payment and demand of payment should be made at the bank; the indorser residing a considerable distance from the bank. Held to be sufficient.

Brent's Executors v. The Bank of the Metropolis, (89) 65

2. The indorser of such note is himself bound by the contract made by the drawer, and by the established and known usage of the bank.

Id. (93) 67

3. A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the County of Alexandria, within the District of Columbia, and having what was alleged to be a place of business in the city of Washington; and the notice of the nonpayment of the note, inclosed

in a letter and superscribed with his name, was put into the post-office at Georgetown, addressed to him at that place. Held, that this notice was sufficient.

The Bank of Columbia v. Lawrence, (582) 271

4. In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it, but this case is not one which required such a duty.

Id. (Ib.) 271

5. If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows that service at his place of residence in another place would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places.

Id. (Ib.) 271

6. That is not properly a place of business, in the commercial understanding of the terms, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business.

Id. (Ib.) 271

7. The general rule is, that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him.

Id. (Ib.) 271

8. It seems to be well settled that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law.

Id. (583) 271

9. The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description.

Id. (Ib.) 271

10. When a person has a dwelling-house and a counting-room in the same city or town, a notice sent to either place is sufficient: if parties live in different post-towns, notice through the post-office is sufficient. Notice to a party living at another place than the holder, sent by mail to the nearest post-office, is good under common circumstances, and in such cases where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice.

Id. (Ib.) 271

11. Some countenance has lately been given in England to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He may employ a special messenger if he pleases, but it has not been decided that he must. To compel the holder to the expense of a special messenger would be unreasonable.

Id. (584) 272

12. Modern decisions go to establish that if a note be at the place where it is payable on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the Circuit Court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity.

Fullerton v. The Bank of the United States, (616) 285

PROMISSORY NOTE—2.

1. The notary public, after the note became due, called at the house of the indorser, who resided in the city of Cincinnati, which he found shut up and the door locked; and on inquiry of the nearest resident, he was informed that the indorser and family had left town on a visit; whether for a day, week, or month, he did not know nor did he inquire. He made use of no further diligence to as-

Peters 1, 2, 3, 4.

certain where the indorser had gone, or whether he had left any person in town to attend to his business. He left a notice at the house of a person adjoining, with a request to hand it to the indorser when he should return. Held, that this was sufficient diligence on the part of the holders of the note to charge the indorser.

Williams v. The Bank of the United States.

2. The general rule of law applicable to this subject has long been settled that to enable the holder of a bill of exchange or promissory note to charge the indorser, it is incumbent on him to prove that timely notice of the dishonor of the bill, or of the nonpayment of the note, was given to the indorser; or if this could not be done, he must excuse the omission by showing that due diligence had been used to give such notice.

Id.

3. If the parties reside in the same city or town, the indorser must be personally notified of the dishonor of the bill or note, either verbally or in writing; or a written notice must be left at his dwelling-house or place of business. Either mode is sufficient, but one or other must be observed unless it is prevented by the act of the party entitled to the notice.

Id.

4. The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or indorser, must give notice of its dishonor to the party whom he means to charge. But if, when the notice should be given, the party entitled to it should be absent from the State, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice.

Id.

5. Where the parties reside in the same city or town, the notice should be given at the dwelling-house, or place of business, and the duty of the holder does not require him to give the notice at any other place.

Id.

6. C., the indorser of the note, at the time it fell due, lived in a house in Georgetown, except the lower front room, which was occupied separately as a store by one of his sons. There was a separate entrance to the dwelling part of the house through an alley or passage, apart from the store, which led to the upper rooms, and back buildings, and yard of the house. The son of C., who occupied the store, had a dwelling-house separate from the store. C. was at that time postmaster of Georgetown, and kept the post-office in another part of the town; where he usually transacted his private business as well as that of his office. C. had no concern in his son's store, but he was frequently about the door. Until he took charge of the post-office, which was a year before the note fell due, written communications and notices for him were sometimes left at the store, and were carried by another of his sons, unless when he forgot it, to him. After C. took possession of the post-office, if notices had been left at the store for C., the bearer of them would have been directed to take them to the post-office, or they would have been delivered to him by his son at the post-office, if recollected, or if they had been seen when left at the store. The notary stated that he believed the notice of nonpayment of the note was left at the store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and he never had been in the dwelling-house, or in the passage or alley. Held, that this notice was not sufficient of nonpayment of the note to charge C. with a liability to pay the note.

The Bank of the United States v. Coreman.

7. If notice of the nonpayment of a note, although left at an improper place, was nevertheless, in point of fact, received in due time by the indorser, and so proved, or could from the evidence in the cause be properly presumed by the jury; it is sufficient in point of law to charge the indorser.

Id.

8. The law in Kentucky is settled, as it is in Virginia and in this court; that upon Virginia contracts by indorsement of promissory notes, every reasonable effort must be made to recover of the drawer by suit, before the assignee can have resource against the assignor or indorser.

The Bank of the United States v. Weisiger,

Peters 1, 2, 3, 4.

9. It is upon the question what constitutes such diligence, that all the difficulties arise in suits upon these contracts. And certainly this court cannot be called upon to carry the obligations imposed upon assignees on this point further than the State courts have already extended them.

Id.

10. What will be considered a sufficient compliance with the requisitions of the laws of Kentucky, imposing diligence in the prosecution of a suit against the drawer of a note, by the indorsee, in order to charge a prior indorser.

Id.

11. The discharge of an insolvent under the statutes, is the most satisfactory evidence of insolvency. After such discharge, it is not required that process of execution shall be issued against the party, in order to conform to the injunction of diligence.

Id.

12. The evidence in the case was, that the day when the note became due, the bank being the holder thereof, and it being payable there, after the usual banking hours were over it was delivered to a notary by the officers of the bank, they informing him at the time that there were no funds there for the payment of the note. This was a sufficient proof of due demand of payment.

The Bank of the United States v. Carneal.

13. When a note is payable at a bank it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same, and if he omits so to do, and a demand is there made of payment by the holder within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonor.

Id.

14. It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule.

Id.

15. When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post-town; if it is not, then to the post-office or post-town nearest to his residence, if known. But the rule as to the nearest post-office is not of universal application; for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and the fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience or business, it may be sufficient to send it to either.

Id.

16. A suggestion was made at the bar that the letter to the indorser, stating the demand and dishonor of the note, is not sufficient unless the party sending it also informs the indorser that he is looked to for payment. But where such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over.

Id.

17. Bills of exchange drawn in one State of the Union on persons living in another State partake of the character of foreign bills, and ought to be so treated in the courts of the United States.

Buckner v. Finley,

Peters 528

PROMISSORY NOTES—3.

1. An action was brought by The Union Bank of Georgetown against George B. Magruder as indorser of a promissory note drawn by George Magruder. The maker of the note died before it became payable, and letters of administration to his estate were taken out by the indorser. No notice of the nonpayment of the note was given to the indorser, or any demand of payment made until the institution of this suit. Held, that the indorser was discharged, and his having become the administrator of the drawer does not relieve the holder from the obligation to demand payment of the note, and to give notice thereof to the indorser. The general rule that payment must be demanded from the maker of a note, and notice of nonpayment forwarded to the indorser within due time in order to render him liable, is so firmly settled that no authority need be cited to support it. Due diligence to obtain pay-

ment from the maker is a condition precedent on which the liability of the indorser depends.

Magruder v. The Union Bank of Georgetown. (90) 613

2. A note was discounted at the office of discount and deposit of The Bank of the United States in the city of Washington, for the accommodation of the drawer, indorsed by Magruder and by M'Donald; neither of the indorsers receiving any value for his indorsement, but indorsing the note at the request of the drawer, without any communication with each other. The note was renewed from time to time, under the same circumstances, and was at length protested for non-payment: and separate suits having been brought by the bank against the indorsers, the drawer being insolvent, judgments in favor of the bank were obtained against both the indorsers. The bank issued an execution against Magruder, the first indorser, and he having paid the whole debt and costs, instituted this suit against M'Donald, the second indorser, for a contribution, claiming one-half of the sum so paid by him in satisfaction of the judgment obtained by the bank. Held, that he was not entitled to recover.

M'Donald v. Magruder. (470) 744

3. That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the note, is unquestionable. When he takes up the note he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence he used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount.

Id. (474) 746

4. The indorser of a promissory note who receives no value for his indorsement from a subsequent indorser, or from the drawer, cannot set up the want of consideration received by himself; he is not permitted to say that the promise is made without consideration; because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself.

Id. (476) 746

PROMISSORY NOTES—4.

1. Action by the indorsees against the indorser of a promissory note, drawn and indorsed in the State of Kentucky. The statute of Kentucky authorizing the assignment of notes is silent as to the duties of the assignee or the nature of the contract created by the assignment. It only declares such assignments valid, and the assignee capable of suing in his own name. But the courts of that State have clearly defined his rights, duties and obligations resulting from the assignment. The assignee cannot maintain an action on the mere nonpayment of the note and notice thereof, until the holder of the note has made use of all due and legal diligence to recover the money from the drawer; whose engagement is held to be that he will pay the amount, if after due and diligent pursuit the maker is found insolvent.

Bank of The United States v. Tyler. (366) 888

2. The principles of the law of Kentucky relative to the liability of indorsers on promissory notes, and proceedings to establish the same, as settled by the decisions of the courts of Kentucky.

Id. (Ib.) 888

3. After judgment obtained in the Circuit Court of the United States against the drawer of a note, a *capias ad satisfaciendum* was issued against him by the holder, and he was put in prison. Two justices of the peace ordered his discharge, claiming to proceed according to the law of Kentucky in the case of insolvent debtors; and the jailer permitted him to leave the prison. The jailer made himself and his securities liable for an escape, by permitting the prisoner to leave the prison. The neglect of the holder of the note to proceed against the jailer and his securities, prevents his making the indorser liable for the amount of the note.

Id. (Ib.) 888

4. The general principle of all the cases is that a plaintiff must pursue with legal diligence all his means and remedies, direct, immediate, or collateral, to recover the amount of his debt from the drawer of the note, or anyone else who has put himself, or has by operation of law been put in his place.

Id. (Ib.) 888

5. The decision of this court in the case of *The Bank of the United States v. Welsiger* examined and confirmed.

Id. (Ib.) 888

PUBLIC AGENTS—3.

1. When money of the United States has been received by one public agent from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States; and they may maintain an action against the receiver for the same.

The United States v. Buford. (23) 590

2. B, a Deputy Commissary-General of the United States, received from M, a Deputy Quartermaster-General of the United States, the sum of \$10,000, and acknowledged the same by a receipt signed by him with his official description. The United States had a right to treat M as their agent in the transaction, by making B their debtor, and to an action brought against him for money had and received, the statute of limitations is no bar.

Id. (29) 590

RE-ARGUMENT—2.

The court refused to hear a re-argument upon a point decided in the case of *Fullerton et al. v. The Bank of the United States* (1 Peters, 612), that the act of the Legislature of Ohio relative to proceedings against parties to promissory notes had been well adopted as a rule of practice in the courts of the United States for the State of Ohio.

Williams v. The Bank of the United States. (106) 363

RECORDING OF DEEDS—1.

1. The Registry Act of Ohio directs that all deeds made within the State shall be recorded within six months from the time of the actual execution thereof, and declares that if any such deed shall not be recorded in the county where the land lies, within the limits allowed by law, "the same shall be deemed fraudulent and void, against any subsequent purchaser, for a valuable consideration, without notice of such deed."

Steele's Lessee v. Spencer. (559) 262

2. In the construction of the Registry Act of Ohio, the term "purchasers" is usually taken in its limited legal sense. It means a complete purchaser; or, in other words, a purchaser clothed with a legal title.

Id. (Ib.) 262

3. It is not necessary that a deed made to a subsequent *bona fide* purchaser without notice shall be recorded to give it operation against a prior unrecorded deed, as by the provisions of the registry acts the prior deed is declared in itself absolutely void as against such purchaser.

Id. (560) 262

4. A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land should, within six months, make a deed, &c., with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner as if the same had been conveyed to him." The decree of the Supreme Court of Ohio, by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the Registry Act of Ohio applies as well to a title under such a decree as it would do if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed.

Id. (558) 261

5. See Deeds, 2, 5, 6, 7, 8, 9.

Elliott v. Peirsol. (339) 170

RECORDS—4.

The record of proceedings against "unknown heirs" is no evidence that any such heirs existed, and the decree and deed made in pursuance of it cannot avail to pass any title, without some evidence that there were some heirs.

Hollingsworth v. Barbour et al. (466) 922

Peters 1, 2, 3, 4.

RELEASE—1.

At Common Law, the release of a debtor whose person is in execution, is a release of the judgment itself. The law will not permit proceedings by a creditor at the same time against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released.

The United States v. Stansbury et al., (575) 268

REMAINDER—4.

1. The uses declared in a deed of marriage settlement were to and for the use of "Joanna Philipse and Beverly Robinson (the releasees) and their heirs, until the solemnization of the said intended marriage; and from and immediately after the solemnization of the said intended marriage, then to the use and behoof of the said Mary Philipse and Roger Morris, and the survivor of them, for and during the time of their natural lives, without impeachment of waste; and from and after the determination of that estate, then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her or their heirs and assigns forever. But in case the said Roger Morris and Mary Philipse shall have no child or children begotten between them, or that such child or children shall happen to die during the lifetime of the said Roger and Mary, and the said Mary should survive the said Roger without issue, then to the use and behoof of her, the said Mary Philipse, and her heirs and assigns forever. And in case the said Roger should survive the said Mary Philipse, without any issue by her, or that such issue is then dead, without leaving issue; then, after the decease of the said Roger Morris, to the only use and behoof of such person or persons, and in such manner and form as the said Mary Philipse shall, at any time during the said intended marriage, desire the same by her last will and testament, &c., &c. The marriage took effect; children were born, all before the attainder of their parents in 1779. Mary Morris survived her husband and died in 1825, leaving her children surviving her. This is a clear remainder in fee to the children of Roger Morris and wife, which ceased to be contingent on the birth of the first child, and opened to let in after-born children.

Carver v. Astor, (1) 761

2. It is perfectly consistent with this limitation that the estate in fee might be defeasible and determinable upon a subsequent contingency; and upon the happening of such contingency, might pass by way of shifting executory use to other persons in fee, thus making a fee upon a fee.

Id., (Ib.) 761

3. The general rule of law founded on public policy is that limitations of this nature shall be construed to be vested when, and as soon as they may vest. The present limitation in its terms purports to be contingent only until the birth of a child, and may then vest. The estate of the children was contingent only until their birth; and when the Confiscation Act of New York passed, they being all born, it was a vested remainder in them and their heirs, and not liable to be defeated by any transfer or destruction of the life estate.

Carver v. Astor, (Ib.) 761

REPORTER OF THE SUPREME COURT OF THE UNITED STATES—3.

Certified copies of the opinion of the court, delivered in cases decided by the court, are to be given by the reporter, and not by the clerk of the court.

Anonymous, (397) 719

RESPONDENTIA—1.

1. It is not necessary that a *respondentia* loan should be made before the departure of a ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run.

Conard v. The Atlantic Insurance Company, (436) 211

2. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium, it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage.

Id., (437) 211

Peters 1, 2, 3, 4.

3. The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund where the risk was *bona fide* run upon other goods, and it was not a mere contract of wager and hazard.

Id., (Ib.) 211

4. It seems that the common and usual form of a *respondentia* bond is that which was used in this case.

Id., (Ib.) 211

SLAVE—2.

1. The Act of the Legislature of Maryland, passed in 1796, ch. 47, sec. 13, declares that "all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of any slave or slaves belonging to such person or persons, by his, her, or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom given shall commence." The time of freedom of the appellee in this case, commenced when he was about eleven years old. Held, that his manumission by will was valid.

Le Grand v. Darnall, (664) 555

2. The Court of Appeals of Maryland has decided that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication. This court entertains the same opinion.

Id., (670) 557

SLAVE TRADE—3.

1. See Construction of statutes of the United States.

2. The offense against the law of the United States under the seventh section of the Act of Congress, passed the 2d of March, 1807, entitled "An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the first of January, 1808," is not that of importing or bringing into the United States persons of color with intent to hold or sell such persons as slaves, but that of hovering on the coast of the United States with such intent; and although it forfeits the vessel and any goods or effects found on board, it is silent as to disposing of the colored persons found on board, any further than to impose a duty upon the officers of armed vessels who make the capture to keep them safely, to be delivered to the overseers of the poor or the governor of the State or persons appointed by the respective States to receive the same.

The United States v. Preston, (65) 604

3. The persons of color held as slaves under an order of the District Court of Louisiana, in a case in which the decree was afterwards reversed, were illegally sold, and they are free.

Id., (57) 601

SPAIN—2.

1. See Louisiana.
2. See Treaties.

SPECIFIC PERFORMANCE—1.

1. See Chancery Practice, 11.
2. *Barry v. Coombe*, (640) 295

STATE LAWS—1.

1. Under the law of Virginia, a confession of judgment by the defendant is a release of errors.

Mandeville v. Suckley et al., (136) 85

2. See Courts of the several States, 1, 2, 3, 4, 5.
3. The Act of the Legislature of Maryland passed 19th December, 1791, entitled "An Act concerning the territory of Columbia, and the city of Washington," which by the 6th section provides for the holding of lands by "foreigners," is an enabling act, and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen.

Spratt v. Spratt, (349) 174

4. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act. Thus after-purchased lands vest in him as a citizen, not by virtue of the act of the Legislature of Maryland, but because of his acquiring the rights of citizenship.

Spratt v. Spratt, (349) 174

5. Lands in the County of Washington and District of Columbia, purchased by a foreigner, before naturalization, were held by him under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands is given absolutely, by this act, and is not affected by his becoming a citizen; but they pass to his heirs and relations, precisely as if he had remained a foreigner.

Id. (1b.) 174

6. The statute of limitations in Kentucky is substantially the same with the statute of 21 James II., ch. 16, with the exception that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to in this case, in the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a State upon a like subject; for this belongs to the local State tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence.

Bell v. Morrison, (359) 178

7. If the doctrines of the Kentucky courts, in the construction of a statute of that State, are irreconcilable with the English decisions upon a statute in similar terms, this court, in conformity with its general practice, will follow the local law, and administer the same justice which the State court would administer between the same parties.

Id. (360) 178

8. The decisions in the courts of New York on the construction of its own statute of frauds, and the extent of the rules deduced from it, present to this court a guide in its decisions upon the construction of their statute.

D'Wolf v. Bahaud et al., (501) 238

9. In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky is the law of this court in deciding the rights of the parties.

Davis v. Mason, (505) 240

10. Under the law of the State of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will.

Id. (508) 241

11. It is a settled rule in Kentucky that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.

Id. (1b.) 241

12. The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory.

Nicholls et al. v. Hodges' Ex., (565) 264

13. Under the laws of Virginia relative to the estate of deceased persons, lands are never appraised.

Archer et al. v. Deneale et al., (589) 274

14. See Practice, 5, 6, 7, 8.

15. Under the law of Virginia which directs the sheriff holding an execution against the goods and effects of defendants to take forthcoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution after ten days' notice to the obligors in the bond of the motion for execution, the property levied upon having been re-delivered, according to the condition of the bond; if the notice given to the obligees, of the plaintiff's intention to proceed is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored.

Alexander v. Brown, (684) 315

STATE LAWS—2.

1. Where the question upon the construction of

the statute of a State relative to real property has been settled by any judicial decision in the State where the land lies, this court, upon the uniform principles adopted by it, would recognize that decision as a part of the local law.

Gardner v. Collins, (58) 347

2. Construction of the law of descents of Rhode Island.

Id. (1b.) 347

3. The act of the Legislature of Maryland relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision: that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission and all the proceedings should be set out in *habe verba*. If the substance of the proceedings is recited, it is sufficient.

Thompson v. Tolmie, (167) 385

4. The law appears to be settled in the States that courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of orphans' courts. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings.

Id. (1b.) 385

5. The law of Kentucky authorizes their courts of chancery to make decrees against absent defendants, on the publication of an order for two months successively in some paper authorized to make the publication, and on fixing it up at certain public places, prescribed by the act. This publication is considered as a constructive service of the process. The Supreme Court of Kentucky has decided that the publication must be continued for two calendar months.

Hunt v. Wickliffe, (214) 402

6. Construction of the provisions of the treaties with the Indians, made by the State of Georgia relative to boundaries, and of the acts of the Legislature of that State relative to grants of land within its territorial limits, and which were not within the Indian boundary line, as defined by the treaties and as recognized by those acts.

Patterson's Lessee v. Jenks, (229) 407

7. If the State of Georgia have construed their treaty with the Cherokee Indians by any subsequent acts manifesting an understanding of it, this court would not hesitate to adopt that construction.

Id. (230) 407

8. If the State of Georgia has practically settled the limits of Franklin County, such settlement ought to have been conclusive on the Circuit Court.

Id. (232) 408

9. Under the statute of limitations of Tennessee of seventeen hundred and ninety-seven, a possession of seven years is a protection only when held under a grant, or under valid mesne conveyances, or a paper title, which are legally or equitably connected with a grant; and a void deed is not such a conveyance as that a possession under it will be protected by the statute of limitations.

Lessee of Powell v. Harman, (241) 411

10. This court has frequently decided that to sustain its jurisdiction in appeals and writs of error, it is not necessary to state in terms upon the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act, if the record shows that the Constitution or a law of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a State law was questioned, and the decision was in favor of the party claiming under such law.

Wilson v. The Black Bird Creek Marsh Company, (250) 414

11. The act of the Assembly of the State of Delaware, by which the construction of the dam erected by the plaintiffs was authorized, shows plainly that this is one of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the

Peters 1, 2, 3, 4.

rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

Wilson v. The Black Bird Creek Marsh Company.

(251) 414

12. S. and M. held land in Luzerne County, Pennsylvania, in common under a Connecticut title. A division of the land was made between them, and S. became the tenant of M. of his part of the land thus set off in severalty, under a lease, to be terminated on a notice of one year. S. afterwards obtained a Pennsylvania title to the land leased to him by M., and on a trial in an ejectment for the land brought by M. against S., the Court of Common Pleas of Bradford County, Pennsylvania, held that S., having held the land as tenant of M., could not set up a title against his landlord. Upon a writ of error to the Supreme Court of Pennsylvania in 1825, it was held that "the relation between landlord and tenant could not exist between persons holding under a Connecticut title." The Legislature of Pennsylvania, on the 8th of April, 1826, passed an Act declaring that "the relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the Commonwealth." The case came again before the Supreme Court of Pennsylvania, and the judgment of the Court of Common Pleas of Bradford County in favor of M., the landlord, was affirmed; that court having decided that the Act of Assembly of the 8th of April, 1826, was a constitutional act, and did not impair the validity of any contract. S. brought a writ of error to this court, claiming that the Act of the Assembly of Pennsylvania of the 8th of April, 1826, was unconstitutional. Held, that the act was constitutional.

Satterlee v. Matthewson,

(380) 458

13. Objections to the jurisdiction of this court have been frequently made on the ground that there was nothing apparent on the record to raise the question whether the court from which the case had been brought had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the Judiciary Act of 1789. This has given occasion for a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is that if the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause; although the record should not in terms state a misconstruction of the Constitution of the United States; or that the repugnancy of the statute of the State, to any part of that Constitution, was drawn into question.

Id.

(409) 467

14. There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions.

Id.

(413) 469

15. There is no part of the Constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract. *Id.*

(*Id.*) 469

16. In the case of *Fletcher v. Peck* (6 Cranch, 87), it was stated by the Chief Justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power, and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion that a State statute which divests a vested right, is repugnant to the Constitution of the United States.

Id.

(*Id.*) 469

17. This court can perceive no sufficient grounds for declaring that the Legislature of Ohio might not repeal the law of that State by which the Court of Common Pleas was authorized to direct, in a summary way, the sale of the lands of an intestate. "Jurisdiction of all probate and testamentary matters" may be completely exercised without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to be identical with that power, or to comprehend it.

The Bank of Hamilton v. Dudley's heirs,

(524) 507

18. The occupant claimant law of Ohio, which declares that an occupying claimant shall not be Peters 1, 2, 3, 4.

turned out of possession until he shall be paid for lasting and valuable improvements made by him, and directs the court in a suit at law to appoint commissioners to value the same, is repugnant to the seventh amendment of the Constitution of the United States, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The compensation for improvements is a suit at common law, and must be submitted to a jury.

Id.

(525) 507

19. Admitting that the Legislature of Ohio can give an occupant claimant a right to the value of his improvements, and authorize him to retain possession of the land he has improved until he shall have received that value; and assuming that they may annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts; still, the Legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, or direct those courts in a trial at common law to appoint commissioners for the decision of questions which a court of common law must submit to a jury.

Id.

(526) 508

20. The inability of the courts of the United States to proceed in suits at common law, in the mode prescribed by the occupant law of Ohio, does not deprive the occupant of the benefit intended him. The modes of proceeding which belong to courts of chancery, are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law, until its decree shall be complied with. If any part of the act be unconstitutional, the provisions of that part may be disregarded; while full effect will be given to such as are not repugnant to the constitution of the State or the ordinance of 1787. The question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect.

Id.

(*Id.*) 508

21. The Act of the Legislature of Maryland passed in 1796, ch. 47, sec. 13, declares that "all persons capable in law to make a valid will and testament, may grant freedom to, and effect the manumission of any slave or slaves, belonging to such person or persons, by his, her, or their last will and testament, and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators, or at such other period as may be limited in such last will and testament; provided always, that no manumission by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be to the prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time freedom given shall commence." The time of freedom of the appellee in this case commenced when he was about eleven years old. Held, that his manumission by will was valid.

Le Grand v. Darnall,

(664) 555

22. The Court of Appeals of Maryland has decided that a devise of property, real or personal, by a master to his slave, entitles the slave to his freedom by necessary implication. This court entertains the same opinion.

Id.

(670) 557

23. This being a suit upon a local statute, giving a particular remedy in the nature of a foreign attachment against garnishees who possess goods, effects, or credits of the principal debtor; the decisions which have been made on the construction of that statute by the State court of Massachusetts are entitled to great respect, and ought, in conformity to the uniform practice of this court, to govern its decisions.

Beach v. Viles,

(678) 560

24. Where under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees under the assignment are insufficient to pay the amount of the just debts and dividends due to the assignees, the established doctrine in Massachusetts is that the assignees cannot be holden as trustees of the debtor, to the creditor who is the plaintiff in an attachment, so as to be chargeable to him in the suit. Even if the assignment were held to be constructively fraudulent in point of law, they would be entitled to retain their own *bona fide* debts; for as to those, they

stand upon equal grounds with any other creditors. This is understood to be the clear result of the cases decided in Massachusetts.

Beach v. Viler, (678) 560

25. The Act of the Legislature of Maryland of 1793, incorporating the Bank of Columbia, one of the sections of which gives to the bank a summary proceeding against debtors to the bank, did not intend to interfere with any legal defense against the claim of the bank the party might have. It does not prescribe the nature of that defense, or deprive him of any which might have been used, had the action been commenced in the usual way.

The Bank of Columbia v. Sweeney, (671) 557

26. J. J. died in New Hampshire, seized of real estate in Rhode Island, having devised the same to his daughter, an infant. His executrix proved the will in New Hampshire, and obtained a license from a probate court in that State to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the Legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. Held, that the act of the Legislature of Rhode Island which confirmed the title of the purchasers was valid. The legislative and judicial authority of New Hampshire were bounded by the territory of that State, and could not be rightfully exercised to pass estates lying in another State. The sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and the deed executed by her of the estate was *proprio vigore*, inoperative to pass any title of the testator to any lands described therein.

Wilkinson v. Leland et al., (655) 552

27. By the laws of Rhode Island, the probate of a will, in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator.

Id. (Ib.) 552

STATUTE OF CHARITABLE USES—3.

See the case of *Inglis v. The Trustees of the Sailor's Snug Harbor*, 99, and the Appendix, on the construction and application of this statute to devises and gifts to charitable uses in the United States.

STATUTE OF FRAUDS—1.

1. The statute of frauds of New York is a transcript on this subject of the statute 29 Charles II., ch. 3. It declares that no action shall be brought to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or some memorandum, or note thereof, be in the writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts to explain its objects, and expound its true interpretation.

D'Wolf v. Rabaud et al., (499) 237

2. Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination; at least in those States where the English authorities have been fully recognized and adopted in practice.

Id. (Ib.) 237

3. If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money is not coincident with, nor the same contract with C to do the act. Each is an original promise though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of either B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to

A, not upon a joint, but a several original undertaking. Each is a direct original promise, founded upon the same consideration.

Id. (500) 237

4. The case of *Wain v. Warlters* (5 East, 10), was the first case which settled the point that it was necessary in order to escape from the statute of frauds that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the courts of New York into its jurisprudence, as a sound construction of the statute.

Id. (501) 238

5. The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

Barry v. Coombe, (650) 300

6. A note or memorandum in writing of the agreement between parties is sufficient under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to sustain an action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c.

Id. (Ib.) 300

7. An examination of the cases will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contract was created. It is written evidence which the statute requires; and a note or letter, and even in one case a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute.

Id. (651) 300

8. Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit: "By my purchase of your half, E. B. wharf and premises this day agreed upon between us, \$7,578.63;" it was held to be a sufficient memorandum in writing under the statute of Frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises."

Id. (Ib.) 300

STATUTE OF FRAUDS—2.

1. In cases not absolutely closed by authority, this court has always expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises, made by different persons at the same time upon the same general consideration.

Townsend v. Sumrall, (182) 390

2. If A says to B, pay so much money to C and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract.

Id. (Ib.) 390

STATUTE OF LIMITATIONS—1.

1. The statute of limitations, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, should have received such support from courts of justice as would have made it what it was intended emphatically to be—a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be

incapable of explanation, by reason of the death or removal of witnesses.

Bell v. Morrison, (360) 178

2. An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this court in the case of *Wetzell v. Bussard* (11 Wheat., 309); "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional—it must show, positively, that the debt is due, in whole or in part. If it be connected with the circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown."

Id. (362) 179

3. If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and if any conditions are annexed, they ought to be shown to have been performed.

Id. (Ib.) 179

4. The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties understood the balance to be, would not, by the courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be. It is indispensable for the party to prove, by independent evidence, the extent of the balance due to him, before there can arise any promise to pay it as a subsisting debt.

Id. (365) 180

5. The acknowledgment of a debt by one partner, after a dissolution of the copartnership, is not sufficient to take the case out of the statute, as to the other partners.

Id. (373) 184

6. A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner.

Id. (370) 183

7. After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose.

Id. (373) 184

8. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone.

Id. (Ib.) 184

STATUTE OF LIMITATIONS—3.

See Limitation of actions.

STATUTES OF LIMITATIONS—4.

1. See Limitations of actions.

STATUTES OF STATES—4.

1. See Construction of State laws.

2. A case was admitted to be essentially the same with that of *Gardner v. Collins* (2 Peters, 58), but the counsel for the plaintiff relied on evidence adduced to show a settled judicial construction of the act of the Legislature of Rhode Island relative to descents different from that which had been made in this court. "The court is not convinced that the construction of the act which prevails in Rhode Island is opposed to that which was made by this court."

Saunders v. Gould, (392) 897

3. Construction of the Act of the Legislature of Maryland of 1721, which authorizes the descent to alien heirs of lands held by aliens under "deed or will," in that part of the District of Columbia which was ceded to the United States by the State of Maryland.

Spratt v. Spratt, (398) 897

Peters 1, 2, 3, 4.

STATUTES OF THE UNITED STATES—3.

1. See Construction of statutes, 1, 2, 3, 4, 5, 6.

2. This court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy.

Bojee's Executors v. Grundy, (210) 655

STATUTES OF THE UNITED STATES—4.

1. See Priority of the United States.

2. See City of Washington.

SUABILITY OF STATES—3.

1. The subpoena issued on the filing of a bill in which the State of New Jersey were complainants, and the State of New York were defendants, was served upon the Governor and Attorney-General of New York sixty days before the return day, the day of the service and return inclusive. A second subpoena issued, which was served on the Governor of New York only, the Attorney-General being absent. There was no appearance by the State of New York. BY THE COURT: This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the Governor and on the Attorney-General. A service on one is not sufficient to entitle the court to proceed.

The State of New Jersey v. The State of New York, (461) 741

2. Upon an application by the counsel for the State of New Jersey, that a day might be assigned to argue the question of the jurisdiction of this court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the State of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely *ex-parte*, the court could not feel bound by its decision if the State of New York desired to have the question again argued.

Id. (Ib.) 741

3. A notice was given by the solicitors for the State of New Jersey to the Governor of the State of New York, dated the 12th of January, 1830, stating that a bill had been filed on the equity side of the Supreme Court, by the State of New Jersey, against the people of the State of New York, and that on the 13th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the State of New York, on the motion of the counsel for the State of New Jersey for a subpoena to be served on the Governor and Attorney-General of the State of New York, the court said: as no counsel appears to argue the motion on the part of the State of New York, and the precedent for granting it has been established, upon very grave and solemn argument, the court do not require an *ex-parte* argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established. The State of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do.

Id. (Ib.) 741

SUPREME COURT OF THE UNITED STATES—2.

1. The city council of Charleston, exercising an authority under the State of South Carolina, enacted an ordinance by which a tax was imposed on the six and seven per cent. stock of the United States; and in the Court of Common Pleas of the Charleston District, an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance violated the Constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the Constitutional Court, the highest court of law of the State; and in that court it was held that the ordinance did not violate the Constitution of the United States, and a writ of error was prosecuted on this decision to this court. Held, that the question decided by the Constitutional Court was the very question on which the revising power of this court is to be exercised.

Weston et al. v. The City Council of Charleston, (464) 486

2. The power of this court to revise the judgments of State tribunals depends on the 25th section of the Judiciary Act. That section enacts "that a final judgment or decree in any suit in the highest

court of law or equity of a State in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, "may be re-examined and reversed or affirmed in the Supreme Court of the United States."

Weston et al. v. The City Council of Charleston. (463) 486

3. A writ of error to this court may be prosecuted where by the judgment of the highest court of the State of South Carolina a prohibition, issued in a State court, to prevent the levying of a tax which was imposed by a law repugnant to the Constitution of the United States, was refused on the ground that the law was not so repugnant to the Constitution.

Id. (464) 468

4. The term *suit* is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice in which an individual pursues that remedy in a court of justice which the law affords him.

Id. (Ib.) 468

5. The words "final judgment," in the 25th section of the Judiciary Act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause; and it is not required that such judgments shall finally decide upon the rights which are litigated that the same shall be within purview of the section.

Id. (Ib.) 468

6. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law. If in a case depending before any court a legislative act shall conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the act. The court must determine whether a repugnancy does or does not exist, and in making this determination must construe both instruments. That its construction of the one is authority, while its construction of the other is to be disregarded, is a proposition for which this court can perceive no reason.

The Bank of Hamilton v. Dudley's Heirs. (524) 507

SUPREME COURT OF THE UNITED STATES—3.

The Supreme Court of the United States has not jurisdiction by *habeas corpus* or otherwise, in a case of a criminal prosecution instituted in a Circuit Court of the United States for the purpose of examining the judgment and proceedings of that court in such cases.

Ex-parte Tobias Watkins. (193) 650

2. See *Habeas corpus*.

3. See *Jurisdiction*.

SURETIES—1.

1. The claims of the United States upon an official bond, and upon all the parties to it, is not released by the laches of the officer to whom the assertion of this claim is intrusted. Such laches have no effect whatsoever on the rights of the United States, as well against the sureties, as the principal in the bond.

Dox v. The Postmaster-General. (325) 163

2. The discharge, by the Secretary of the Treasury of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for the amount due upon the judgment, and unpaid.

The United States v. Stansbury et al. (575) 268

TAXES AND TAXATION—4.

1. See *Corporation*.

2. See *Lands and land titles*.

3. The official tax books of the corporation of Washington, made up by the register from the original returns or lists of the assessors laid before the Court of Appeals, he being empowered by the ordinances of the corporation to correct the valuations made by the assessors, are evidence; and it is not required that the assessor's original lists shall

be produced in evidence, to prove the assessment of the taxes on real estate in the city of Washington.

Runkendorf v. Taylor's Lessee. (349) 882

4. In an *ex-parte* proceeding, as a sale of land for taxes under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes to cure any radical defect in his proceedings; and the proof of regularity devolves upon the person who claims under the collector's sale.

Id. (Ib.) 882

5. Proof of the regular appointment of the assessors is not necessary. They acted under the authority of the corporation, and the highest evidence of this fact is the sanction given to their returns.

Id. (Ib.) 882

6. The act of Congress under which the lot in the city of Washington in controversy was sold, required that public notice of the time and place of sale of lots, the property of non-residents, should be given by advertising "once a week" in some newspaper in the city for three months. Notice of the sale of the lot in controversy was published for three months; but in the course of that period, eleven days at one time, at another ten days, and at another eight days transpired in succeeding weeks, between the insertions of the advertisement in the newspapers. "A week" is a definite period of time, commencing on Sunday and ending on Saturday. The notice was published Monday, January 6th, and was omitted until Saturday, January 18th, leaving an interval of eleven days. Still the publication on Saturday was within the week preceding the notice of the 6th, and this was sufficient. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week for three months, the law is complied with and its object effectuated.

Id. (Ib.) 882

7. No doubt can exist that a part of a lot may be sold for taxes where they have accrued on such part.

Id. (Ib.) 882

8. The lot on which the taxes were assessed belonged to two persons as tenants in common. The assessment was made by a valuation of each half of the lot. To make a sale of the interest of one tenant in common for unpaid taxes valid, it need not extend to the interest of both claimants; one having paid his tax, the interest of the other may well be sold for the balance.

Id. (Ib.) 882

9. The advertisement purported to sell "half of lot No. 4, in square No. 491;" and the other half was advertised in the same manner as belonging to the other tenant in common. This was not a sufficient advertisement, and a sale made under the same was void.

Id. (Ib.) 882

10. It is not sufficient that in an advertisement of land for sale for unpaid taxes, such a description is given as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry; nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, would the sale be valid, unless the same information had been communicated to the public in the notice.

Id. (Ib.) 882

11. The tenth section of the act of Congress provides that real property in Washington, on which two or more years' taxes shall be due and unpaid, may be sold, &c. In this section a distinction is made between a general and a special tax. Property may be sold to pay the former as soon as two years' taxes shall be due; but to pay the latter, property cannot be sold until the expiration of two years after the second years' tax becomes due. The taxes for which the property in controversy was sold, became due, by the ordinance of the corporation, on the 1st day of January, 1821 and 1822. The special tax for paying was charged against the lot in 1820, and became due on the first of January, 1821; but the ground on which it was assessed was not liable to be sold for the tax until the 1st of January, 1823. The first notice of the sale was given on the 6th of December, 1822, nearly a month before the lot was liable to be sold for the special tax of 1820. Held, that the whole period should have elapsed which was necessary to render the lot

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liable to be sold for the special tax, before the advertisement was published.

Ronkendorf v. Taylor's Lessee. (349) 882

12. The power of taxing moneyed corporations has been frequently exercised, and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

The Providence Bank v. Billings and Pittman. (514) 939

13. That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.

Id. (Ib.) 939

14. The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies.

Id. (Ib.) 939

15. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the correction of every abuse of power which may be committed to the State governments. The intrinsic wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.

Id. (Ib.) 939

TENANCY BY THE COURTESY—1.

1. It seems that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of the wife to entitle himself to a tenancy by courtesy, in waste, or what is sometimes styled "wild lands."

Davis et al. v. Mason. (506) 240

2. If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists.

Id. (508) 241

3. At present it is fully settled in equity that the husband shall have courtesy of trust, as well as of legatesates, of an equity of redemption, of a contingent use, or money to be laid out in lands.

Id. (Ib.) 241

TENNESSEE—2.

Construction of the statute of limitations of Tennessee relative to possession of lands.

Lessee of Powell v. Harman. (241) 411

TERRITORIES—1.

1. The Constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The American Insurance Company v. 356 bales of Cotton. (542) 255

2. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and the new relations are created

Peters 1, 2, 3, 4.

between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed; although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

Id. (Ib.) 255

3. See Florida.

4. See Jurisdiction.

TIME—4.

"A week" is a definite period of time, commencing on Sunday and ending on Saturday.

Ronkendorf v. Taylor's Lessee. (349) 882

TREASURY STATEMENTS—3.

1. An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases the officers may well certify, for they must have official knowledge of the facts stated.

The United States v. Buford. (29) 591

2. But when moneys come into the hands of an individual, not through the officers of the treasury, or in the regular course of official duty, the books of the treasury do not exhibit the facts, nor can they be known to the officers of the department. In such a case the claim of the United States for money thus in the hands of a third person must be established, not by a treasury statement, but by the evidence on which that statement was made.

Id. (Ib.) 591

TREATIES—2.

1. A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

Foster et al. v. Wilson. (314) 435

2. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

Id. (Ib.) 435

3. See Louisiana.

TREATY—4.

See Louisiana.

TRIAL BY JURY—3.

1. The amendment to the Constitution of the United States by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

Parsons v. Bedford et al. (447) 737

2. The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every State constitution in the Union.

Id. (446) 736

TRUSTS AND TRUSTEES—1.

1. Where, by the terms of a deed conveying real estate in trust, to be sold for the benefit of the creditor of the grantor, the trustee is directed to sell the property conveyed by public auction, the trustee was bound to conform to this mode of sale. This was the test of value which the grantor thought proper to require; and it was not compe-

tent to the trustee to establish any other; although, by doing so, he might in reality promote the interests of those for whom he acted.

Greenleaf v. Queen et al., (145) 88

2. See Agreement, 2.

3. See Chancery Practice, 1, 2, 3.

4. Full notice of a trust draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice.

The Mechanics' Bank of Alexandria v.

Louisa & Maria Seton, (309) 156

5. It is well settled in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust.

Id. (Ib.) 156

TRUST AND TRUSTEE—3.

Whenever a person by will gives property, and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it.

Inglis v. The Trustees of the Sailor's Snug Harbor, (119) 624

UNITED STATES—1.

Lien of the United States for priority of payment. See Priority of Payment. Lien.

UNITED STATES—2.

For all national purposes embraced by the federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the States are necessarily foreign and independent of each other.

Buckner v. Finley, (590) 530

USAGE—1.

1. See Bills of Exchange, 4, 5.

2. See Promissory Note, 1.

USURY—1.

1. C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and, in lieu of money, they stipulated to take the post notes of the bank, payable at a future day, without interest, while the post notes were at a discount of one and a half per cent. in the market, at the time of the transaction. Such a contract is usurious. The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank in the note; and the subsequent payment of the original note for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction.

Gaither v. The Farmers' and Mechanics' Bank of Georgetown, (37) 43

2. If a note be free from usury in its origin, no subsequent usurious transactions respecting it can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through an usurious transaction, may not be able to maintain a suit upon it.

Id. (Ib.) 43

3. The act of Assembly of Maryland declares "all bonds, contracts, and assurances whatever, taken on an usurious contract, to be utterly void." And the indorsement of a promissory note for an usurious consideration is a contract within the statute, and was void.

Id. (Ib.) 43

USURY—2.

1. The Branch Bank of the United States at Lexington, Kentucky, discounted a promissory note, reserving interest thereon at the rate of six per centum per annum; it being agreed that the owner of the note should receive the proceeds of the discount in notes of the Bank of Kentucky, at their nominal value, although the same were, at the time of no greater current value than fifty-four per cent. of the said nominal value. Held, that the contract was usurious, and void, and that the bank could not recover of any of the parties to the discounted note.

The Bank of the United States v. Owens, (527) 508

2. A fraud upon a statute is a violation of the statute.

Id. (536) 511

3. A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest. According to this principle, the lender in this case has taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. This is contrary to the provisions of the charter of the Bank of the United States, and against law.

Id. (537) 511

4. Reserving interest as discount is the same as taking the same, since it cannot be permitted by law to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for there the actual receipt is generally necessary to consummate the offense. But where the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do.

Id. (538) 512

5. The charter of the Bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.

Id. (Ib.) 513

USURY—3.

1. The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. This has been long settled, and is not now open for controversy.

Thornton v. The Bank of Washington, (40) 595

2. The taking of interest for sixty-four days, on a note, is not usury, if the note given for sixty days, according to the custom and usage in the banks at Washington, was not due and payable until the sixty-fourth day. In the case of Renner v. The Bank of Columbia (9 Wheat., 581), it was expressly held, that under that custom the note was not due and payable before the sixty-fourth day, for until that time the maker could not be in default.

Id. (Ib.) 595

3. Where it was the practice of the party who had a sixty-day note discounted at The Bank of Washington, to renew the note by the discount of another note on the sixty-third day, the maker not being in fact bound to pay the note according to the custom prevailing in the District of Columbia; such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. Each note is considered as a distinct and substantive transaction. If no more than legal interest is taken upon the time the new note has to run, the actual application of the proceeds of the new note to the payment of the former note before it comes due, does not of itself make the transaction usurious. Something more must occur. There must be a contract between the bank and the party at the time of such discount, that the party shall not have the use and benefit of the proceeds until the former note becomes due, or that the bank shall have the use and benefit of them in the meantime.

Id. (42) 596

USURY—4.

1. S. being seized in fee of four brick tenements and lots of ground in Alexandria, in consideration of five thousand dollars, granted to M. an annuity or yearly rent charge of five hundred dollars, to be issuing out of and charged upon the houses and ground, and covenanted that the same should be paid to M., his heirs and assigns forever thereafter, with the right to distrain in the case of nonpayment of the same. In the deed granting the rent charge, M., the grantee, covenanted that at any time after five years, on the payment of five thousand dollars with all arrears of rent, he, M., would release the said rent charge, and the same should cease. S.

Peters 1, 2, 3, 4.

covenanted to keep the buildings in repair, and that he would have them fully insured against fire, and assign the policy of insurance for the protection of M., the money from the insurance to be applied to the rebuilding or repairing the houses, if destroyed or injured by fire. Afterwards, S., by deed of bargain and sale, conveyed to L., the plaintiff in error, the houses and lots of ground subject to the payment of the rent to M., who since the same conveyance has been seized of the same. The rent being unpaid, M. levied a distress for the same, and L. brought replevin; and the defense to the claim for rent set up to the avowry was that the transaction was usurious, and the deed granting the rent charge was, by the laws of Virginia, absolutely void. The statute of Virginia of 1793 provides that no person shall take, directly or indirectly, more than six per cent. per annum on loans of money or for forbearance for one year; and it declares that all bonds and other instruments for a greater amount of interest shall be utterly void.

Lloyd v. Scott, (205) 833

3. The requisites to form an usurious transaction are, 1. A loan either expressed or implied. 2. An understanding that the money lent shall or may be returned. 3. That a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done is an important ingredient to constitute this offense.

Id. (Ib.) 833

4. An ignorance of the law will not protect a party from the penalties of usury, where it is committed: but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches.

Id. (Ib.) 833

5. The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law.

Id. (Ib.) 833

6. If the court were in this case limited by the pleas to the words of the contract, and it purported to be a purchase of an annuity, and no evidence were adduced giving a different character to the transaction; the argument that, though the annuity may produce a higher rate of interest than six per cent. upon the consideration paid for it, as it was a purchase it was legal, would be unanswerable. An annuity may be purchased like a tract of land or other property; and the inequality of price will not of itself make the contract usurious. If the inadequacy of consideration be great in any purchase, it may lead to suspicion; and connected with other circumstances, may induce a court of chancery to relieve against the contract.

Id. (Ib.) 833

7. In this case five thousand dollars were paid for a ground rent of five hundred dollars per annum. This circumstance, although ten per cent. be received on the money paid, does not make the contract unlawful. If it were a *bona fide* purchase of an annuity, there is an end of the question; and the condition which gives the option to the vendor to re-purchase the rent by paying the five thousand dollars after the lapse of five years, would not invalidate the contract. The right to re-purchase, as also the inadequacy of price, would be circumstances for the consideration of a jury.

Id. (Ib.) 833

8. The purchase of an annuity, or any other device used to cover an usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced.

Id. (Ib.) 833

9. If a party agree to pay a specific sum exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. Where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.

Id. (Ib.) 833

10. All the material facts to constitute usury are found in the second plea. It states a corrupt agreement to loan the money at a higher rate of interest than the law allows. That the money was advanced, and the contract executed according to such agreement. That on the return of the principal with the full payment of the rent, after the lapse of five years, the annuity was to be released. The amount Peters 1, 2, 3, 4.

agreed to be paid above the legal interest for the forbearance is not expressly averred, but the facts are so stated in the plea as to show the amount with certainty. Five hundred dollars, under cover of the annuity, were to be paid annually for the forbearance of the five thousand dollars; making an annual interest of ten per cent. These facts, uncontradicted as they are, amount to usury. It is evident from this statement of the case, that the annuity was created as a means for paying the interest until the principal should be returned, and as a disguise for the transaction. Such is the legitimate inference which arises from the facts stated in the plea.

Id. (Ib.) 833

11. The principle seems to be settled that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons, who are entire strangers to the transactions. A stranger must "take heed to his assurance at his peril;" and cannot insist on his ignorance of the corrupt contract, in support of his claim to recover upon a security which originated in usury.

Id. (Ib.) 833

12. In the case of *D'Wolf v. Johnson* (10 Wheat., 367), the first mortgage being executed in Rhode Island in 1815, was not usurious by the laws of that State; and the second mortgage executed in Kentucky in 1817, being a new contract, was not tainted with usury. The question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage to defeat foreclosure, was not involved in that case.

Id. (Ib.) 833

13. The law of Virginia having declared that a contract infected by usury is void, and by the deed from S. to M., a right to enter on the premises and distrain for the rent being claimed under a deed, which, upon the admissions in the pleadings, is usurious; and the premises upon which the distress was made being held by L. under a conveyance from S., L. may set up the defense of usury in the deed against the summary remedy asserted by M. under the deed.

Id. (Ib.) 833

VENDOR AND VENDEE—1.

1. In contracts for the sale of land, by which one agrees to purchase and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.

The Bank of Columbia v. Hagner, (464) 222

2. Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclinations of courts have strongly favored the latter construction, as being obviously the most just.

Id. (465) 223

3. In such cases, if either vendor or vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal.

Id. (Ib.) 223

4. An averment of performance is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof.

Id. (Ib.) 223

5. The time fixed for the performance of a contract is at law deemed the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay, in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed.

Id. (Ib.) 223

6. It may be laid down as a rule that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. And this averment must be sustained by proof, unless the tender has been waived by the purchaser.

Id. (467) 224

7. If before the period fixed for the delivery of a deed for lands the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of a suit unnecessary. But this rule can never apply, except in cases where the act which is construed into a waiver, occurs previous to the time for performance.

The Bank of Columbia v. Hagner, (467) 224

8. The taking possession of property by the vendee before conveyance, is a circumstance from which is to be inferred that he considered the contract closed, but would not deprive him of the right to relinquish the property if the vendor could not make a title, or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase money had it been paid.

Id. (468) 224

9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase money. It would be compelling him to take a lawsuit, instead of the land.

Id. (Ib.) 224

VENDOR AND VENDEE—3.

Parsons v. Armor and Oakey. (413) 724

VIRGINIA LAND TITLES—3.

See Land and land titles, 1, 2, 3, 4.

WASTE—2.

1. Action on the case against the defendant for waste, committed by him while tenant of the plaintiff, the owner of the reversionary interest, by pulling down and removing from the demised premises a dwelling-house erected thereon, and attached to the freehold. The question raised in the case was, what fixtures erected by the tenant during his term are movable by him. The general rule of the common law undoubtedly is that whatever is once annexed to the freehold becomes part of it, and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, never was inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; and more liberally between tenant for life and in tail, and remainderman or reversioner, in favor of the former; and tenant, in favor of the tenant. A more extensive exception to the rule has been of fixtures erected for the purposes of trade. Fixtures which were erected to carry on trade and manufactures, were from an early period of the law allowed to be removed by the tenant, during his term, and were deemed personalty for many other purposes.

Van Ness et ux. v. Pacard, (143) 376

2. It might deserve consideration whether, if the rule of the common law of England which prohibits the removal of fixtures erected by the tenant for agricultural purposes were not previously adopted in a State by some authoritative practice or adjudication; it ought to be assumed by this court, as a part of the jurisprudence of such State, upon the mere footing of its existence in the common law.

Id. (145) 377

3. The question whether fixtures erected for the purposes of trade are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for the purposes of trade or not.

Id. (146) 377

4. If the house were built principally for a dwelling-house for the family, independently of carrying on a trade, then it would doubtless be deemed a fixture falling under the general rule, and irremovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception.

Id. (147) 378

WILLS AND TESTAMENTS—1.

1. Under the law of the State of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will.

Davis et al. v. Mason, (508) 241

2. It is a settled rule in Kentucky that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.

Id. (509) 241

3. Where a legacy for which suit is instituted is given jointly to several persons in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the court. The right of each individual depends on the number who are entitled, and this number is a fact which must be inquired into, before the amount to which anyone is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties.

Pray et al. v. Belt et al., (681) 314

4. The testator in his will says, "whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator.

Id. (679) 313

5. Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation than as concluding the rights of the parties. If an unreasonable use be made of such a power so given in a will; one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised.

Id. (680) 313

6. There cannot be such a construction given to such a clause in a testator's will as will prevent a party who conceives himself injured by the construction from submitting his case to a court of justice. A court must decide whether the construction of the will adopted by those who are named is the right construction, or the grossest injustice might be done.

Id. (Ib.) 313

WILLS AND TESTAMENTS—3.

The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance.

Finlay et al. v. King's Lessee, (377) 712

WRIT OF ERROR—3.

1. See Amendment, 1.

2. If the writ of error be brought by the plaintiff below, then the sum which the declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute.

Gordon v. Ogden, (34) 593

3. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the Circuit Court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties.

Id. (Ib.) 593

4. The court has no authority, on a writ of error from a State court, to declare a State law void on account of its collision with a State constitution;

Peters 1, 2, 3, 4.

it not being a case embraced in the Judiciary Act, which gives the power of a writ of error to the highest judicial tribunal of the State.

Jackson v. Lamphire, (280) 679

5. The record consisted of the petition, the answer, the whole testimony, as well depositions as documents, introduced by either party, and the *fiat* of the judge, that Armor, the plaintiff below, recover the debt as demanded. The difficulty is to decide under what character we shall consider this reference to the revising power of this court. If treated strictly as a writ of error, it is certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony as well as the law of the case to the revision of this court; and then there is no mode in which the court can treat this case, but in the nature of a bill of exceptions. The court is not at liberty to treat this case as an appeal in a court of equity jurisdiction under the Act of 1803; because the party has not brought up his cause by appeal, but by writ of error.

Parsons v. Armor and Oakley, (425) 729

Peters 1, 2, 3, 4.

WRIT OF RIGHT—3.

1. In writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If anything which fell from this court in the case of *Greeno v. Lister* (8 Cranch, 229) can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene v. Watkins* (7 Wheaton, 31). It is there laid down that the tenant may give in evidence the title in a third person for the purpose of disproving the demandant's seisin; that a writ of right does bring into controversy the mere right of the parties to the suit; and if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises: or that his mere right is inferior to that set up against him.

Inglis v. The Trustees of the Sailor's Snug Harbor, (133) 629

2. In a writ of right on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety. *Id.* (135) 630

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